INDEX

CASES

DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

TIKA, Appellant,
AND
THE OFFICIAL RECEIVER, Respondent.

[No. 16 OF 1925.]

1926. JANUARY 5, 8, 22.

BEFORE SIR C. MAJOR, C.J., BERKELEY, J., AND GILCHRIST, ACTING J.

Criminal Law—Bankruptcy—Fraudulent non-delivery of business books—Evidence of existence of books—Notice to produce—Whether secondary evidence admissible at that stage—Indictable Offences Ordinance, 1893, section 224—Insolvency Ordinance, 1913, section 2.

On the trial of an insolvent trader for the non-delivery of certain of his business books, notice to produce having been served and the books not forthcoming, evidence was led by the prosecution to prove the contents of the books. Counsel for the accused objected to such evidence on the ground that it could not legally be admitted until there had been first a finding of fact as to the existence of the books.

Held, (1) That where the objection to secondary evidence concedes that there is some primary evidence of some sort in existence but defective in some collateral matter, the Court must first, before admitting such secondary evidence, hear and determine whether the objection is well-founded,

but (2) Where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter *instanter* but should admit the secondary evidence leaving the main question to the jury.

Appeal against the conviction of the appellant Tika for that he having had a receiving order made against him on the 3rd April, 1925, did not deliver up to the Official Receiver certain books relating to his business.

The relevant facts are stated in the judgment of the court.

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

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

The judgment of the Court was read by SIR CHARLES MAJOR:—

The appellant was charged before the Georgetown magistrate's court that, having had a receiving order made on the 3rd of April, 1925, in respect of his estate on his own petition, he did not, on the 24th of April, deliver up to the respondent two books, particularly described as a black covered book containing entries of his banking transactions and a cash sales book. That offence is created by the 224th section of the Indictable Offences Ordinance, 1893, in its third paragraph. By the second section of the Insolvency Ordinance, 1913, the offence may be prosecuted summarily, and by the third section it is declared that the onus of proving absence of intent to defraud if and when non-delivery of books occurs, lies upon the person accused, and that no allegation in the indictment or information nor proof of that intent is necessary.

Evidence was given before the court below of the petition, of the receiving order, and of a list of books of the debtor, drawn up and signed by himself at the request of an officer of the respondent's department on the 24th of April, in which the two books mentioned in the charge were not included. That list was attached by the appellant to the statutory form of questions required to be put to and answered by a bankrupt (amongst which is—"what books of account have you kept and where are they?") and is headed—"I hereby state that the undermentioned books are all the books in "my possession which were kept by me in connection with my business up "to the date of my insolvency and handed over by me to the Official Re-"ceiver." It was proved that the books described in the information were not delivered and that no reference to nor information regarding them had ever been made or given by the appellant. The evidence given by the appellant on his public examination was put in, in which appear the statements—"never kept a cash book in business, and if anyone says that they have seen "a cash book it will not be true." "Never showed Mr. Barcellos a cash book." "I never kept a long black covered book in which the above entries "were made. If anyone swears I kept such a book it would be a lie." If Barcellos swears it would be a lie." "Mr. Barcellos never saw "any book be-"sides the books in court from which he was able to ascertain the affairs of my business." A witness, Joseph Greenidge, was called, who, speaking of the year 1919, said: "He (meaning the defendant) opened a drawer on the "right hand of his desk and took out a book 9″ x 5″ and about 2″ thick. It "was a black covered book." That book being called for by prosecuting counsel on notice to produce it, counsel for the defendant said that he had no such book, and objected that secondary evidence of its contents could not be received unless the court first found, on the whole evidence, that the book was

or had been in existence, the court would be so finding at that stage without hearing evidence of the defence. The objection was over-ruled and secondary evidence at considerable length was given by Greenidge followed by Barcellos. The evidence of the latter was supplemented by that given by him during the public examination of the debtor, wherein the witness had already deposed to the existence on the 14th of March of the books mentioned in the charge. The case for the prosecution was closed and the appellant went into the witness-box. His testimony as to the existence and possession of the two books was, in the circumstances of his defence, necessarily brief. He said—"I never kept a black covered book containing depos- "its of money in bank on one side and withdrawals on the other," "I have "handed over to the Official Receiver all the books I had in my possession "relating to my business at the time I applied for the receiving order." "I know Greenidge . . . I never showed him any black covered book as he described in his evidence." "I know Barcellos . . . I did not show him a cash "sales book or a long black covered book at my house at any time." Harry Tika, the appellant's son, said, "My father at no time kept any book in "which his deposits and withdrawals from the bank were entered."

It will be seen from what has been just said that the objection made to the magistrate's reception of secondary evidence of the books was based on the contentions, that the court must decide at that stage of the hearing, firstly, if the books had existed at all, and only after and according to that decision, secondly, if they, being at any time after the presentation of the petition and receiving order made in the appellant's possession or under his control and relating to his property or affairs, had not been delivered by him to the Official Receiver; also that the court could not thus decide the first question until it had then heard the defendant's evidence touching the existence of the books: in other words, that the second question might not call for decision at all and the charge thus, then and there, come to the ground.

Those contentions form the groundwork of this appeal, and four cases have been cited to us as supporting them. Taking them in chronological order of decision, in *Harvey* v. *Mitchell* (1841) (2 M. & R. 366, N.P.) secondary evidence of a distress warrant was challenged until the issue whether the warrant was or was not in the defendant's possession or under his control had been determined on interlocutory evidence, defendant's counsel insisting that he had a right to interpose that evidence. In *Bartlett* v. *Smith* (1843) (11 M. & W. 483) the same objection was made until an issue whether a bill of exchange purporting to be a foreign bill was or was not in fact an inland bill and, there-

fore, insufficiently stamped, had been likewise determined, defendant's counsel offering evidence to impeach the bill. In *Boyle* v. *Wiseman* (1855) (24 L.J. Ex. 284) the same objection was made until the determination of the question whether a letter produced by the defendant on notice to produce was or was not the original letter alleged by the plaintiff to contain a libel. In *Froude* v. *Hobbs* (1859) (1. F. & F. 612) on the same objection the issue was raised whether a book, produced by the defendant on notice, was or was not the book in which an entry of memorandum of agreement alluded to by the plaintiff was made.

It appears, therefore, from those cases; that the identity, or possession or control, or tenor of a document produced or known to exist, was in question, that is to say, the issue was purely collateral, and, moreover, that in each case (except the last, where to the proposal of the judge to take evidence counsel consented) evidence to support the objection was then and there offered—in *Harvey* v. *Mitchell* indeed, insisted upon. Here, we observe counsel for the defendant, having taken the objection, made no offer or claim to call evidence for the defendant on the issue, in fact deliberately abstained from so doing, under the submission, he tells this court, that it was incumbent on the magistrate to call for that evidence. It is astonishing how often appears the fallacy involved in that submission. No obligation of the kind was, in any event, cast upon the learned magistrate. When he left to himself as to a jury at the conclusion of the evidence for both parties the question whether the books had existed and, according to his determination of its corollary whether he should consider or ignore the secondary evidence of their contents, he was, in our opinion, proceeding rightly.

In *Stowe* v. *Querner* (1870) (L.R. 5 Ex. 155) the declaration was on a policy of marine assurance by the assured against the underwriter. It is as well to read *in extenso* the judgment in that case of Bramwell, B., in the Court of Exchequer: "In this case the question which was argued before us "yesterday arose thus:—during the trial of an action on a policy of insur- "ance it became necessary to produce the policy and the plaintiffs gave "evidence of a duly stamped policy having been executed, and of its being "in the possession of the defendant. Notice to produce had also been given. "Upon its being called for, however, the defendant declined to produce it, "and thereupon the plaintiffs proposed to read a document which purported "to be a copy, and which they had received from the defendant's broker. "The defendant objected, and offered to displace the effect of the evidence "of the policy which had been given by the plaintiffs, and to render the "copy inadmissible by showing that no policy had ever been executed at "all. The judge refused to hear this inter-

"locutory evidence, and allowed the document to be admitted and read. We "are all of opinion that he was right. If the objection on the part of the de- "fendant had been that there was a policy but that it was not stamped, it "would perhaps have been well founded. But here it was objected that there "was no policy executed at all; an objection which goes to the entire "ground of action, and one which, if it had prevailed, might have left the "jury nothing to decide. For, suppose the judge had ruled that the copy was "inadmissible on the ground that there was no original ever in existence, "the plaintiffs would in fact have had no case left, and the judge would "himself have decided the whole of it. The difference between this case and "*Boyle* v. *Wiseman* is very wide. There the plaintiff had the means, if he "had chosen, of giving the alleged original in evidence, but here, if the "copy had been excluded, the plaintiffs would have been left without any "means of proof whatever. Put an illustration analogous to the present. "Suppose an action to be brought for libel, and a copy of a letter which is "destroyed, but which contained the libel complained of, is produced and "tendered in evidence. Could the defendant say "'Stop; I will show that no "'letter was in point of fact ever written, and I call upon you, the judge, to "'hear evidence upon this point, and if I satisfy you that no such letter ever "'existed, you ought not to admit the copy?' Surely not: for that would be "getting the judge to decide what is peculiarly within the province of the "jury. The distinction is really this: where the objection to the reading of a "copy concedes that there was primary evidence of some sort in existence, "but defective in some collateral matter, as, for instance, where the object- "tion is a pure stamp objection, the judge must, before he admits the copy, "hear and determine whether the objection is well founded. But where the "objection goes to show that the very substratum and foundation of the "cause of action is wanting, the judge must not decide upon the matter, but "receive the copy, and leave the main question to the jury. It was further "said that there was no *stamped* policy in existence. But the real objection, "as I have already observed, was that there was no policy at all, and there- "fore, of course, no stamped policy. The want of stamp was not the actual "point relied on, and it was in a manner merged in the other objection. We "are, therefore, of opinion that this rule should be discharged."

So here, the objection struck at the very root and ground of the charge, which, if the magistrate found on interlocutory evidence that the books had never existed, collapsed altogether. Having decided on the whole of the evidence in the case that they did exist, he proceeded to consider the evidence of their contents on the question of their relation to the appellant's property or affairs.

It was not disputed that their contents established that relation, or that they had not been delivered, and the remaining question for decision was whether at material times they were in the appellant's custody or under his control. The magistrate held that they were. We think that his findings on all those questions were amply justified by the evidence before him. That he was not satisfied by the appellant that there was no intent to defraud in withholding the delivery of the books is somewhat emphatically shown by his finding that that intent in fact existed. His dissatisfaction in our opinion was just. The appeal must be dismissed with costs.

Appeal dismissed.

HUMPHRYS *v.* MCARTHUR.

HUMPHRYS *v.* MCARTHUR.

[No. 108 OF 1926.]

1926. NOVEMBER 4, 5, 6, 9, 20. BEFORE DOUGLASS, J.

Election petition—Election to Court of Policy—Nomination of Candidates—British Guiana Constitution Ordinance, 1891,—Amendment Ordinance, 1909, sections 16 and 17—Delivery of declaration of qualification—Whether declaration can be effected by an attorney—Meaning of expression "within forty-eight hours"—Whether Sunday included in computation of time—"Dies non"—Public Holidays Ordinance, 1919,—Interpretation Ordinance 1891,—Distinction between effect of want of qualification of candidate and non-compliance with Statutory requirements—Whether notice need be given to electors of non-compliance by candidate with Statutory requirements.

(*a*) The words "within forty-eight hours" contained in the provisions of section 17 of the British Guiana Constitution Ordinance, 1891, Amendment Ordinance, 1909, requiring the delivery by a nominated candidate to the Returning Officer of a statutory declaration of qualification must be literally construed and includes Sundays.

(*b*) The expression "dies non" connotes a day on which judicial acts cannot be performed and has no application to an act purely ministerial such as the delivery of a declaration.

(*c*) The declaration required by the said Ordinance must be made by the candidate himself and cannot be effected by an attorney.

(*d*) The failure to deliver the statutory declaration of qualification has the effect of rendering the original nomination void. Consequently the principle which requires a candidate to give notice to the electors of his rival's lack of qualification so as to render votes for such rival invalid has no application to a case where the statutory declaration as to qualification has not been delivered.

Election Petition by Hugh C. Humphrys, Barrister-at-law, praying a declaration that the election of Joseph Sydney McArthur, Barrister-at-law, as a member of the Court of Policy, was void and that the said Humphrys ought to have been returned as the candidate elected.

The facts appear in the judgment.

G. J. deFreitas, K.C., and *J. A. Luckhoo, K.C.,* for the petitioner.

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

DOUGLASS, J.: The election of a member of the Court of Policy for Electoral District No 1, Eastern Division, County of Demerara, took place on the 15th day of October, 1926, when Joseph Sydney McArthur, the respondent and Hubert Chester Humphrys, the petitioner, were the only candidates up for election, and on the 18th October the Returning Officer, Mr. J. A. Veerasawmy, declared the result of the poll as follows:—Humphrys 607 votes, McArthur 713 votes, and he made the requisite return to the Governor of the election of McArthur as a member of the Court of Policy for the said County and Division.

On the 29th October Mr. Humphrys filed his petition alleging that the nomination of the said J. S. McArthur should be deemed void under section 17 (1) of Ordinance No. 24 of 1909, being an amending ordinance of the British Guiana Constitution Ordinance, 1891, and herein referred to as 'the amending ordinance,' that it was the duty of the returning officer to have declared him the petitioner elected and asking that it be so determined.

The facts preceding the polling day that have been either admitted or proved, are that the returning officer fixed Friday, the 8th October, as the day for receiving the nomination of candidates when four candidates were duly nominated in the following order, between the hours of 9 and 10 a.m., viz., the said J. S. McArthur, Edmund Fitzgerald Fredericks, the said H. C. Humphrys and Arnold Emanuel Seeram. Mr. Fredericks and Mr. Seeram both withdrew on Tuesday, the 12th October. At the time of his nomination Mr. McArthur was out of the colony and only returned on Monday, the 11th October, a public holiday. Under section 17 (1) of the amending ordinance a statutory declaration of the qualification of the candidate for election has to be delivered, or to be caused to be delivered, by him to the Returning Officer at the time of nomination, or within 48 hours thereafter. The petitioner delivered his statutory declaration on Saturday, the 9th October, at 8 a.m., and Mr. McArthur delivered his before 9 a.m. on Tuesday, the 12th October. It is obvious then that Mr. McArthur's declaration was not delivered within 48 hours after the time of nomination on an ordinary interpretation of these words, but learned counsel on behalf of the respondent objects that inasmuch as Sunday and a public holiday (*i.e.,* Monday, the 11th October) intervened the 48 hours should not run continuously but those two days being *dies non,* the 48 hours enjoined by the ordinance would not expire until 9 to 10 a.m. on Tuesday, the 12th October, and that therefore the respondent's declaration was within the allotted time. He referred to Ordinance No. 25 of 1919, section 3, in which Sunday and the second Monday in October were inter alia declared *dies non* for the purpose of public holidays. The expression *dies non* is of course only an abbreviation of "dies dominicus non est juridicus," *i.e.,* days on which no judicial or legal proceedings might be transacted, but on reference to various authorities it will be found that ministerial acts—*e.g.,* the swearing of an affidavit before a commissioner—may lawfully be executed on a Sunday. A reference to the Interpretation Ordinance, No. 14 of 1891, is of no assistance for only the definition of a 'day' is given, as meaning "24 hours *de momento in momentum* unless a Sunday or public holiday intervenes," nor do the Rules of Court in respect to time apply, as they only deal with conten-

tious matters before the court—thus excluding any application of the decision in *Bramwell* v. *Mutual Industrial Corporation* (1915. 112 L.T.R. 1071) to the present case; moreover in the computation of time under Order XLV, for the doing of any act or taking any proceedings there is excluded "time . . . . . limited by hours." Several cases were cited by learned counsel on both sides founded on the Lord's Day Act 29 Car. II. c. 7, but as that does not apply in this colony the cases carry the argument no further.

Learned counsel for the petitioner submitted that there were four exceptions to the common law rule that when a period is fixed within which some act must be done, Sundays and holidays in general count like other days, viz.:—

(1) Where the statute excludes certain days from the period.

(2) Where the last day is a *dies non* and the act is to be done by the court, or by the court in conjunction with a party—a "judicial act" in fact (*Mumford* v. *Hitchcocks* 1863. 135. RR. 731).

(3) Where the act to be done is one forbidden to be done by statute on any one day included in the period (29 Car. 4 c. 7).

(4) Where it is impossible to do the act on the day fixed. Halsbury (Vol. XXVII., p 451) states "the fact that the last day of a prescribed period "is a Sunday or other holiday does not generally give the person who is "called upon to act an extra day; it is no excuse for his omission to do the "act on some prior day," and as Williams, J., stated in delivering judgment in *R.* v. *Justices of Middlesex* (1843, 7 Jnr. 396) "no authority is cited in "support of this argument (i.e., that Sunday ought not to be reckoned) and "in the absence of such, I think, the plain words of the Act are not to be got "rid of."

It has been difficult to find any cases direct to the point as both "the Parliamentary Elections Act, 1868," in section 49, and "the Municipal Corporations Act, 1882," section 230 (1) expressly exclude "Sunday. . . . "and any day set apart for a public fast or thanksgiving" in reckoning time, whereas the British Guiana Constitution Ordinance, 1891 (Ordinance No. 1 of 1891) herein referred to as the principal ordinance, and its amendments, contain no such provision. There were, however, three cases referred to which are of some assistance to the court on the question whether Sundays or public holidays ought to be excluded from a period fixed (1) *Rawlins* v. *Overseers of West Derb* (1846. 15 L.J.R. 70) where the last day to place one's name on the Register of Voters was 20th July which happened to fall on a Sunday, and it was held "there is no law which requires matters of this nature shall not be done on a Sunday." (2) *ex parte Simpkin* (1859 119 R.R. 772), when Hill, J., following the

decision in *Peacock* v. *R.* (114 R.R. 707) in giving judgment said, "Where "an Act of Parliament gives a specified number of days for doing a par- "ticular act, and says nothing about Sunday, the days are consecutive days "including Sunday." And (3) *R* v. *Elvin* (1904) (Transvaal L.R. 431) where it was held that in the time of 48 hours allowed for an appeal for the purposes of calculating the period of the necessary notice, Sunday should be regarded as an ordinary day.

Mr. P. N. Browne, K.C., for the respondent submitted that the expression 48 hours could only be interpreted as running during "working days," but he could give no authority and I can see no reason for so interpreting an apparently definite limit of time, more especially as by section 112 of the principal ordinance although the expression "working day" is used with reference to the declaration of result of the polling, that is the only section I can find the expression used in the ordinance, and it is a sound rule that where the statute law does not provide the common law obtains. And what was it that had to be done within the 48 hours? It was that the candidate nominated should deliver or cause to be delivered to the returning officer a statutory declaration of his qualifications. By no stretch of imagination can this be described as a "judicial act," and the words "cause to be delivered" seem to imply not only that the candidate need not make the delivery himself but also that the delivery to the authorised assistant of the returning officer would be sufficient. In *Cooper* v. *Coates* (1804. 3 M & G. 98) delivery to (and examination by) a clerk when the statutory direction was to his principal, was considered sufficient, the delivery being a ministerial and not a judicial act; (and see *Pennell* v. *Churchwardens of Uxbridge* (1862 5 L.T. 685.))

It has been described as a hardship in the present case that the returning officer was absent most of the Saturday and Sunday—on election duties—but the hardship if any did not in fact affect the matter as Mr. McArthur was not in the colony until the following day. After a careful consideration of the able argument adduced I am unable to agree that 48 hours mean anything more than it says, and it must have expired between 9 and 10 a.m. on Sunday; my opinion is strengthened by the preceding words of the section, "shall at the time of nomination," the 48 hours are clearly added as an act of grace and must be strictly adhered to. The statutory declaration was not delivered within the time required and consequently the nomination of the respondent was not valid and his election must be declared void.

I might here refer to the attempt made by Mr. Sampson, the respondent's solicitor, to save the situation by delivering a statutory declaration made by himself and within the 48 hours, setting

out his client's qualifications. This, of course was worthless and was rightly rejected by the returning officer. It is the candidate and he only who must make the declaration as will be seen by reference to sections 17, 18 and 19, and to the schedule of the amending ordinance.

Having held the nomination of the respondent was not valid and his election to be deemed void, the court has now to determine whether Mr. Humphrys—the petitioner—the only other candidate on the polling day, should be deemed duly returned and elected within the meaning of section 128 (2) of the principal ordinance or whether the election was void *in toto*; this section is, with the requisite changes, a copy of section 11 (13) of 31 and 32 Vic. c 125, "The Parliamentary Elections Act, 1868." The many cases arising on election petitions go to show that if a candidate "who does not withdraw," to quote the concise par, in Lord Halsbury's Work on Elections (Vol. XII. p. 305) "is for any reason disqualified to be a candidate, "and the other candidate desires that all votes given for the candidate so "disqualified should be treated as thrown away, *i.e.*, treated as null and "void as though they had never been given, a notice of disqualification "must be published to the electors." Many of the cases apparently relied on by learned counsel for the petitioner and the respondent are not of so much assistance in arriving at a decision as may at first sight appear, for in section 17 (1) of the amending ordinance we have a special provision to which I can find no parallel in any English Act, and which is peculiarly appropriate to the present case; a careful consideration of section 17 (1) is indicated as necessary before applying the test of English decisions.

This section declares that where the statutory declaration required is not delivered within the stated time "the nomination or election as the case "may be of such candidate shall be deemed to be void and the returning "officer shall thereupon proceed as if such candidate had withdrawn from "his candidature or had not been elected." The section denotes a distinction on non-delivery of the declaration between "nomination" when the returning officer shall proceed as if such candidate had withdrawn and "election" when the Returning Officer shall proceed as if such candidate had not been elected, and it seems to me that this distinction is drawn to meet two emergencies, or contingencies, *in the first place* the case where the returning officer having accepted the nomination of more than one candidate for each or any seat under section 16 (4) and having appointed a day for holding the election he afterwards does not receive delivery of the required declaration, he should then proceed as if the candidate had withdrawn from his candidature under section 16 (15);

and *in the second place* the case where there is only one candidate nominated for the vacant seat and the returning officer having declared him to be duly elected under section 16 (3) does not receive delivery of the required declaration, he should then proceed as if that candidate had not been elected, *i.e.,* fix a fresh day for nomination to the vacant seat probably necessitating a new writ (see section 81 of the principal ordinance).

It was the first contingency that arose on the nomination for a member of the Court of Policy for Electoral District No. 1, East Division, County of Demerara, and the returning officer in allowing the respondent's name to remain as a nominated member did so on a misunderstanding of the extent of time limit for delivery of the statutory declaration, for he should have proceeded as if the candidate, Mr. McArthur, had withdrawn from his candidature and had he done so he could at any date after the 12th October have declared the petitioner to have been duly elected as the only remaining candidate for the seat to be filled; up to that date Mr. Fredericks and Mr. Seeram were still candidates for the vacant seat and had they not withdrawn the election would have taken its normal course without Mr. McArthur.

I am of opinion that no question of the disqualification of the respondent arises within the meaning of the rule that in such a case notice of it ought to be published to the electors; to admit it would in effect be to eliminate section 17 (1) which definitely meets the present case. It is true that had the other two candidates been aware that Mr. McArthur's declaration would be deemed defective they or one of them might have continued their or his candidature, but it manifestly would not be just to deprive the petitioner of the undoubted right he had acquired under section 17 (1); they withdrew on false premises but in no way due to anything the petitioner did, and indeed it is admitted that they did not intend to stand against the respondent, and they were fully aware of the late hour at which he delivered his declaration. Had the said section not existed, and such was the case previous to 1909, I should have seriously considered the necessity of a fresh election, but the court cannot place the petitioner in a worse position owing to the fault of or misunderstandings of other parties, and I must again emphasize the fact that there was no disqualification of the respondent as a candidate; he failed to complete the necessary steps to become a candidate, and so put himself in the position of a candidate who withdraws from an election.

My opinion is strengthened by the cause of *Cutting* v. *Windsor* (1924. 40 L.T.R. 355) dealing with an election under the Municipal Corporations Act, 1882, section 56 (2) and the 3rd Schedule Part II, r. 7; the former reads "if the number of valid nominations

"is the same as that of the vacancies the person nominated shall be deemed "to be elected," and the latter, "every nomination paper . . . must be deliv- "ered by the candidate at the Town Clerk's office seven days at least before "the day of election, and before 5 o'clock in the afternoon of the last day "for delivery of nomination papers." A paper purporting to be the nomination of the respondent was incomplete, and only returned to the Town Clerk completed at 5.45 p.m. on the last day for nomination. The election took place and the respondent secured 824 votes against 528 votes given to the petitioner. Mr. Justice Avory in giving judgment said that the case resolved itself into whether Mr. Windsor (the respondent) had been duly nominated. So far as rule 7 provided for the time within which nomination papers must be delivered at the Town Clerk's Office it was mandatory. It was not within the discretion of the Town Clerk to receive nomination papers after the hour specified in the rule, nor was it competent for that Court to say that delivery of a nomination paper after the prescribed time constituted a good nomination. Mr. Windsor had never been duly nominated and his election must be declared void. Mr. Cutting (the petitioner) was the only other candidate and he must be declared duly elected. The petition was therefore granted with costs.

Mr. Humphrys by addressing meetings of electors and others and in a personal interview with Mr. McArthur did his best to counteract the affect of the returning officer's mistake though he was under no obligation to do so.

After the withdrawal of Mr. Fredericks and Mr. Seeram, Mr. Humphrys remained the only candidate and must be declared to have been duly elected.

I grant the petition with costs against the respondent.

JOHN PEREIRA, *et al, v.* MANOEL PEREIRA.

JOHN PEREIRA, *et al, v.* MANOEL PEREIRA.

[No. 238 OF 1925.]

1926. JANUARY 27, 28. BEFORE BERKELEY, J.

Roman-Dutch Law—Husband and Wife—Mutual will—Survivor appointed Executor—Whether rights of heirs vested on death of first dying—Massing of estate—Power of surviving spouse to revoke mutual will.

The power which a surviving spouse generally has to revoke a mutual will in so far as it affects his or her half of the property is taken away on the concurrence of the following two conditions:—(a) that the will disposes of the joint property on the death of the survivor, and (b) that the survivor has accepted some benefit under the will.

Opposition by children of deceased wife against transport by the husband of certain property on the ground that their interests therein had vested and that as the joint estates had been massed and the husband had adiated under the will he could not convey the said property.

The facts and relevant portions of the will are stated in the judgment.

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

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

BERKELEY, J.: This is an opposition action in which the plaintiffs claim (a) that the defendant be restrained from passing transport of the several properties set out in the claim, and (2) an order that the defendant give to the plaintiffs security to the extent of $15,000 for the restitution of the common property belonging to the defendant and his deceased wife Anna Pereira, the mother of the plaintiffs, the defendant being entitled to a life interest only in terms of the mutual joint will.

Counsel for the defendant submits (1) that the defendant has the right to dispose of his half share of the common property and that he only accepted the benefit of a life interest in respect of his wife's estate in accordance with the terms of the mutual will and (2) that there was no massing of the joint property.

Copies of the will and the declaration and inventory, together with the debts due and owing from the deceased and the memorandum of legacies and bequests as required in connection with "estate duty" are laid over and it is agreed that the sole question for this court is the construction to be placed on the mutual will.

The will is dated 9th September, 1913, and it states that they are married in community of goods and that they desire to deal with the whole of the common property belonging to them. After disposing of one plantation (Relief) to three unmarried

daughters, they bequeath to each, the other of them, for the term of their respective lives all the property movable and immovable of which they may respectively die possessed to be held and enjoyed free and undisturbed from the interference of any of their heirs therein and thereby appointed subject to the life interest therein immediately created in their respective favours, and subject to the bequest to their three youngest daughters of plantation Relief as aforesaid they leave and bequeath at their respective deaths to their nine children (the plaintiffs) born of their marriage all the property movable and immovable of which they may die possessed appointing the said children as their heirs under the said mutual last will. The will appoints the survivor of the other of them executor.

The wife Anna Pereira died on the 10th September, 1913 and the properties the subject matter of this action formed part of the property disposed of under the said mutual will.

The following rules of law as to mutual wills were authoritatively laid down as prevailing in Roman-Dutch Law: (a) that such wills, notwithstanding their form, are to be read as separate wills, the dispositions of each spouse being treated as applicable to his or her half of the joint property, (2) that each is at liberty to revoke his or her part of the will during the co-testator's lifetime with or without communication with the co-testator and after the co-testator's death, (3) that the power which a surviving spouse , generally has to revoke a mutual will as far as it affects half of the property is taken away on the concurrence of two conditions; (a) that the will disposes of the joint property on the death of the survivor, or as it is sometimes expressed, where the property is consolidated into one mass for the purpose of a joint disposition of it (technically termed "massing of an estate") and (b) that the survivor has accepted some benefit under the will. (*Nathan,* Vol. III., 1838, and *Denyson* v. *Mostert* (cited by counsel for the plaintiffs), *Moore's* P.C.C, N.S., Vol. VIII., 531). De Villiers, C.J., in *Brand exor.* v. *Brands exors.* (4 Juta. 325) says: "An estate is said to be "'massed' in a mutual will when the unalienated common property is to "remain consolidated for the purpose of a joint disposition of it on the "death of the survivor."

In this case the testators by their mutual will bequeathed at their respective deaths all their property to their nine children and appointed them their heirs; they gave a life interest to the surviving testator for the term of his or her natural life. On the death of his wife, the survivor (the defendant) accepted the usufruct. Having done so I am of opinion that the property vested in the children immediately on the death of their mother, the period at which the children were entitled to possession being postponed. *In re* Zipp, Buch., 1878, p. 132) *In Rahl* v. *de*

Jager (1 Juta, p. 40) De Villiers, C.J., said: "It appears the testatrix first "died and after her death the husband took benefits and adiated under the "will. It is argued that the husband was not a mere usufructuary but a fidu- "ciary heir and that until his death no interest vested in the legatees. But by "the clause appointing the heirs the testators are entirely included and the "will simply means that after the death of the first dying the survivor is to "have the usufruct and the remainder is to go over to the legatees."

On the authorities cited the Court declares the opposition just, legal and well founded and orders that the defendant be restrained from passing transport. The defendant is to pay costs.

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

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

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

[No. 3 OF 1925.].

1926. NOVEMBER 13; DECEMBER 4. BEFORE DOUGLASS, J.

Debtors' Ordinance, 1884,—Summons calling upon judgment-debtor to be examined as to means—Summons not heard—Parties agree to payment by instalments—Agreement embodied in consent order—No evidence of consideration moving from debtor—Power of Court to rescind order.

Where a summons has been issued under the Debtors Ordinance, 1884, calling upon a judgment-debtor to be examined for proof of means and no hearing takes place pursuant to such summons but the parties themselves consent to an order for payment by instalments but with no provision for committal in default of payment, the Court can, where there is no evidence of a binding agreement between the parties, rescind the order at the instance of the judgment creditor.

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

E. F. Fredericks, for the respondent.

Application to rescind consent order made on summons issued under Debtors' Ordinance, 1884.

DOUGLASS, J.: On 28th February, 1925, an order was made by consent of the parties, that the amount received by the plaintiffs on judgment dated 20th December, 1924, should be paid by quarterly instalments commencing on the 1st April, 1925. These instalments have been paid regularly, but the plaintiffs now desire to have the said order rescinded as they are of opinion they can obtain settlement of their judgment more expeditiously.

The summons preceding the order was brought in reliance on the Debtors Ordinance, 1884, asking that the debtor might be examined for proof of means and for committal, but on the case coming on for hearing no evidence was taken, the parties having already come to an arrangement and asking the court to confirm it, so that no order was made for committal in default of payment of any instalment, and although entitled "In the Debtors "Ordinance, 1884," the order has very little to do with it, and could have been made under Order XXXV., r. 5.

Several cases, depending upon what is known as a "Judgment Debtor Summons," were referred to by learned counsel, but do not appear to assist one at all. *In re Ives* Exp. *Addrington* 1886, 16 Q. B. D. goes to show that a County Court may make such an order for enforcing the judgment of the High Court, though it cannot rescind or vary such an order if made by the High Court which has considered and adjudicated upon the question of the debtor's ability to pay, and this power is contained in sec. 4 (g) of our Debtors Ordinance. But in the present case the

court neither considered nor adjudicated upon the debtor's ability to pay, had it been so the usual order would have run, "and whereas . . . . it has "been proved to the satisfaction of the court that the defendant has had "since the date of the judgment the means to pay the sum then due and pay- "able in pursuance of the judgment and has neglected to pay the same" and so forth.

No evidence was offered, and I can find nothing to bind the plaintiffs to abide by any private arrangement, nor why the court would require evidence that the defendant had or has the means to settle the judgment or *vice versa* as the order was made without any such evidence. I am satisfied that the plaintiff is entitled to rescission of the order of the 28th February, 1925, and I have heard no reason why their request should be refused. I am of opinion however that they are not entitled to any costs of this application in the circumstances and I can make no order for issue of execution but must leave the plaintiffs to proceed on their judgment as they were entitled to do previous to the said order, making allowance for any amounts received by them on account of the judgment.

I accordingly rescind the order of the 28th February, 1925.

LAING *v.* DODDS.

[No. 116 OF 1926.]

1926. NOVEMBER 22, 29, 30; DECEMBER 1, 2, 17.

BEFORE DOUGLASS, J.

Election Petition—British Guiana Constitution Ordinances, 1891 and 1909,—Statutory declaration of qualification of candidate—Qualification based on ownership or possession under a lease—British Guiana Constitution Ordinance, 1891, Amendment Ordinance, 1909, section 4 sub-section 5 (c)—Whether possession in said section refers to that of lessor or lessee—Nature of interest in land required—Not uncertain or liable to defeasance on contingencies—Distinction between Statutory declaration of qualification ex facie good and intrinsic tack of qualification—Necessity for notice to electors of facts showing disqualification—Effect of notice of facts not proved at trial—Disqualification found by Court on other facts—Whether competing candidate can be declared elected and returned in such case or whether election merely void.

The nature of the interest in land required by sub-section 5 (c) of section 4 of the British Guiana Constitution Ordinance, 1891, Amendment Ordinance, 1909, is a stable one and not one liable to defeasance on contingencies, so that the requirements of the Ordinance are not fulfilled where the candidate is a lessee of land already subject to a mortgage and the mortgagee is not a party to the lease.

The provisions of, sub-section 5 (c) of section 4 of the British Guiana Constitution Ordinance, 1891, Amendment Ordinance, 1909, prescribe the following as one of the qualifications: "Ownership or possession under a lease for 21 years or upwards of any house or house and land situate in the Colony the annual rental or value whereof over and above the interest payable under any mortgage is not less than $1,200."

Held, That such a qualification can be only that of a lessor or owner and not that of a lessee.

Where the Statutory declaration of a candidate's qualification is *ex facie* good the nomination is good and valid though not final and conclusive upon questions of qualification and it therefore becomes incumbent upon a competing candidate to inform the electors of any facts showing disqualification upon which he proposes to base an election petition praying for his election and return.

Where a candidate informs the electorate of certain facts which he alleges go to show lack of qualification on the part of his rival, but such facts are not proved in a subsequent election petition in which the Court finds the alleged disqualification to be founded on other grounds, the proper order for the Court to take is to declare the election void, not to declare the candidate so informing duly elected and returned.

Election Petition by J. A. Lain praying that it might be declared that one J. Dodds was not duly qualified to be nominated or elected a member of the Court of Policy and that one R. E. Brassington be declared duly elected and returned.

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

E. F. Fredericks and *P. A. Fernandes,* for the respondent.

DOUGLASS, J.: The election of a member of the Court of Policy to represent the North Western Division of Electoral District No. 2 (County of Essequebo) took place on the 22nd of October, 1926, when John Dodds, the respondent, and Robert Edward

Brassington were the only two candidates up for election, and on the 26th of October the Returning Officer, Mr. Howard Thompson McKenzie King, declared the result of the poll as follows: J. Dodds 303 votes, R. E. Brassington 295 votes, and he made the necessary return to the Governor of the election of Mr. Dodds as a member of the Court of Policy for the said county and division.

On the 10th day of November, 1926, Mr. James Allan Laing, an elector, filed his petition alleging that the said John Dodds was not a duly qualified candidate on the day of nomination, and was not duly elected or duly returned, and asking that the election and return in respect of the said J. Dodds be declared null and void, and that it may be determined what person was duly elected and returned. It appears the Returning Officer fixed Thursday, the 14th day of October, as the day for receiving the nomination of the candidates and that on the 15th of October the said J. Dodds delivered to the Returning Officer a statutory declaration of his qualification for election as prescribed by section 17 of the British Guiana Constitution Ordinance, 1891, Amendment Ordinance, 1909, (hereinafter referred to as "the amending ordinance"); paragraph 5 of the declaration reads: "I "possess the following property; Lease of Plantation Mainstay, described "on transport No. 851 dated 13th of August, 1925. For a period of 25 "year's commencing 22nd September, 1926, executed in my favour by "Elaine Margery Dodds, of an annual rental of over twelve hundred dol-"lars, over and above all interest charges due on mortgage."

In his petition the said J. A. Laing states that the said John Dodds did not at any of the said times (*i.e.*, the 14th, 22nd or 26th October) nor at the presentation of his petition possess a lease or otherwise of Plantation Mainstay of an annual rental or value exceeding the sum of $1,200 over and above all interest, payable under a mortgage thereon, or any of the other property qualifications required by section 4 (5) of the amending ordinance. The petitioner then sets out the grounds on which he considers the lease worthless, and he further states that the said lease is not a lease as contemplated by the said section, nor is it within the terms of the said section.

In opening the case on behalf of his client the petitioner, Mr. P. N. Browne, K.C., and with him Mr. J. A. Luckhoo, K.C., submitted that the statutory declaration was bad at law in respect of paragraph 5 thereof—set out above—and that if the court so held there would be no necessity to call any witnesses as to the sufficiency of the qualification under the lease or as to the actual value of the property in question. The contention was that the declaration was deficient in four respects, any one of which was sufficient to render the declaration worthless and the nomination void, viz.:

1. That the parcels in the lease only mentioned land, whereas the qualification must be house property or house and land.

2. That the lease coming after the mortgage on the property and being made subject to it was void for uncertainty; the mortgagee might foreclose at any time on breach of any of the terms of the mortgage.

3. A lease must be for a term certain, this was not; it might determine at any time or on the death of the lessee.

4. That the respondent has mistaken the meaning of section 4 (5) (*c*) of the amending ordinance which intends to set out the qualification of the leaseholder not of the lessee.

Section 4 of Ordinance No. 24 of 1909 (the amending ordinance) reads: "No person shall be capable of being elected a member of the Court "of Policy, or having been so elected shall sit and vote in the said Court "who . . . . . (sub-section (5) does not possess some one of the following "property qualifications, namely: . . (c) Ownership or possession under a "lease for 21 years or upwards, of any house or house and land situate in "the colony, the annual rental or value whereof over and above the interest "payable under any mortgage is not less than $1,200."

With reference to the first objection I will only say that as the declaration had to state that the candidate possessed a house, or house or land, the Returning Officer would have been within his rights in declining to accept it as it now runs, but I find it unnecessary to decide whether or no the word "Plantation" includes the house on it as well as land, the terms of the lease itself show that it intended to do so.

The next two objections can be taken together. The date of the mortgage referred to is the 30th April, 1926, and the lease was made on the 22nd of September, 1926, and without the consent of the mortgagee, indeed a clause of it runs. "This lease shall not in any way prejudice the "rights of the mortgagee Rahiman in respect to her mortgage on the said "Plantation Mainstay." At Roman-Dutch Law which to a great extent still applies to conventional mortgages, a mortgagor is not prohibited from granting a lease, but he cannot thereby prejudice the mortgagee's rights. A lease *ad longum tempus* when duly registered is in the nature of a servitude and is now by statute called a registered encumbrance, and the maxim applies *qui prior est tempore potior est jure.* This lease then is of no avail against the rights of the mortgagee of property whose title is prior to that of the lessee, she could immediately foreclose on the property if the mortgagor (the lessor) . . . . . .

1. Died before the capital sum was paid in full.

2. Attempted to sell or transport the property, or allowed it to be levied upon.
3. Failed to pay the instalments, or interest, at the times due.
4. Allowed certain life policies to lapse.
5. Failed to pay taxed charges, rates, etc.
6. Neglected to repair buildings or keep up the coconut cultivation.

Such a property qualification whether on the part of the lessor, or (as claimed by the respondent) on the part of the lessee, might be described as an uncertain one, and liable to disappear at any moment on a variety of contingencies. On the other hand if the mortgage is made subject to the lease, or the mortgagee joins in the lease, then a stable property qualification is created, and that in my opinion is the only one that would satisfy the requirements of section 4 (5) (c). It is difficult to believe that the legislature intended to make it possible for a candidate to manufacture a property qualification solely for the purpose of qualifying as such, the leasehold property must be of genuine origin and for a period of 21 years certain and not liable to terminate at any time quite apart from any default on the part of the lessee. I have come to the conclusion that the said lease of the 22nd September, 1926, between Mr. and Mrs. Dodds is not good as a property qualification to either of the parties thereto, within the meaning of the said section.

But it is the last objection which is in my opinion the most important one as it touches the construction of the section itself. In reply to this objection Mr. Fredericks for the respondent said that although section 4 (5) (c) might apply to quality the lessor of a property, it was also intended to quality the lessee, not indeed by the rental which he paid but by the value of the leasehold which he obtained. This interpretation at first sight seems possible but it is hardly probable that it was the intention of the ordinance to treat the tenancy or possession of a bare lessee as a property qualification when one considers the section as a whole and other sections of the same ordinance which I will refer to.

In the said section 4 (5) three divisions of property qualification are set out: (a) ownership under title or possession under a licence of occupancy of not less than 80 acres of unencumbered land of which not less than 40 acres shall be in actual cultivation.

(b) Ownership of immovable property (under similar title) of not less than $5,000 value above amount of any mortgage. And it must be remembered that when this section was enacted the word “immovable” did not include leasehold property as it does since the 1st of January, 1917.

(c) Ownership or possession of lease of a property consisting of a house or of a house and land, for 21 years and upwards whereof the clear annual rental or value is not less than $1,200.

So that the qualification under (a) is by quantity and quality of landed property; under (b) is on the clear value of immovable property, and under (c) on the annual value of leasehold property. Now compare the words of the commencement of this subclause 5 (c) "ownership or possession" under a lease with the words of section 11 (2) (with reference to the qualification of city voters), "occupation or tenancy" secured by lease of a house or land, etc.; and compare too section 54 of the principal ordinance with reference to property qualifications for county voters, when both qualifications are included in separate sub-sections, namely in sub-section (2) *ownership* of a house or of a house and land of the annual rental or value, etc., and sub-section (4) *occupation* or tenancy of a house, or of a house and land of the annual rental or value, etc., secured by lease; surely there must have been some reason for using such distinct terms, and yet the respondent's view would make the words "ownership or possession" of a term equivalent to "occupation or tenancy." of a term. The word "ownership" would not in any event be used with respect to the interest of a lessee; to constitute ownership the rights to (a) possess, (b) use and enjoy, and (c) to alienate, must be exclusive.

Even if this section is not as clear as it might be in its wording it seems to me that its construction is finally settled by the words "over and above the interest payable under any mortgage" these words were omitted from the original section in the principal ordinance; the only person affected by the mortgage is the lessor or owner of the leasehold property not the lessee, whose only concern is to pay a rent of not less than $1,200, (I now refer to those leases which are good against the mortgagee and not to those at his mercy which I have already dealt with under the head of the second objection), but the amount of the mortgage does of course affect the value of the property as leasehold to its owner or possessor, and consequently in calculating the rental he receives he must take into account the interest he pays on the mortgage. Section 11 (2) may again be noted where in the qualification by occupancy or tenancy there is no mention made of allowing for any interest payable under any mortgage, because if the annual rental or value is not less than $120 no mortgage would affect the tenant's qualification.

Section 5 too of the amending ordinance is a confirmation of this view of the previous section, it is with reference to the property qualification by shares in a company and sets out the same

three sub-divisions (a), (b) and (c), the last one reads: "The annual rental or "value of such house or house and land over and above the interest payable "under any mortgage" as a property qualification of the shareholders of the company, *i.e.,* of the owners or possessors of the lease holds of the company.

I think that it was intended to fix the property qualification for a member of the Court of Policy at a high standard and that there was no intention of qualifying a mere lessee, as a property holder. Consequently I hold that Mr. John Dodds did not make a declaration sufficient to satisfy the ordinance; he has not proved he possessed a property qualification, and consequently he was not capable of being elected a member of the Court of Policy and his election must be declared void.

The election of Mr. Dodds being void it remains to determine whether Mr. R. E. Brassington, the only other candidate, was duly elected and returned, or whether the election was void, (See Ord. No.1 of 1891, section 128 (2)).

As I stated in my decision on a late election petition it has been laid down as the results of decisions of the courts that if a candidate is disqualified to be a candidate, and the other candidate desires that all votes given for the candidate so disqualified should be treated as null and void, and so secure his own election, a notice of the disqualification must be published to the electors, and in *Gosling v. Veley* (1847, 7 Q.B. 437) it was held that where the disqualification depends upon a fact which may be unknown to the electors notice is always necessary.

Mr. J. A. Luckhoo, K.C., for the petitioner, submitted that although notice was given to the electors' it was not strictly necessary as the declaration was bad *ex facie* and consequently there was no complete nomination as required by the Ordinance, that only one candidate had supplied the necessary declaration to complete his nomination and that therefore he should be declared elected; he referred to *Benn* v. *Benn* (1889. 53 J.P. 167) in support of his argument, but on reference to that case and also to *Cutting* v. *Windsor* (1924. 40 T.L.R. 395) it will be seen that in each case the nomination was void because the candidate was nominated in an irregular manner. That is not the case here the nomination was perfectly good, supported by a declaration which the Returning Officer passed as sufficient, and the proceedings were perfectly regular, the nomination in short was not void but the candidate's qualification has now been found to be insufficient, a very different thing.

In *Pritchard* v. *Mayor of Bangor* (1888. 13 Ap. Ca. 241) Lord Watson in the course of his judgment said with respect to a valid nomination, "I do "not mean to suggest that it is final and conclusive upon questions of dis- "qualification, ...but I

"think it was intended to be conclusive to this effect, that the nomination "paper so sustained as valid should form the basis of the election, and that "the nominee in that paper should be treated as a person for whom votes "could be given." And as Kennedy, J., said in *Hobbs* v. *Morey* (1904. 1 K.B.D. 74): "A valid nomination includes the case of a person who is dis- "qualified in fact, but whose disqualification is not apparent on the nomina- "tion paper, and whose nomination has been sustained by the Mayor. This "being so, the election must proceed, and the question . . . . becomes not a "question between the two candidates, but between the successful candi- "date and the electorate." This brings me back to the only question left to decide, were the persons whose votes it is sought to treat as having been thrown away in fact aware of the disqualification? for the other alternative that the disqualification was of a sort whereof notice is to be presumed may be at once discarded.

A difficulty at once arises, namely if there was sufficient notice of a disqualification, what effect would it have if the respondent was held to be disqualified on grounds other than those notified to the electors? On a careful perusal of the evidence it appears that the grounds for disqualification were stated to be that Mr. Dodds was seeking election on a lease, that the lease was useless, the whole thing was fraudulent and collusive, that if electors gave their votes to Mr. Dodds they were throwing them away; and Mr. Souza, the agent for E. E. Brassington, told the electors that in his opinion the lease did not satisfy the requirements of law, "I relied a great deal on the lease being bad." Mr. Laing, the petitioner, stated that he had no notion of the legal interpretation of the section, he only objected to the over valuation of the property. The general reply of those intending to vote in favour of the respondent seems to have been that they did not mind if Mr. Dodds had no qualification they would vote all the same.

Now it is obvious that since counsel relied on the qualification offered being deficient at law, that the value of the property or the truth of the statements in the declaration are not before the court and no evidence was offered in proof thereof, so that any statement to electors that the lease was fraudulent or the property over valued cannot be counted as effective grounds for holding that any elector "threw away" his vote.

It seems to me that this case is met in the words quoted by Lord Coleridge, G.J., in the *Launceston Election Petition. Drinkwater* v. *Deakin* (1874, 30 L.T. N.S. 832) as being in accordance with a sound construction of the law as well as with justice and reason, that "In a Parliamentary elec- "tion, in order to give effect to the notice, the disqualification must be "founded on some positive and definite fact existing and established at

"the time of the polling, so as to lead to the fair inference of wilful per-"verseness on the part of the electors voting for the disqualified person;" and Brett, J., to the same effect: "Where there are certain circumstances "existing in fact, and notice of those circumstances would tell a person of "ordinary care, sense and intelligence that they produced incapacity in the "candidate, then the voter who nevertheless votes for the said candidate "throws away his vote."

In the present case definite facts were stated as existing which if established would render the qualification of the respondent void, but those facts have never been proved because it was not necessary for the main purpose of unseating the respondent to do so.

It is perfectly clear from the evidence that no notice of the legal construction of the said section, under which the respondent was claiming a property qualification, was ever made to the electorate, and that the electors understood that the objection to the lease was because the rent was a fictitious one, the value of the leasehold less than that required by law, and the lease faked and made between husband and wife. Much as I desire to save the electorate and candidates further expense I cannot see my way to find that the electors received the necessary notice informing them why the declaration was bad, nor that the faces put forward at the election as disqualifying the respondent have been proved, to put it shortly there is not sufficient proof that those who voted for respondent threw away their votes; there was no wilful voting for a person obviously ineligible for the facts stated to the electors are not the facts upon which the court has determined that the declaration was insufficient to qualify the respondent as a possessor of landed property.

I am of opinion and determine that the election must be declared void as no person was duly elected and returned.

The petitioner is entitled to his costs.

WEST INDIAN COURT OF APPEAL.

REPORTS OF DECISIONS

OF

THE COURT

SITTING IN

British Guiana

[1927.]

R. FURNESS (Chief Justice of Barbados).

SIR ANTHONY DEFREITAS (Chief Justice of British Guiana).

SIR G O'D. WALTON (Acting Chief Justice of Trinidad).

REX *v.* MEERTINS.

[No. 2 OF 1927.]

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1927. FEBRUARY 28.

BEFORE FURNESS, C.J., SIR ANTHONY DEFREITAS, C.J., AND SIR G. WALTON, ACTING C.J.

Criminal Law—Case stated—West Indian Court of Appeal Ordinance, 1921, sections 4 and 5—Crown Cases Act, 1848—To be treated as an appeal—Powers given by Statute to Court of Criminal Appeal in England—No such powers given to West Indian Court of Appeal—Charge of murder—Evidence of bad character of accused—No previous attack on character of witnesses for Crown—Contravention of rules of evidence and of Evidence Ordinance, 1893, sections 22 and 23—Duty of Court ex mero motu to stop such questions—Specific direction of Judge to jury to discard such evidence—Whether misreception of evidence in such circumstances an invalidating factor—Evidence of provocation considered by trial Judge insufficient to warrant reduction of charge to manslaughter—Direction to jury confining their possible verdicts to murder or acquittal—Evidence of provocation on which jury might have found verdict of manslaughter—Misdirection.

(*a.*) A case stated to the West Indian Court of Appeal under the provisions of sections 4 and 5 of the West Indian Court of Appeal Ordinance, 1921 is to be treated as an appeal.

(*b.*) The West Indian Court of Appeal in adjudicating on such a case does not possess certain powers conferred by statute on the Court of Criminal Appeal in England.

(*c.*) Evidence cannot be led as to the bad character of an accused person where his character is not in issue and no attack has been made upon the character of witnesses for the Crown, and it is the duty of the Court, even if counsel for the accused does not object, *ex mero motu* to stop such question, or, if the evidence of bad character is already given to direct the jury to discard it from their minds.

(*d.*) Where such evidence is wrongly admitted and the trial Judge directs the jury to discard it from their minds and more specifically to take into consideration evidence given of the good character of the accused, the misreception of such evidence is not a factor invalidating a subsequent conviction.

(*e.*) Where there is such evidence of provocation as might possibly lead a jury to reduce the crime from murder to manslaughter it is the duty of the judge to leave such a verdict open to the jury, even though inconsistent with the defence actually put forward.

Case stated under the provisions of the West Indian Court of Appeal Ordinance, 1921, sections 4 and 5.

S. E. Wills for the prisoner.

Hector Josephs, K.C., Attorney General, for the Crown

DEFREITAS, C.J.: This is a case stated by the learned trial Judge at a Court of Assize in British Guiana, reserving two points of law for this West Indian Court of Appeal, under the authority of sections 4 and 5 of Ordinance 2 of 1921. Those

sections correspond with sections 1 and 2 of the English Act 11 and 12 Vict. c. 78, the Crown Cases Act, 1848. In England when a question is reserved under the l848 Act it is treated as an appeal under section 3 (a) of the Criminal Appeal Act, 1907, 7 Edw. 7, c. 23; so we should be on our guard to bear in mind the powers given by statute to the Court of Criminal Appeal, which have not been given to this Court.

2. On an indictment charging Richard Meertins with murder the jury found him guilty, and strongly recommended him to mercy. At the trial, the second witness for the prosecution, Abraham Rutherford, was asked a question in re-examination by the Assistant to the Attorney General as to the general character of the accused. His answer was that his "general character is very cruel." Nothing had previously been said by Rutherford, or by any witness, in relation to the character of the accused or the character of any person connected with the prosecution. Counsel for the defence, Mr. S. E. Wills, who did not object to the question or the answer, was allowed to cross-examine upon that re-examination, and the witness then said of the accused that "He has always bean a good and quiet workman." The next witness for the prosecution was a boy, with whose mother the accused had lived in concubinage but from whom the accused had recently parted. It was she whom the accused was convicted of having murdered. The boy said in cross-examination: "The accused is good and kind to me." In his address to the jury in reply to Mr. Wills's address, the Assistant to the Attorney General, who was conducting the prosecution, asked them "to "pay no attention to the statement by Rutherford as to the general character "of the accused, but to take it, as the boy had said, that he was always good "and kind."

3. The learned Judge expresses as follows the first question reserved by him:

> "Whether the admission of that portion of the evidence of the witness Rutherford which states 'General character is very cruel' was legal, in view of the fact that it was not objected to at the time, that the jury were told by the Assistant to the Attorney General to pay no attention to it, and that it was impliedly excluded from their consideration by me."

It appears from what the learned Judge elsewhere says that there was something more than an implied exclusion, for he says earlier in the stated case:

> "In summing up the evidence to the jury I referred to the fact that the Assistant to the Attorney General had already told them to take no notice of the witness Rutherford's statement of general character and I desired

them to note that the same witness said 'he was a good and quiet workman' and that the boy Ellis had said that the defendant was good and kind to him."

The learned Judge approved and confirmed the Assistant to the Attorney General's withdrawal of the evidence of the accused's cruel character, and he pointedly put to the jury the evidence of good character, which he desired them to note and, thereby, to act upon.

4. The Assistant to the Attorney General was wrong in putting a question as to character at that stage. It was one of those slips that sometimes unhappily occur. It was a contravention of the general rules of evidence and of sections 22 and 23 of Ordinance 20 of 1893. Questions cannot be put that may have the effect of constituting an attack on the character of the accused, when his character is not in issue—as it was not in this case. Such evidence of character is inadmissible. In this case there was no objection by counsel for the defence to the irregular question or answer. But that is not of great importance, for it is always the duty of the trial judge—without waiting for any objection from the prisoner's counsel—to stop such questions himself, *ex mero motu*, and if by mischance they are put, then it is equally the clear duty of the judge to direct the jury to disregard them and not to let them influence their minds. Counsel for the prisoner informs this Court that the Assistant to the Attorney General had the benevolent intention of eliciting from Rutherford that the accused was "a good and quiet workman" as appeared in the depositions, but that Rutherford did not fulfil his expectation. Perhaps a leading question might have successfully carried out that benevolent intention. The question for us now is, whether this inadmissible evidence invalidates the conviction. I think that the stated case shows that this evidence was, in effect, not admitted, and that it was rejected and not left to the jury for consideration; so that there was in fact, no real misreception of evidence that would necessarily cause the conviction to be quashed (under the old rule which still governs this Court) even though there might be sufficient other evidence to sustain the conviction. Although this Court has not the power given to the Court of Criminal Appeal in England to dismiss an appeal in which the ground of complaint is misreception of evidence if in the opinion of the Court of Appeal there has been no miscarriage of justice, yet I think that this Court ought not to say that a conviction is invalidated by irregular evidence in a case where such evidence has been clearly withdrawn and disregarded and so could have no effect on the decision of a jury who were also pointedly directed by the Judge to consider and accept other evidence having an effect contrary to the effect of

the irregular evidence. My answer to the first question is that Rutherford's evidence as to the general character of the accused, in the particular circumstances of this case, does not invalidate the conviction, and that the conviction cannot be disturbed on that ground.

5. The second question is stated by the learned Judge in the following terms:

> "Whether my direction to the jury that the case was one either of murder or nothing for which the accused could be held guilty, thus excluding a verdict of guilty of manslaughter, was a misdirection."

Earlier in the stated case the learned Judge says, in relation to his summing up to the jury:

> "I directed them as to the difference between murder, manslaughter and excusable homicide, that manslaughter included all felonious homicide not amounting to murder, but that in my opinion there was no such evidence of provocation as would justify the jury in finding a verdict of manslaughter, and they had no option but to find the accused either guilty of murder or, if they believed his story, of excusable homicide; that, in short, in the death of the woman it was either murder or nothing for which the defendant could be held guilty of crime."

It is clear that the learned Judge absolutely withdrew from the jury any question of manslaughter on any ground. It does not appear that counsel for the defence invited the jury to return a verdict of manslaughter as an alternative to a verdict of not guilty. But the learned Judge's reference to insufficient provocation in his summing up leads one to infer that there is some material in the case that he thought might possibly be erroneously taken by the jury to afford sufficient evidence of provocation to ground a verdict of manslaughter. He effectually guarded against that possibility by directing them that they had no "option" but to find a verdict of murder or of acquittal. He denied them their usual function of considering and measuring the sufficiency, in the particular circumstances, of the provocation he referred to. It does not appear why the jury made a strong recommendation to mercy, unless it be that they were inclined to a verdict of manslaughter, which they knew they had been prohibited from finding. The question now before us is, was that withdrawal of manslaughter from the jury a misdirection? It is only if there is no evidence of manslaughter that a judge may direct a jury that they cannot find a verdict of guilty of manslaughter; and he must leave such a verdict open to the jury if there is evidence on which manslaughter can be found even though inconsistent with the defence

actually put forward, whatever that defence may be. The jury must consider each question and the answer to it in the light of others before and after: they may believe the prisoner in part: they may conclude that is trying to shelter himself behind the substantial defence set up and they may take a different view of the facts from that given by him in his evidence: they may arrive at the true view of the facts without accepting the whole of any witness's version and without paying special attention to whether any particular witness is called on one side or the other: they may find materials in the prisoner's or some other witness's evidence, which, if other parts of the evidence are disbelieved or doubted or rejected as inconsistent, may afford them ground for a verdict of manslaughter instead of murder.

It is the duty of this Court to hold that the withdrawal of the question of manslaughter from the jury was a misdirection, if we find that there was sufficient evidence to enable the jury to form an opinion, from the facts and circumstances connected with the allegation of a provoking blow with a cup and the ensuing angry struggle with a knife that would justify them in returning a verdict of manslaughter. I think there was such sufficient evidence, which should have been left for their consideration, and that there was, therefore, a misdirection. It is not for the Judges of this Court to say that the jury *would* have formed such an opinion, but it is enough to say there was material upon consideration of which they *could* have reached that view.

I think that the conviction must be quashed and the judgment set aside.

FURNESS, C.J.: I concur.

WALTON, ACTG. C.J.: I concur.

Conviction Quashed.

MENDELSON, LTD., Appellant,

AND

DE ABREU, Respondent.

[No. 4 OF 1926.]

1926. FEBRUARY 26; MARCH 4

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

Master and servant—Monthly Salary—No terms as to length of notice—Reasonable notice—What is—Whether it must expire at the end of a calendar month—Assessment of damages—Difference of opinion between two judges of Full Court on appeal from single judge—Effect of—Appeals Regulation Ordinance, 1922, section 6 (*2*) *1.*

Per MAJOR, C.J.:—Where in a contract for service at a monthly salary it is understood that it might be terminated by reasonable notice and such salary is actually paid at the end of each month, then reasonable notice is in the circumstances one month's notice expiring at the end of a calendar month.

Per BERKELEY, J.:—Reasonable notice in the circumstances of such a case does not necessarily mean notice expiring at the end of a calendar month. The notice is good irrespective of the date of its expiry, if it is of a month's duration.

(*a*) Where the notice is insufficient the measure of damages lies in that insufficiency.

(*b*) Where the Full Court is composed of two judges on appeal from a single Judge and they differ the judgment of the single Judge shall stand.

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

J. A. Luckhoo, K.C., and *S. L. Van B. Stafford,* for the respondent.

SIR CHARLES MAJOR: The contract—a verbal one—proved in the action was that in April, 1924, the plaintiff should enter the defendant's service at a monthly salary of $75. Nothing was said about the duration of the hiring. There was an understanding that the service might be mutually determined by reasonable notice. The plaintiff on the 8th of September, 1924, received from the defendants a notice of discontinuance of this employment on the 7th of October. He was paid his salary for September and for the seven days of October. He claimed damages for his dismissal on insufficient, that is, unreasonable notice, in that it should have been at three months, not one month.

The learned judge, therefore, had to inquire into the nature of the hiring in order to ascertain what, in the circumstances of the ease, was a reasonable notice. The evidence showed that the plaintiff's first payment of a whole month's salary was made on the 31st of May, 1924, to that date, and, by obvious inference, that he had been paid such amount of salary for April, as according to the commencement of his work, he had earned. The defendant's representative testified that his principals always treated their servants as monthly servants. That was evidence whereon the judge was justified in finding that notice for a month was reasonable. But it was evidence also that the hiring was coterminous with each month, from the first to the last day of the month, and *ex necessitate,* as I think, a notice to terminate the employment to be effective must have expired at the end of a month. The notice here, therefore, might be given on any day in September but to expire on the 31st of October. Mr. Nepean, it is true, said that the plaintiff's employment was as from the 10th of the month. So, perhaps, it was, in April, 1924, but only I think the evidence shews, for the purpose of computing salary for that month.

The learned judge has given the plaintiff the balance of salary for October and also salary for November. To that extent I cannot go, for the assessment proceeds (apparently) on the assumption that after the 1st September no effective notice could be given except to expire at the end of November, whereas, as I have already said, 1 think it might and should have been at the end of September, to expire at the end of October. It was actually given to expire on the 7th of October and was, therefore, insufficient only as lacking twenty-four days of that month. In that insufficiency lies the measure of damages. The

balance of salary for October was, as the learned judge has stated, $59. It follows, in my judgment, that the order of the Court below should be varied by the substitution in it of that sum for the sum of $134, and so, I think, this Court should order, but that there should not be, in those circumstances any order as to the costs of this appeal.

BERKELEY, J.: This is an appeal from the decision of Gilchrist, J., who in a claim made by respondent for wrongful dismissal entered judgment for $134 with costs.

The respondent's claim alleges that it was agreed that his service should be determined by a reasonable notice on either side.

On 10th April, 1924, the respondent entered the service of the appellant company and his wages were paid to him at the end of every month. On 8th September, 1924, respondent was informed that his services would not be required after 7th October. The attorney of the defendant company says that all employees including the managers are treated as monthly servants and always given a month's notice from any date.

The learned judge finds that the respondent was entitled to one month's notice terminating the employment at the end of any particular month.

This is the main question for the consideration of this court. To quote Lord Halsbury—"If no custom nor stipulation as to notice exist, and if the "contract of service is not one which can be regarded as a yearly hiring, the "service is terminable by reasonable notice." (Halsbury, V., 20.97 S. 187). Amongst the many cases referred to by Lord Halsbury the following show that reasonable notice does not require the notice to terminate at the end of any particular month—*Fairman* v. *Oakford* (29 L.J. Ex. 459) where the plaintiff entered the defendant's service on 26th July, on a, salary of £250 a year, and was paid weekly. On 20th January, 1860, defendant gave plaintiff a month's notice to leave his employment and paid him his wages to 20th February. It is there laid down that, except in the case of menial servants, there is no inflexible rule with respect to the duration and mode of determining general contracts of service. *Hiscox* v. *Batchellor* (15 L.T., 543)—where plaintiff entered into a written agreement with defendant in August, and on 13th September following plaintiff received a month's notice to end agreement on 13th October. There was no provision as to notice to determine agreement, and one month's notice was held to be a reasonable notice. See also *Green* v. *Wright* (L.R. 1 C.P.D. 591).

In *Ryan* v. *Jenkinson* (25 L.J. Q.B. 11) Coleridge, J., said: "No doubt there is a rule with respect to tenants of land from

"year to year that a notice to quit must be to quit at the end of a complete "year. But no authority has been adduced to show that such a rule is appli- "cable to notices to quit in all cases. In the case of land there would be "great inconveniences arising from the nature of the property and the "course of husbandry to allow the relation of landlord and tenant to be ter- "minated at any time. . . . . It seems therefore to me that the trustees are "justified in giving a three months' notice to terminate the "schoolmaster's "holding *at any time* during the year."

I am of opinion that the notice of one month, as given by appellant, was a good notice and that the appeal should be allowed.

As the Chief Justice differs from me on the main ground of appeal I may add that I agree with him that the learned judge erred in entering judgment for $134. The trial judge refers to *Dewar* v. *The Daily Chronicle, Ltd.* (L.R.B.G. 1919, 170). In that case the plaintiff was wrongfully dismissed on the 24th June and paid up to that date. He was therefore entitled to the balance due for June and his salary for July. In the present case notice was given on the 8th September, 1924, to quit on 7th October, 1924. In effect this was notice to quit on 31st October and plaintiff is only entitled to balance due to 31st October.

MAJOR, C.J.: The result of the difference in our opinions seems to be that, pursuant to the provision of section (6) (2) of the Appeals Regulation Ordinance, 1922, as we differ on the question of expiry of the notice, given to the plaintiff, the decision of the learned judge that it must have expired at the end of a month stands but that as to what we both regard in any event as an excess in the damages assessed, his order that, judgment be entered for the plaintiff for $134 must be varied in the manner I have just indicated.

Appeal Allowed.
Judgment Varied.

PEREIRA, Appellant,

AND

PEREIRA, *et al*, Respondents.

[No. 2 OF 1926.]

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1927. MARCH 2.

BEFORE FURNESS, C.J., SIR ANTHONY DEFREITAS, C.J., AND SIR G. WALTON, ACTING C.J.

Mutual will—Husband and wife—Disposition of separate properly on the respective deaths of each—Whether consolidation into mass—Rights of surviving spouse where no massing.

Spouses made a mutual will leaving to each the other of them for the term of their respective lives all the property of which they may respectively die possessed, leaving and bequeathing at their respective deaths all the property of which they might die possessed to their nine children whom they appointed to be their heirs.

Held, (1.) That the fact that each of the spouses dealt only with his or her own half of the property precluded the operation of consolidation into a mass.

(2.) That consequently, the survivor was at liberty to deal with his portion of the property even though he had accepted benefits conferred on him by the mutual will.

Appeal from Berkeley, J., who on the facts stated in the judgment below had made an order restraining the surviving spouse from dealing with one-half of the common property disposed of, on the ground that the spouses had massed their property.

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

G. J. DeFreitas, K.C., for the respondents.

FURNESS, C.J.: The question we have to consider on this appeal is whether the trial judge was wrong in deciding on the law as stated by him, that the opposition to a proposed transport by the appellant was just, legal and well founded.

On the 9th September, 1913, the appellant, Manoel Pereira, and his wife, Anna Pereira, who had been married in community of goods, executed a mutual will. After declaring that they desired to deal with the whole of their common property, directing payment of their debts, funeral and testamentary expenses and making certain specific bequests, they bequeathed to each, the other of them, for the term of their respective lives, all the property movable and immovable of which they might respectively die possessed, to be held and enjoyed free and undisturbed from the interference of any of their heirs therein, and thereby expressed to be appointed; subject to the life interest therein

immediately created in their respective favours and the aforesaid bequests the testator and testatrix left and bequeathed ft their respective deaths all the property movable and immovable of which they might die possessed to their nine children and appointed the said children as their heirs.

Anna Pereira died the day after the will was executed; the will was proved by the appellant and he remained in possession of the common property affected by this action. Twelve years later, that is to say in 1925, the appellant advertised a transport of an undivided half share in the greater part of the common property in favour of one of the nine children appointed as heirs under the will and this action was brought by or on behalf of the remaining eight children to restrain the appellant from passing the transport, on the ground that the appellant having accepted the benefits of the will was bound by its terms, and that by virtue thereof he had only a life interest in the common property, the remainder being vested in all the children.

The learned trial judge, quoting from *Denyssen* v. *Mostert* (1872) 8 Moore's P.C. 502, has stated the law with regard to the revocation of a mutual will by a surviving spouse. Such a power exists and is only taken away where, in addition to the surviving spouse accepting some benefit under the will, the will disposes of the joint property on the death of the survivor, or, as it is sometimes expressed, where the property is consolidated into one mass for the purpose of a joint disposition of it after the death of the survivor. Can it be said that, in this case, such a consolidation has been effected? Mutual wills have to be construed as the separate testaments of the two spouses, and the disposition of such spouse has to be treated as applicable to his or her share of the joint property. In the will before as each spouse has been at particular pains to deal with his or her own half of the property only. The will runs: "We leave and bequeath to each, the other of "us, for the term of our respective lives all the property movable and im- "movable of which we may respectively die possessed" and it is on their "respective deaths" that the testators institute the children as their heirs subject to the life interests already created in their respective favours. It follows that on the death of Anna Pereira her half of the common property, but her half alone, immediately vested in the nine children, subject to the usufruct given to the appellant. In other words the joint property was not consolidated but severed and, as there was no massing, the appellant is entitled to accept the benefits conferred on him by the will without being deprived of the right to dispose of his own half of the common property. (*Denyssen* v. *Mostert* supra; *Mills & anr,* v. *Estate van Blerk & ors.* (1914) C.P.D. 857).

In my opinion the judgment of the Court below should be reversed and judgment entered for the appellant with costs both of this Court and the Court below.

DE FREITAS, C.J.: I concur.

WALTON, Acting C.J.: I concur.

Appeal Allowed.
Judgment set aside.

THE SHIP "LILIAN BARNES," Appellant,

AND

SPROSTONS, LTD., Respondent.

[No. 3 OF 1926.]

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1927. MARCH 7.

BEFORE FURNESS, C.J., SIR ANTHONY DEFREITAS, C.J., AND SIR G. O'WALTON, ACTING C.J.

Ships—Collision Preliminary Act—Nature and effect thereof—Whether evidence in variance therewith admissible—Breach of Regulations—Whether necessarily fatal to delinquent's case—Whether breach effective if not contributing to collision.

(*a*) The statements in the Preliminary Act required to be filed by the Rules for the Admiralty Courts in we colonies are not mere pleading allegations but admissions of fact binding the parties making them. Nevertheless, it may he shown that they were made by mistake.

(*b*) The statements made in a Preliminary Act are not so rigidly binding as to render inadmissible evidence at variance therewith especially when such variance is not material to the issue and the other party is not prejudiced thereby or when the Court is satisfied with and trusts the evidence varying the statements.

Appeal from a decision of the Supreme Court of British Guiana whereby damages were awarded for loss caused by a collision between the ships "Lilian Barnes" and "Mahaica."

The facts relevant to the appeal are contained in the judgments.

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

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

FURNESS, C.J.: This is an appeal against the decision of the trial judge in an action brought by the owner of the "Mahaica" against the "Lilian Barnes" for damages occasioned by a collision between the two vessels on the night of the 13th January, 1925.

As in most collision cases there was some difficulty in arriving at the true facts and it is quite impossible on the data before us to work out what occurred with mathematical accuracy. Some facts, however, are sufficiently clear. Both parties agree that the wind was N.E. and there was ample evidence for the learned trial Judge's finding that the "Mahaica" was sailing about E.S.E.—in other words that she was sailing close-hauled, and that she was off a lee-shore.

The "Lilian Barnes." by her preliminary act, admits she was running free, and accepting these circumstances, Article 17 of the Collison Regulations applied and cast upon the "Lilian Barnes" the duty of keeping out of the way of the "Mahaica." The expert witnesses called by the respondents at the trial both say that the "Lilian Barnes" should have passed under the stern of the "Mahaica," and that the "Lilian Barnes" was wholly the blame for the accident. This is the conclusion at which the learned trial Judge arrived, but the appellant complains that to do so he improperly admitted evidence at variance with Article 9 of the respondent's preliminary act. That Article states that the distance of the "Lilian Barnes" when first seen was about two and a half cables and that her bearing was about four points on the port quarter of the "Mahaica," *i.e.,* North-North-West. The principal witness as to the facts was Wm. Collison, the captain of the "Mahaica," and Wm. Collison. In his evidence-in-chief, said: "I sighted her on my port quarter, about two points." When asked in cross-examination what he meant by two points on his port quarter he said "N. by E. would be two points on my port quarter. 'Lilian Barnes' could have seen my port light."

On the foregoing evidence it is clear that while the preliminary act of the respondents placed the "Lilian Barnes," when first sighted, four points on the port quarter of the "Mahaica,"—in which position the "Lilian Barnes" would be an overtaking vessel, and unable to see the "Mahaica's" portlight,—the respondent's principal witness placed the "Lilian Barnes," when first sighted, only one point on the port quarter of the "Mahaica,"—in which position the "Lilian Barnes" would not be an overtaking vessel, and would be able to see the "Mahaica's" port light. Is this variation, as the appellant urges, fatal to the respondent's case?

As appears in the judgment of the learned trial Judge, quoting from the judgment of Fletcher Moulton, L.J., in "The Seacombe" (1912) 106 L.T. 247, the statements in a preliminary act are

"statements of facts made under such circumstances that they rank as for-
"mal admissions of fact, binding the parties making them perhaps as
"strongly as any admissions of fact can do. An admission of fact, as such,
"does not constitute an estoppel. It may be shown that it was made under
"mistake, and the Court may be satisfied that such was the case; but it is
"evidence against the party making it, its strength varying according to the
"conditions under which it is made." On the seventh day of the trial in this case, after the last witness had given evidence, Wm. Collison was recalled by the Court and asked what he meant by "quarter." He replied—pointing as we are informed to the port side of a model boat—"I called 'quarter' this Bow, Beam Quarter and Stern."

I think this reply explains how what now appears to be a mistake in the respondent's preliminary act arose. Such a mistake was, of course, gravely reprehensible and tended to discredit the whole case of the respondent and, in considering whether it was proper to allow such a mistake to be rectified by evidence at the trial,—whether it could be rectified without doing injustice to the appellants,—it becomes important to enquire how far the mistake was material to the issue. To answer that question let us further consider the facts. Whether the "Lilian Barnes," when first seen, was four points on the port quarter of the "Mahaica," namely N.N.W., and therefore an overtaking ship within the meaning of Article 24 of the Collision Regulations, or whether the "Lilian Barnes," when first seen, was only one point on the port quarter of the "Mahaica," namely N. by E. and therefore an approaching vessel within the meaning of Article 17 of the Collision Regulations, one duty and one duty alone was cast on the "Lilian Barnes,"—to keep out of the way of the "Mahaica." I am therefore of the opinion that the mistake was not material to the issue and that the appellant was not prejudiced by the variation from N.N.W. in the respondent's preliminary act to N. by E. in Wm. Collison's evidence, and that the learned trial Judge was justified in receiving and acting on this evidence of Wm. Collison. "The Alice" and "Rosita," 1868), L.R. 2 P.C. 214; the "Seacombe," supra, the "Hontestroom" (1927), 136 L.T. 33."

The appellant has also urged that judgment should be in the appellant's favour merely on the ground that, by their preliminary act, the respondents have placed the "Lilian Barnes" in the position of an overtaking vessel thus casting on the "Mahaica" a duty, which was not performed, to show a white light in accordance with Article 10 of the Collision Regulations. Had it been part of the appellant's case that the "Lilian Barnes" was an overtaking vessel and that the "Mahaica" should have shown a

white light there would have been almost irresistible force in the argument that the respondents must be held to the statement in their preliminary act as to the bearing of the "Lilian Barnes" and abide the consequences. But the ease set up by the appellant's preliminary act was the very reverse of the above situation, according to that preliminary act the "Lilian Barnes" was on a S.W. course and first sighted the "Mahaica" half a point on her starboard bow. It follows that, on the appellant's own showing the circumstances did not demand the exhibition of a white light on the part of the "Mahaica," and that being so, it would be wholly illogical to give judgment for the appellant on the last-mentioned ground. Moreover it is to be observed that the effect of the Maritime Convention Act, 1911, has been to abolish the former arbitrary rule by which any infringement, which by possibility might have contributed to a collision, rendered a vessel to blame and leave the Court to follow what is a reasoning judgment, and to say, "Did this want of obeying the regulations in any way contribute to the collision?"—not, "Might it possibly have done so?" ("The Enterprise" (1912) p. 207).

The learned trial judge found that the "Lilian Barnes" was not keeping a proper look out. I am entirely in accord with that finding and it is to the want of a proper look-out on the "Lilian Barnes" that I attribute the collision. The veracity of Wm. Collison has never been in dispute, and this appeal seeks to attach more importance to the terms of a preliminary act than to the truth and justice of the case; it ignores the distinction between allowing a preliminary act to be amended, whereby, may be, a damaging admission might be removed from the record, and retaining such an act on the record but allowing evidence to be given, explaining or correcting it, at the trial. The appeal must be dismissed with costs.

DE FREITAS, C.J.: I concur.

WALTON, C.J.: I agree with the judgment delivered by the learned President. This appeal must be dismissed with costs. Preliminary acts as required were filed and the trial proceeded without pleadings. The appellants who were the defendants in the Court below, filed a counter-claim but withdrew it. They adduced no evidence but contested the case by the method of cross-examination and generally picking holes in the case as presented.

The argument of the appellant before us resolves itself into the following main propositions.

(a) The preliminary act of the plaintiff in giving the position of the respective ships, so placed them that a collision was mathematically impossible.

(b) The preliminary act according to the authorities cannot be departed from or varied in any way.

(c)The burden of proof is on the plaintiffs, therefore they must establish their case *aliunde* the preliminary act of the defendants.

(d)Whether accurate or inaccurate, the plaintiff's preliminary act must be adhered to. Therefore the positions of the ships therein stated, once and for all, have made the "Lilian Barnes" an overtaking ship, and imposed a duty on the "Mahaica" to have a white light on her stern as provided by the Collision—Regulations which she did not have.

The oral evidence differed from the preliminary act as to the position of the "Lilian Barnes." But the difference was not such as to alter the duty imposed by the regulations on this vessel.

In the case of the "Seacombe," P.D.C.A. 1912, it was said as to the nature and status of the statements in the preliminary act—"They are not "mere pleading allegations. They are statements of fact made under such "circumstances that they rank as formal admissions of fact binding the "party making them perhaps as strongly as any admissions of fact can do. "An admission of fact as such does not constitute an estoppel. It may be "shewn that it was made under mistake, and the Court may be satisfied that "such was the case, but it is evidence against the party making it, its "strength varying according to the conditions under which it is made." And again "to my mind they carry such weight from the nature of a preliminary "act and from the circumstances under which it is made that I should doubt "whether otherwise than under the most special circumstances, and with "the special leave of the Court, a party would be allowed to depart from the "admissions in the preliminary act at all events as far as evidence in chief is "concerned."

Several cases have been cited decided both in England and in Canada in support of the sanctity and unalterability of the preliminary act. The learned trial Judge admitted the evidence at variance with the statement in the preliminary act and acted on it and in my opinion he was right. The rule is not so rigid as is contended. The statements in the preliminary act remain and are a strong evidential value, but if the Court is satisfied and trusts the evidence varying the statement there is no legal reason why it should not act on it. The preliminary act may not be disturbed but it may be departed from. In the recent case of the "*Owners of s.s.* "*Hontestroom*" v. *Owner of s.s. Sagajorack*" reported in the Law Times of January 8, 1927, Lord Summer in his judgment said "He that is, the learned President) also ac- "cepted the evidence of the 'Hontestroon' that the 'Sagaporack' was be- "ginning to port back again, just before the collision occurred, and he did "so in spite of the

"fact that the 'Hontestrooms' preliminary act made no mention of this "porting," And again "of course the preliminary act; of the 'Hontestroom' "ought to have mentioned that at the last moment the 'Sagajorack' acted "apparently under a port helm but so late and so little that the collision "was not averted. No one disputes this nor can anyone fail to appreciate the "risk of general discredit that this omission justly brought on her whole "case. The evidence was, however, given by two witnesses who were in an "excellent position for observation. It was admitted without objection. It "was given in its natural place in the story."

Here is a recent case, where evidence at variance with the preliminary act was admitted and considered and acted on. The variation in the case under review was exactly three points on the compass. It made no difference at all to the obligation of the "Lilian Barnes," a ship running free, to keep out of the way of the "Mahaica," a ship, close-hauled, to the wind. But it makes a great difference on the question of whether she was an overtaking ship,

So far as the argument seeks to exclude this evidence it, in my opinion, fails. So far as it seeks to prove that the position fixed the preliminary act renders a collision impossible, it contains the fallacy that a ship so placed will necessarily pursue a fixed line, while sailing on the water.

In order to maintain their submissions and pin the respondents down to the statements in their preliminary act the appellants say that their preliminary act may not be looked at, until the case has been prove *secundum allegata, et probata.* . . . . . now, as has been already stated, the preliminary act is a formal admission. It is solemnly opened and filed with the proceedings. It is clearly evidence against the party making it. There can be no doubt that that it may be used by the plaintiff in support of his case. Even in a criminal trial the confession and conduct of the accused are proved by the prosecution as part of their case.

The position given to the "Lilian Barnes" in its own preliminary act is perfectly consistent with the manner and the points of contact of the two vessels. The "Mahaica" was sailing on a course. E.S.E. close-hauled, the "Lilian Barnes" was on a course S.W. sailing free.

To my mind it would be an astonishing proposition to hold the plaintiffs to their preliminary act, and logically deduce that there never was a collision, notwithstanding the broken mast and splinters, and not consider the position of the "Lilian Barnes" as given by herself. The Court in other words is asked to blind itself to material properly before it and arrive at a decision not in accordance with the true facts. It would seem

to me that of all the questions asked in the preliminary act, the easiest to answer would be the course of one's own ship. The question as to whether the "Lilian Barnes" was an overtaking ship, is answered by her own admission, her course lay S.W. so she never was an overtaking ship, and therefore there never was any obligation on the "Mahaica" to show a white light at her stern, as required by the Collision Regulations.

Appeal Dismissed.

PARIKAN RAI, Appellant,

AND

LA PENITENCE ESTATES COMPANY, LTD., AND DOUGLAS, Respondents.

[No. 1 OF 1927.]

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1927. MARCH 10.

BEFORE FURNESS, C.J., SIR ANTHONY DE FREITAS. C.J., AND SIR G. O'WALTON, ACTING C.J.

Roman-Dutch law—Transport containing covenant binding "proprietor"—Sale of transportee to another—Transport not passed to other party—Whether term "proprietor" means or includes "beneficial owner" or connotes only the "legal owner."

Immovable property was conveyed by transport to A., and the said trans-port contained a covenant on the part of A., as proprietor to pay B. for such expenditure, as might be incurred to B. on B.'s land for the purpose of draining A.'s land. A. subsequently sold his land to C. but did not pass transport thereof to C.

Held, that A., remained liable under the covenant contained in his transport, on the ground that the term "proprietor" used therein connoted the legal owner and did not include the beneficial owner.

Appeal from a judgment of the Supreme Court of British Guiana in favour of the respondents on a claim brought by the appellant against them to recover certain expenses incurred by the appellant for draining the first-named respondent's land.

The facts appear in the judgment.

J. A. Luckhoo, K.C., and *E. M. Duke,* for the appellant.

G. J. de Freitas, K.C., for the first-named respondent.

P. N. Browne, K.C., for the second-named respondent.

FURNESS, C.J.: This action was brought by the appellant against the respondent to recover a proportion of certain drainage expenditure on L'Union Estate incurred by the appellant between October, 1922, and June, 1924.

L'Union was one of a group of adjoining estates formerly the property of the respondent. The respondent sold L'Union to Yhap, who, in turn, sold to the appellant under a transport passed on the 18th December, 1922. The transport was made subject to the right at all times thereafter of the proprietors from time to time of certain estates (including those estates which I shall refer to as A., B. and C, and which also formed part of the said group of estates formerly the property of the respondent) to drain their plantations through L'Union, provided that so long as such privileges existed the said proprietors should pay to the proprietors of L'Union a stated proportion of their drainage expenditure. It is understood that the transport of L'Union by the respondents to Yhap contained a similar provision.

In May, 1922, the respondent sold A. to Sholto Douglas, who has been made a third party in these proceedings and Sholto Douglas immediately re-sold A. to Munna. The following July the respondent sold B. and C. to Sholto Douglas.

On the above-mentioned sales of A., B. and C, Munna entered into possession of A. and Sholto Douglas entered into possession of B. and C, but no transport was passed in respect of either A., B. or C. until the 9th of July, 1924, that is to say, until a date subsequent to the expenditure a proportion of which the appellant now seeks to recover.

The learned trial judge found: (a) that drainage of A., B. and C. was effected through L'Union up to a given time (which he did not state); (b) that the term "proprietor" used in the transport to the appellant included the third party, but did not include the respondent; and (c) that he had no jurisdiction to give judgment for the appellant against the third party; the learned trial Judge then gave judgment for the respondent with costs but made no order as to the costs of the third party.

I am unable to agree with the learned trial Judge's interpretation of the word "proprietor," which he bases on the fact that the third party had been in beneficial occupation and control of the estates bought by him and that it was the third party who was getting the benefit of the drainage of those estates through L'Union. In this colony a transport of immovable property vests in the transferee the full and absolute title therein and it is not lawful for any person in whom the title to any immovable property vests to transfer it except by passing and executing a transport before the Court. Consequently I have come to the

conclusion that, in the absence of anything to the contrary appearing in the transport itself, the parties, when they used the word "proprietor," must have intended the person for the time being holding under a transport. I am strengthened in this view by the decision in *Van de Spuy* v. *Maddison* (1877) 7. Buch. 97 and other South African cases quoted by Mr. Luckhoo, showing that elsewhere, where a similar system of conveyancing exists, no person can be said to be the proprietor of land until he has obtained a transfer, and by the local case of *Gangadia* v. *Barracot:* 1919 B. G. Reports, 216, which exemplifies the importance attached in this colony to the formal transport of immovable property before a Judge. I am, therefore, of the opinion that the respondent and not the third party was the proprietor within the meaning of the transport to the appellant throughout the period during which the cause of action arose and is liable to the appellant in whatever sum may be found due under the terms of that transport.

ANTHONY DE FREITAS, C.J., British Guiana: I concur.

G. O.'D WALTON, Acting C.J., Trinidad: I concur.

Appeal Allowed.

DE MATTOS, Appellant,
AND
BYNOE, Respondent.

[No. 75 OF 1926.]

1926. MARCH 19, 26.

BEFORE SIR C. MAJOR, C.J., BERKELEY AND DOUGLASS, JJ.

Sale of land—Expected expiration of existing tenancy—Vendor's knowledge thereof—Whether duty to disclose—"Suppressio Veri"—Elements of cause of action of deceit—Distinction between active misrepresentation and mere non-disclosure.

In contracts for sale of land the mere non-disclosure by the vendor of the expected expiration of a tenancy does not amount to a misrepresentation giving rise to an action for deceit unless the withholding thereof would render the representations made by the vendor false.

Appeal from a decision of one of the Stipendiary Magistrates for the Georgetown Judicial District awarding a sum of $40 as damages against the appellant for misrepresentation in a contract of sale of land.

The facts of the case appear in the judgments below.

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

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

MAJOR, C.J.: The plaintiff's claim is for $40, special damages by way of compensation for loss of that sum as rent of certain premises for the months of October and November, 1925, acquired by her under contract of purchase and sale, dated the 10th of September, 1925, on the ground that, in the course of the negotiations for sale (the contract being completed and conveyance made on the 19th October), the defendant did not disclose to the plaintiff that a tenant, Gabriel Gonsalves, had given the defendant notice of his intention to vacate possession of the premises whenever he secured other premises, to which the defendant had agreed, but, well knowing of that agreement, falsely represented to the plaintiff that the premises were tenanted by Gonsalves under a contract from month to month. The evidence of Dummett, the plaintiff's agent (who carried through the purchase on her behalf), is: "Mr. DeMattos (the defendant's husband who "acted for her) told me that it was a two-storied house renting at $40 a "month; that Gonsalves was the tenant; that Mrs. DeMattos lived in the "other cottage. . . . . that both places were tenanted."

DeMattos' evidence as to the conversation is: "On 10.9 . . . . Dummett "asked me what rents were and about tenants, I

"informed him Gonsalves and Mrs. DeMattos, and amount of rents. These "all tenancies in force." It is common ground that for whatever reason and in whatever knowledge or ignorance, DeMattos did not say aught to Dummett of any communication from Gonsalves of intention to leave the premises, either on notice to quit (properly so called) or understanding or agreement with him. The magistrate has found as a fact that DeMattos knew at the time of the sale that Gonsalves' tenancy was to be terminated definitely, *i.e.*, on the 31st October. I do not think that the evidence justifies that finding so far as it relates to the definite date, but there was evidence before the Court from which the magistrate might not unreasonably infer the existence, on the 10th of September, of an understanding between DeMattos and Gonsalves as pleaded, namely that the latter might vacate the premises when he found other lodging, and without expressing any opinion thereon, I do not think that the finding to that extent should be disturbed.

Now, the statement of DeMattos on the 10th of September as to the existence, and nature, and value of Gonsalves' tenancy was in every respect true, and the plaintiff's case has been based on the contention that here there was *suppressio veri*, undue concealment, to the plaintiff's pecuniary damage. As to the form of the plaintiff's action, Lord Chelmsford in *Peek* v. *Gurney* (43 L.J. Eq., 19), commenting on the nature of those proceedings, said: "This case is entirely different from suits instituted either to be "relieved from, or for the enforcement of, contracts induced by the fraudu-"lent concealment of fact which ought to have been disclosed . . . It is a suit "instituted to recover damages from the respondents for the injury the ap-"pellant has sustained by having been deceived and misled, by their mis-"representation and suppression of facts, to become a shareholder in the "proposed company of which they were promoters. It is precisely analo-"gous to the common law action for deceit." That description applies to these proceedings, and the learned judge dealt with the ease before the House on the assumption that "mere concealment will not be sufficient to "give a right of action to a person who, if the real facts had been known to "him, could never have entered into a contract, but there must be some-"thing actively done to deceive him and draw him into dealing with the "person withholding the truth from him." Lord Cairns, in the same case, on reticence amounting to undue concealment, said: "Looking at the terms of "the prospectus I may say I entirely agree with what has been stated by my "noble and learned friends before me, that mere silence could not, in my "opinion, be a sufficient foundation for this proceeding. Mere non-"disclosure of material facts, however morally censurable, however that "non-

"disclosure might be a ground, in a proper proceeding at a proper time, for "setting aside an allotment or a purchase of shares, would in my opinion "form no ground of action in the nature of an action for misrepresentation. "There must be, in my opinion, some active misstatement of fact, or at all "events, such a partial and fragmentary statement of fact, as that the with-"holding of that which is not stated makes that which is stated absolutely "false."

Applying those statements of law to this case, I look in vain for any evidence showing something actively done or said by DeMattos or the defendant (apart from the former's silence as to the understanding) to deceive Dummett. There is certainly no evidence that when Gonsalves spoke of his and his wife's hope that they would not be turned out, he was doing so at the instigation and as the mouthpiece of the defendant. I am unable to see how in any sense it can be said that DeMattos' statement was so partial that what he did not say, as for instance. "Gonsalves and I have agreed that he "shall leave when he can find other premises" made absolutely false what he did say, namely "the premises are under existing tenancies at a monthly "rental of $40," In Lord Halsbury's work, in the article on misrepresentation (which we know to have been contributed by Mr. Spencer Bower) it is put thus: "Mere incompleteness is not *per se* a factor in misrepresenta-"tion. It must always be proved that it rendered what was stated fallacious "and false."

For those reasons—I need not notice other points discussed—I am of opinion that the plaintiff's claim could not be successfully maintained, that the judgment of the learned magistrate should be set aside and judgment ordered to be entered for the defendant, with costs of suit and of this appeal.

BERKELEY, J.: This is an appeal from the stipendiary magistrate of the Georgetown judicial district who awarded one month's rent ($40) and $5 as general damages to the respondent on the ground that the appellant by her agent had not disclosed to the respondent on her agent the fact that one of her tenants (Gonsalves) was vacating the house occupied by him on 31st October,

On 10th September, 1925, the respondent paid to the appellant $300 on account of the purchase price, $6,500, of the west half of lot 295, corner of Murray and Thomas Streets, Georgetown, with all the buildings and erections thereon. The usual conditions embodied in the agreement included that possession would be given on the passing of the transport and that all rents up to the passing of the transport were to be paid to the vendor. Transport was passed on 19th October, 1925, and the rent up to

that date was paid by respondent to appellant. On the tenant Gonsalves paying his rent to the appellant's agent it was sent to the respondent. On 31st October the tenant Gonsalves sent the key of the house to the respondent. The respondent took possession and found that he had vacated the cottage rented by him. There was no reference in the agreement as to the tenant remaining in the house and the mere fact that he was told by the agent of the appellant that he could leave at the end of any month cannot be regarded as a material fact which ought to have been disclosed.

The purchase of this half lot was made without any regard as to the conditions of the buildings thereon.

If it could be regarded as a material fact the question would arise: Did it induce the respondent to buy? The fact that she had purchased the property without any regard to the conditions of the buildings and that her agent says it was bought by him without going to see it because he was satisfied to take it for $6,500 shows that the tenant quitting when he did in no way affected the purchase by the respondent (*Smith* v. *Land and House Property Corporation* (28 L.R.C.D. 7 16).

Appeal allowed with costs.

DOUGLASS, J.: I concur. The case of *Dimmock* v. *Hallett* relied on by the respondent and the learned magistrate was very different to the present case. It was an appeal by the purchaser of an estate asking to be relieved of his purchase by reason of misrepresentation; there were particulars of sale which the purchaser had relied on and which were calculated to mislead. Here there were no particulars, it was an open sale, the only writing in the memorandum set out in the receipt in the manner very usual in this colony. I can find no misrepresentation either in this or on the evidence offered, nor do I find there was any concealment of facts which a purchaser is entitled to demand having regard to the class and character of the purchase. There was nothing for the vendor to divulge, the so-called notice of intention of the tenant to give up his monthly tenancy on an uncertain contingency was clearly not a binding notice and even if it had been, to quote the Master of the Rolls in *Leyland* & *Taylors Contract* (1900 2 C. D. 625) I do "not see "how the mere omission to disclose a notice could affect the value of the "property." Mere silence while it causes no appreciable damage and is not fraudulent does not constitute misrepresentation.

The appeal should be allowed with costs.

Appeal Allowed.

CHUNG *v.* CHUNG.

CHUNG *v.* CHUNG.

[No. 81 OF 1926.]

1926. MARCH 27; APRIL 17. BEFORE DOUGLAS, J.

Specially indorsed writ—Conditional leave to defend granted—Claim less than $250—Application by defendant for leave to appeal—Whether order granting conditional leave final or interlocutory—Appeals Regulation Ordinance, 1922, section 3(2)—"Substantial question of law involved"—Appeals Regulation Ordinance section 9—Meaning of "question of law"—Whether expression is confined to issues or matters involved in the suit per se and affecting the claim—Whether expression includes the legal correctness of a judge's order granting conditional leave to defend.

(*a*) An order refusing unconditional leave to defend an action is for the purposes of appeal therefrom, not to be deemed an interlocutory order.

(*b*) The expression "No leave of appeal shall be given unless there is a substantial question of law involved" occurring in section 9 of the Appeals Regulation Ordinance, 1922, has reference only to issues of law involved in the action *per se, i.e., semble,* arising on the pleadings themselves or on the evidence adduced, and does not include such questions as the legal correctness of a judge's order granting conditional leave to defend a claim brought by a specially indorsed writ.

C. R. Browne for the applicant.

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

DOUGLASS, J.: Preliminary objections were taken by Mr. J. A. Luckhoo, K.C., for plaintiff that.

1. If the order to be appealed from is an interlocutory one then this application should have been made *ex parte,* and notice should not have been served on the other side.

2. The order appealed from was not an interlocutory one and the defendant in treating it as such is in error, and

3. The subject-matter of the claim being under $250 the application and affidavit in support must show that there was a substantial question of law involved and not only is there not such allegation, but there was as a matter of fact, no such substantial question of law involved.

Objections Nos. 1 and 2 may be taken together. The notice of motion clearly indicates that the order was treated as an interlocutory one although to meet the objection of counsel it is now asserted that there was no intention to treat it as such, and that the word "interlocutory" in the said notice is surplusage. Counsel for both parties appear to have come to this conclusion on an interpretation of section 3 (2) of the Appeals Regulation Ordinance, 1922, "an order refusing unconditional leave to defend an action "shall not be deemed to be an interlocutory order within the meaning of "this section." I was at first doubtful whether the last six words should not be construed only with reference to appeals to the Court of Appeal, inasmuch as the

said section has as its heading PART I. "Matters in which no appeal lies to "the Court of Appeal" and continues (1) "notwithstanding the provisions "contained in section 3 of the Act no "appeal shall lie to the Court of Ap- "peal," *i.e.,* (under section 2) West Indian Court of Appeal. But I also notice under section 3 (1) (i) cases in which appeals shall lie to the Full Court are embraced, so that sub-section (2) may well refer to all interlocutory orders refusing unconditional leave to defend to whichever Court they are appealable; I am more inclined to this view as sub-section (2) is taken from the English "Judicature (Procedure Act, 1894" and section 1 (3) thereof is reproduced in section 11 (2) of the Appeals Regulation Ordinance, 1922, which would apply to appeals to either Court.

Such an order then should be treated as a final order, and there would have been no need to ask for leave to appeal had the value of the property in respect to which the action is brought exceeded $250, as it is, the application should have been made *ex parte* under Rule 7 (1) of the Rules of the Supreme Court (Appeals) 1924. As the applicant points out however, the application does not only ask for leave, but as an alternative that proceedings be stayed or judgment entered on terms suggested, or for such other order as the Court might think fit. As there is included more than mere leave to appeal in his application—whether rightly or wrongly I do not now decide—I cannot say they were wrong in serving notice on the other side, but it might affect the question of costs.

Whether or not a substantial question of law is involved cannot be treated as a preliminary objection only, for it is the main ground on which their right to appeal is founded, if there is no substantial question of law involved no leave should be given. Now there is some difference in the opinion of counsel whether the substantial question of law arises out of the suit itself, or is also involved in the act of the judge in making the conditional order, or as Mr. C. R. Browne for the applicant puts it, a question of law arises as to the correctness of the judge in giving conditional leave to defend.

The second proviso to section 9 of the Appeals Regulation Ordinance, 1922, reads: "Provided also that no appeal shall lie. . . . where the amount "claimed. . . . does not exceed $250 except by leave of the judge by whom "such judgment or order is given or made or of the Full Court. No leave to "appeal shall be given unless there is a substantial question of law in- "volved." It seems very clear to me that the substantial question of law referred to must be one affecting the claim, and a reference to the old Rule 5 of Order 43 strengthens my opinion, is reads "no leave to appeal shall be given unless it appear to the

"Judge or to the Appeal Court that there is some substantial question of law "involved in the appeal upon which it is desirable to have the decision of "the Appeal Court," If the substantial question of law arose only from the decision of the Judge it would be involved in every case, and there would therefore always be a right of appeal which would make nonsense of the conclusion of the second proviso. The word "unless" presumes the hypothesis that there may be actions where the value of the property does not exceed $250 and in which no question of law is involved.

Is there then a substantial question of law involved in this action? In the notice of motion the solicitor for the defendant states that the grounds of the application are contained in the affidavit of A. V. Crane dated the 16th day of March, 1926, and that the defendant relies upon the whole proceedings. I can find no affidavit of that date but presume it is the affidavit dated the 17th day of March, 1926; in paragraph 2 thereof it is stated that the promissory note sued upon had been paid and that a second promissory note given by the defendant had been returned by the plaintiff, and in paragraph 3 (1) that the affidavit of merits disclosed a complete *prima facie* defence, and the other subheads of that paragraph contained reasons why the defendant cannot and should not pay money into Court. It can of course be no part of a defence to say that such money is not available, and see *Bird* v. *Barstow*, (1892. 1. Q.B. 94).

It is true that in paragraph 3 it is urged that the Judge erred in law when he directed that the defendant be at liberty to defend the action on payment into Court of the sum of $240, but as I have said already that is quite beside the point which is not whether the Judge erred at law, but whether there was a substantial question of law involved in the suit.

To turn now to the affidavit filed by the defendant on the 13th day of March, he admits that the plaintiff lent him the $240, and that he gave a promissory note dated the 25th April, 1923, that on her informing him that it was lost he gave another note dated 5th July, 1924, that his brothers undertook to repay the plaintiff and had not done so, and that she the plaintiff had agreed to look to the brothers for payment, and returned the second promissory note to the defendant. I can find no substantial question of law, plenty of facts the truth of which depends upon the evidence to be adduced, and which even if true it would still remain doubtful whether the defendant was entitled to judgment.

The defendant admits the promissory note and the debt, the only question arising is has he paid it? Order 12, Rule 4 says that the defendant shall "file an affidavit stating that he has a good defence to the action on the "merits, and setting forth the

"facts on which he relies as a defence, or stating his willingness to pay the "money claimed (where the recovery is the object of the action) into "Court;" as the case was entirely one of facts the Court adopted the second alternative and ordered the defendant to pay the money claimed into Court, for it was essentially a case where the defendant should have made the otter. I draw attention to the fact that since 1917 this alternative on the part of the defendant is not included in the English (parallel) rule 3 of Order 14.

On the grounds that no leave to appeal may be given in a case such as this, relying on the second proviso in section 9 of the Appeals Regulation Ordinance, 1922, I must refuse this application with costs.

GREGORY, Appellant,

AND

FIELD AND ROSS, Respondents.

[No. 358 OF 1925]

1926. APRIL 23, 26.

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

Master and Servant—General employment—Particular employment—Chauffeur—Company's servant—Driving on company manager's private business—Chauffeur employed by company to do so—Whether such employment ousts the general employment—Tests to be applied.

Where a company's chauffeur is employed by the company to do not only its own business but also that of its manager the latter is not liable for a tort committed by the chauffeur while engaged in his the manager's business unless it can be proved that in the course of such manager's private business the manager actively interfered with the driving so as to be the procurer and cause of the wrongful act complained of.

Appeal from a decision of one of the magistrates for the Georgetown Judicial District who in a claim brought by the respondents against the appellant for injury sustained by negligent driving found that the chauffeur though generally the servant of the company was at the particular point of time in the

employ of the appellant. The company provided the manager with a chauffeur to perform work necessary for the company's business and also to drive the manager for his private purposes. The chauffeur's wages for both kinds of work were paid by the company.

H. C. Humphrys for the appellant.

J. S. McArthur, K.C., and *E. P. Bruyning* for the respondents.

The following Judgment of the Court was read by the Chief Justice:

In making the order for taking further evidence on the issue of particular employment, this Court said that as the case then stood if the magistrate had considered the question of particular employment, we should be inclined to say that there was some evidence before him to justify his coming to the conclusion that the driver of the motor car was, at the time of the accident, and notwithstanding his general employment of the company, acting as the servant, not of the company, but of the defendant. Now that the further evidence is before us, the question to be answered is, has that evidence displaced the reasonableness of the inference that the magistrate might have drawn without it? The contention of the respondents that it has not done so, as put forward by Mr. McArthur, is based on the propositions—(1) that the car at the time of the accident, was being used on the defendant's business and not that of the company; (2) that the driver of the car was paid by the defendant and not by the company, because paid out of an allowance received by him from the company; (3) that, at the time, the driver was employed by the defendant and under his unrestricted control.

The first proposition, we think, is true, for we cannot regard the mere fact that the defendant intended to take in the car, to listen to the band, a guest who happened to be, or because he was, a customer of the company, as evidence of engagement on the company's business. The second and third propositions we consider unfounded. The evidence, read as a whole, seems to us, to establish that the car was hired by the company, that is to say, that the defendant, if he hired it, did so as the company's representative, in the same manner as he engaged the driver of it, paid and (if need be) dismissed the driver of it, or had it repaired from time to time, as the company's representative. The car is used on the company's business, It is sometimes also used on the defendant's private business, and was, at the time of the accident, being so used, in the sense that the driver of it had been directed by the defendant to fetch him that he might proceed on that

business If the defendant pays the driver, he does so with the company's money allowed to him for that purpose, on whatever business the ear may be used, for part of the driver's duty as the company's servant is to drive their representative about on their and his business. To what extent then, does the defendant when using the car on his private business rightly control the driver? Only, in our opinion, as far as to direct him as to any particular destination. We say "rightly control," because if, when in the course of use of the car on private business, the defendant should, to adopt the illustration of L. J. Bowen in *Donovan v. Laing* "actively interfere with the "driving and injure anyone, he may be liable, not as master, but as the pro- "curer and cause of the wrongful act complained of." There is no suggestion here of that interference. The defendant, in fact, at the time of the accident, was not even in the car. That during any use of it he happens personally to occupy the dual position of company's representative and private individual, and that difficulties may well arise of proof of which capacity he happens at any given time to fill, cannot affect the facts of the case as disclosed by the evidence.

On the view we take of that evidence we think it impossible to hold that, at the time of the accident the defendant personally was Stephens' master, or had that degree of control over Stephens, which, according to the authorities, must have existed to render him personally liable as master. His mere power to direct whence and whither the driver of the car should come and go, it appears from those authorities, is not enough to draw the liability.

It follows, therefore, that the judgment of the learned magistrate was wrong and must be set aside, that the appeal is allowed, and order made that the judgment be entered for the defendant with costs here and in the court below.

Appeal Allowed.

CHAVES, Appellant,
AND
BURNETT, Respondent.

[No. 134 OF 1926.]

1926. APRIL 23, 30.

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

Landlord—Liability to inmate of house—Local Government (*Landlords Liability for Repairs*) *Ordinance, 1921, section 2—Interpretation—Implied conditions as to repair of tenancy and keeping fit for human habitation—Whether injured inmate need prove pecuniary loss.*

It is not necessary for an inmate of a house to which the Local Government (Landlords Liability for Repairs) Ordinance, 1921, applies, to prove pecuniary loss in order to sustain an action against the landlord for injury suffered by reason of the breach by the landlord of the condition to keep the tenement in all respects reasonably fit for human habitation.

Appeal from a decision of one of the Stipendiary Magistrates for the Georgetown Judicial District who gave judgment in favour of the respondent for damages sustained by reason of the breach of the condition to keep the tenement in all respects reasonably fit for human habitation.

H. C. Humphrys for the appellant.

S. J. Van Sertima for the respondent.

BERKELEY, J.: The appellant rented a house or room situate at lot 88, Robb Street, Georgetown, to Alfred Burnett, the husband of Malvina Burnett, the respondent, at a monthly rental of two dollars and sixteen cents. Owing to the steps of the house or room not having been kept in good order the respondent on 4th January, 1926, put her foot on a treader of the steps and it came off. She fell on her back and got a blow on the back of her neck. The doctor who saw her found contusions on the back of the right shoulder and head and a bruise on the right knee. She was indisposed for three weeks.

On these facts the respondent claimed damages in the Magistrate's Court and was awarded twenty-five dollars and costs.

The action was brought under section 219 of the Local Government Ordinance, 1907, as re-enacted by section 2 of Ordinance No.5 of l921.

This section provides at sub-section (b) that the house shall during the tenancy be kept in repair and in all respects reasonably fit for human habitation and that in the event of a breach of the condition any inmate of such house or room who suffers any

loss by injury to health or in any other way whatever in consequence of such breach shall be entitled to recover damages from the landlord of such house or room.

Counsel for the appellant submits that the respondent not being the tenant can only recover as an inmate for loss and not for personal injury which is not loss (*Haigh & anor.* v. *R.M.S.P.* Co. L.T.R. Vol. 49 N.S. 802).

I am disposed to think that the intention of the Legislature was to place an inmate on the same footing as a tenant but the use of the word "loss" raises a doubt as to an inmate being able to recover damages for "personal injury."

I am of opinion, however, that sub-section (b) provides that an inmate of the house or room who suffers (1) any loss by injury to health or (2) in any other way whatever in consequence of such breach of condition, shall be entitled to recover damages from the landlord. In other words both these provisions are governed by the word "suffers" and not by the words "any loss" as submitted by counsel.

The respondent therefore is entitled to damages under proviso (2).

Counsel further submits that in sub-section (b) reference is made only to a house and that respondent cannot claim damages as to a room. There is a large building under one roof. This building is divided into a number of rooms and each room has its own steps leading into the room. The room rented by respondent's husband was his house to all intents and purposes.

Appeal is dismissed with costs.

DOUGLASS, J.: This is an appeal from the decision of the Magistrate of the Georgetown Judicial District who gave judgment in favour of the plaintiff, the present respondent, for $25 as damages for injuries arising from the wrongful acts of the defendant, the appellant.

Briefly it appears that the plaintiff is the wife of the tenant of a room at lot 88, Robb Street, Georgetown, who holds at a monthly rent of $2.16 of the defendant, his landlord. On the 4th January, 1926, in going down the steps leading from her room, "a treader" came off and the plaintiff was precipitated on her back and suffered certain injuries in consequence. The claim is laid under section 2 of Ordinance No. 5 or 1921, an Ordinance to amend the Local Government Ordinance, 1921, and to replace section 219 thereon. The section was adopted in part from section 14 of the Housing and Town Planning Act, 1909, but it is wider in so far as it extends its benefits to "inmates of such house or room" whereas the English section applies to the tenant only. Before considering the principal reason for appeal I will

deal with the suggestion that the necessity imposed on the landlord to keep the house in repair does not extend to a room, as although under sub-section (a) of section 2 both the house or room are to be in a state of repair at the commencement of the tenancy, sub-section (b) only refers to the house being *kept* in repair and it was argued, the steps if included in the letting at all were a part of the room and therefore there was no liability on the landlord to *keep* them in repair.

I am of opinion on a consideration of the whole Act and on comparing it with the English sections 14 and 15 (1) where the keeping in repair applies to a house or part of a house that the "word house should be construed to read house or room, and reference to the explanatory memorandum published at the date the Bill came before the legislature confirms the opinion; it reads: "This Bill proposes to make it an implied condition in any such "contract (*i.e.,* for the letting of a house or room) that the house or room is "reasonably fit for human habitation at the beginning of the tenancy, that it "shall be so kept during the tenancy and that such liability cannot be "evaded by any contract to that effect." Apart from this Mr. Humphrys, counsel for the appellant, takes two substantive objections to the decision of the magistrate.—(1) That in so far as the tenant is concerned sub-sections (a) and (b) of section 2 are implied conditions of the contract and that consequently on a breach he could sue for damages, whether he suffered loss or not, but not so with respect to the other inmates of such house or room, there was no contractual relationship with them and consequently they could only sue in case of actual loss suffered; that the plaintiff had not proved any such actual loss for the defendant had settled with the doctor, and therefore the magistrate was wrong in giving any damages; and (2) that the steps were no portion of the house for the present ordinance is an amendment by substitution for section 219 of the Local Government Ordinance, 1907, and that ordinance could never have applied to the steps of a house or room as it dealt with health and sanitary matters, consequently the amending section did not include access to a house or room.

To take this objection first, learned counsel's argument is apparently supported by an old local case, *Cabral* v. *Wharton* (Ap. 10. 9. 11), but even if that decision were correct at that date it would not now be applicable, as the word "repair" has been deliberately introduced into section 219. But with all due deference I cannot agree with the restricted interpretation given in that decision. Apparently the English case of *Walker* v. *Hobbs & Co.* (1889. 23 Q.B.D, 458) was never brought to the notice of the Court, where it was held that under section 12 of the Housing of the Working Classes Act

(from which our repealed section 219 was taken) the tenant had a right to sue his landlord for injuries caused by the premises not being reasonably fit for human habitation owing to any defective state of repair. If the steps are included in the letting of a house or room then they clearly come within the provision for keeping in repair. All that *Dunster* v. *Hollis* (1918. 2 K.B. 795) decided was that the provision of section 15 (1) of the Housing and Town Planning Act of 1909 that section 14 should take effect as if the condition included an undertaking that the house should be "kept by the landlord in all respects reasonably fit for human habitation" does not impose on the lessor of part of a house an obligation to keep a common flight of steps in repair, but he is bound to avoid exposing the tenant to a concealed danger or trap of which the tenant had no warning and to take reasonable care to keep the steps reasonably safe. As that is so in the case of rooms let where the landlord retains control of a common staircase it seems obvious that where he does not retain such control the room with its steps are equally subject to the conditions set out in section 2 now under discussion. The case of *Miller v. Hancock* (1893. 2 Q.B. 177) also deals with a letting in which the landlord retained the staircase in his possession. In the present case the steps were not common to the whole house but were appropriated to the tenant of each particular room.

To come to the first objection, that although the tenant could have sued for general damages under the contractual obligations imposed by the ordinance, the other inmates, which in the present case includes the wife of the tenant, can only take advantage of that contractual obligation if they suffer any loss by injury to health or in any way whatever in consequence of a breach of that obligation. The leading ease on injuries to a person lawfully on the premises—other than the tenant, is *Ryall* v. *Redwell* (1914. 3 K.B. 135). It decided that a stranger to the contract of tenancy had no remedy for a breach of the implied undertaking under the Act. This case does not appear to have been referred to in *Groves* v. *Western Mansions, Limited* (1916. 33 L.T.R. 76) where the plaintiff was the wife of the tenant of a room on the first floor of a building let in separate tenements approached by a common staircase, she slipped on a defective step and suffered personal injuries, and sued the landlord for damages for negligence. In the course of his judgment, Mr. Justice Lush said: "It was obvious there was "no privity of contract between her and the defendant, and if she had any "cause of action at all it must be on some grounds other than the contract. "She must claim as an invitee or a licensee. A licensee could only complain "if he was exposed to a concealed danger of which he was ignorant and of "which the licensor had knowledge. An invitee

"had a higher right, he must not be exposed to any unusual or unexpected "danger or to a concealed trap of which the invitor had or with reasonable "care ought to have had, knowledge, and of which the invitee himself was "ignorant."

Apart from statute this makes clear what the rights of the plaintiff would be, and it therefore remains to consider to what extent she could succeed under the latter portion of section 2 of Ordinance No. 5 of 1921.

The plaintiff in her claim states that she incurred expenses in obtaining treatment and has been otherwise greatly damnified and claims the sum of $100 damages for the wrongful acts of the defendant. No particulars are given and she apparently claims general damages, and I agree with the learned counsel for the appellant that she has not proved or endeavoured to prove any loss in a pecuniary sense, and the case of *Haig and Others v. R.M.S.P. Co.* (49 L.T.R, 802) referred to by him is also to the point in which Brett, M.R., lays it down that "Personal injury cannot be included "under the word 'loss,'" and I am of opinion that had the words "suffer any "loss by injury to health" stood alone, the plaintiff should have been non-suited.

The rest of the paragraph, and the object of the ordinance must also be taken into consideration. I own I do not feel sure whether the legislature intended to place the inmates of a room in all respects on an equality with its tenants, if so it goes very far beyond what any English case law has decided, but as regards the construction of the whole section I do not feel justified in differing from my learned brother in his construction of the doubtful portion of it, especially as were a comma inserted after 'suffers' and another after the words 'injury to health' the meaning would appear that an inmate who suffers any loss by injury to health, or who suffers in any other way whatever in consequence of such breach shall be entitled to damages. I am the more inclined to concur as the equities of the case are all on the side of the respondent, the landlord had notice of the defect and either made no effort to remedy it, or at the best made a patched-up job which partially remedied the defects of the steps and turned them into a concealed trap.

For these reasons I agree that the appeal fails.

Appeal Dismissed.

In re ISHMAEL, *Ex parte* WHITNEY.

In re ISHMAEL, Debtor,

Ex parte WHITNEY, Creditor.

[No. 20 OF 1924.]

1926. APRIL 8, 15. BEFORE BERKELEY, J.

Insolvency Ordinance, 1900—Insolvency Rules, 1901—Scheme of composition—Creditor assenting thereto—Creditor not paid under terms thereof—Application by creditor for annulment of scheme.

The Court will not annul a scheme of composition accepted by a creditor merely on the ground that the creditor has not been paid thereunder. The proper procedure is for the creditor to lodge his proof, and on failure of payment, for the Official Receiver to sue the surety to the bond securing the payments under the deed of composition.

The Court can compel the Official Receiver to sue the surety in case he fails to do so.

Application by creditor to rescind scheme of composition in insolvency proceedings.

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

S. L. Van B. Stafford for the respondent.

BERKELEY, J.: 1. This is an application by Cephas Whitney, a creditor, to annul the composition accepted by the creditors and approved by the Court on 30th August, 1924.

2. The debtor was adjudged insolvent on 5th July, 1924. This composition therefore was accepted after the adjudication of insolvency and is within the provisions of section 21 of the Insolvency Ordinance, 1900.

3. The ground of this application to annul the composition is that the debtor is indebted to this applicant in the sum of $461.62 and that he has not been paid 35% of his debt as provided for under the terms of the composition.

4. The payment of the composition is secured by a bond given by Altaffhusain on 19th July, 1924, in favour of the Official Receiver, and under that bond the Official Receiver pays the debts which are proved and admitted by him. Rule 176 provides that "Every person claiming to be a creditor "under any composition or scheme, who has not proved his debt before the "approval of such composition or scheme, shall lodge his proof . . . with "the Official Receiver, who shall admit or reject the same. And no creditor "shall be entitled to enforce payment of any part of the sums payable under "a composition or scheme unless and until he has proved his debt and his "proof has been admitted."

5. It is therefore open to the applicant to establish his claim in accordance with this rule and if the Official Receiver admits it he has to pay it.

6. If the surety fails to pay it is the duty of the Official Receiver to sue him at law on his bond and if the Official Receiver neglects this duty then the Court has power to compel him to perform it. (*Ex parte* Mirabita—*In re* Dale—20 L.R. Eq. 772).

Application dismissed with costs in the sum of $15 to each of the parties opposing the application.

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

SPROSTONS, Ltd. *v.* THE SHIP "LILIAN BARNES."

[No. 18 OF 1925.]

1926. MARCH 29, 30, 31; APRIL 7, 8, 9, 12, 13, 14, 15, 16; MAY 15.

BEFORE DOUGLASS, J.

Ships—Collision—Admiralty Jurisdiction—Colonial Courts Act, 1890—Supreme Court Ordinance, 1915, sections 31, 46 (4),—Rules of Court, 1900, Order I, r. 3—Procedure—Right of Reply—Preliminary Act—Nature and effect thereof—Negligence—Circumstances in which strict adherence to regulations relaxed—"Overtaking vessel"—Meaning of Expression—Pleadings—Necessity to plead specifically act of negligence relied upon—Whether breach of regulations necessarily fatal to case of delinquent—Losses resulting from collision—Measure of damages.

(*a*) The Rules of Court, 1900 have no application to proceedings brought in the Admiralty Jurisdiction of the Supreme Court of British Guiana, and consequently, in such proceedings the party beginning has in all cases the right of reply.

(*b*) The statements in the Preliminary Act required to be filed by the Rules for the Admiralty Courts in the colonies are not mere pleading allegations, but are formal admissions of fact binding the parties making them nevertheless, it may be shown that they were made under a mistake.

(*c*) Strict adherence to the Regulations for preventing collisions at sea is dispensed with where it is manifest that it will lead to disaster.

(*d*) Any party in a collision suit who intends to rely upon a particular act of negligence must specifically allege such act in the pleadings.

(*e*) Mere disobedience to the Regulations does not *per se* warrant judgment being given against the delinquent; it must also be shown that such disobedience was one of the proximate causes of the collision.

(*f*) Damages in the case of collisions of ships include expenses incurred in completely repairing the damage done notwithstanding the result may be to render the vessel more valuable than it was before the collision.

The facts are fully set out in the judgment.

G. J. DeFreitas, K.C., and *B. B. Marshall* for the plaintiff.

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

DOUGLASS, J.: On the evening of the 13th January, 1925, between the hours of 9 and 9.30 p.m. the sailing barge "Mahaica," a converted steamship of about 75 tons register, bound from Georgetown to New Amsterdam, both in the colony of British Guiana, with a general cargo, while still at or near the mouth of the Demerara River came into collision with the schooner "Lilian Barnes," bound to Georgetown, presumably from Barbados, as she was about to enter the river.

This action was brought by the owners of the "Mahaica" against the "Lilian Barnes" to recover damages and the losses occasioned by the collision between the two vessels, and the "Lilian Barnes" counterclaimed against the owners of the "Mahaica" for damage and consequent losses arising from the same collision.

In the preliminary act tiled on behalf of the plaintiffs the course of the "Mahaica" is stated to have been E.S.E. close hauled on the port tack when the "Lilian Barnes" was first seen, the direction of the wind being N.E. and this has been duly proved in the evidence, and in the preliminary act tiled on behalf of the defendant the course of the "Lilian Barnes" is stated to have been S.W. and she must therefore have been running free. In these circumstances, it would seem, apart from other considerations, that in obedience to the "Regulations for Preventing Collisions at Sea," under Order-in-Council of the 13th October, 1910, and more especially Art. 17 (a), (e) and Arts. 20 and 24 of those Regulations,—which will be referred to later,—it was the duty of the "Lilian Barnes" to get and keep out of the way of the "Mahaica" whilst the latter vessel was bound to keep her course.

It is stated by the plaintiffs that the night was clear (par. 5 of their preliminary act), no mist, and the moon was coming up, the defendants in their preliminary act state (par. 5) that the weather was dark and hazy. It was full moon on the 10th of January and on the night in question the moon would be rising at 8.59 p.m. (local time), so that there being no contrary evidence I shall take it that though the night was fairly dark it was also clear.

Before considering the evidence it might be well to state here that when the plaintiffs' case was closed at the end of the seventh day of hearing the Court was adjourned on the application of Mr. P. N. Browne, K.C., leading counsel for the "Lilian Barnes,"

and on the next day he announced that he had decided not to call any witnesses, although he had previously stated that witnesses from Barbados had been for some days in waiting; at the request of Mr. G. J. deFreitas, K.C., leading counsel for the plaintiffs, the case was again adjourned until the next day. On the resumption of the case on the 14th April there was some discussion as to the practice in the conduct of cases on the Admiralty side of the Court, whereupon Mr. Browne stated that he had been misled into deciding not to call witnesses as he had understood that Mr. deFreitas was relying on the ordinary Rules of Court as directing the practice. The effect of "the Colonial Courts Act," 1890, was to assimilate the jurisdiction of the Admiralty Courts of the Colonies to that exercised in Admiralty by the High Court in England, and to permit rules to be made for them. This Court was vested with Admiralty Jurisdiction within the meaning of that Act by section 31 of Ordinance No. 10 of 1915. Not only does Order 1, rule 3 of our Rules of Court of 1900 state "These Rules shall not apply to proceed-"ings in the Admiralty Jurisdiction of this Court" but section 46 (4) of the. Supreme Court Ordinance (Ordinance No. 10 of 1915) provides that in default of rules regulating the practice and procedure of the Court in its Admiralty Jurisdiction, such practice and procedure shall be. . . . . in accordance with the Rules for the Admiralty Courts in Her Majesty's possessions abroad, approved by Her late Majesty's Orders-in-Council bearing date the 22nd August, 1883. (This date should read "23rd" August). The rules to be followed are those to come into operation on the 1st January, 1884, of which Rule 115 directs the procedure at the trial of an action, and reads as follows: "The party beginning shall first address the Court, and "then produce his witnesses, if any . . . . and shall have a right to sum up their "evidence. In all cases the party beginning shall have the right to reply and "shall not produce further evidence, except by permission of the Judge."

Counsel for the defendant was placed in an unfortunate position owing to the fact that Captain Clarke, mister of the "Lilian Barnes," had died before the case came on for hearing, and he decided to rest his defence on the weakness of, and the discrepancies in, the plaintiffs' case and on the preliminary act filed by the defendant; his rigorous cross-examination of the plaintiffs' witnesses was directed to these ends. He urged that the defendants were entitled to a non-suit, inasmuch as (1) the variation between the preliminary act filed by the plaintiffs and the evidence adduced was fatal, (2) the case for the "Mahaica" as set out was an impossible one, and (3) that the evidence disclosed such negligence and want of seamanship on the part of the plaintiffs as

disentitled them to any damages. I take it that as no witnesses were called for the defendants the counterclaim was necessarily waived.

Actions on the Admiralty side of the Supreme Court of British Guiana are so rare that it would perhaps assist in an analysis of the evidence and to arrive at its effect to set, in the first place, the preliminary act in its proper place in relation to it, and to the claim and defence respectively. Each party has to file such a document (See Rule 54 and English Order 19, Rule 28), and its purpose is not only to fix the material circumstances of a collision whilst the facts are fresh in the minds of the parties, but also to prevent the defendant shaping his case to meet the case put forward by the plaintiff (The Vortigern, 1860. 1 L. T. 307). Its effects could scarcely be summarised better than in the judgment of Fletcher Moulton, L.J., in the case of "The Seacombe" (1912. 106 L.T. 247). He said: "No evidence was called "on behalf of the 'Seacombe,' but in the preliminary act of the defendants "it was stated—here follows the substance of the preliminary act.—At the "close of the case the learned judge (in the court below) refused to act on "the statements in the preliminary act, treating them as nothing more than "statements put before the Court as in pleadings, which could not in the "absence of consent be treated as accurate. In my opinion the learned judge "took a wrong view of the nature and status of the statements in the pre-"liminary act. They are not mere pleading allegations, They are statements "of facts made under such circumstances that they rank as formal admis-"sions of fact, binding the parties making them, perhaps as strongly as any "admissions of fact can do. Admissions of fact, as such, do not constitute "an estoppel. It may be shown that it was made under a mistake, and the "court may be satisfied that such was the case. But it is evidence against "the party making it, its strength varying according to the conditions on "which it was made . . . .The statements of fact in a preliminary act are "statements which must be presumed to be made after the most careful ex-"amination and consideration . . . . I should doubt whether otherwise than "under the most special circumstances, and with the special leave of the "Court a party would be allowed to depart from the admissions in his pre-"liminary act, at all events as far as evidence in chief is concerned."

With reference to this necessity, that the evidence should support the statements contained in the preliminary act, earlier cases were "The North American" (1858. 12 Morris P.C. Cases) which decided that the Court is bound by the pleadings and must proceed *Secundum allegata et probata*, though there is some doubt whether in so doing it will arrive at the real truth and

justice of the case; and (2) "The Ann" (1860. 13 Moore's P.C. Cases 198) where when the libel in a cause of collision pleaded that the default took place in a particular manner, it was held that such default must be proved in the manner in which it is alleged in the pleadings. It is not enough to establish by evidence that the default was committed in another manner, although the result would be the same on the merits, as the Court will confine its judgment to the issue raised upon the pleadings. Both these cases were referred to by Mr. Browne as supporting his contention that the plaintiff's evidence did not confirm the facts as set out in their preliminary act.

The preliminary acts contain 14 separate paragraphs of particulars; certain facts set out in the plaintiffs' and defendants' particulars respectively are not contradicted by the opposite party, these paragraphs are, par. 1, par. 2, here there was a difference of an hour in the time of the collision but it has no bearing on the equities of the case, par. 4, par. 6, in which the defendant states 1 to 2½ knots in excess of the plaintiff but it does not materially affect the party's case. With regard to pars. 5 and 7 I have already stated the conclusion I arrived at on the evidence. I am also satisfied from the evidence that each vessel carried the regulation port and starboard lights (see pars. 8 and 11). It is true that the "Lilian Barnes" only saw the red (port) light of the "Mahaica" but that would necessarily be so in the circumstances alleged by either the plaintiffs or defendants. There was a lot of inconsequent and inconclusive evidence offered and sought on the state of the lamps of the "Mahaica," and a suggestion, of which there was not the slightest proof, that the port light of the "Mahaica" was only exhibited immediately before the collision. From the details given in the evidence there is no doubt that both lights of the 'Mahaica' were in working order, and although the glass of the starboard lamp had apparently been strengthened or mended by a strip of cement-like substance, I accept Commander Tupper's evidence—he having had special experience in the visibility of ships' lights—that the starboard light would be quite sufficient; and except as possible evidence of carelessness in keeping the lamp, the state of the starboard lamp does not affect the case. The dirty state in which the lamps were when produced in Court is amply accounted for by their having been laid aside for over 12 months. I would here draw the attention of both parties to the fact that their respective statements in par. 11 of their preliminary acts are insufficient, there should be stated in that paragraph all alterations or combinations of lights seen alter the vessel's lights are first seen. (The Monica, 1912 P.D. 147). The contested paragraphs of each of the preliminary acts filed are, par. 3 "the place of collision," par, 9 "the distance

"and bearing of the other ship when first seen," par. 12 "the measures "which were taken and when to avoid the collision," and par. 13 "the parts "of each ship which they first came into collision."

Paragraph 3. There is great difficulty in arriving with any accuracy at the spot where the collision took place, no observations or soundings were taken at the time to ascertain the situation nor was any buoy placed to mark the spot, and the evidence of the witnesses is most confusing. The plaintiff in his preliminary act states the place of collision as "abreast of the old "bandstand on the Georgetown Sea Wall, which is east of the Demerara "Lighthouse, about five cables from the shore." The defendant states it was "at or near the mouth of the Demerara River and about half a mile north-"east of the Georgetown Lighthouse." Both these statements leave much to be desired; with respect to the first the chart of Georgetown and the mouth of the Demerara River (put in evidence) shows the old bandstand is not east of the lighthouse but about E.N.E. and the word "abreast," if confined to its dictionary meaning of "side by side" or "in a line with," is extremely vague and leaves the direction to be taken from the old bandstand most indefinite, unless it means that the spot is on the same imaginary line joining the lighthouse and bandstand and continuing in the same direction for 5 cables (*i.e.*, half a nautical mile), this would place the spot in about 3 to 5 feet of water at low tide according to the chart, but apparently this is not the meaning or position given by Commander Tupper, the Harbour Master, in giving expert evidence for he marks a circle "B" on the chart as being the position he understands from the plaintiffs' preliminary act, it is to the N.N.E. of the old bandstand and he states that on the 13th of January at 9 p.m. there would have been 17 to 20 feet of water there, and the captain of the "Mahaica" appears to agree with this when he says the place of the collision was opposite the old bandstand to the east of the channel, but from the evidence of witnesses as to the depth of the water this could hardly have been the spot where the collision took place, although I notice that one witness says that 200 yards on the shore side of "B" it shoals rapidly.

The position stated in paragraph 3 of the defendant's preliminary act was rather more vague. The Georgetown lighthouse was proved to be ¼ mile inland from the coast line, and the spot is to be taken half a mile N. E. of that; when Commander Tupper was asked to mark the chart from this description he placed the spot at "E," where at low tide there would only be 2 feet of water. Mr. Browne on behalf of the defendants objected to the lighthouse being taken as the point from which the half mile was to

be measured, but I see no other alternative, though I understand the suggestion to be, half a mile from the shore N.E. of the lighthouse, if this could be adopted as the meaning the spot would be in about 5 feet of water at low tide.

The statement signed by Captain Clarke (Exhibit "G") the day after the collision does not assist, so that I have to gather from other evidence of witnesses the position where and the depth of water in which the vessels met. To ascertain the safe depth to which each vessel could go their respective draughts must first be known. We have in evidence that the "Mahaica" was drawing 4 feet forward and 5 feet aft, if fully loaded it would have been drawing 5 feet 6 inches and 6 feet respectively and Captain Douglas, who was called as an expert witness, tells us that the "Lilian Barnes" when loaded would be drawing 9 feet forward and 12 feet aft. There is no evidence of its being loaded but it may be presumed coming from Barbados it had some cargo on board. The master of the "Mahaica" and William Collison, his brother, both say that on the collision occurring the "Lilian Barnes" dropped anchor immediately and first, and that the "Mahaica" followed, but even if she had not the ships were so locked that they would have kept together. And the evidence also shows that with the wind and tide as it was the drift of the vessels would be towards the shoal. Captain Douglas says that if the anchors were down there might still be a drift of 10 or 15 fathoms. Captain Collison (master of the "Mahaica") also states he had 8 feet of water at the time of the collision and did not touch bottom. He did not sound but taking into consideration that the broken foremast and sails and riggings which went overboard were washed under the starboard side of the "Mahaica" to the port side he is probably fairly correct, and he also states that the "Lilian Barnes" slacked away her chain to go astern but she could not go because she was aground. The mate of the "Mahaica," William Abbensetts, says, "at daylight we were opposite the old bandstand, "we were east of the jetty red light (Fort Groyne); we were on the flat when "the collision occurred." The whole evidence goes to show that both vessels at the time of the collision were approaching shallow water to the east of the channel, and that the "Lilian Barnes" should not have been there in running for the harbour. Captain Douglas also states in his opinion the "Lilian Barnes" was aground when she met the "Mahaica" or she would have capsized her.

I can only come to the conclusion that the collision occurred within a few feet of shoal water to the east of the channel and nearly opposite the old bandstand, a position which was a dangerous one for the "Lilian Barnes" but not for the "Mahaica." Commander Tupper, speaking as an expert, after hearing the

evidence and considering the preliminary acts with the chart is of opinion that the "Lilian Barnes" must have been to the east of the channel and would have gone aground anyhow.

Paragraph 9. When the "Lilian Barnes" was first seen we had it that the "Mahaica" was on a course E.S.E. (par. 7) and that the distance of the "Lilian Barnes" when first seen was about 2½ cables (¼ mile), and the bearing about 4 points on the port quarter of the "Mahaica," and the preliminary act goes on to say "that is N.N.W." How far is this description verified by the witnesses called? There is no reason to doubt the Captain of the "Mahaica" who was at the wheel when he states that he was on his fourth tack getting out of the river close hauled and on a E.S.S. course, and that when he first sighted the "Lilian Barnes" she was on his port quarter about a quarter of a mile away; the mate Abbensetts, who was stationed forward on the port side as look-out, confirms the Captain's statement, though W. Collison says that the "Lilian Barnes" was one and a half miles off when he first saw her, and pointing directly amidships. Thomas Jones, who was standing near the Captain on the starboard side, says he first saw the "Lilian Barnes" when it was about five lengths of the "Mahaica," that would be about 500 feet. It is generally accepted, and Commander Tupper also states, that distances at sea are most deceptive,; no special comment should be made if witnesses differ in their estimation as to distance to the extent of half a mile—especially at night time—nor is a discrepancy of one or two points fatal; in the *North American* (referred to above) the Right Hon. Lord Kingsdown in pronouncing the judgment of the Privy Council said, "there "is some discrepancy between them (*i.e.,* the parties), as in such cases al- "ways occurs, as to a point or two of the compass both in regard to the "wind and the courses of the two vessels, but it was agreed by counsel on "both sides that in their view of the case such difference was immaterial." The exact bearing of the "Lilian Barnes" when first seen is immaterial in the present case except perhaps in one respect which I would refer to later. Whether she was two or four points on the port quarter, or on the beam, of the "Mahaica" her duty under the Admiralty Rules was the same, she was running free before the wind and the "Mahaica" was close hauled on her port tack. It may be gathered from paragraphs 4 and 7 of the preliminary act of the defendants that it is admitted that the "Lilian Barnes" was sailing before the wind, and it is emphasised both by Captain Douglas and Commander Tupper as experts that if she was upon the course and in the circumstances disclosed by the preliminary act there should have been no collision. Captain Douglas states, "in any position on the port beam of the "'Mahaica' the 'Lilian Barnes' must port her helm

"otherwise she would be opposing green to red, but if she was only two "points on the port quarter she might have cleared without altering her "helm," and later, "if the two lights were seen on the 'Lilian Barnes' she "was heading S.S.E., if port light only she would be heading S.W.; in either "position she could pass clear under the stern of the 'Mahaica.'" Commander Tupper states that anywhere on the port side of the "Mahaica" the duty of the "Lilian Barnes" would be the same if she was sailing free, and on being asked the question in cross-examination, "if the 'Mahaica' was head-"ing E.S.E. and saw both lights of the 'Lilian Barnes' four points on her "port quarter what course would the 'Lilian Barnes' be taking?" he answered "she must be coming about S.S.E." All the evidence leads to the conclusion that the course of the "Lilian Barnes" was varied from S.S.E. to S.W., and had she been going S.W. consistently no collision would have occurred.

We now have approximately the course of each of the two vessels, and their distance apart when the "Lilian Barnes" was first seen by the "Mahaica" was at least a quarter of a mile, and when the "Mahaica" was first seen by the "Lilian Barnes" 120 feet, *i.e.*, a little more than the length of one of the vessels. In the first position the Court concludes from the evidence there would have been no fear of any collision had the "Lilian Barnes" seen the "Mahaica" "highly improbable" Commander Tupper says, and, "a quarter of a mile is ample room to manoeuvre in." In the second position a collision was inevitable and no steps could have been taken to prevent it. The situation as stated in the defendants' preliminary act necessitates the enquiry, what was the look-out of the "Lilian Barnes" doing? It would not in any way assist the case to enquire whether the look-out on the "Mahaica" might not have seen the "Lilian Barnes" sooner, and I may here note that it was the primary duty of the look-out of the "Mahaica" who was stationed forward on the lee bow to notice any possible danger ahead in the course the vessel was taking, so that a vessel to the N.N.W. or even to the N.N.E. would not readily be observed.

The preliminary act of the defendants declares that the port light of the "Mahaica," described as "a dim red light," was first seen by the "Lilian Barnes" at a distance of 120 feet and bearing about half a point on her starboard bow; if that was so, I cannot conceive why she had not observed the lights of the "Mahaica" a long time before, or how she had reached the position to the east of the river channel whilst making for the mouth of the river with a following wind, unless, as it was suggested, she was taking her course by the Fort groyne (red) light, when the wind and tide would give her an easterly tendency.

But that would not account for the faulty look-out on the "Lilian Barnes," and the burden of proof lies upon each vessel to show that she kept a proper look-out. It is suggested on cross-examination—though not included in the preliminary act—that the "Lilian Barnes" was in a position that she could not see the port light of the "Mahaica," *i.e.*, over two points abaft the beam, but even then the evidence goes to show that the boom of the "Mahaica" should have been visible at least 500 feet away, and Commander Tupper says that on a clear night a sailing ship would be visible from one to one and a quarter miles away and he infers that the "Lilian Barnes" was keeping a very bad lookout or none at all. For want of any evidence to the contrary and on the statements in the defendants' preliminary act the Court is irresistibly led to the same conclusion, and I accordingly find that the "Lilian Barnes" was not keeping a proper lookout.

This does not, however, dispose of the matter, for the defence takes two points, first it was contended that the "Mahaica" was to blame in any event for keeping her course too long and that she ought to have taken steps earlier to avoid a collision, which she saw was imminent, and secondly that the "Lilian Barnes" being in the position in which she could not have seen the lights of the "Mahaica," it was the duty of the latter to have shown a white light or a flare up light at her stern and that it was the omission to do this which made the collision inevitable.

Although having regard to the relative positions of the two vessels it was the duty of the "Mahaica" to keep her course, it has been held that "A. vessels would not be justified in blindly "persisting in that course if it were "manifest that disaster must result from it" (*The Tasmania* 15 Ap. Ca. 223). In the note to Article 21 of the Regulations for preventing collisions at sea it states: "When in consequence of thick weather or other causes such ves- "sels (*i.e.*, the overtaken vessel) finds herself so close that collision cannot "be avoided by the action of the giving-way vessel alone, she also shall "take such action as will best aid to avert collision," and Article 27, "In "obeying and construing these rules due regard shall be had to all dangers "of navigation and collision, and any special circumstances which may ren- "der departure from the above rules necessary in order to avoid immediate "danger," and Article 29: "Nothing in these rules shall exonerate any ves- "sel. . . . . from the consequences of any neglect to carry lights or signals . . ". . . . or of the neglect of any precaution which may be required by the "practice of seamen, or by the special circumstances of the case."

In estimating the culpability or otherwise of the master of the "Mahaica" it must be remembered that it was the gross negli-

gence of the "Lilian Barnes" in the first place which placed him in the situation in which he had to take a sudden decision, and that there ought not to be required of him that precise judgment and presence of mind which might be required in other circumstances, and that it being night his position was the more difficult. On a careful consideration of the whole evidence and especially of Captain Douglas and Commander Tupper as experts I cannot find that the master of the "Mahaica" was wrong in keeping his course, and I am satisfied that when the collision appeared imminent, certainly before the 120 feet intervening distance mentioned by the defendants, if he had starboarded his helm he would have still collided with the "Lilian Barnes" and that if he had ported his helm he would probably have run ashore; he did neither, and the statement that he first ported so that the red light of the "Mahaica" was lost to view, and then starboarded (see par. 12 of the defendants' preliminary act) and all within the space of time that could be measured in seconds is absurd, and I am not surprised that Captain Douglas stated the said paragraph 12 as impossible.

Had the master of the "Mahaica" altered her course at any time after he first became aware that a collision was imminent, and she had either run aground or the collision had still occurred, she would have had great difficulty in justifying his action in a Court of law. I find in this respect he was right in keeping his course and that he acted as a prudent man and skilled seaman.

Paragraph 13. The evidence given by witnesses of the collision confirmed by the evidence of the extent and nature of the damage done to the "Mahaica" proves that it was the "Lilian Barnes" that ran into the "Mahaica" and not the "Mahaica" that came broadside on and struck the stem of the "Lilian Barnes," as stated in the defendants' preliminary act.

There remains only one question—and an important one—whether the "Lilian Barnes" saw or could have seen the lights of the "Mahaica" in time to avoid the collision and if they were not visible to her whether there was a breach of the rules on the part of the "Mahaica" in not showing a stern light. In dealing with this articles 10 and 24 of the regulations must be considered. Article 10 reads: "A vessel which is being overtaken by another "shall show from her stern to such last-mentioned vessel a white light or a "flare up light." And Article 24 reads: "Notwithstanding anything con- "tained in these rules every vessel overtaking any other shall keep out of "the way of the overtaken vessel. . . . . Every vessel coming up with an- "other vessel from any direction more than two points abaft her beam, *i e.*, "in such "position, with reference to the vessel which she is overtaking that "at night she would be unable to see either of that vessel's

"sidelights, shall be deemed to be an overtaking vessel." The expressions "a vessel which is being overtaken by another" and "overtaking any other" have been considered and defined in several decisions, though as a matter of fact Article 10 (formerly Article 11) did not exist before the year 1880. In *the Franconia* (1876. 2 P.D. 8) Brett, J., in delivering judgment, said: "Can we form a definition of the difference between crossing ships and "overtaking ships . . . . I think it is a very good rule that if the ships are in "such a position, and are on such courses and at such distances that if it "were night the hinder ship could not see any part of the sidelights of the "forward ship, then they cannot be said to be crossing ships, although their "courses may not be exactly parallel. . . . And if the hinder of two such "ships is going the faster than the other she is an overtaking ship. Now if "the *Strathclyde* was a mile or a quarter of a mile distant from the *Franco-* "*nia,* and the *Franconia* was two points on the quarter of the *Strathclyde* "then the *Franconia* could not have seen any part of her sidelights, and "that I think, is the opinion of the gentlemen who advised us. . . . the *Fran-* "*conia* was an overtaking vessel." And again in the Imbro (1889. 60 L.T.T.R. 936) Brett, J., says: "In my opinion a vessel approaching another "from aft and being more than two points abaft the beam of the foremost "ship—a position from which the coloured sidelights of the foremost ves- "sel would not be visible—is an overtaking vessel within the meaning of "Article 11. . . . the whole object of the article being in my judgment to "provide for a warning light being shown to a vessel approaching another "from aft and in such a position from which the coloured lights of the fore- "most vessel would not be seen." To apply these cases, according to the plaintiffs' preliminary act the "Lilian Barnes" when first sighted was about four points on the port quarter of the "Mahaica," the master in giving evidence says two points but in any position between two and four points the sidelights of the "Mahaica" would not have been visible to the "Lilian Barnes." The "Lilian Barnes" was the faster vessel and therefore an overtaking vessel. Then the case of the "*Maine*" (1886. 11 P.D. 132) lays it down that the obligation to show the light at the stern does not arise till the vessel which is being overtaken has had an opportunity of seeing that the vessel which is overtaking her is the vessel coming nearer to her, and that she is approaching on such a course that she cannot see the lights of the overtaken ship.

The first thing one notices in the accounts of the approaching collision is that there is considerable difference of opinion as to the distance at which the "Lilian Barnes" was when first seen, and her bearing on the "Mahaica" which varies from amidship

to four points on the port quarter, in a word, there is no proof that the "Lilian Barnes" could not have seen the port light of the "Mahaica" in time to avoid a collision. Even if it were proved that the bearing of the "Lilian Barnes" on the "Mahaica" was such that the latter vessel should have exhibited a stern light or flare and that she did not do so it may still be shown by the plaintiffs that non-compliance with the Regulations was not the cause of the collision. The evidence goes to show that on the night in question the loom of the "Mahaica" must have been visible at some distance, though as stated in the "*Fenham*" (1870. 3 L.R.P.C. 213): "The mere fact "of a vessel looming in the dark would not point out the way the vessel was "going until the set of her sails could be seen." It is of course impossible without having been present to say exactly at what distance the loom of a sailing vessel could have been seen on this occasion.

As I have already pointed out, there is no charge on the pleadings or allegations in the preliminary act that the "Lilian Barnes" was in a position from which she could not see the sidelights of the "Mahaica," on the contrary if as she alleges she was sailing S.W. and saw the "Lilian Barnes" bearing half a point on her starboard bow she would probably have been able to see both sidelights though it is possible the starboard light might have been obscured by the sails. In the "*Marpesia*" (1872. 4 P.C. Ap. 212) it was held that if a plaintiff in a collision suit intended to rely upon a particular act of negligence by the defendant, he is bound specifically to allege that act in his pleadings and it is not sufficient that the act may be included generally in an allegation in the pleadings which do not clearly state such particular act. So if it was intended by the defendants to rely upon the default of the plaintiffs in neglecting Article 10 it should have been expressly alleged (and see "The Ann" above).

But apart from the question of bearing and loom the Court should consider whether there is any reason why the necessity of exhibiting a stern light did not or would not occur to the master of the "Mahaica." The evidence goes to show that after the first sighting of the "Lilian Barnes" when she was showing both her lights the master of the "Mahaica" states "I "sighted her on my port quarter about two points. I look again and see she "change her course, I continued and she came on amidships and altered "again and keep off. She was yawing," and on cross-examination he says more definitely, "I next saw her port light, and next starboard light, then "port light again and then starboard light when she struck. She was travel-"ling much faster than me. Every time she came up to the wind she went "eastward. At one time the

"'Lilian Barnes' was coming S.W. by S., then S.W. direct clear of me." This is confirmed by the mate Abbensetts who says he "saw first a red "light. . . I next saw starboard light, then port light; she was yawing. I was "looking north when I first saw the schooner, she was coming up the river, "she would have passed astern if we dropped anchor directly I saw her;" and again W. Collison, who has been a coasting sailor for six years, says: "I looked and saw port and starboard lights. I went back (*i.e.*, to starboard "side of 'Mahaica') and return two or "three minutes after and then saw "starboard light only . . . then I saw her port light and on cross-examination "the 'Lilian Barnes' was pointing directly amidship when I first saw her "about 1½ miles off, that was when he saw the port light first, when I saw "starboard light she was a quarter of a mile off." The yawing of the "Lilian Barnes" which all the eye-witnesses describe may be put down either to running with the wind which was N.E. and on an ebb tide, or careless steering with no proper look-out. Neither Commander Tupper nor Captain Douglas as experts can explain her position or suggest a motive for her manoeuvres, so I will not attempt to do so.

In the circumstances detailed can it be said that the master of the "Mahaica" did less than a cautious seaman should have done or that he should have seen the necessity of exhibiting a stern light? When she was first seen it might appear that the course of the "Lilian Barnes" indicated that she had not seen the "Mahaica" but on the port light only showing of the "Lilian Barnes" the master of the "Mahaica" would naturally assume that she was keeping the rule of the road and going astern of his vessel. In *Cayser* v. *Carron Co.* (1884. 9 Ap. Ca. 873) it is stated by Lord Watson as a sound rule, "Where there are regulations to be observed in the management of "vessels at sea, the one vessel has always a right to suppose that the other "vessel is going to do what would be right and proper, and regulate its own "manoeuvre on the supposition that the other vessel will do its duty and do "all that ought to be done," and he continues, "In the case of a rule like this "(M.S. Act, 1873, sec. 17) mere disobedience is not enough; it must be "shown that it constituted a fault in this sense, that it was actively contri-"buting to the collision. To express it otherwise, it must be shown to have "been one of the proximate causes of the collision." The section of the M.S. Act, 1873, referred to was repealed and re-enacted by section 419 (4) of the M.S. Act, 1894, and now this section has itself been repealed and the stringency of absolute adherence to the arbitrary rules relating to collisions somewhat relaxed, for under the Maritime Conventions Act, 1911, section 4 (1) "The Court is clearly authorised to see whether the

"breach of the regulations did or did not contribute to the collision. It "means that the statutory provision that the mere fact of the breach of the "regulations, whether it did or did not in fact contribute to the collision, is "to be sufficient to render a vessel responsible for the collision as one of "two wrong-doers, is repealed, and the Court is left to exercise its own "judgment and discretion in the case before it." (See "The Enterprise," 1912. 107 L.T.R. 271).

Both Commander Tupper and Captain Douglas as experts state that, having heard the evidence, if they had been on the "Mahaica" they would have done as the master did and kept her course, and Commander Tupper says the "Mahaica" could not have done anything "to avoid the collision . . . . ."The 'Mahaica' was not under any obligation to show a rear light."

It is submitted by Marsden in his work on "Collisions at Sea," (2nd Ed.) that if a collision occurs between two ships approaching each other so as to involve a risk of collision "there is no presumption that the ship re- "quired to keep out of the way is in fault; for the duty of the other ship to "keep her course is no less stringent than that of the former ship and until "she proves that she did keep her course the fact of the collision is no evi- "dence of negligence in the ship required to keep out of the way. But upon "such proof being given, a presumption of fault in the ship required to keep "out of the way arises, and unless she proves circumstances rebutting this "presumption she will be held in fault without proof of any specific act of "negligence on her part." The "Mahaica" has been shown to have been right in keeping her course and the "Lilian Barnes" has not rebutted the consequent presumption that she was in fault to the satisfaction of the Court.

In conclusion I find the "Lilian Barnes" was alone to blame for the collision in disregarding the regulations more especially Article 17 (a) and (e) and Article 24, and that the "Mahaica" in keeping her course and speed was in reliance on Article 21 and could have taken no step to avoid the collision, in the special circumstances of the case. There is no evidence to show that the master of the "Mahaica" did not exhibit that reasonable care and skill which it was his duty as a seaman to exercise.

The ship "Lilian Barnes" is therefore liable for the losses consequent on the collision, this includes not only a complete repair of all the damage done notwithstanding the result may be to render the vessel more valuable than she was before the collision but also compensation for loss of freight. The Court however will only give such compensation when it is satisfied that the vessel has been deprived of freight which has actually been

lost to the owners through the vessel not being available. Mr. J. A. Headecker, acting Traffic Superintendent for Sprostons, Limited, during this period, states that the "Mahaica" was engaged with four other vessels during the grinding season, *i.e.*, from October to January or February, in taking general cargo to Berbice and returning with sugar, her full load being 864 bags equal to 96 tons, for which the plaintiffs would receive $172.80. An examination of the cargo book put in evidence (Exhibit "F") does not disclose any sugar received from New Amsterdam during the month of January but there were two cargoes in February and two in March of 864 bags of sugar each loaded by the "Mahaica" in Berbice. Mr. Headecker also states that the "Mahaica" was off duty three or four weeks and estimates a loss on her nett earnings of $800. With respect to the $75 freight on board on the 13th January when the collision occurred that apparently was not lost to the plaintiff but transferred to another of their vessels and shipped to New Amsterdam on the 14th January. The same witness also states: I cannot give particulars of applications we "had to refuse "owing to the "Mahaica" being laid up. I can only remember Messrs. Cur-"tis, Campbell applied for a craft to take machinery and manure in January, "the week after the accident. I can't be certain of another"; no other information was supplied. The Court cannot grant damages in respect of the loss of profits which are contingent and indefinite but it may arrive at an estimate by taking an average of other voyages made by the same vessel in similar circumstances. There is not sufficient information to arrive at any definite figures for prospective loss of freight to Berbice from Georgetown but it may fairly be estimated that the "Mahaica" lost at least one load of sugar from Berbice during the period she was laid up. In *The Admiralty Commissioners* v. *s.s. Valeria* (1922. 2 A.C. 242) Lord Dunedin lays it down: "The true method of expression I think is that in calculating dam-"ages you are to consider what is the pecuniary sum which make good to "the sufferer, so far as money can do so, the loss which he has suffered as "natural result of the wrong done to him."

There is no necessity to go into details of the actual damage done to the plaintiffs' barge as a survey was made of the "Mahaica" on the 14th January, 1925, and a certificate is put in as an exhibit ("A 1") showing the actual damage suffered.

Mr. W. A. Walker, chief Mechanical Engineer, Sprostons, Limited, also prepared a list of damage done (Exhibit "D") with prices and details of repair to the amount of $545.10 and in his evidence he showed how that sum was arrived at. The work was completed between the 24th January and 10th February and is

kept distinct from other work which it was necessary to do to the vessel at the same time and which delayed it in dock a few days longer.

I accordingly assess damages at $750 and gave judgment for the plaintiffs for that amount with costs. Interest at 4% from the time when the bill for repairs was paid, on the whole amount of damages will be allowed as part of the damages.

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

In re CABRAL.

Ex parte OFFICIAL RECEIVER.

[No. 15 OF 1925.]

1926. MARCH 18, 22, 23, 24, 25; APRIL 26, 27; JUNE 12.

BEFORE DOUGLASS, J.

Insolvency—Proof filed by alleged creditor—Refusal of Assignee to accept claim—Hearing before Judge—Effect of judgment by consent—Power of Bankruptcy Court to go behind judgment—Circumstances in which power exercised—Whether Assignee need give specific reasons for rejection of claim.

(*a*) The Assignee of an insolvent when rejecting a claim need not give specific reasons for so doing; it is sufficient if he intimates that he is not satisfied therewith. His duty is merely to accept or reject and he does not give a judicial decision on the merits of the case.

(*b*) The hearing by a Judge of the merits of a case after such a rejection is not, strictly speaking, an appeal.

(*c*) In Bankruptcy the Court has full power to go behind any judgment on the ground that no act of the bankrupt improperly entered into with one creditor ought to prejudice the rights of the others.

(*d*) The rejection by the Court of a creditor's proof based on a consent judgment does not necessarily imply that the amount claimed may not be recovered in future from the bankrupt or that the judgment is not binding on the debtor.

The facts of the cases fully appear in the judgments below.

G. J. de Freitas, K.C., for the applicant Morris.

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

S. J. Van Sertima, for the Official Receiver.

In re CABRAL, *Ex parte* OFFICIAL RECEIVER.

DOUGLASS, J.: A receiving order was made against the petitioning debtor on the 28th July, 1925, and the Official Receiver constituted receiver of his estate, there was no assignee appointed by the creditors and the Official Receiver acted as such (See Art. 27 of 2nd Schedule to Ord. No. 29 of 1900, and Sec. 65 1 (g) and 73 (4) thereof). He rejected certain debts and gave notice to the creditors whose proofs were so rejected under Article 23 of the said 2nd Schedule. In each of the debts so rejected the proof relied on by the creditor was a judgment obtained by consent for the amount claimed and costs, and in three cases the creditor was dissatisfied with the decision of the Official Receiver and appealed from him to the Court.

In the first application Mr. G. J. deFreitas, K.C., for the creditor J. G. Morris, took a preliminary objection that it was not competent for the Assignee (the Official Receiver) to reject the claim as he had given no reasons for his rejection and the grounds endorsed on the proof of claim were merely begging the question in stating that he was not satisfied, and that he should not only have alleged but have proved his grounds for rejection, and again the debt being a judgment debt, unless a *prima facie* case of suspicion is shown he cannot reject it, and he had given no grounds for such a suspicion, nor were there any. Learned counsel referred to several cases in support of his contention, of these several dealt with section 6 (3) of the Ordinance—the power of the Court to dismiss a petition—but the position of an Assignee with reference to a creditor who comes in to prove is not the same as, and in many respects very different from, that of the. insolvent himself.

In ex parte Revell re Tollemache No. 1 (1884. 13 Q.B.D). 720) the point was taken whether the Court will enquire into the consideration for a judgment debt when nothing is shown to justify the enquiry. I do not think that situation arises here, but even if it did all that Baggallay, L.J., says on the point is "I am disposed to think that *prima facie* a judgment ought to be "considered binding. But if a proper case is made, I think the Court ought "to direct an enquiry into the consideration for a judgment debt." And he refers to the rule as clearly stated by Lord Justice James in *ex parte Kibble.* "It is the settled rule of the Court of Bankruptcy, on which we have always "acted that the Court of Bankruptcy can enquire into the consideration for a "judgment debt. There are obviously strong reasons for this because the "object of the Bankruptcy Laws is to procure the distribution of a debtor's "goods among his just creditors. If a judgment were conclusive a man "might allow any number of judgments to be obtained by default against "him by his friends or relatives without any debt being due on them at all."

I do not think it necessary to refer to any other case except *in re Van Laun ex parte Chatterton* (1907. 2 K.B. 23) where Cozens Hardy, M.R., in giving judgment states, "All that we decide is that the Trustee is entitled to "say, I will not admit your proof until you have given reasonable means of "satisfying myself whether the debt in respect of which you are proving is "to any and to what extent justifiable and reasonable." No judgment recovered against the bankrupt can deprive him of this right, and I am of opinion that the Assignee was amply justified in these cases in refusing to accept the judgment on his *bona fide* suspicion of fraud, or collusion.

When a creditor sends in his proof to the Official Receiver or Assignee he can either accept or reject it, but the creditor has no right of hearing, nor can the Assignee give a judicial decision on the merits of the case. The creditor if he wishes for that must go to a judge—not, as pointed out by Judge Parry *in re John L. Blair* and another, on *appeal,* in spite of that term being unfortunately used in rr. 185 and 190 of the Insolvency Rules, 1901, and in the marginal notes to rr. 189 and 190 and to article 24 of the 2nd Schedule to the ordinance, but, on an application by the creditor that his cause may be heard in a Court of Justice, and he is enabled to proceed under direction of, and subject to, rules 16, *et seq.* and 189 and 190. I find against the preliminary objection raised and that the Official Receiver as Assignee has taken the right course in dealing with the claims now in question. Two applications came before me which I will deal with separately; each case rests on a judgment obtained by the creditor against the insolvent, which *prima facie* is evidence of a debt, and the validity of which no other Court than a Court of Bankruptcy has power to contest, and each case must depend upon whether the evidence the creditor produces is sufficient to satisfy the Court that he or she has not only a genuine claim against the insolvent, but one provable in bankruptcy.

Where there is evidence that the judgment was obtained by fraud, collusion or mistake, or of any miscarriage of justice the Court of Bankruptcy may go behind the judgment and enquire into the consideration for the debt, and its validity.

In is stated in *ex parte Lennox* (16 Q.B.D. 315) that this rule is founded on the principle "that under whatever circumstances "a judgment may have "been obtained against a bankrupt, yet no act of his, collusion, compromise "improperly entered into, or anything else—ought to prejudice the rights of "the other creditors, because the assets ought to be distributed in the bank-"ruptcy among the honest and *bona fide* creditors of bankrupt."

In re CABRAL, *Ex parte* OFFICIAL RECEIVER.

CLAIM BY MORRIS ON PROMISSORY NOTE FOR $6,800.

The evidence of A. F. Cabral, the insolvent, and of J. G. Morris, who was in Cabral's employ as barman, and later manager of some of his spirit shop for about 26 years, goes to prove that

(*a*) The amount claimed is made up of three separate loans, viz., $2,800 made on 25th June, 1921; $3,200 on 22nd August, 1923; and $800 on 12th June, 1924, at which last date the present promissory note was given and the old notes were destroyed, and

(*b*) That all these transactions were entered in Cabral's cash and expenditure books. None of these books were produced however, and in explanation Cabral states that having given the books to his attorney J. Jorge to submit to an auditor he never saw them again, and understood they had been burnt.

Pedro Dias, who worked in the "Guiana Standard" and "Royal Standard" and for whom Cabral "had a great likeness," supports the evidence of Morris that the latter kept large sums of money in the safe, and that he gave a parcel, said to contain $3,200, to Cabral in 1923, and that in May or June, 1924, Cabral asked Morris for $800, and that the witness got paper and stamp for the promissory note.

The evidence leaves no doubt that Morris did amass a considerable sum of money and that he did not keep it in the bank. Before touching on the contrary evidence—for one cannot call it a defence—offered by the Official Receiver as Assignee I may note the weak points in the evidence in support of the application.

(1) There is no entry in any book of transactions between Cabral and Morris. The latter states he got the dates and items in the memorandum book produced by him from the missing books about June, 1925, the last original entry being in Jorge's handwriting, and wrote them on a bit of paper and then copied them into Exhibit 'E.' I must direct particular attention to this exhibit, there are six entries, all obviously made at the same time in a feeble coloured ink that does not appear in any other place in the book. The first five entries are relative to five loans between 1912 and 1920 made to persons other than Cabral and all paid off before the entry was made (in Ex 'E,'). They could not have been copied from Cabral's books as they did not concern him, and their appearance weakens the effect of the other extract and throws doubt on the origin of all of them.

(2) Cabral had a bank account but none of these loans ever appeared there as we would expect, although large amounts were weekly paid in to his credit (Ex. 'M').

(3) From 1920 to 1924 Cabral was getting advances from the Bank and it is difficult to see why he should borrow from an employee.

(4) In May, 1925, Cabral's wife started proceedings against him for judicial separation and alimony, and in his affidavit dated 2nd June in answer to the petition, he describes his means and liabilities, but makes no mention of these loans or promissory notes.

It may also be noted that the writ for the amount claimed by Morris, and on which he afterwards obtained judgment by consent was filled on 21st July, 1925, a week before the order for alimony was made pending the suit.

(5) In spite of the large amounts kept Morris as he states in the same safe as the shop cash, up to $5,000 at times, he admits he drew advances on his salary, and this is confirmed by the account books of the shops for 1918 and 1923.

(6) Two other points to be noted are that Morris never kept any memorandum of the amounts he lent Cabral nor entered them in any book, and he never told Cabral he was going to sue him—so he states—rather an astonishing thing between two such intimates as they were.

When J. Jorge was called by the Official Receiver he flatly contradicted most of the important facts on which the truth of Morris' story depends. Although he was Cabral's attorney since September, 1921, he knows of no loan from Morris to Cabral, he never burnt any books—and his statement in this respect must needs be accepted as the contrary evidence is founded on rumour only—there were no cash books to burn, none were ever kept, Morris never kept his private cash in the safe drawer so far as he knew and he had checked the cash several times, one drawer held daily sales and the other $100 cash for shop change, the stock book he had taken to Mr. Henderson who had refused to audit it, it was so badly kept and Cabral had quarrelled with him because when Cabral suggested making false entries therein, he refused. It is true that, by permission of the Court, counsel for Morris called J. A. M. Pacheco to rebut this evidence by Jorge, but though he was a witness to be trusted, his evidence did little to weaken the effect of Jorge's evidence. He spoke of the good character of Morris as a foreman and salesman, which had not been doubted, he confirms the statement that cash was kept in the safe as a reserve, and on cross-examination he states, "Morris never told me he had any money in the safe." The only apparent direct denial of an assertion by Jorge was that Morris always kept the safe key, whereas Jorge says "the drawers of the "safe have no key," the other divergences on their evidence are what I may call of opinion and of personal observation, and do not go to the root of the matter.

The intimacy between the insolvent and Morris was such that it is difficult to believe that when the latter filed his writ on 21st July, 1923, he was unaware that the debtor intended to file his petition which he did a week later, or that the debtor was unaware that Morris intended to sue him. The evidence of Cabral and Morris cannot but be looked upon with suspicion when the surrounding circumstances are disclosed, and are at least neutralized by the evidence of Jorge, and combined with the disappearance of Cabral's books, the unconvincing memorandum copied by Morris, and other portions of doubtful evidence to which I have drawn attention, compel me to find that Morris has failed to prove that any consideration was given for the promissory note on which he obtained judgment by consent. The Court must consider the interests of the other creditors of the insolvent who have a right, as represented by the assignee, to dispute a judgment obtained under these peculiar circumstances, and in my opinion the proof was properly rejected.

The costs of this application must be borne by Morris.

CLAIM BY MISS GONSALVES ON PROMISSORY NOTE FOR $4,900.

The evidence goes to show that the promissory note on which judgment was obtained by consent represented the balances due on loans and two previous notes, viz.:—

1. A Promissory note for $2,200 given in 1920 and said to be the balance representing a total sum of $4,000 advanced by Miss Gonsalves to Cabral in December, 1915.

2. A promissory note given in July by Cabral representing a sum of $2,319.43, the price obtained by Miss Gonsalves for the sale of lot 350, Cummingsburg, to Mrs. de Freitas in July, 1920, but handed to one Ferreira at the request of Cabral, and

3. A loan of $400 lent to Cabral in September, 1924, when the other notes are said to have been surrendered, and the present one substituted. I am satisfied on the evidence that Miss Gonsalves for several years, 1909 to 1915, was allowed to take half profits on the dry goods business of Cabral at Vergenoegen, and that during that period she practically had no expenses as Cabral supplied her up to 1921, and she must have accumulated a fair amount of money as the business was a flourishing one. She herself states she kept no accounts, but that Cabral told her what her proportion of the profits was.

She had sufficient money at all events in November, 1918, to purchase lot 350, New Market Street, for $3,000, part of which was left on mortgage, this was the property afterwards sold to Mrs. de Freitas, and on 5th July, 1920, she bought lot 3, George and Norton Streets, for $6,000 leaving $5,000 on mortgage, and on same date she purchased lot 1, George and Hadfield Streets,

paying $1,500 cash and later reducing the mortgage on it by $800. In considering whether any consideration was given for the promissory note for $4,900 it is obvious that I must deal separately with the items it is alleged to be composed of.

With respect to No. 1 (above) I am of opinion that Miss Gonsalves has not given satisfactory proof that the debt ever existed on the following grounds, (a) she only states from hearsay what was the amount due to her on the closing of the Vergenoegen business, (b) she makes three different statements at different times as to how the $4,000 loan was made, and finally leaves it uncertain whether it was a lump sum, or a number of separate loans, (c) she produces no accounts or written memorandum showing how the $4,000 was reduced to $2,200, and the date when the alleged promissory note was given for that amount varies, (d) there is no corroboration of her statement that this amount or indeed any amount was borrowed from her by Cabral, for his consent to judgment, in the peculiar relationship between them, cannot be accepted as corroboration, (e) the mere fact that Cabral promised to pay her $2,200 in 1920 imports no consideration, it may well have been a voluntary gift.

The next item No. 2 (above) stands on a different footing. Without going into details, I may say that I find from the exhibits put in and on the evidence of A. C. Mendes and J. Jorge that she has established the right to claim the amount of $2,319.43. With regard to the $400, item 3 above, there is again no corroboration of this loan, it rests only on a bare statement without details. Taking into consideration the relationship of Miss Gonsalves and Mr. Cabral it seems extraordinary that in 1924 a man of his business capacity should have asked her for the loan of so small a sum, and I am unable to find that she has given satisfactory proof that she advanced out of her moneys the $400 as she states.

Miss Gonsalves is frank enough to state that she told Cabral that she intended to sue him and that he did nothing to dissuade her, and she knew he would consent to judgment. As in the case of Morris' claim, a certificate is put in that the writ of summons was filed on the 22nd July, 1925—three days before the Receiving Order was made against Cabral—and judgment by consent signed on the 30th July.

The only item then she has proved to the satisfaction of the Court is that of $2,319.43 and I must reject the balance of her claim.

With regard to both claims I may say that rejection of proof does not imply that the amounts claimed may not be recovered at a future day, and still less that the judgments registered by consent are not binding on the debtor, this Court cannot affect or

upset the judgments, all it does is to hold that certain amounts which have not satisfied the strict proofs required shall not rank with other sums found due to the *bona fide* creditors of the insolvent to the prejudice of their claims in the insolvency.

WALDRON *v.* FREDERICKS.

[No. 329 OF 1925.]

1926. JUNE 2, 19.

BEFORE EGG, ACTING, J.

Landlord and tenant—Injury to wife of tenant—Common Law rights—Statutory modification—Local Government (*Landlords' Liability for Repairs*) *Ordinance, 1921, section 2—"Inmate."*

The principle of the common law which precluded a wife from recovering damages from her husband's landlord for injuries sustained by her in consequence of a breach by the landlord to repair the premises demised has been modified by the provisions of section 2 of the Local Government (Landlords Liability for Repairs) Ordinance, 1921, which enacts in effect that any inmate of a house demised may recover damages flowing from a breach of the implied condition created by the said ordinance that in every letting for human habitation the landlord shall *inter alia* during the tenancy keep the tenement in all respects reasonably fit for human habitation,

Chaves v. *Burnett* (30. 4. 26) followed.

The facts appear in the judgment.

C. R. Browne, for the plaintiff.

E. F. Fredericks, for the defendant.

EGG, ACTING J.: The plaintiff, the wife of Randolph Waldron, is claiming $750 as damages from the defendant for injuries sustained, costs of medical attendance and nourishment due to the defendant's neglect in not keeping in proper repair the back stairway of a cottage situate at 50, Cummings Street, Alberttown, rented by her husband from the defendant, which stairway broke and gave way with her, the plaintiff, on the 30th July, 1925, when she was lawfully using same.

Counsel for the defendant takes the point:

(a) No contractual right of the plaintiff to sue, inasmuch that the plaintiff's husband was the tenant, and his wife would have no cause of action against the defendant for injuries received through a defective stairway of the said cottage.

WALDRON *v.* FREDERICKS.

This case is brought under section 2 of Ordinance No. 5 of 1921, an ordinance to amend the Local Government Ordinance, 1907 (dealing with landlords liability for repairs) for apart from the liability of the landlord to the tenant for repairs and the breach thereof it extends its benefits to "any inmate" of such house or room, and I am asked to hold that although the plaintiff may be an inmate of the house, nevertheless she would have no right to sue—being an accident and the defect in the stairway a latent one. In *Ryall* v. *Kidwell*, (1914. 3 K.B. 135) (approving of *Cavalier* v. *Pope*, 1905. 2. K.B. 757) it was decided that a stranger to the contract of tenancy had no remedy for a breach of the implied undertaking under the Act, *i.e.*, Housing and Town Planning Act, 1909, that the premises demised were reasonable tit for human habitation, but in the latter case of *Groves* v. *Western Mansions, Ltd.* (1916. 33 L.T.R. 76) it was held on proof of a concealed trap on a premises an invitee or licensee could recover damages for injuries sustained therefrom.

I therefore direct myself to the questions:—

Is the plaintiff an "inmate" of the house? and is she entitled to damages.

I find as a fact that the plaintiff is an inmate of the cottage rented by her husband and has been and is still living with her husband in the said cottage from 1923 to date.

The point (a) raised by counsel for the defendant was argued in the Full Court of Appeal in this colony in the case of *Burnett* v. *Chaves* decided on 30th April, 1926, on identical facts as in this case, in which that Court held that an "inmate" who suffers any loss by injury to health, or in any other way whatever in consequence of a breach to keep the house in repairs can recover from the landlord of such premises for such breach and as was said by Douglass, J., in the said case: "I am the more inclined to concur as the "equities of the case are all on the side of the respondent (inmate) the land-"lord had notice of the defect and either made no effort to remedy it or at "the best made a patched up job which partially remedied the defects of the "steps and turned them into a concealed trap." Here, as in that case, the plaintiff notified the defendant's agent, Mrs. Chung (who is also her attorney and in charge of the premises) twice of the condition of the stairway—once by Marion McCall—her mother-in-law, who took a "treader" of the stairway which came off to Mrs. Chung who had same nailed on and "propped" the stairway and on the other occasion by plaintiff herself when the stairway got worse, and Mrs. Chung promised to repair same but did nothing thereby leaving same to be a concealed trap.

The case quoted *Bernard* v. *Ramdhanie* (1920. L.R.B.G. p. 22) does not assist, as that case was determined before Ordinance

No. 5 of 1921 was enacted, and the other case of *Hamilton* v. *Hubbard* (1924) referred to by counsel was one in which the defendant consented to judgment.

Agreeing with the decision of *Burnett* v. *Chaves* referred to before and finding the landlord (defendant) liable for the injuries sustained, it remains for me to assess damages.

The defence that plaintiff has agreed to settle the case before instituting the action for the costs of Dr. Nicholls' bill plus half the costs of nourishment required fails, for on the evidence adduced I can find nothing to warrant my conclusion to that effect, yet on the other hand I consider the plaintiff's claim excessive, for apart from temporary shock, abrasions and confinement to her bed for three weeks in obedience to the doctor's order I do not feel justified in holding that the condition of plaintiff's heart, being weak and rapid for some time, was due to the fall, there being no proof that same was normal before the fall. Taking all the circumstances especially the fact that plaintiff had given birth to a child five months previous to the fall and consequently she might not have been as strong as otherwise I award her $200 as damages with costs on the lower scale.

There will be judgment for plaintiff against the defendant for $200 with costs on the lower scale.

CHUNG *v.* CHUNG.

CHUNG *v.* CHUNG.

[No. 81 OF 1926.]

1926. JUNE 13, 19. BEFORE DOUGLASS, J.

Amendment of order—Order XXVI., r. 11—Interlocutory application—Order dismissing application containing by error "costs to be taxed"—No costs taxable—Power of judge to give costs of day on such application—Order XLVI., r. 4—Appendix I. Part 1 (*c*)*—Power to amend order to carry out Court's intention.*

Where an interlocutory application is dismissed and an order made thereon contains by error the words "costs to be taxed" when in point of fact no costs are taxable thereon and the intention of the Court was to give the successful party the costs of the day, the Court has power under Order XXVI., r. 11, to amend the order by deleting the words erroneously added and by virtue of paragraph 3 of Appendix I, Part 1 (c) of the Rules of Court, 1900, to fix the said costs.

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

A. V. Crane, for the respondent.

DOUGLASS, J.: The plaintiff, who was successful in opposing an application on the part of the defendant for leave to appeal, is now asking the Court to correct and amend the order made on the 17th April, 1926, in respect of the concluding sentence, "This Court doth order that the said ap- "plication be dismissed with costs to be taxed"; he relies on Or. XXVI., r. 11: "Clerical mistakes in judgments or orders, or errors arising therein from "any accidental slip or omission, may be at any time corrected by the Court "or a Judge." He admits that paragraphs 1 and 2 of Appendix I, Part I. (c) of the Rules do not apply and asks for costs to be fixed under paragraph 3 thereof or under Or. XLVI., r. 4.

I agree that if such costs had been asked for at the hearing rule 4 might have been the authority for granting them. The plaintiff supports his request for amendment of the said order by reference to two cases, *In re Swire* (1885. 30 C.D. 239), when it was held that the Court had jurisdiction to alter the record of its order so as to make it conformable to the order which the Court had pronounced, and *Shipwright* v. *Clements* (1890. 38 W.R. 746), where there was an accidental omission in drawing up the order in the Registrar's Office, and it was held it could be amended. In the present case there was no accidental omission in, but an erroneous addition to the order, and which should not have been there, for without any special direction there were no costs to tax on an interlocutory application which was refused, as in this case. The costs alluded to in the order could only have been any costs to which the plaintiff was entitled in default of any special direction. I am of opinion that the Court not hav-

ing been asked for a sum in lieu of taxed costs cannot now make such a direction under Order XLVI. (4) so that only the third paragraph of (c)—referred to above—and of course the full power of the Court under Order XLVI., r. 1 "to award and apportion costs in any manner it may deem just," can be relied on.

It is true that in *Bentley* v. *O'Sullivan* (1925. W.N. 95) it was held that rule 11 should be strictly construed and used with extreme caution, and even a misunderstanding on the part of the judge or of the practitioner who obtained the order is not sufficient alone to give jurisdiction to amend when once the order is on record, but here there is no mere misunderstanding, there is an undoubted error in inserting the words "to be taxed," when the judge made no such order, and it appears there are no taxable costs. I am of opinion that the only possible costs, in the absence of any directions, are, in this case, the costs of the day, which, once allowed, may be fixed at any reasonable time, though if not fixed at the time the order is made the other party have a right to give their view of what the amount of such costs ought to be in the circumstances.

I have carefully considered "*The Turret Court*" (1901. 84 L.T. 332) but that, after all, only decides that any costs outside the ordinary costs of judgment must be applied for at the hearing, and I feel in a happier position than the President of the Admiralty Court in that case who had to regret that he must refuse the costs then asked, for I am able to allow the costs of the day, and I direct that the Order dated the 17th April, 1926, be amended by striking out the words "to be taxed" and that the costs of this day be fixed at $15.

I cannot, however, allow the plaintiff the costs of this application, as it was necessitated by the initial mistake of adding words not warranted by the judgment.

LAM AND LAM, Appellants,
AND
BOOTH, Respondent.

[No. 13 OF 1925.]

1926. JANUARY 6, 26.

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

Criminal Law—Sunday trading—Employer charged—Sale of liquor—Delivery of liquor by watchman—Watchman not employed to sell liquor—Whether principle as to servant's scope of employment applicable—Summary Conviction Offences Ordinance, 1893, section 193.

In offences of Sunday trading the principle applied in civil proceedings that a master is not liable for the acts of his servant committed outside the scope of his employment has no application.

Appeal by Lam and Lam, owners of a licensed liquor shop, against a conviction on a charge of having by their employee delivered spirituous liquor on Sunday contrary to law. It was proved at the hearing that the purchaser received the liquor from a man who was employed as a watchman by the owners of the shop and it was contended on behalf of the defendants that the employer could not be held responsible for the act of the watchman as the latter was not employed to deliver liquor.

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

C. H E. Legge, Acting Assistant to the Attorney General for the respondent.

The judgment of the Court was read by the Chief Justice:—

The charge against the appellants was that they, being the owners of a certain licensed place, on a Sunday by a person in their employ, delivered spirituous liquor. The charge seems to have been laid under the Licensed Places (Closing Hours) Ordinance, 1902, but that ordinance was repealed by the Shop Closing Ordinance, 1924, and the magistrate dealt with the complaint as under section 193 of the Summary Conviction Offences Ordinances, 1893. That section creates two offences, one of opening, or keeping open, on a Sunday, any shop or other place for the purpose of selling or bartering any goods therein, the other, of selling or bartering or offering for sale or barter, or delivering, any goods on a Sunday, It has been argued for the respondent that the second offence is not limited to the shop or other place, but may be committed elsewhere. That is not so. The actual sale or barter, or offer for sale or barter, or delivery, must, we think, take place in or from the shop or other place, and the provisions of section 195 (1) relating to the personal liability of the owner of the shop or other place confirm that view.

It may be said at once that evidence was given to the magistrate upon which he could find that the liquor was delivered to Mangra, the purchaser, on the Sunday night, over the palings round the appellants' shop premises, by a man called Ford, employed by them as a watchman on those premises, who had got it at the time from the shop, that is to say, the delivery took place from the shop. With the magistrate's findings, therefore, on those issues we cannot interfere. Mangra, even if Ford's, was not shown to be the appellant's accomplice, for we agree with their counsel that the bare fact—and there was nothing else—that the liquor was taken from the shop was not enough to establish their complicity.

The argument addressed to us by Mr. Luckhoo has mainly turned on the question whether the delivery by Ford was made within the scope of his employment, that of watchman, learned counsel submitting the applicability to the case of the principle that a man shall not be held responsible for the wrongful act of his servant when that act is not within the scope of his employment, unless there be some evidence from which his knowledge of, or, complicity with the act appears or may be inferred, that evidence, as has been said, being absent here. The particular point does not appear to have been raised, so far as we are aware, at the hearing of the many decisions of cases like the present in the local courts either of first instance or review. When Ford delivered the liquor he seems to us to have been acting outside the scope of his employment of watchman, and if the principle just stated were applicable, the appellants, his employers, would

not on the facts of the case, be in our opinion responsible for his act But we see no room for the principle to prevail. In 1888 Sir David Chalmers, C.J., in reviewing the decision in *De Souza* v. *Francis* (Rev. cas. 1888, 160) made the following remarks: "The legislature, perceiving the futility of "only prosecuting employees, and knowing or foreseeing the difficulty of "finding evidence of the complicity of employers, invented a method of "bridging over the difficulty by enacting that the responsible employers, "the owners of the goods made the subject of Sunday trading, should in "every event be liable absolutely for whatever contravention of the law "committed by their employees, whether they knew of, or encouraged, or "were in any way accomplices in such contraventions or not—thus putting "on employers the strongest possible pressure to use their authority over "their employees for the maintenance of the law." We concur with the view thus expressed of the effect of the enactment. The words of section 195 (1) could hardly be stronger, for they make the wrong-doing of a member of a man's family and of his employees his own act, precisely as if actually committed by himself, thus shutting out from consideration any such principle as that now urged.

The evidence being what it was, we are clearly of opinion that the appellants were rightly convicted. It is said that in this respect, the law thus puts honest employers in jeopardy every hour at the hands of those who, unknown to their master, secretly use their employment to put money in their own purses by illegal acts. But it is to be remembered that, in the absence of that law, dishonest masters could, with but small ingenuity and a minimum risk to themselves, easily reap a rich harvest at the bands of complicitous servants.

The appeal is dismissed with costs.

WIGHT *v.* RONGEIRON.

WIGHT *v.* RONGEIRON.

[No. 315 OF 1925.]

1926. JUNE 15, 29. BEFORE EGG, ACTING J.

Promissory note—Action against one defendant—Order adding a co-defendant—Procedure—Whose duty to comply with order—Order XIV, r. 15—Misunderstanding of order—No ground for variation thereof.

Where the Court makes an order under Order XIV, r. 15, of the Rules of Court, 1900, that a person be joined as a defendant, it is the duty of the plaintiff, unless the Court otherwise orders, to file an amended copy of the writ of summons and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served.

An Order of Court cannot be varied in its terms unless by application filed and granted and misunderstanding of a rule or statute is no ground for such an application.

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

S. L. Van B. Stafford for the defendant.

EGG, Acting J.: On this action coming on for hearing counsel for the defendant takes the objection that all the parties are not before the Court.

By an order dated 12th September, 1925, in the said action it was ordered, *inter alia* . . . . "and the defendant by his counsel further applying "that the Official Receiver of British Guiana as receiver of the estate of "George Glennie Mutch, debtor, be joined as a co-defendant in this action, "and it appearing from the said affidavit of the abovenamed defendant filed "herein that the said George Glennie Mutch is a party interested in the "subject matter of this action it is ordered that the defendant be at liberty to "defend this action and it is further ordered that the Official Receiver of "British Guiana as receiver of the estate of George Glennie Mutch be "added as a co-defendant to this action."

It appears from the records that nothing has been done in compliance with the said order in respect of adding the co-defendant due to a misunderstanding—as to whether the plaintiff or defendant should do so—and as counsel for defendant states that order has not been varied or set aside and Rule 15, Order 14, of the Rules of Court enacts who should file and serve the amended writ of summons—that the duty was cast on the plaintiff to do so.

The order of Court as signed cannot be varied in its terms, unless by an application filed and granted and no misunderstanding of a rule or statute can vary the terms of the order—and as was said by Scrutton, L.J, in the case of *Bentley* v. *O'Sullivan,*

(W.N. 1925, 95) "If a judgment (or Order) could be corrected on the "ground of 'misunderstanding' it would open a very wide door."

The order dated the 12th September, 1925, not having been varied or set aside in respect of the adding of the co-defendant and from the correspondence read out that passed between the solicitors in this action I order the plaintiff to file an amended copy of the writ of summons in this action and serve such new defendant personally with such writ within 10 days from the date hereof, and it is further ordered that the hearing of this action shall stand over until the pleadings (if any) in regard to the addition of the co-defendant shall have been closed. Under the circumstances costs be costs in the cause.

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

WHITNEY, Appellant,

AND

ISHMAEL, Respondent.

[No. 20 OF 1924.]

1926. JUNE 18; JULY 16.

BEFORE DOUGLASS, J., AND EGG, ACTING J.

Insolvency Ordinance, 1900—Insolvency Rules, 1901—Appeals thereunder—Necessity for security to be lodged for costs of appeal—Rule 97 of Insolvency Rules—Duty of Court to see that conditions precedent to appeal are complied with—Defect or irregularity—Rule 121 of Insolvency Rules—Whether Appeals Regulations Ordinance, 1922, and Rules of Court, 1924 modify or repeal Insolvency Rules, 95-99—Time within which security must be lodged—Special circumstances in which time extended—What are not such circumstances.

It is a condition precedent to an appeal under the Insolvency Ordinance, 1900, and the Insolvency Rules, 1901, that security for costs of appeal should be lodged.

Failure to lodge such security is not a mere defect or irregularity.

Such security should be lodged within the specified time, to wit, 21 days.

The time for appealing under the Insolvency Rules, 1901, has not been modified, altered or affected by the Rules of Court, 1924.

Only in special circumstances will the Court extend the time for appealing and the slip of a solicitor or the mistake of counsel as to the meaning of an enactment will not suffice to warrant the Court in exercising its powers of extension.

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

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

The judgment of the Court was delivered by DOUGLASS, J.:

This is an appeal against the decision of Mr. Justice Berkeley dismissing an application made in the matter of the insolvency Ordinance, 1900, by Cephas Whitney, a creditor in the insolvency of Alice Ishmael, to annul the scheme of composition approved by the Court on the 30th August, 1924. At the conclusion of Mr. Woolford's, K.C., address on the reasons for appeal I drew attention to the fact that rule 97 of the Insolvency Rules, 1901 had not been complied with, relating to the security to be lodged with the registrar for costs of the appeal, no objection on this score had been raised by the other side, but the Court is bound to take notice of any deficiency in the record, and as was held in *Kerr* v. *DeFreitas,* (B.G.A.J. 9.4.07) "The Court has uniformly held that the record laid before it must "itself show that the conditions of Appeal have been complied with, and "there being no evidence before it of such compliance, the onus of proving "it would rest on the appellant"; in that case, and in this the appellant does not deny that no security for costs has been deposited. An appeal is a matter of special provisions and in a case such as this leave has to be—and was—obtained, and it is of course only given on condition that the necessary procedure be strictly complied with. There are many decisions to show that this Court has always insisted on the deposit of security as obligatory both under the Ordinances regulating the appeals from Magistrates, and under the Mining Ordinance but, so far as I am aware, this is the first instance under the Rules of Appeal in Insolvency matters.

Mr. Woolford contended that these rules do not apply as they have been superseded by the Appeals Regulation Ordinance No. 33 of 1922 and the Rules of December, 1924 made thereunder, and that under those Rules (See R. 4 (1) & (4) a deposit for security of costs of an appeal is only necessary if so ordered on application made, and as a proof that it is the Appeal Rules that apply, he referred to R. 6 (3) "The time for appealing from . ". . . any order or decision made in the matter of any bankruptcy or in any "other matters not being an action shall be the same as the time limited for "appeal from an interlocutory order under this rule"; this would make the time 14 days, whereas by rule 96 of the Insolvency Rules the time for appealing is 21 days.

Mr. Woolford also drew attention to the fact that even under Rule 97 of the Insolvency Rules the Full Court might dispense with the security, and that under section 121 of the Insolvency Ordinance "no proceeding in in- "solvency shall be invalidated by any formal defect or by any irregularity "unless substantial injustice has been caused by the defect or irregularity."

To take this last suggestion first, it can scarcely be held that the disregard of a definite condition of appeal is a "formal defect," and all the cases on this section (a parallel section with section 147 (1) of the Bankruptcy Act, 1914) go to show that the defect must not be one of substance. Rule 340 (corresponding to the English Rule 385) is wider even than section 121 when it states "non-compliance with any of these rules or with any rule or "practice for the time being in force shall not render any proceeding void, "unless the Court shall so direct, but such proceeding may be set aside ei- "ther wholly or in part as irregular, or amended or otherwise dealt with in "such manner and upon such terms as the Court may think fit."

I should be chary in applying this rule or section 121 to the rules relating to appeals, but in any event English case law appears to have ignored them so far as regards the necessity for the deposit of security. Neither do I think the Court can now entertain an application to dispense with the security, it is too late, it should have been made at or before the time of making an appeal, *i.e.*, within 21 days from the order of the Court appealed from. That this is so I have not the slightest doubt for in a case where the respondent to an appeal asked to have the amount increased four days after an appeal was entered, on the plea that he could not have made the application before, as till the appeal had been entered he did not know any appeal would be brought, Sir James Bacon, C.J., said, "if the applicant had any intention of requiring that a larger sum . . . . should be deposited in the "event of an appeal from my decision being brought, they ought to have "asked for it when the decision was given and it is now too late to ask to "have the amount of the deposit increased." *Ex parte Lovering. In re Thorpe* (1873. 15 Eq. Ca. 291).

That the special rules in insolvency still apply in spite of the apparent contradiction of the later rules of the Supreme Court (Appeals), 1924 referred to by Mr. Woolford, is shown by several English cases, and this is so by force of Rule 99 of the Insolvency Rules (R. 130 of the English Bankruptcy Rules) which commences "*Subject* to the foregoing rules Ap- "peals to the Full Court (in England to the Court of Appeal) shall be made "in the manner and form as laid down in the rules of the Supreme Court," &c. In the notes to Order 58, rule 9 of the English Rules of the Supreme Court—corresponding to rule 6 (3) of our rules of 1924—the Annual Practice (1926 Ed.) states: "Although rule 15 (our rule 6 (1)) now fixes 14 days "as the time for appealing from an interlocutory order, it seems that the "effect of rule 134 of the Bankruptcy Rules (our rule 96) is that the time "for appealing fixed by rule 130 at 21 days is not altered."

In re Taylor, ex parte Bolton (1909. 1 K.B. 103) followed *in*

re Dallmeyer (given as a footnote to *in re Taylor*) decides that the deposit for security for costs must be lodged, and the appeal entered, and the notice of appeal must be given, within 21 days. The Court will not extend this time unless there are special circumstances; we can find none in this case, and it has been held *in re Victoria* (No. 1.) (1894. 1 Q.B. 259) that the slip or forgetfulness of a solicitor would not constitute such a special circumstance, nor would the fact that an applicant's legal advisers omitted to read the Law Reports for the previous year (*in re a debtor,* 1910, W.N. 224), and where through a mistake of counsel as to the effect of the R.S.C. Ord. LVIII. r. 15 (Our r. 6 (1)) an appeal from a Divisional Court was not brought within the proper time, the Court of Appeal held that there was not sufficient ground for granting leave to appeal. *Re Cole's* and *Ravenshear's Arbitration* (1907. 1 K.B.D. 1).

The Court is of opinion that the Rules of Appeal 95 to 99 inclusive of the Insolvency Rules, 1901 have to be complied with, and that no security as specified in R. 97 having been lodged the appeal is not properly before this Court and must be dismissed with costs.

DECRUCE *v.* THE DEMERARA ELECTRIC COMPANY, LTD.

[No. 2 OF 1924.]

1926. MAY 27; JUNE 10, 14, 17, 28, 29; JULY 17.

BEFORE DOUGLASS, J.

Collision on land—Negligence—Injury causing death—Rights of deceased's relations—Accidental Deaths and Workmen's injuries Ordinance, 1916,—Basis on which damages allotted in such cases—Observations on the reason for citing cases.

(*a*) Where there is evidence of negligence on the part of the plaintiff, it should be left to the jury to say whether such negligence proximately contributed to the accident.

(*b*) The onus of proving contributory negligence rests in the first instance on the defendant.

(*c*) Cases should be cited for the principles enunciated in them. Comparisons of the facts of one case with those of another for the purpose of endeavouring to ascertain the conclusion to be arrived at in the second case are generally useless.

(*d*) A relative of a deceased person who claims under the Accidental Deaths and Workmen's Injuries Ordinance, 1916, need not prove any loss of legal right. It is sufficient to prove a reasonable expectation which might well exist even though the deceased had never contributed to the support of the plaintiff, but expenses incurred through the loss are not to be included in the estimate of damages.

The facts sufficiently appear in the judgment.

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

H. C. Humphrys, for the defendant.

DOUGLASS, J.: The plaintiff is claiming damages and compensation for the loss by death of his son William DeCruce from injuries received on the 7th July, 1923, due to the alleged negligence and unskilfulness of the defendant company's servants.

It appears that the deceased William DeCruce was a passenger in bus No. 630 proceeding from Diamond in a northerly direction to Georgetown; bus No. 933 was coming in the opposite direction from Georgetown going south, as they approached each other at Prospect, the road being narrow, they both slowed down, but bus 933 getting on to a doubtful part of the parapet on the east side of the road swerved back and a portion of it struck not only the conductor of bus 630 but also the said W. DeCruce, precipitating the former into the bus and the latter on to the road. William DeCruce died in the Georgetown Hospital on the 12th July, 1923, from the effects of this accident. I cannot treat seriously Mr. Humphrys' suggestion that the identity of the person injured by being thrown out of bus 630 with W. DeCruce who died in hospital has not been proved, to say the very least there must have been good reason why Jones and Green the conductor and driver respectively of the bus gave evidence at the inquest.

Both buses were the property of the defendant company and were driven by their servants. Neither of the buses were damaged nor marked by the so-called collision, but on the evidence adduced it is clear that certain portions of bus 933 came into contact with the conductor of bus 630 and with W. DeCruce, and not with bus 630 itself. Jones, the conductor referred to, admits that he was standing on the right hand footboard collecting fares with a portion of his body protruding beyond the lines of the bus; the evidence of the position of DeCruce when struck is very contradictory and must be considered in detail before the questions of negligence or contributory negligence can be discussed.

There is considerable difference too in the evidence of the make and dimensions of the two buses, this may be due partly to alterations made in them by the defendant company; the rough sketch put in by the defendants turned out to be wrong in several particulars. The following details may be accepted as correct: Bus 630 was registered in 1918, transferred to defendant company in February, 1923, had four rows of seats open at the ends and a capacity to carry 19 adults, and had a right hand

driving wheel; Bus 933 was registered in 1920 and licensed to carry 21 adults and when transferred to the defendant company in April, 1923, it had 5 rows of seats with a handrail or arm at the ends and was licensed for 22 adults. It had a left hand driving wheel and was of a heavier build and had stronger springs and I am also satisfied from the evidence that the footboard of bus 933 was higher from the ground than that of bus 630, especially when it was not full up. I cannot trust Sylvestre's evidence to the contrary as parts of his evidence were not more correct than his drawings of the buses. I might here take the evidence relative to the width of the road at the spot where the buses passed each other, it was measured by Inspector Matthey and his sworn evidence at the inquest on the deceased is accepted by both parties. He states bus 630 at extreme width was 6 feet and bus 933 was 5 feet, 8 inches, a total width of 11 feet, 8 inches, and the road was 12 feet, 3 inches in width with another 3 inches perfectly safe on each parapet, this would give the buses an extreme margin of 1 foot, 1 inch to pass

There were apparently two wider spots on this narrow stretch of road at Prospect where it is customary to wait for the other bus, but Green, the driver of bus 630, says that having passed the first spot going north the other bus should have waited but did not, and that he pulled up to from 4 to *5* miles an hour, and on his extreme left on seeing bus 933 approaching.

Now to go back to the position of W. DeCruce on bus 630; he took the back outside seat on the right and apparently the conductor Jones—according to a written statement made on the 8th July—offered him another seat on the first bench, or as he now says, told him to get in front, why he did this does not appear, but DeCruce refused to move as he was only going as far as Farm; it may here be noted that the bus was full up at the time of the accident. All the plaintiffs' evidence goes to show that DeCruce sat with one foot on the footboard and, there being no handrail, his right shoulder would project slightly; the witnesses best able to judge say he was not standing on the footboard nor leaning out. Both Jones and Green in their respective accident reports to the defendant company state that deceased at moment of accident was "sitting half way on last bench with one "foot on foot-board." Now contrary evidence is given by Drakes, the driver of bus 933, he says: "I saw a policeman, holding on to back upright with "one hand, his feet on footboard and he was leaning out"; but a curious fact is that he never noticed the conductor on the upper footboard although he was in front of the policeman and must have partially obscured him. Drakes also says he told Green that police was hanging out but Green denies this.

The witness Hunte says he saw policeman standing on footboard with his hand around post leaning over on right hand side, he also saw the conductor on the footboard. Then Lachan, the conductor of bus 933 says, "I "saw a man on footboard of bus 630 hanging out, left hand round rail, "standing on footboard," he too did not see the conductor. Extracts from the reports sent in by Jones and Green, undated, by the way, are of very little service, I have seen the originals and they are mere parrot repetitions of each other; the reports of the conductor and driver of the other bus 933 have disappeared.

I desire to draw attention to the need of more reliable and independent reports in such cases as this and of proper filing. The absence of the two reports referred to throws grave doubts on the *bona fides* of the company's defence. It is obvious that a report made at once with the facts fresh in the reporter's mind and before there has been a chance of tampering with him is of the greatest importance and use when made independently, and should be of as much assistance to the Court as the preliminary act is in an Admiralty case. To find a form of Accident Report headed "Report the truth the whole truth and nothing but the truth," and then apparently a dictated report following makes the proceeding a farce and is to the discredit of the company which permits such a thing. I cannot then put much trust in the evidence of either Drakes or Lachan, and as for Drakes one is led to believe that it may be to his benefit, that his report is not in evidence.

As the evidence of the two conductors and of the two drivers is in the main contradictory I am driven back to the evidence of independent witnesses of the position of DeCruce at the time of the collision. Hunte is the only one who says he was standing on the footboard but 1 must take into account it was only the second time that Hunte had been on a bus and it might well be that the right leg of DeCruce resting on the footboard would give the appearance of standing from his point of view. The evidence of both Boodhoo and Ramdeen, the persons nearest DeCruce, goes to show that he was not leaning out but resting his right foot on the footboard, and more important still, no one at the time of the accident accused the policeman of leaning out, and Ramdeen adds that the policeman held on to his jacket to save himself and ripped it up, almost an impossible position if he had been standing on the footboard and leaning out as the defence described.

Without going further into detail the evidence seems to prove that there were two contacts, at the first the front of bus 933 struck the conductor Jones on bus 630 and next swerving away the back part, or perhaps the stanchion by the third seat of bus 933 struck the policeman, he having already lost his balance

either owing to the collision with Jones or to the front of the footboard of bus 933 (which was higher than bus 630) having first swept away his right foot which supported him. This view is in a measure confirmed by the post mortem examination. The actual injury from which W. DeCruce died, rupture of the spleen, which is mainly on the left side could scarcely have been caused by his first contact with the bus and was probably due either to being jammed between the two vehicles or to dropping on to the road.

The story as now told by Drakes of why he went so far on to the parapet is difficult of belief, more especially as nothing was said about it at the time except that he swerved back because he found the bus slipping. It also comes out in the evidence that if he only noticed DeCruce when about 15 feet away he could not have been keeping a proper look-out, and DeCruce could not have been as conspicuous an object as he makes out. The whole evidence indeed points to carelessness in driving on a dangerous portion of the road. Drakes admits that the road was wide enough for him to pass but it needed care, and on his own showing he did what is a very common thing in this colony, he kept to the centre of the road, too late in the circumstances, and having in consequence to make a sudden swerve off to his side went too far on the parapet, and was obliged to swerve back to avoid upsetting his bus; had he kept to his left side and his further inclination to the left, if necessary, taken gradually when the other bus appeared, the accident could never have occurred.

I must hold that he a servant of the defendant Company was guilty of negligence. But learned counsel for the defendant Company says that even if this is so the deceased was guilty of contributory negligence which was the ultimate cause of the accident, in short had not DeCruce been in the position in which he is alleged to have been, the collision, if it occurred, would not have affected him. It was held in *Walton v. L.B. & S.C. Rly. Co.* (1866. 14 L.T.R. 253) that when there was evidence of negligence on the part of the plaintiff it should be left to the jury to say whether such negligence approximately contributed to the accident. The onus of proving affirmatively that there was contributory negligence on the part of the person injured rests in the first instance upon the defendants (*Wakelin* v. *L. & S. W. Rly. Coy.* 3 T.L.R. 233).

There can be no personal evidence in the present case as the unfortunate man died without making any statement. Even assuming a slight want of care on the part of the deceased in taking the position in the bus which he did—and after all the evidence shows that it was almost an inevitable one in a crowded

bus with no protection at the end of the seats—it does not excuse the defendant from his reckless and negligent act, or entitle him to say that the want of care of DeCruce cancelled his negligent conduct, for if he could by the exercise of ordinary care and diligence have avoided the mischief then the plaintiff's negligence would not excuse him. There were several cases referred to by learned counsel on both sides but I will only refer to the judgment of Lord Finlay in *Craig* v. *Glasgow Corporation* (1919. 35 T.L.R. 214) where he said that the use of cases was for the proposition of law which they contained, and it was of no use to compare the facts of one case with the special facts of another for the purpose of endeavouring to ascertain the conclusion to be arrived at in the second case.

I have gone into the facts at some length and have already stated that I do not consider it has been proved that W. DeCruce had any portion of his body projecting beyond the step though his right leg and shoulder, may be, were beyond the line of the bus, and bus 933 must have trespassed on bus 630 or DeCruce would not have been touched. I do not know how I can infer that this was negligence on his part, though it might possibly have been on the part of the Company to permit their bus 630 to be running without any protection to the ends of the seats; after all the footboard is a portion of the bus and was in this case covered by an extra roof which projected above it, and there should be no expectation that anyone's leg braced on the step would be in danger from any outside cause. I do not find that the position taken by DeCruce was such an act of negligence as to serve as an excuse for the defendant's carelessness or that it was proximately or even remotely the cause of the accident. It has been said "the peculiarity of "contributory negligence is that it proceeds on the assumption that both "plaintiff and defendant have been guilty of some breach of duty and the "enquiry is limited to which of the two, by exercising ordinary care, had "the last opportunity of preventing the occurrence." After a careful consideration of all the facts I am of the opinion that Drakes, the servant of the defendant Company, by the exercise of ordinary care and skill, could have avoided the mischief and that the defendant Company is therefore liable in damages. The action is brought by the father of the deceased, who died unmarried and without leaving a will, under the provisions of Part 1 of Ordinance No. 21 of 1916. For a basis on which damages are allotted in such cases as this I was referred to *Franklin* v. *The S. E. Rly Coy.* (1858. 6 W.R. 573) where the defendant company was sued under the parallel English section of 9 and 10 Vic. c. 93, on which our Ordinance is founded, it was there held that there need not be any loss of legal right on the

part of the plaintiff, "reasonable expectation is enough and such reasonable "expectation might well exist, though, from the father not being actual in "need, the son had never done anything for him." In the present case it is shown that W. DeCruce did assist his father. A case followed immediately after the above, *Dalton* v. *S. E. Ely Coy.* (6 W.R. 574) when the principle was confirmed and it is further stated that "the subject matter of the statute "is compensation for injury by reason of the relation not being alive," but expenses incurred by the loss cannot be included. I accordingly assess the damages at $275 and costs.

THIERENS, Appellant,

AND

FERNANDES, Respondent.

[No. 200 OF 1926.]

1926. JULY 2, 7; AUGUST 6.

BEFORE BERKELEY, ACTING C.J., DOUGLASS, J., AND EGG, ACTING, J.

Barrister—Claim for fees by way of "quantum meruit"—Legal Practitioners Regulation Ordinance, 1897, section 15—Meaning of the terms "special agreement" and "business" contained therein—Bill of costs—Service thereof condition precedent to a claim "quantum meruit."

The respondent a barrister-at-law was employed by the appellant to bring about a settlement of certain proceedings then pending between the appellant and a third party. It was orally agreed between the appellant and the respondent that the former would pay the latter the sum of $20 if he succeeded in obtaining from the third party a written apology to the appellant and payment of the sum of $120. A cheque for the sum of $120 was sent by the third party and a letter of regret written by that party's counsel. Subsequently thereto the appellant refused to pay the respondent the sum agreed upon and insisted upon the legal proceedings being continued which the respondent declined to do.

Held (Per BERKELEY, ACTING C.J., AND EGG, ACTING J.) :—(a) That the agreement came within section 15 of the Legal Practitioners Regulations Ordinance, 1897, and not being in writing could not be enforced.

(*b*) That even if the claim could have been brought by way of "quantum meruit" the serving of a bill of costs was a condition precedent which had not been fulfilled in this case.

(*c*) The term "business" in section 15 of the said Ordinance connotes business done or to be done in connection with some proceeding or matter in Court, and does not include work done or services rendered by a solicitor for his client in other matters, *e.g.*, negotiating a purchase or sale or arranging a mortgage of property or preparing documents not intended for use in Court.

(*d*) The term "special agreement" in section 15 of the said Ordinance must have reference to some business to be transacted in the Court or offices of the Court in connection with some proceeding or matter whether of a contentious or non-contentious matter.

Per DOUGLASS, J. (dissenting):—(*a*) That the appellant having declined to accept the terms obtained for him by the respondent, the only course open to the latter was to take proceedings by way of "quantum meruit" for services rendered, and in such proceedings evidence of the oral agreement could be given to indicate what was a fair and reasonable sum for the services rendered.

(*b*) *Semble,* that the agreement in question did not come within section 15 of the Ordinance.

Appeal from a decision of the Stipendiary Magistrate for the East Coast Judicial District given in favour of the respondent a barrister-at-law who claim the sum of $20 as a fair and reasonable sum for services rendered by him for the appellant.

The facts appear in the judgments below.

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

The respondent, in person.

BERKELEY, Acting C.J.: This is an appeal from the decision of the Stipendiary Magistrate who ordered the appellant to pay $20 claimed as due and payable for work done and services rendered by the respondent as a legal practitioner for and on behalf of the appellant at his request, the said amount being a fair and reasonable remuneration for his services. The particulars set out that it was verbally agreed that this amount should be paid by appellant on his obtaining a written apology together with the payment of $120 as costs and compensation to appellant in the assault cases instituted against the Holders, the said cases to be thereafter withdrawn which said terms were fixed and accepted by appellant and concluded by the respondent on his behalf in his presence.

The appellant appeals on the ground that the decision is erroneous in law and unwarranted by the evidence as set out in the reasons of appeal.

The respondent who appears in person submits that his claim which is made under the Legal Practitioners Ordinance, 1897, (s. 14) is based on a *quantum meruit* and not on a written agreement (s. 15). In *Farnum* v. *Serrao* (B.G.A.J. 1898. 19) the plaintiff sued the defendant to recover $50 alleged to be due under a verbal agreement. The agreement was that plaintiff was to be paid this sum for drawing up a petition to the Governor and the necessary work in connection therewith. The petition was prepared and handed to the defendant who subsequently refused to pay the $50. The magistrate dismissed the action on the ground that to be valid in law the agreement should be in

writing. On appeal the plaintiff contended that the services rendered were not peculiar to a Barrister or Solicitor and could have been rendered by a non-professional man and therefore section 13 (now 15) did not apply. Section 15 is not to be found either in the Attorneys' and Solicitors' Act, 1870, (Ch. 28, XXXIII. and XXXIV. Vic.) or in the Solicitors' Remuneration Act, 1881, (Ch. 44., XLIV. and XLV. Vic.) although the said section 15 seems to be based on section 4 and section 8 respectively of the Acts herein referred to. It reads: "No special agreement otherwise valid in law between "a barrister or solicitor and his client as to the amount or manner of pay-"ment for the whole or any part of any past or future services, fees, charges "or disbursements in respect of business done or to be done by such barris-"ter or solicitor shall be good and valid in law unless the same is in writing."

Chief Justice Smith, in the course of his decision after setting out this section, says that he is of opinion that the "business" mentioned in this section must be business connected with the profession of a barrister or solicitor, business in which he was employed because he was a barrister or solicitor, and he is further of opinion that the "business" with respect to the performance of which a special agreement may be made is business either contentious or non-contentious to be performed or done in connection with some legal proceeding or matter.

In the present case there was a criminal proceeding before the magistrate and the verbal agreement was that on payment of $120 the criminal proceedings would be withdrawn. The Chief Justice then refers to the words "business done" in section 11 (now 12) and says that it clearly appears to him that those words have reference only to business done in connection with some proceeding or matter in Court and would not include work done or services rendered by a solicitor for his clients in other matters, *e.g.*, negotiating the purchase or sale, or arranging a mortgage of property, or preparing documents not intended for use in Court. He adds later on, that he is of opinion that the special agreement which is required to be in writing must have reference to some business to be transacted in the Court or offices of the Court in connection with some proceeding or matter whether of a contentious or non-contentious character. He found that the decision of the magistrate was wrong on the ground that a petition to the Governor did not come within the section.

I refer at length to this case as it shows the learned Chief Justice's construction of section 13 (now 15). I agree with the construction placed thereon and it seems to me that if a claim such as the present one did not come within the provisions of that section the section itself would become inoperative,

Respondent has urged very strongly that his claim is one of *quantum meruit* under section 14 (2) of the Ordinance and cites the case of *Sirikissoon* v. *Fernandes* (himself), (B.G.L.R. 1923, p. 1). I propose to point out the difference between that case and the present one In that case there was no agreement as to the fees to be paid. Remuneration for his services had been promised and the respondent had charged £12. 10s. for his services. The learned Chief Justice said that a "bill of costs" should be delivered before suit for the recovery of the amount of that bill, but he accepted as "the bill" a certified copy of a letter written by the respondent to the appellant who had received it and in that letter the services rendered and the amount of his charges were set out. The Chief Justice adds that he did this with some hesitation and that barristers would do well perhaps always to deliver a bill of costs (strictly so-called) in the event of the existence of an opinion thereon differing from his. In the present case there is nothing in writing which can be regarded as a "bill of costs" and in fact there could not be as it is admitted that the payment of $20 was a verbal promise on condition that the appellant received $120 as compensation.

In my opinion as the law requires that a bill of costs is to be delivered before suit for recovery of the amount claimed in a *quantum meruit,* it is essential that a bill of costs be delivered.

It is unnecessary to deal with the other reasons of appeal. I hold that the appeal must be allowed with costs.

DOUGLASS, J.: This is an appeal against the decision of the Magistrate of the East Coast Judicial District in finding for the plaintiff, a barrister, the amount claimed by him, $20, for services rendered, and costs.

There are several reasons given for the appeal, but the main one in my opinion is 1 (e), The learned Magistrate was wrong in holding that the action was based on a *quantum meruit* because the plaintiff in cross-examination swore as follows: "am suing defendant on his (meaning the defendant) verbal agreement to pay $20, the terms having been agreed on in his presence."

I say the "main one" because it seems to me that if this Court held that the action was one on a *quantum meruit* all the other objections to the suit (1) on the grounds of champerty and maintenance, (2) No written bill having been delivered and (3) the alleged agreement being oral and not in writing as directed by section 15 of Ordinance No. 18 of 1897 fall to the ground for want of any foundation.

The particulars annexed to the summons declare that the plaintiff claims from the defendant the sum of $20 being the amount due owing and payable by the defendant to the plaintiff

for work done and services rendered by the plaintiff as a legal practitioner. . . . the said amount being a fair and reasonable remuneration for the said services as per particulars. The particulars follow: "To this amount verbally agreed on to be paid by defendant to plaintiff for—here follow services—which said terms were fixed and accepted by the defendant and concluded by plaintiff," &c.

At this stage there can be no doubt that the suit was on a "quantum meruit"—it says so in so many words—and that the agreement referred to was offered as evidence of this fact that the amount charged was reasonable because the defendant had accepted it as such. The summons in referring to the particulars says: "A copy of whose claim (*i.e.*, the plaintiff's) is hereto "annexed," and what is the claim? That he has rendered services for which $20 are a fair and reasonable remuneration, not that the defendant has agreed to pay him $20 and he sues on that agreement. In proof of the particulars supporting his claim the plaintiff gave in evidence in chief, "I told "him (*i.e.*, defendant) I would meet him half way (*i.e.*, accept a fee of $25 "instead of $50), on condition he would give me something further in event "of compensation being obtained." (p. 4) "I reminded defendant of his "promise to pay me a further fee in event of my succeeding in getting com-"pensation." He then said, "Mr. Fernandes I will be quite satisfied with $100 and will pay you $20." (p.5) "The $20 offered me by defendant is a "*fair and reasonable remuneration* for my services in obtaining the amount "and written apology." (p. 7) On his cross-examination Mr. Fernandes made use of the expressions taken in the Reasons of Appeal as proving that the suit was brought on the oral agreement, and not on a "quantum meruit." I confess I do not take it so; conflicting statements by a witness cannot possibly alter the initial nature of the suit. Take for example that I sue on a simple debt due to me, on a loan, there has been a promissory note but it is not in order, so I sue on the debt, and in the course of the hearing the fact that a promissory note was given is emphasised and on cross-examination I state (foolishly) "I am suing on that amount secured by the promissory note" it does not alter the fact that it is the debt I am proceeding for, and not on the promissory note.

There is no question of insufficient consideration in this case, it is true that a past consideration will not support a contract, but a request to do a certain act or give certain services raises the inference of a promise to pay a reasonable sum in return for that act or those services, and a subsequent promise to pay shows what is thought reasonable. As Bowen, L.J., says *in re* Casey's Patents (1892. 1 Ch. 116): "That promise may be treated

"either as an admission, which evidences, or as a positive bargain which "fixes the amount of that reasonable remuneration on the faith of which the "service was originally rendered." Although the alleged agreement might be void under section 15 of the legal Practitioners Regulation Ordinance, 1897, I do not now give an opinion—it would still be perfectly good evidence of what was thought reasonable remuneration and the magistrate has apparently accepted it as such.

Furthermore the terms offered by Mr. Fredericks in his letters of the 17th April, 1926, were never accepted by the defendant, as is evidenced by the fact that the suit was continued and there remained no sum of $120 from which to deduct the $20; it is not proved what became of the cheque (Exhibit G.) but it must have been either destroyed or returned, and the only step left to the plaintiff was to sue on a *quantum meruit.* The principle involved in *Rickett* v. *Badger* (1856. 1 C.B.N.S. 296) is applicable, and the law would imply in these circumstances a promise on the defendant's part to remunerate the plaintiff for his services although the arrangement made by the plaintiff on his behalf was never carried through. I do not consider it necessary to consider the present claim in connection with sections 12 and 14 (1) of the Ordinance, as it does not relate to matters in respect of which a tariff of costs has been prescribed by law.

Sections 14 (2) of the Legal Practitioners Regulations Ordinance, 1897, states: "In any proceeding in any Court in which the amount of any bill of "costs is sought to be recovered or is disputed, any Court or Judge before "which such proceedings are pending shall decide whether the fees charged "relating to matters for which no tariff of costs has been by law prescribed "are excessive, or are a fair and adequate remuneration for the work done "and services rendered."

It might be contended that as the word "Court" is defined in section 2 of the Ordinance as meaning the Supreme Court of British Guiana a magistrate would have no jurisdiction under this section. This Court was referred to a case of *In re J. H. James* (1895. 65 L.J. 191) where it was held that business done by a solicitor in a "Police Court" or at "Quarter Sessions" is not done in any Court within the meaning of the Attorneys and Solicitors Acts, 1870, section 8, but that decision turned on the argument that to so extend the meaning of any Court would be giving a Police Court Magistrate or Justice jurisdiction over a subject otherwise outside the exercise of his jurisdiction, and that the words "actions," "suits," &c, were applicable only to proceedings in a Supreme Court. That argument would not apply here for quite apart from this section, a magistrate whose civil jurisdiction is largely that of a County Court Judge in

England has power under the Petty Debt Recovery Ordinance, 1893, to hear and determine actions such as this, and I should hold that the words "In any Court," by natural inference took it outside the definition of Court, just as surely as the barrister or solicitor in the previous sections is not confined for his practice to the Supreme Court of British Guiana under the definition of Court, but is entitled to practice "In any Court." The learned magistrate held that the evidence supported the claim for a *quantum meruit*, and I cannot find that his conclusion was not warranted on the facts, consequently I am of opinion that this appeal should be dismissed with costs.

It might, I suppose, still be contended that the suit, whether on the contract, or for a *quantum meruit*, was void and illegal as tainted with maintenance or champerty. "Maintenance" is defined by an early writer as, "Where any man giveth or delivereth to another, that is, plaintiff or defen-"dant in any action, any sum of money or other thing for to maintain his "plea or maketh extreme labour for him when he hath nothing therewith to "do." "Champerty" is maintenance in which the motive of the maintainor is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject matter of the suit shall be divided between the plaintiff and the maintainor. Originally the suit could only have relation to lands recovered; various statutes extended its scope. The Solicitors Act, 1870, section 11, made illegal any agreement by a solicitor in a suit to stipulate for payment only in the event of success in such suit. The case of *In re Attorney and Solicitors Act*, 1870, (1875. 1 C.D. 573) referred to by Mr. Browne, K.C., (as also the other cases of professional misconduct), depends upon this section in its finding that the agreement was champerty; we have no such section applicable in this colony and the eases do not apply. Every Court has inherent jurisdiction to prevent abuse of its proceedings but I doubt whether, in the absence of legislation, a legal practitioner who in good faith arranges to be paid on a scale proportionate to his success is guilty of any offence. See *Findon* v. *Parker* (1843. 12 L.J. Ex. 444). And again, this alleged agreement did not involve litigation, on the contrary it was to stop it, and so would not be void or illegal for maintenance and champerty even under section 11 of the Solicitors Act, 1870.

EGG, Actg. J.: This is an appeal from the decision of the Stipendiary Magistrate of the East Coast Judicial District who gave judgment in favour of the respondent on a claim brought for $20 for work done and services rendered by the respondent as a legal practitioner at the request of the appellant.

The evidence before the magistrate shows that the appellant engaged the respondent, a barrister-at-law, practising before the courts of this colony, to write one Holder demanding an apology, payment of $150 as compensation and $100 to be paid to charity, for an assault. This respondent did, *vide* Exhibit "C"—Letter—charging appellant $50 for his services, but eventually agreeing to take $25 on condition that the appellant gave him something further in the event of compensation being obtained—to this appellant agreed and paid $10 on account.

Before, however, any definite offer of compensation was forthcoming, respondent advised institution of criminal proceedings against the Holders "to bring matter to a head" which was done, respondent thereafter receiving a further sum of $15.

Pending the hearing of the criminal cases, appellant and respondent went into figures as to the amount of compensation likely to be accepted and decided on $120, when on respondent reminding appellant of his promise to pay a further fee in event of getting compensation—appellant said: "Mr. Fernandes I will be quite satisfied with $100 and I will pay you "$20." This was on the 17th April, 1926. Later, same day, in appellant's absence a cheque for $120 together with a letter of regret signed "E. F. "Fredericks" were received by the respondent. Two days after the appellant telephoned the respondent stating that he (appellant) did not want to settle matter—but desired the criminal case to proceed. Respondent objected to this course claiming he had done his part.

Learned counsel for appellant urges that the learned magistrate was wrong in deciding that the action was based on a *quantum meruit*, because the defendant in cross-examination swore: "I am suing defendant (appel- "lant) on his verbal agreement to pay me $20, the terms having been agreed "on in his presence" and here I say at once that the plaint is one for remuneration *quantum meruit, but* the point for decision is whether the evidence establishes that the respondent can succeed on a claim for *quantum meruit*—or at all.

For success of the respondent one has to see whether he has done everything on his side to entitle him to sue, if the appellant refuses to perform his part. Now, it cannot be denied that throughout the terms of settlement—the apology from Holder to the appellant came first and thereafter the compensation. Has the respondent so obtained an apology for the appellant—if one can be interpreted through Exhibit "F." in compliance with the demand Exhibit "C."—In my opinion no such apology has been obtained, further, on the appellant stating he was not considering terms, the respondent indicated that he would refuse to carry on the criminal cases and report cases as settled. For

these reasons I am of opinion that the respondent is not entitled to judgment and the learned magistrate erred when he so did hold. But assuming for argument that the respondent is entitled to judgment in his favour then I am faced with reasons (c) and (d). Reason (c) is as follows:—"If by the "Legal Practitioners Ordinance, 1897, the plaintiff (respondent) is entitled "to sue on the alleged promise or agreement, the delivery by the plaintiff "(respondent) to the defendant (appellant) of a bill of costs or letter of de-"mand is a condition precedent to a suit being brought for the recovery of "the amount and none was delivered."

In the case of *Sirikissoon* v. *Fernandes* (1923. L.R.B.G.) in the course of a lengthy decision Sir Charles Major, C.J., said: "But there is much in "Mr. Browne's contention that the claim must have been founded (as the "sub-section says) on a bill of costs. 'The controversy is one concerning a "particular professional relationship and its incidents. The expression 'Bill "of Costs' is a term of art, it connotes delivery of the bill before suit for "recovery of the amount of that bill." In that case reference was made to a letter which the learned Chief Justice with some hesitation stretched and regarded as the bill of costs to be delivered prior to the issuing of process, whereas in this case no such bill of costs or even a letter has been delivered—in spite of the advice of the learned Chief Justice to barristers in like cases when suing, and here again I disagree with the decision of the learned magistrate, wherein he stated, "In the present case plaintiff (respondent) is "suing for an amount which he claims is a fair and reasonable remuneration "for his services and it cannot to my mind be looked upon as part of a bill "of costs as I understand that expression. In any case were it necessary to "deliver a bill of costs as argued by Mr. Browne I am prepared to follow "the opinion expressed by the learned Chief Justice in *Sirrikissoon* v. *Fer-*"*nandes* and merely direct the formal delivery of such to the defendant "(appellant) being satisfied that the defendant (appellant) has had ample "and sufficient notice of the amount plaintiff (respondent) is entitled to for "his work he having himself not only suggested the amount of the remu-"neration but actually agreed to pay it," because the sub-section under which the respondent lays his claim deals with the recovery of a bill of costs where no tariff of costs has been by law prescribed and the non-delivery of same prior to suing cannot be waived in the sense the learned magistrate indicated.

As to reasons (d)—the alleged agreement or promise on which the plaintiff (respondent) sued being oral and not in writing is invalid and unenforceable against the defendant (appellant) *vide* section 15 of Ordinance No. 18 of 1897.

It will be noticed that in both of the English Acts of 1870 and 1881, XXXIII, and XXXIV. Victoria, Chap. 28 and XLIV, and XLV. Victoria, Chap. 44 relating to remuneration of attorneys and solicitors as to contentious and non-contentious business neither of the Acts prevent solicitors from entering into agreements with their clients as to costs, fees, etc., but enable them to do so, specifically, however, laying down the procedure to be adopted in enforcing such agreements, if made, in writing. On comparing these Acts with Ordinance 18 of 1897 (The Legal Practitioners Regulation Ordinance) I find that section 15 of the Ordinance which reads:—"No "special agreement otherwise valid in law between a barrister or solicitor "and his client as to the amount or manner of payment for the whole or any "part of any past or future services, fees, charges or disbursements in re- "spect of business done or to be done by such barrister or solicitor shall be "good and valid in law unless the same is in writing" is the only section dealing with agreements between barristers or solicitors and their clients and I concur with the dictum of learned Chief Justice Smith in his decision in *Farnum* v. *Serrao* (1898. L.R.B.G.) wherein he stated on a construction of the said section which was then section 13 of the said ordinance "that "the business with respect to the performance of which a special agreement "may be made is business either contentious or non-contentious to be per- "formed or done in connection with some legal proceeding or matter." The respondent in this case was engaged to do business, of a contentious nature and in the course of such business the agreement was made to pay him something further in the event of compensation being obtained—which said agreement was further strengthened by the appellant saying "Mr. Fer- "nandes I will be quite satisfied with $100, and I will pay you $20." Again in *Farnum* v. *Serrao* "the learned Chief Justice stated that the plaintiff in "that case was contending that the law does not say that no agreement be- "tween a barrister Or solicitor and his client shall be good unless in writing, "but only that no 'special Agreement' shall be valid, that some meaning "must be placed upon the word special and the meaning he asks the Court "to place upon it is an agreement by which a barrister or solicitor under- "takes to do a client's business for other remuneration than that which he "would by virtue of any scale of fees in force be entitled to receive." I agree with that contention and go further and say that the "manner of pay- "ment" mentioned in section 15 means "depending on result" or "charging nothing if successful," "if unsuccessful a certain amount" or *vice versa.*

The respondent received $25 for his services—qua barrister—whether he succeeded or not and made an agreement to be paid

$20 in the event of his obtaining an apology and $120 as compensation—an agreement made as to the manner of payment in respect of business done by a barrister in a contentious matter. I am therefore of opinion that the agreement comes within section 15 of the ordinance and should be in writing to be enforceable.

Finding for the appellant on these reasons I have not dealt with the others.

Appeal allowed with costs.

Appeal Allowed.

HAYNES *v.* THE TOWN CLERK OF NEW AMSTERDAM.

[No. 245 OF 1926.]

1926. JULY 27, 28; AUGUST 4, 12.

BEFORE BERKELEY, ACTING C.J.

*Town Council—Election of councillors—Vacancy created by absence of councillor—Position of councillor elected to fill vacant seat—Seniority of councillors—New Amsterdam Town Council Ordinance, 1916, sections 17, 20, 22, 2*5.

(a) Where a councillor is elected to till a vacancy created by the absence of another councillor, such elected councillor's term of office dates from his election and not from the election of the former councillor.

(b) The question of seniority of councillors referred to in section 17 of the New Amsterdam Town Council Ordinance, 1916, is to be decided by the number of votes obtained and not by the circumstance that one councillor took the oath before the other. The Councillor who obtains the majority of votes is to be deemed the "settlor" councillor.

Claim for a declaration that a certain councillor of the New Amsterdam Town Council did not, go out of office by effluxion of time and that a notice for election of a councillor in his place was illegal.

Ex parte application for injunction against nomination of candidate. Interim injunction granted and notice of application and of order served on respondent. Agreement to treat interlocutory proceedings as final hearing. The facts of the case appear in the judgment below.

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

G. J. DeFreitas, K.C., for the respondent

BERKELEY, Acting C.J.: The plaintiff is a registered voter under the New Amsterdam Town Council Ordinance, 1916, and he claims (1) a declaration that Mr. Joseph Eleazer, who was an elected Councillor for the Town of New Amsterdam, did not in law go out of office by effluxion of time as found by the Mayor and Town Council on 30th June, 1926, and (2) that the notice published in the *Official Gazette* of 3rd July, 1926, for the election of a councillor in his place was illegal or improper. This notice is dated 1st July and refers to the seats of Messrs. Peters and Eleazar as having become vacant and calls on all registered voters to elect two councillors at the time and place fixed. A second notice of the same date fixes eleven o'clock on 7th July, 1926, at the Town Hall as the time and place.

On an *ex parte* application to restrain the nomination of candidates to fill the office of councillor held by Mr. Eleazar the Court on 6th July granted an interim injunction and ordered notice of the application to be served on the defendant and directed that the matter come on for hearing within three weeks from the date of application.

On 16th July an appearance was entered and on the 27th July when the matter came on for hearing, it was agreed by counsel on both sides that this hearing should be regarded as the trial of the cause.

The first point for consideration is whether Mr. Cooper who was elected on the 11th January, 1926, to fill the seat of Mr. Carrega (which had become vacant under section 20) is senior to either Mr. Abbensetts or Mr. Eleazar inasmuch as he occupies the seat of Mr. Carrega. No doubt if he had remained in office he would have gone out on the 1st day of July, 1926, (s. 17). Mr. Carrega had absented himself out of the colony after the expiration of his leave and his seat thereupon became vacant (s. 20) and a notice was issued for the election of a new member to serve in his place. The new member was Mr. Cooper, and in the absence of any provision in the Ordinance that the new Councillor's term of office should date from the election of the councillor whose seat had become vacant I am of opinion that Councillor Cooper's assumption of office dates from 11th of January, 1926, when he was elected.

The second point is the construction to be placed on section 22 of the Ordinance which 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," (see in the matter of the petition of Robinson, (B.G.L.R. 1924, p. 34) where section 92 of the original Georgetown Town Council Ordinance (No. 25 of 1898) is word for word the same as section 22 and the words "whose decision shall be final" are found at the

end of section 93 of that Ordinance. It is also found at the end of section 23 of the Ordinance under consideration. By an amendment Ordinance No. 26 of 1900, s. 12, these words were added to section 92. No amendment has been made in the New Amsterdam Town Council Ordinance and this Court therefore cannot apply the latter part of section 23 to section 22.

The third point to be considered is which of the two councillors, Abbensetts or Eleazar is the senior councillor. The Ordinance provides that on the 1st day of July in each year the two senior elected councillors for the time being shall go out of office and a new election shall take place in the manner hereinafter provided (s. 17). No question arises as to Councillor Peters who is senior to both of these gentlemen as being one of the two seniors to go out. Two seats became vacant and on 10th of October, 1924, three candidates were nominated. The returning officer in making his return of the members elected writes: "Abbensetts 58. Eleazar 53" This is in compliance with section 55 which requires the returning officer to "pub- "licly state the result of the poll and make *declaration* of the person *elected* "to be a member of the Council and shall forthwith make a return of the "member *elected.*" This declaration shows that the person or persons elected are member or members of the Council from the date of his or their election. If after his election he absents himself from any three consecutive meetings his seat shall be declared vacant (s. 19). This includes an absence following immediately on his election. A reference to the repealed Ordinance (No. 8 of 1891) shows that there is no section similar to section 55 (supra) but that ordinance in sections 8 and 9 provides that the relative seniority of such members shall be determined by the Town Council (or Governor in Council) in favour of the person having the highest number of legal votes. It would seem that section 55 is intended to take the place of sections 8 and 9 of the old Ordinance. It is also to be noted that by section 15 "every councillor shall before voting or sitting at any meeting of the Coun- "cil take and subscribe the oath." This confirms the view I take as to section 55. It is admitted by the defendant that since the coming into force of the present Ordinance he and Eleazar contested a seat, that he got a majority of votes and went out as senior councillor, that in another contest for two seats Abbensetts got the majority of votes and was treated as senior and that this present case is the first contested case in which the Town Council has decided that the elected member who first takes the oath is the senior councillor.

I may add that section 22 deals with facts and section 17 points to the happening of an event by the process of time and therefore does not come within the terms of section 22.

I find that the Town Council on 30th June, 1926, erred in holding that Councillor Eleazar who had taken the oath first was senior councillor and that they also erred when they declared on the 5th of July that his seat was vacant. I hold that Councillor Abbensetts is the senior councillor and goes out of office as from 1st July, 1926.

The injunction is granted. Both parties agreed that the determination of this cause should include the action. It is ordered that the defendant pay the costs. No damages awarded.

RONGEIRON, Appellant,

AND

WIGHT, Respondent.

[No. 315 OF 1926.]

1926. AUGUST 6, 13, 27.

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

Claim on promissory note against one of two makers—Application by defendant to have other maker added as co-defendant—Order granting application—Omission of plaintiff to cite co-defendant in accordance with Order XIV, r. 15 of the Rules of Court, 1900,—Hearing—Preliminary objection by defendant to plaintiff's noncompliance with order—Objection upheld—Costs incurred by successful objection—Whether such costs should be "costs in the cause" or "costs reserved"—Observations on the terms "costs in any event," "costs of the action," "costs reserved."

(*a*) Where a defendant successfully applies for an order adding another party as co-defendant, the costs of such application should be reserved because it is impossible for the Court at that stage to decide whether such joinder is justified or not.

(*b*) By a parity of reasoning, the Court should also reserve the question of costs incurred by reason of a non-compliance with such an order.

Appeal from the decision of Egg, Acting J., who after upholding an objection of the defendant against the non-compliance of the plaintiff with an order that another person be added as co-defendant ordered that the costs incurred by reason of such non-compliance shall be costs in the cause.

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

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

The judgment of the Court was delivered by DOUGLASS, J.:

On the 12th September, 1925, the Judge made an order in the action of *P. C. Wight* v. *J. Rongeiron* that the defendant be at liberty to defend this action, and further that the Official Receiver of British Guiana as Receiver of the estate of Geo. G. Mutch be added as co-defendant to the said action, and that the appearance of defendant J. A. Rongeiron do stand. This order having been made, and no appeal against it having been entered, it was the duty of the plaintiff under Order 14, Rule 15, to file an amended copy of the writ of summons and serve the new defendant. For reasons which are unnecessary to discuss he did not do so, and consequently on application by the defendant J. A. Rongeiron, taken as a preliminary objection on the action coming on for hearing on the 15th June, 1926, it was, by order dated the 29th June, ordered that the plaintiff should file and serve the amended copy of writ within 10 days thereof, and it confirmed the proceedings to date and that "the costs occasioned by the non-compliance with the said "order of the 12th day of September, 1925, including the cost of appear-"ance of counsel and solicitor on the 15th and 29th days of June, 1926, be "costs in the cause." It is against this part of the order relating to the costs that the defendant has appealed. His counsel objects that

1. The learned Judge had no jurisdiction to make an order which might operate to award costs against a successful defendant and

2. No grounds existed on which the learned Judge could deprive the defendant of his costs.

The Court then has to direct its attention to the question of the jurisdiction of the Judge to make the costs of the order of the 29th June, 1926, "costs in the cause," and whether he had a discretion and, if so, whether he exercised it in making the said order.

Before discussing the case-law on the subject of costs the suggestion that the Supreme Court in British Guiana has a wider jurisdiction over costs than the Supreme Court in England might be considered. Our Order 46, Rule 1 reads: "Subject to the provisions of the Supreme Court Ordi-"nance, 1893, and of these Rules the Court shall have full power to award "and apportion costs in any manner it may deem just;" the parallel Rule in the English Practice is Order 65, Rule 1: "Subject to the provisions of the "Acts and these Rules, the costs of and incident to all proceedings in the "Supreme Court . . . . . shall be in the discretion of the Court or Judge." Apparently it has been conceived that the words "may deem just" are fuller and less binding than the words "shall be in the discretion," but the words "may deem just" can only go to the extent of the juris-

diction of the Court over costs, and Rule 1 subjects the Court and its powers to the provisions of Supreme Court Ordinance, 1893 (now the Supreme Court Ordinance, 1915) and section 3 (2) of that Ordinance (See section 3 (1) and (2) of the 1915 Ordinance) enacts that "the Court . . . . . shall have "and may exercise all the authorities, powers and functions belonging or "incident to such a Court according to the law of England, and all the au- "thorities, powers and functions which at the time of this Colony coming "under the dominion of the British Crown belonged or were incident to" certain Courts of Holland exercising the jurisdiction of Superior Courts. Since the enactment of the Civil Law of B.G. Ordinance, 1916, and the tendency to rely on English practice and procedure the Court is not inclined to support the view that the Supreme Court of this colony has more extensive powers than that of the Supreme Court in England, and we are of opinion that in effect what the Court "may deem just" must relate to matters in the discretion of the Court within the meaning of the English Order 65, Rule 1.

Now Mr. Stafford's argument put shortly is that an order making the costs "costs in the cause" is equivalent to "costs to follow the event," and thus the defendant, in the event of the plaintiff getting judgment on his claim will be deprived of the costs of an application in which he was successful, and that the Judge has no power to deprive a successful defendant of his costs nor to make a successful defendant pay costs. Learned counsel in support of his argument referred more especially to three cases *Foster* v. *G. W. Rly. Coy.* (1882. 8 Q.B.D. 520); *Higgins* v. *Higgins* & Co. (1916. 1 K.B. 640); and *Bevington v. Perks* (1925. 2 K.B.D. 229). The first case related to costs before Railway Commissioners, but it was allowed that the same rule of costs was applicable to matters before them as to matters in the Chancery and Common Law Division of the High Court and it was held that a defendant cannot be made to pay any part of the costs if *wholly* successful, and it was not a question of discretion but of jurisdiction. In the second case it was held that there must be material on which the discretion of the Judge could be exercised. There, the plaintiff failed to obtain *all* that he asked for and there was no evidence on which the Judge could exercise his discretion, therefore the defendant could not have been deprived of their costs, and *à fortiori* could not have been ordered to pay the plaintiff's costs. The last case, which involved third party procedure and not the procedure adding a defendant, followed the decision in *Ritter* v. *Godfrey* (1920. 2 K.B. 47) where it was held that in exercising his discretion in the case of a *wholly* successful defendant the Judge must give him his costs unless there is evidence that . . . . .

1. the defendant brought about the litigation, or

2. the defendant has done something in connection with the suit calculated to occasion unnecessary expense and litigation, or

3. the defendant has done some wrongful act in the course of the transaction of which the plaintiff complains.

So far as appears all the cases cited were those in which a defendant was *wholly* successful, or the plaintiff failed in *all* that he sued for and do not appear to deal with a defendant successful only on an interlocutory application or on a side issue.

It does not lie within the province of this Court to discuss the reasons or the justification for asking for, or making, either of the two orders referred to as neither of them was appealed from by the plaintiff, and only a small portion of the order of the 29th of June by the defendant, but in order to arrive at the extent of the powers of the Judge to award costs it is necessary to ascertain the circumstances in which the two orders were made, and what they purported to achieve; did they materially affect the plaintiff's claim, or decide in favour of the defendant that the addition of the Official Receiver was necessary to his defence, or to the hearing of the action?

It is fairly obvious that the addition of the Official Receiver as co-defendant is in no way necessary to the success of the action, and the plaintiff took exception to the making of the first order on the ground that if the defendant wished to protect himself he should proceed by third party procedure under Rule 16 and not under Rule 13, and at one time the Court was inclined to that view, but after an opportunity of considering the case-law on the subject it is of opinion that the defendant was within his rights as the cases next referred to will more fully show, but which are cited principally with reference to the solution of the question whether in any event the defendant is entitled to the costs of obtaining either of the orders.

The portion of Order 14, Rule 13, pertinent to the defendant's original application and this appeal reads: "The Court or a Judge may, at any stage "of the proceedings, either upon or without the application of either party, "and on such terms as may appear to the Court or Judge to be just, order "that . . . . . the names of any parties, whether plaintiffs or defendants who "ought to have been joined, or whose presence before the Court may be "necessary in order to enable the Court effectually and completely to adju-"dicate upon and settle all the questions involved in the action, be added." *Norris* v. *Beazley* (1877. 2 C. P. D. 80) is to the point on the construction of what the sentence "involved in the action" means, and Denman, J., in the course of his judgment said: "I am quite clear that the Court ought not "to bring in any defendant against whom the plaintiff

"does not desire to proceed, unless a very strong case is made out, showing "that in the particular case justice cannot be done without his being brought "in," and Coleridge, C.J., "I wish to guard against being supposed by any- "thing I have said to have meant that a defendant could never be added at "the instance of the defendant; such was not my meaning." In *Fardell Traction Haulage Co., Ltd.*, v. *Basset* (1899. 15 T.L.R. 204) the defendant applied under Order 16, Rule 11 (our Order 14, Rule 13) to have Dixon, a co-contractor with him, joined as a defendant. Dixon applied to have the Order set aside, was refused, and appealed. A. L. Smith, L.J., in giving judgment, said there was good ground shown—he would say no more—for saying Dixon was a joint contractor with Basset. In his opinion the order was right though in form it must be amended and he ordered that after the words "the plaintiff not to be prejudiced by this joinder if Dixon held not "liable" should be added the following, "in which case the defendant Bas- "set to pay Dixon his costs." Dixon was made to pay the plaintiff's costs of the appeal in any event but there would be no costs of the appeal as be- tween Basset and Dixon. The Court being unable at that stage of the pro- ceedings to decide whether or not the contract sued upon was in fact joint held that as the defendant had made out a reasonable case of joint contract an order would be made joining the alleged joint contractor as a co- defendant, but at the risk of the defendant as to costs in case it should ap- pear at the trial that the contract was not joint, or that the co-defendant was not liable.

In *Norbury Natzio & Co., Ltd.*, v. *Griffiths* (1918. 2 K.B. 369) though the facts were dissimilar the headnote is so applicable to the circumstances in this case that we quote it *in extenso.* "In an action on a joint contract "against one only of the joint contractors the Court has jurisdiction, without "obtaining the consent of the plaintiff, to make an order requiring the plain- "tiff to add the other joint contractor as a co-defendant. Where, in an action "on a contract against one defendant only, the defendant shows reasonable "grounds fog believing that the contract was made with himself and an- "other person as joint contractors, he has in the absence of special circum- "stances showing that it should not be made a *prima facie* right to an order "requiring the plaintiff to add that person as a co-defendant; but the Court "will make the order without prejudice to the consideration at the trial of "the question whether the contract was in fact joint, and will so frame it as "to protect the plaintiff in regard to costs if it should appear that that other "person ought not to have been joined." This was an appeal from an order of Bray, J., refusing an application of the defendant that the plaintiff be ordered to join one Vasey as co-defendant in the action, he

apparently thought in the absence of consent by the plaintiff he had no jurisdiction to make the order asked for, but the Appeal Court held that he had jurisdiction and a discretion, as Pickford, L.J., said: "There may be "cases in which the Court will rightly decline to make the order, but, in the "absence of special circumstances showing that it ought to do so its prac- "tice is to make it."

How v. *Whittington* (*Earl*) (No. 4. 1904. 91 L.T, 763) deals generally with costs; "costs of the action," "cost reserved," and "costs in any event," were considered in detail by Kekewich, J. With regard to "costs of the action" he says, "if the Court has solemnly said that certain costs are to be "costs of this action it goes without saying that they come within the order "for taxation, and it is the duty of the Taxing Master to include in the costs "all costs which have been disposed of in that way." In respect of cases where costs have been "reserved" the learned Judge says: "I think that "when costs are reserved it is necessarily implied, and the practice of the "Court sanctions the implication, that there is reserved the question of the "incidence of those costs, quite apart from the question whether they are to "be paid by the plaintiff or the defendant. It may turn out that they are to be "paid by neither, and that the costs of both ought to come out of the estate, "or be paid by a third party. In the meantime the Court has pronounced no "opinion whatever, not only on the question whether the plaintiff should "pay the defendant or the defendant should pay the plaintiff but as to how "the costs should be borne at all."

It appears from the cases cited above that the defendant was within his rights in making his application, and consequently that he should not be deprived of his costs if his application is eventually found to have been justified, and much less, in that event, to have to pay the plaintiff s costs of his (the defendant's) application, and it must be remembered that the learned Judge was not, nor is this Court now, deciding whether there was any necessity for the other to be joined, or that the defendant was right in asking that he should be joined, that is the question which must be left open for consideration at the trial. So far as the orders concern the application for leave to defend, in making the costs to be costs in the cause the learned Judge was only following the English practice, but there was included in the orders the direction to add a defendant. I think it will be conceded that the right of the defendant to his costs on such an order should not be made wholly to depend upon the success or otherwise of the plaintiff in his claim against the defendant, for it may be found that the defendant was right in adding the other as a co-defendant for his own protection or assistance yet in the event

of the plaintiff obtaining judgment in his suit he would be deprived of costs justifiably incurred; neither the plaintiff nor the defendant can be said to be entitled to the costs of either of the said orders at the present stage.

The defendants, the present appellants, fail in their suggestion that the costs of obtaining the said order should be paid by the plaintiffs but succeed on the point that the costs should not be costs in the cause. In the circumstances the Court is of opinion that the order dated the 29th June, 1926, in respect of the paragraph referring to costs be varied and amended and instead of "that the costs occasioned by the non-compliance with the "said order dated the 12th day of September, 1925, including the costs of "appearance of counsel and solicitor on the 15th and 29th days of June, "1926, and of carrying this order into effect be costs in the cause," to read as follows: "and that the costs of obtaining the order of the 12th of Sep- "tember, 1925, and of the 29th of June, 1926, respectively be reserved." Each party should bear their own costs of this appeal.

Appeal Allowed.
Order Varied.

In re ALEXANDER TEIXEIRA'S TRUSTS.

In re ALEXANDER TEIXEIRA'S TRUSTS.

[No. 176 OF 1925.]

1926. JANUARY 25, 27. BEFORE SIR C. MAJOR, C.J.

Will—Bequest of legacy—Payment of corpus to legatee to be made on death of a named person—Income thereof directed to be paid legatee in the interval—Whether legatee's interest vested or contingent.

Where a legacy is given to be paid at a future date accompanied by a gift to the legatee of the income thereof in the interval the legacy vests in the legatee at the death of the testator notwithstanding that the legatee is not alive at the date fixed for payment.

Petition by legatee's administrator for opinion of Court as to the interpretation of a will.

The relevant portions of the will in question and the arguments are set forth in the judgment.

G. J. deFreitas, K.C., for the petitioner.

C. V. Wight, for the respondent.

MAJOR, C.J.: Alexander Teixeira by his will appointed his wife, the present respondent, his executrix and trustee and directed her to stand possessed of $12,000 of his estate and the investments representing the same, in trust to pay the income or interest on $6,000 thereof monthly to his brother Francis during the lifetime of his wife, and on her death to pay the said sum of $6,000 or to hand over the investments representing the same to the said Francis. The administrator with the will of Francis (who outlived Alexander and whose wife is still alive) on petition for the opinion of the Court, submits that the bequest gave to Francis a vested interest in the principal sum, the respondent that the interest is contingent upon the death of Francis' wife.

The many authorities on bequests akin to the present one, some of which have been cited by counsel for the petitioner are familiar, and the question that I have to decide may be shortly stated to be whether I shall apply to the bequest the rule of construction thus put by Neville, J., *In re Williams* (1907. 1 Ch. 189). "It is said," observed that learned judge, "that "the rule is absolute that where a legacy is given at a future date, accom- "panied by a gift of income in the meantime, the legacy vests in the legatee "at once, notwithstanding that he does not live until the date fixed for pay- "ment." I entertain no doubt that the rule is to be applied to this gift, and that Francis took a vested transmissible interest in the principal sum; the futurity annexed to the gift—to use Mr. Jarman's expression—staying, not the vesting, but the payment only. Mr. Wight for the respondent has referred

to *Batsford* v. *Kebbell* (3 Ves. 363). In that case the bequest commenced, not with the income of a specific sum to be taken out of the testator's estate at once, as here, but with dividends only, the corpus to be taken out at a future time. "In this case," said Lord Chancellor Loughborough, "there is "no gift but in the direction for payment." Here the gift is made first and the direction as to time of payment follows. I note that in *Wadley* v. *North*, reported in Vesey Junior as decided but a few days after, and on consideration of *Batsford's* case, Sir Richard Arden, M.R., speaking of a bequest of a testator's residue upon trust, first to pay the income thereof to his mother and sister during their lives, and after their death to pay and apply the same for the use and benefit of his sister's child or children living at her death, said "there could be no doubt, upon the principles laid down in the cases "cited to him, as well as that adopted in *Batsford* v. *Kebbell*, that it would "be a vested interest; the principal given, the payment postponed." I am asked by the respondent to consider the fact that the wife of Francis, for the duration of whose life the payment of the principal sum is postponed, is one of Francis' residuary legatees, and also to notice that Alexander provided for the destination of the principal sum if Francis should predecease him. I am not concerned to look at the will of Francis at all on this inquiry. Alexander did not purport in any way to interfere with his brother's disposal of the legacy, and Francis did not predecease him.

Francis, therefore, taking a vested transmissible interest, the principal sum, subject to the present trust in the hands of Alexander's trustee for payment of the income to the representatives of Francis during the lifetime of his widow, will on her death, be payable to them and follow his disposition of the residue of his estate.

Ex parte FORDE.

[No. 48 OF 1926.]

1926. SEPTEMBER 1, 9. BEFORE DOUGLASS, J.

Declaration of Title by prescription—Civil Law of British Guiana Ordinance, 1916, section 4—The Consolidated Act for the better regulation of Georgetown, 1828—Town Council Ordinance, (*No. 2 of 1837*)*—Georgetown Town Council Ordinance, 1860—Georgetown Town Council Ordinance, 1898—Georgetown Town Council Ordinance, 1918.*

Although the Georgetown Town Council Ordinance, 1918, and certain cognate enactments of earlier date prohibit the sub-division by transport of lots of land within the city in less portions than half lots, yet where it is proved that prior to the passing of such enactments and at a time when no such prohibition existed lots were carved out in less than half lots and were so occupied for a period of 30 years *nec vi nec clam nec precario* the Court has power to grant a declaration of title by prescription under the provisions of the Civil Law of British Guiana Ordinance, 1916.

Petition for declaration of title.

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

DOUGLASS, J.: This is a claim by prescription under section 4 (1) of the Civil Law of British Guiana Ordinance, 1916, to a quarter lot in the city of Georgetown described as the West ½ of West ½ Lot 3, Charles and Evans Streets, in New Charlestown District. The division of town lots into less than half lots has for many years been prohibited by law and its application to prescriptive rights was discussed in *Will* v. *Gonsalves* (B.G. App. Ca, 12th December, 1904). The appellant in that case claimed that he and his predecessors had been in possession of land encroaching on the respondent's lot for a period of time sufficient to give him a title thereto by prescription. The Court held that if the land was originally divided into an equal portion subsequent to March, 1828, the law would be violated, the sub-division would be void and illegal. The possession relied on dated from 1867 and therefore subsequent to the laws of 1828 and 1860 and the Court were of opinion that the appellant could not acquire a title by prescription to a portion of land illegally carved out of the North half lot. The reference to 1828 is to the Ordinance passed on 17th March that year called "The Consolidated Act for the better regulation of Georgetown" and Art. 2 reads: "It shall not be lawful to sub-divide lots of land in Georgetown now "or hereafter to be laid out to the westward of the line of road running from "the York and Albany Barracks and continued by prolongation (South) "along the Camp road to the middle-walk of Plantation Werk-en-Rust at "the corner of the Colonial jail in less portions than half lots under a pen-"alty of three thousand guilders"; any property to the East of Camp Street or to the South of the Middle Walk of Plantation Werk-en-Rust now D'Urban Street is clearly excluded from this provision.

It is uncertain when the Charlestown Ward was brought into the city boundaries, possibly in 1829, as a plan of the ward was made at that date, but it was certainly included by 1837, as Ordinance No. 2 of 1837 to "establish a Mayor and Town Council" mentions Ward No. 11, Charlestown Ward. . . bounded on the North by the South draining trench of Plantation Werk-en-Rust.

It was not until Ordinance No. 25 of 1860 (afterwards No. 1 of 1860) "The Georgetown Town Council Ordinance" that a general prohibition of less than half lots was extended to Georgetown as a whole; section 19 reads: "From and after the taking effect, of this ordinance, it shall not be "lawful to sub-divide lots of land in Georgetown in less portions than half "lots. . . and every such sub-division shall be void and all divisions of lots "in Georgetown heretofore made contrary to the provisions of any law, "ordinance or regulation in force previously to the taking effect

"of this Ordinance shall be and continue void." This Ordinance repealed the 1828 and 1837 Ordinances and was itself repealed by Ordinance No. 25 of 1898 which in section 118 enacts (1) "from and after the commencement "of this Ordinance it shall not be lawful to sub-divide by transport lots of "land within the city in less portion than half lots. (2) Every transport pur- "porting to sub-divide any lot contrary to this section shall be void." This is repeated in Ordinance No. 44 of 1918, section 128, which repeals the 1898 Ordinance. We have it in evidence that as far back as 1845 lot 3, Charlestown, was divided into four portions and that July Austin who died in 1903 was at that date registered as the proprietor of the W½ of the W½ on the Town Register, the other three quarter-lots being in the names of different proprietors. The Charlestown District was clearly not included in the restrictions under the 1828 Ordinance and the division into quarter lots was made long before the 1860 Ordinance, and the other three-quarter lots have already obtained transports. All the requirements of the "Rules of the Supreme Court (Declaration of Title), 1923," have been complied with and no opposition has been entered. I therefore declare that the petitioners have proved their title as owners to the West half of the West half of lot No. 3, having been in undisturbed possession for 30 years and over in their own right and that of their predecessors in title.

JOHN, Appellant,
AND
COZIER, Respondent.

[No. 67 OF 1924.]

1926. JULY 21, 22, 23, 24; SEPTEMBER, 10.

BEFORE BERKELEY, ACTING C.J., DOUGLASS, J., AND EGG, ACTING J.

Mining Regulations, 1905—Claims located of area in excess of that permitted by Regulations—Claim Licence granted for a specific limited area—Legal position of area outside of delimited portion—Rights of third parties to locate—Area liable to be "jumped"—Observations on duty of appellant to furnish appellate tribunal with evidence of all necessary facts—Effects of omission to do so.

H. and E. had located an area far in excess of that permitted to be located by the Mining Regulations. H. and E. obtained a claim licence for a specific portion of the said area. The appellant attempted to "jump" the whole of the excessive area, his claim to "jump" was dismissed and thereafter the respondent purported to locate that portion of the "excess" area outside of the portion for which a licence had been issued to H. and E. Subsequently the appellant attempted to locate the said portion located by the respondent.

Held, (DOUGLASS, J., dissenting) That where a person purports to locate an area in excess of that permitted by the Mining Regulations and is afterwards granted a claim licence for a specific limited portion thereof, the area outside of the delimited portion is no longer lawfully occupied and is open to location.

The appellant contended at the hearing that service of the notice of appeal from the Warden's decision was bad and that the learned Chief Justice had erred in holding that it was good; but there was no evidence in the transcript of the facts upon which the learned Chief Justice had based his decision.

Held, That it was the duty of the appellant to furnish the Court of Appeal with all necessary evidence and in the absence thereof the Court must presume that the decision of the Court below was right.

Appeal from the decision of Sir Charles Major, C.J., who had reversed a decision of a Warden given in favour of the appellant in a dispute arising under the Mining Regulations.

The facts appear in the judgments below.

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

P. N. Browne, K.C., and *E. M. Duke*, for the respondent.

BERKELEY, Acting C.J.: This is an appeal from the decision of the Chief Justice who reversed the Warden's order in favour of the appellant.

Houston and Eytle in March, 1922, were holders of a prospecting licence to search for precious stones (r. 3). They located a claim and within three months filed at the office of Lands and Mines a notice stating the particulars and the description of the ground located and its situation so as to enable their claim to be identified by the Warden together with an application, in writing

for a licence to mine for precious stones (r. 7). In the "Official Gazette" of 4th July, 1922, the ground located was described as "Campanero Block, "right bank Eping, right bank Mazaruni, length of claim 6,000 feet, width "of claim 2,400 feet." This description represents an area of about 330 acres which was within the limit of 500 acres (r. 35). On the same day (4th July, 1922) a claim licence was issued to them in respect of these 330 acres. About April, 1923, the Warden visited Campanero block and he found for the first time that Houston and Eytle had located an area of land more than five times greater than the 330 acres for which they had made application and which had been issued to them under their claim licence. He also found that the boundaries given by them in connection with the 330 acres represented in fact about 2,500 acres. He then gave them permission to alter their boundaries and allowed them until midnight of 5th August, 1923, to do so. He further held that from 6th August, the excess area located by Houston and Eytle would be open to location by anyone.

In March, 1923, the appellant jumped the lands within the boundaries as set out in Houston and Eytle's claim, that is, about 330 acres, and the evidence before the Warden shows that he heard the dispute and decided against the appellant.

In May, 1923, the respondent who had a prospecting licence located claims on that part of Campanero Block which formed no part of the area (330 acres) which Houston and Eytle had applied for and in respect of which they had a claim licence. The respondent on 15th August, 1923, obtained a claim licence in respect of the claim that he had located. The appellant on 6th August, 1923, (his dispute having been dismissed) made locations on the land located by the respondent. The respondent then filed a complaint against the appellant which was heard by the Warden who held that until he ordered the original boundaries to be changed the whole of the Campanero block was the property of Houston and Eytle from 29th March, 1922, and that any locations made prior to 6th March, 1922, were unlawful.

The main ground of appeal is that the trial judge was wrong in holding that the appellant was entitled in law to locate during the month of May, 1923, as Houston and Eytle in March, 1922, had marked out their boundaries as required by law.

This cannot be regarded as a correct statement. They had deliberately deceived the Department of Lands and Mines as to the area located by giving a false description of the boundaries I am of opinion that the Warden was wrong in holding that he could give them permission to alter their boundaries under regulation 33 (2). That permission is limited to what is set out in the first part of the said sub-section and applies only to the

boundaries which ought to have been given in respect of the 330 acres mentioned in the claim licence. He was also wrong in holding that Houston and Eytle were in legal possession at any time of any location which was not covered by their claim licence. To hold as he did offers an inducement to give false boundaries and thereby obtain a larger area than that given in the claim licence.

The description of the ground located and its situation is required in order to enable the claim to be identified by the Warden (r. 7) and the applicant for a claim licence "when required by the Warden" to do so has to point out to the Warden the position and boundaries of the claim for which a licence is sought, and if he fails to have such claim pointed out and verified within six weeks after the Warden has notified him of his readiness to verify the location, the application shall be cancelled and after notice thereof is published in the *Gazette* the location shall be null and void and the land open to location by any person (r. 14 (2)). This regulation contemplates that the appellant shall "be required by the Warden" in order that the boundaries of the claim may be verified to the satisfaction of the Commissioner and he then may issue a licence for the land so located (r. 14 (1)). In this case the Warden never required Houston and Eytle to point out the position and boundaries. If he had done so he would have found that they had not given a true description of the ground located as required by law and this would have rendered the location null and void, and the land located would be open to location by any one.

Counsel submits that the appellant having jumped the claim of Houston and Eytle neither the respondent nor anyone else could locate any part of the land while the jump was pending and therefore the location by the respondent was unlawful. On my finding that Houston and Eytle were not legally in possession of the whole of the Campanero block it follows that appellant's jump could only be limited to the area held by them under their claim licence.

The reason of appeal as to amending the recognizance was I granted at the request of counsel for the then appellant (Cozier) and counsel for the respondent (John) admits that he consented. Under the circumstances this reason was withdrawn by direction of the Court.

As to the service of notice and reasons of appeal the trial judge held that service was duly made by forwarding the same by registered post to the registered address of the appellant. In *Humphrys* v. *Jarad, et al* (B.G.L.R., A.J. 26th March, 1925), I held that delivery at the registered address was in order and that under regulation 5 (4) such delivery had the same effect as personal service. The only difference is, that in the present case

notice was served by a registered letter and in the case cited it was delivered in person. The Mining Ordinance, 1920, section 92, provides that notice may be served either personally or by registered letter. I hold therefore that the service was in order, the contrary that it was not duly received not having been proved (Ordinance 30 of 1907, s. 2).

Objection is taken to a copy of the proceedings before the Warden in the matter of the jump having been received by the trial judge during the reply of counsel for the appellant. The document ought to have formed part of the record as it refers to the jump made by the respondent. I am disposed to think that it could not be tendered at that stage of the proceedings but the jump is referred to by the Warden in his decision and the facts are sufficiently set out in the evidence of the witnesses.

This appeal is dismissed with costs and the order of the Chief Justice confirmed.

DOUGLASS, J.: This is an appeal by the defendant John in *Williams and others*, versus *John and others* that the judgment delivered by Sir Charles Major, C.J., on appeal from the Warden's Court and dated 9th April, 1925, be reversed, and that the decision of the Warden made on the 27th November, 1923, dismissing the complaint of the present respondent be restored.

On the first ground of appeal with reference to the recognizance entered into by the complainant and ordered to be increased by order dated 14th November, 1924, an objection was taken by learned counsel for the respondent (one of the complainants in the original proceedings) that it was not arguable as the time had passed in which an appeal could be made on an interlocutory order. Learned counsel for the appellant replied that there could be no such interlocutory order made on a preliminary objection to the appeal from the Warden, for there could be only one judgment on the appeal which was final and conclusive (section 31 (4) of Ordinance No. 13 of 1893). Without expressing any decision on this point the Court were of opinion that in the circumstances disclosed, and inasmuch as learned counsel for the appellant had virtually applied for and consented to the increase in the recognizance, this reason of appeal could not now be properly raised by him. The second ground of appeal is to the finding of the Chief Justice that service by registered post to the registered address of the respondent in the Court below, and not to his actual address or residence, was in order.

No such finding was embodied in the transcript for the Full Court, though learned counsel in arguing this ground seemed to take it for granted that the Court was aware of all the facts which he knew, and on which he relied.

Rule 13 of the Rules of the Supreme Court (Appeals), 1924, gives a list of the papers to be left by the appellant with the Registrar, this includes *inter alia*, "(3) all necessary affidavits. (4) the Judge's notes at the hearing. "(5) all other documents including the correspondence to which reference "may be made at, and required for, the hearing of the appeal." It was the duty of the appellant to supply the facts as contained in affidavits or other documents on the record. Learned counsel desired the Court to refer to the record when he had omitted to supply the necessary documents under Rule 13, and in certain circumstances it might be done, but not when there has been a flagrant breach of Rule 14. That Rule reads: "When any question of "fact is involved in an appeal, the evidence taken in the Court below bear- "ing on the question shall, subject to any special order, be brought before "the Full Court, (a) as to any evidence by affidavit by production of office "copies of the affidavit, and (b) as to any evidence given orally, by the pro- "duction of copies of the Judge's notes or such other materials as the Full "Court may deem expedient." The Court has insufficient evidence before it to show in what manner the service complained of was made, or on what facts the Chief Justice gave his alleged decision that service was good.

It is absurd to argue that the respondent has not asked for any of the necessary proofs, it is hot his duty to do so, the appellant must prove his case in the manner provided for by the Rules. In *Colonial Securities Company* v. *Massy* (1896. 1 Q.B. 38) Lopes, L.J., said, "Where a case tried by a "Judge without a jury comes to the Court of Appeal the presumption is that "the decision of the Court below *on the facts* was right and that presump- "tion must be displaced by the appellant, ... if the case is left in doubt it "is clearly the duty of the Court of Appeal not to disturb the decision of the "Court below." This Court is left in doubt of what the facts relied on relative to the service of proceedings consisted.

Order 58, Rule 11, of the English Rules contains similar provisions to our Rule 13, and in the yearly Practice, 1924, the learned editor has the following note, "It is the duty of the appellant to bring before the Court of "Appeal all the evidence oral as well as written on which the order ap- "pealed against was founded and it he does not do so his appeal may be "dismissed, or the appeal may be ordered to stand over at his expense, or "he may be deprived of his costs, or the solicitor may have to pay the costs "personally."

It is certainly not advisable—to say the very least—to decide an important point of practice and procedure on insufficient information, and I am of opinion that the appellant has failed to make good his second ground of appeal.

Reference was made to my decision in *Humphrys v. Jarad* (12.1.25) and on further consideration of the question of service of proceedings in appeals under the Mining Ordinance, 1920, I am confirmed in my opinion already expressed, and would like to add that the power to make Regulations under that ordinance (section 100) includes Regulations with respect to determination of disputes before the Warden, but does not include any power to make rules for proceedings on appeal.

The third reason of appeal is that illegal evidence was admitted namely a copy of proceedings in another matter which did not form part of the proceedings before the Warden and now appealed from.

It appears that such a document was put in and marked as Exhibit "A" when counsel for the appellant in the Court below (now the respondent) was replying at the close of the case. Injury trials any document which has been read to the jury, even though not formally put in, is treated as evidence, and a Judge can reopen a case or adjourn it to supply material evidence inadvertently omitted. At the same time a party who wishes to produce further affidavits, or documentary evidence, should give notice of his intention to apply at the hearing of the appeal for leave to produce such evidence. I am not inclined to hold that this evidence was properly admitted, and therefore it is my duty to reject it and to decide the case on legal evidence, though at the same time I have not the slightest doubt that had application been made in the proper manner this Court has ample power under Rule 15 of the Rules of Appeal, 1924, to have received the document as further evidence. The evidence however is not necessary as it is admitted that John could not prove his jump, and the evidence adduced before the Warden shows that in the dispute between himself and Houston the decision went against John (folio 15), and McNaughten (folio 16) gives in evidence that John told him of the dispute by jump between himself and Houston, and on the 4th August he heard that the Warden had decided the jump against David John, and the Warden told him the same thing.

We now come to the principal ground of appeal No. 4, which objects that the learned Chief Justice was in error when he held that the present respondent was entitled to locate portions of land in the Campanero Block during the month of May, 1923, already located by Eytle and Houston during March, 1922, who had marked out the boundaries by cutting lines and erecting boards as required by law. It appears that Eytle and Houston (hereinafter referred to as Houston's) in March, 1922, located a large area of land Known as the Campanero Block. In April, 1923, the present appellant John jumped the said block, but after investigation by the Warden in the month of July his claim was dismissed. In May, 1923, Cozier and others (the complainants

located several claims within the boundaries of the Campanero Block, and on the 4th, 5th and 6th of August John and others took possession of these locations, and later are stated to have ejected the complainants who thereupon took proceedings in the Warden's Court on the 26th November, 1923, and asked to be declared the lawful owners of the said locations. In the meantime Houston had applied for and obtained a claim licence comprising 330 acres only of the original area located of 2,170 acres, and from the 6th August all the land in excess of 330 acres was declared open to location by anyone.

It is admitted and proved that the claims jumped by John in April, located by Cozier in May, and again located by John and others in August are on the same land, and comprised in the first two instances the whole Campanero Block and in the last the balance of that block after deducting the 330 acres allotted to Houston. I do not see how John's jump concerns the present appeal, it did not succeed, and John rests his case upon locations on August 5th and following days. A jump does not imply possession or occupancy, and it is expressly stated in Regulation 94 (1) that when asserting his right to jump any land the person should refrain from locating the same, and in sub-section (6) shall not take possession thereof, therefore if Cozier was within his rights in locating the Campanero Block the previous jump, which was subsequently held to be ineffective, should not affect these rights; this appeal was, in effect, brought to decide the process necessary to acquire the claim to land which has been located greatly in excess of the area allowed by Regulation 35.

To unravel these tangled claims needs the interpretation of several of the Mining Regulations of 1905 (now replaced by the Mining Regulations, 1924), but perhaps it would be well in the first place to take Mr. Duke's objection on behalf of the respondents that the Warden had no power to declare land open to location, nor to fix a date when it was open, nor even to declare Cozier's location null and void. Apparently the only power given to the Warden to do any such thing, in so many words, is in cases where a dispute comes before him for his decision when he may declare that a location made by any party to it was null and void (Reg. 191). It seems that Mr. Duke would confine the meaning of "dispute" to matters coming before the Warden by way of complaint under section 89 of the Mining (Consolidation) Ordinance, 1920, but I do not so confine its meaning. Reg. 178 states "All disputes by way of opposition to the issue of any "licence, and all disputes as to what land is or is not lawfully occupied, or "has or has not been lawfully located, or any other disputes arising under "these regulations, shall be decided by the Commissioner, or by the War-"den," etc., and Regulation 179 goes on

to say that if a person *so desires* he may have the dispute settled on filing a complaint, and so forth. But any discussion or question of possession raised by any interested person with respect to a claim made by him and settled out of hand by the Warden is a dispute, and one infers from the wording of Reg. 191 that he has the right to declare the location involved as null and void.

Again it may be noted that in Regulation 6 (1) any location not made in compliance with this regulation (*e.g.,* locating land previously lawfully occupied or previously located) "shall be disallowed by the Commissioner;" these last words are omitted in the new Regulations of 1924 and the words "shall be null and void" inserted, the natural inference is that when a Regulation declares any transaction to be null and void it also imputes the power in the Commissioner or Warden to carry out that Regulation. I do not find that the Warden has exceeded his powers when he declared the land open to location, or if he declared the location in excess of the 330 acres to be null and void, although the latter was scarcely necessary.

It is admitted that Houston had located in March the boundaries of the claim enormously in excess of the quantity allowed by Regulation 35 and the questions have to be answered. (1) Was the whole claim lawfully occupied and (2) What rights had other parties to occupy any portion of the same area and in what manner? Although Houstons occupied the Campanero Block in March, 1922, and apparently marked out the whole area they only claimed 330 acres, and after due publication they received the claim licence to that extent in July, 1922, but did not mark out fresh boundaries until required to do so in July, 1923, so that between July 1922, and July, 1923, the excess of the block beyond the 330 acres was still an occupied area though perhaps not lawfully occupied. There was no opposition to the issue of licence to Houstons and consequently they were never called upon to verify their boundaries, which only became necessary when required to do so by the Warden (Reg. 14); the sentence "and the boundaries of the claim," *etc.,* in Reg. 14 (1) can only refer to cases where there is opposition, and in the new Regulations is omitted, evidently in reliance on the powers of the Warden contained in Reg. 14 (2).

The answer then to the first question is, that the whole claim, even if in excess, is lawfully occupied until the licence granted defines its area, and thereafter the excess may still be occupied but such occupancy is not lawful; at the same time unless certain steps are taken the location of that excess has not become null and void. The respondent says that re-location is the proper step to take but the appellant says no, a title can only be acquired by jumping

In order to assert the right of "jump" there must exist a "claim" to be jumped, and the latter word is defined in section 2 of Ordinance No. 34 of 1920 as, "An area of Crown land in respect of which . . . a licence is issued, "and includes any claim located whether a . . . . . licence has been issued in "respect thereof or not." There is no definition of "location," but it implies entry on and occupation of a determinate portion of land not previously lawfully occupied or previously located, and is the only method of initiating a claim over such land. Regulation 6 (1) implies that if the land has already been lawfully occupied, or has been located—whether lawfully or not—then a location of the same would have no effect at law, and any such location must be disallowed by the Commissioner. And this is followed up by Regulation 1 which declares that if proper notice of location is not filed as required "the location shall be null and void," and the land open to location by any one. This, by the way, appears to be the only case where, when a location is declared null and void, there is no necessity to publish a notice to that effect in the *Gazette.* But what is provided for those cases where the land has been previously lawfully occupied, or has been previously located, but the occupancy becomes unlawful or the location is found unlawful in respect of excess area? I think the answer is provided in Regs. 38 and 93.

There is of course no doubt that a claim defying the provisions of Regulation 35 may be jumped under Regulation 93; Houstons held a claim "for which a licence had been issued" and had "included therein a greater area than is allowed by the Regulations (Regulation 93 (2)), and it depends upon whether the word "only" in the sentence, "under the following circumstances only," refers to the 'only' means of acquiring such a claim (thus excluding the possibility of locating), or to the only circumstances in which a right could be asserted by a jump, for the latter would not exclude the possibility of location; the wording of the regulation allows the possibility of construction either way, and one must look to other regulations and the function of location as a means of claim in endeavouring to ascertain its meaning. In *Fowler* v. *Mattis* (1922. L.R.B.G. 9) the Chief Justice, Sir Charles Major, arrived to the conclusion that the "only" remedy to an outsider was to jump such claims and not to locate, and it may be remarked that in the new Regulations which were published in 1924 the same wording is used in Regulation 93 thus to a certain extent confirming the interpretation by Sir Charles Major. The learned Chief Justice however has now come to the opposite opinion "after a more elaborate examination of the Regulations," and now holds that the word "only" does not

infer that the only remedy open to a person is jumping when the circumstances set out exist, but that a person may not adopt the remedy of jumping unless those circumstances exist, leaving available any other remedy that may be open.

I propose to take each sub-section of Regulation 93 and endeavour to ascertain whether the only remedy, or rather course, available to a person desirous of acquiring the land in question, is by jumping. There are two divisions in the Regulation, the first relates to cases where the licence has not been issued in which cases a claim may be jumped:—

"(a) If the person locating it had no prospecting licence in force at the "time; or trespassed on another person's path or trail in order to locate it "under Regulation 82."

Now under Regulation 82 it appears it is only the person cutting the path who can avail himself of this remedy, and it seems that jumping must be the only remedy as it affects a location previously made (See Reg. 6 (1)). Even here an inconsistency in the Regulations may be noticed, for Regulation 82 says "and possession may be taken of such claim under Reg. 93," whereas Reg. 94 (6) says the complainant *i.e.*, the person asserting the right to jump "shall not take possession thereof," in case of a claim in dispute.

(b) This relates to the clause now sought to be interpreted.

(c) "If with intent to deceive or to defraud other prospectors etc., the "person locating it does not comply with Reg. 30."

Reg. 30 directs that all boundaries shall be marked. This has not to be done within any stated time, but it must apparently be within three months under Reg. 7, and the remedy could only be by jumping for the land had been lawfully occupied, and there had been a location.

"(d) If notice of location has not been given as required by Reg. 7." Reg. 7 declares that if the application and notice referred to therein be not filed as required, with the amount payable, the location shall be null and void, and the land located be opened to location by any one. In this case then in addition to the remedy by jumping, location is available.

"(e) If the boundaries of the claim are not marked and kept marked as "required by these Regulations."

Reg. 30 deals with the marking, and Reg. 33 with the keeping marked. Jumping is the only remedy (emphasised by Reg. 33), for the claim was lawfully occupied.

The second division relates to cases where the licence has been issued, in which cases a claim may be jumped:—

(a) If the boundaries of the claim are not kept marked as required by these Regulations.

Similar to (c) above, except that the words "are not marked" are no longer necessary, for to obtain the licence they must have been marked. The only remedy is by jumping for the same reason as above.

(b) This relates to the clause now being dealt with.

It appears then that the cases set out above are not examples in which the only remedy is by jumping, sub-section (d) makes this clear, but the intention was to give an inclusive list of cases for which jumping is available. There is no such list of cases applicable to re-location only but they may be gathered from the various regulations (see Regs. 7; 14 (2), (4); (6); 18 (3); 5 38; (6)) but once a location has been made no one else can locate the same land until the location is declared to be null and void, when "the land is open to location by any person." And this I think is the natural interpretation of Reg. 6, for land can only be located that has not previously been lawfully occupied, or previously located; and any location not made in compliance with this Regulation shall be disallowed by the Commissioner. The ban of lawful occupation or previous location must be removed by legal means before anyone can lawfully re-locate.

From a remark made earlier in this decision it will be gathered that on a construction of Regulation 14 I do not hold that the boundaries of a claim must be verified before the issue of a licence, but only when requested by the Warden, it might perhaps be very desirable that it should always be so verified but one can see that without a considerable increase in officials and better means of travel it might not be practicable, and I note that the forms required to be filled in on the application for a claim licence do not provide for a description of the boundaries amongst the details to be given, and the licence is issued without prejudice to the rights of any other persons in respect of the same land. Consequently I am of opinion that the claim licence in Houston's name was in order and available against other persons to the extent covered by it, but even if it were not so I should still hold that as, previous to the 5th of August, 1923, the original location had never been declared null and void, neither by any regulation nor by the Commissioner or Warden, the area included could not be again located. It is with the greatest deference that I venture to differ from the learned Chief Justice in this respect more especially as it necessarily leads me to the decision that Cozier could not acquire the excess over the quantity of land appropriated by the licence to Houston by fresh location until the previous location had been declared null and void. A location once acquired can only be got rid of in two ways it can be disallowed, or abandoned. (And see Regulation 34, last line).

On the merits of the case only I am inclined to agree with the decision of the learned Acting Chief Justice which I have had the privilege of reading, and I regret that I cannot see my way to finding that Cozier could legally locate lands previously located before that location had been declared null and void; it is directly contrary to Rule 6 (1) which enables a person to locate claims not previously located, and which proceeds "Any location not "made in compliance with this Regulation shall be disallowed by the Com- "missioner."

A location cannot cease automatically on its own initiative, once located the land or claim must remain so until it is declared null and void by the proper officer or by the effect of one of the regulations; it can never be intended that each prospector could decide for himself whether a location is null and void, as the respondent did in the present case, it would lead to endless private quarrels if not worse.

A licence was obtained for apparently the whole of the excess of the Campanero Block by the respondent on the 15th August, 1923, on his applications made in May, but as every licence is granted subject to the conditions that the location is "on Crown land which can be legally located under the authority of the Mining Ordinance, 1920," I hold that no one could locate any claim included in the Campanero Block before the 5th of August, 1923. I cannot understand how the licence was ever granted inasmuch as when John's jump was disallowed in July the property was declared to be open to location only from the 5th August. On the evidence it appeared that Cozier's location and claim were made bona fide but he had the misfortune to found it on a title which the Mining Regulations do not support, and the charge of "gross fraud and deception practised on the "Government prospectors and claim-holders" contained in the appellant's defence to the complaint is totally uncalled for, was not attempted to be proved, and should never have been made. Fraud should not be alleged unless it is intended to prove it and in cases such as this I have made it a practice to disallow costs to the party alleging it.

The fourth reason of appeal being well founded I am of opinion that the appeal should be allowed, and the decision of the Warden restored except in respect of costs.

EGG, Acting J.: This is an appeal from an order of Sir Charles Major, Chief Justice, sitting on appeal from the decision of a Warden, allowing the Appeal.

As to Reason 1, counsel to appellant, on being heard after objections taken by counsel for respondent, admitted that application was made for increased security on the recognizance at

the hearing of the appeal. The Court upheld the objection on the grounds that counsel for appellant was a party consenting to the amendment of the recognizance and this reason was withdrawn.

Reason 2 reads:—"The learned Chief Justice was in error when he "held as he did that the service of the Notice and Reasons for Appeal made "by the appellant in the Court below was duly made by the appellant for- "warding the same by registered post to the registered address and not the "actual address or residence of the respondent."

Much has been made of the decision in *Humphrys* v. *Jarad* (1923, L.R.B.G.) as applicable to this reason but on a careful perusal of same it will be seen that the facts therein are not on all-fours with the facts in this case. Section 92 of the Mining Ordinance No. 34 of 1920 reads *inter alia* "notice in writing of the reasons of appeal may be served either personally "or by registered letter": and as I understand from counsel for respondent that the latter method was adopted. If that is so, then on proof of the conditions laid down in Ordinance No. 30 of 1907, section 2 being complied with—the registered letter being addressed to a place where the respondent may be found and no rebuttal of these facts being shown, I am of opinion that such service would be good service—and here I take the opportunity of recording that no such copies of the necessary affidavits to which reference may be made by the judges have been supplied in accordance with Rule 13 of the Appeal Court Rules, 1924, consequently I am left in doubt as to the mode of service effected by the non-compliance with this rule and as was said by Lopes, L.J., in the case of *Savage* v *Adam* (W. N. 1895—109): "Where a case tried by a Judge without a jury comes to the Court of "appeal the presumption is that the decision of the Court below on the facts "was right, and that presumption must be displaced by the appellant. If he "satisfactorily makes out that the Judge below was wrong then inasmuch as "the appeal is in the nature of a re-hearing the decision should be reversed: "if the case is left in doubt it is clearly the duty of the Court of Appeal not "to disturb the decision of the Court below." For this reason I must hold that Reason 2 of the Appeal is of no avail and that the service effected was good service.

As to Reason 3—"The admittance by the learned Chief Justice of the copy of the proceedings in the matter of the jump of John *v.* Houston during the reply of counsel, in spite of objection, was irregular as such proceedings were not tendered in the Warden's Court," although it directly affected the cause, nevertheless I am of opinion that the admission of that document is not in itself sufficient to warrant my holding that the learned Chief Justice

based his decision solely upon those proceedings, there being sufficient evidence after elimination of those proceedings for him to find as he did. I propose to deal with Reasons 4 and 5 as one reason, therefore it will be necessary to trace the steps to be taken before a claim licence is issued.

By Regulations 4 (5) and 6, on receipt of a prospecting licence, a person shall be entitled to prospect and locate claims on any of the Crown lands in the colony, not previously lawfully occupied or previously located or reserved. Reg. 29 states the mode of marking out the limits of the location and Reg. 7, says after location and within a reasonable time, in any case not more than three months thereafter, the applicant shall file at the office of the Warden or the Department of Lands and Mines in Georgetown a notice in duplicate stating particulars of the location and its situation as will enable the claim to be identified by the Warden, together with an application in writing for a licence. On receiving the notice and application the Commissioner shall cause the same to be published in the *Gazette* for three successive Saturdays and if there be no opposition to the issue of the licence and the boundaries have been verified to the satisfaction of the Commissioner the licence may be issued for the land so located.

Much has been said by counsel for appellant on the construction of section 14 as to the verification to the satisfaction of the Commissioner of the boundaries of the claim, if no opposition, whether before the issue of the licence or at all or as counsel urges that verification only occurs when there has been opposition to the issue of the licence. On a careful reading of the Regulations it will be conceded that the words “Such a description of “the ground located and its situation as will enable the claim to be identi- “fied by the Warden” as stated in Reg. 7 must be of some force—for in the next Regulation it is laid down that the Warden after filing one copy of the Notice of Location and application for licence in his office shall forward the other together with the application by the first opportunity to the office of the Commissioner and shall at the same time furnish to the Commissioner such information, if any, respecting such location and application as he may think requisite, therefore it becomes one of the Warden’s duties to visit the *locus in quo* and report such information as he may think requisite, in order that the Commissioner, in case of any breach of the Regulations, may disallow the location or suspend work, (vide Regulation 4 (6),) meanwhile in the absence of such disallowance the locator is entitled to work the ground located until his application for a claim licence can be granted, the publication of which and verification of boundaries taking place before issue of same and for

the purpose of verification power is given to the Warden under Reg. 14 (2) to call on the applicant to point out to him the position and boundaries of the claim and on failure to do so within six weeks after notification, the application for the licence shall be cancelled and the location made null and void, thus, it will be seen, that verification of boundaries is a condition precedent to the issue of the licence.

Finding myself in agreement with the decisions of the learned Chief Justice, I quote from his decision the following:

"Now, in this case no verification of Houston's location was demanded "or made before the issue to him of the claim licence. I understand that "omission on the part of the officers of the Mining Department to be com- "mon. It is against the law, and the note at the foot of the licence form to "which my attention has been invited does not cure the illegality. The "words therein: 'This licence is issued in accordance with the description "of the claim given by the locator thereof' cannot suspend or annul the pro- "vision that that description shall be verified to the Commissioner's satis- "faction before the licence is issued. On the other hand the words that fol- "low 'without prejudice' &c, seem to protect persons other than the locator "who may have rights either by previous acquisition or subsequent ac- "cruer" and here, counsel for appellant is serious in his contention that the appellant having chosen to jump the claim held by Houston—whilst such jump was pending—he or anyone else was precluded from locating within—the area originally located—consequently a location by the respondent within that area and subsequent issue of a licence therefor was unlawful. Regulation 93 expressly lays down the cases in which jumping is allowed and Regulation 94 states, if a person asserts a right to jump a claim located or held he shall clearly define in his notice of jumping the land which he asserts the right to jump and shall retain from locating the same —and Sub-Reg. 9 of the said Reg. 93 states, in the event of the claim being awarded to the jumper he shall be entitled to receive from the Commissioner on payment of the prescribed fee a licence for the claim in question and the licence originally issued shall become null and void.

The evidence before the Warden shows that the appellant jumped the claim of Houston called Campanero Block on the 15th March, 1923, and on the 16th and 17th May, 1923, the respondent Cozier located—learned counsel for appellant urges Cozier could not locate because appellant John had jumped the area located, but nothing to prevent others from jumping also and further that that was the only remedy open to appellant John and others if any of the circumstances existed as mentioned in Regulation 93. In this case a claim licence has been issued for an

area of 330 acres—an area which could be lawfully occupied, any excess thereof would be unlawfully occupied as the location for same by virtue of the issue of a licence had defined and limited the area granted—hence, the jump could only be for the area held under the claim licence, *i.e.*, 330 acres, and not as counsel of appellant would have me to believe for the 2,500 odd acres as was located by Houston, therefore land inside the Campanero Block and not within the 330 acres would be open for location and I am of opinion that the learned Chief Justice was right when he so held and stated in his decision "Houston located" more than five times 500 acres and marked the boundaries thereof "as I held in *Fowler* v. *Mattis* (1923, "L.R.B.G.) acquiring the right to work that enormously excessive area to "the exclusion of others until the issue or refusal of a claim licence in re- "spect of what could only be a regular portion of it. He applied for and ob- "tained a claim licence to land particularly described as comprising 330 "acres and to that area he was necessarily confined, Reg. 7 14 (1), 15, 36 "and 37. If Houston by reason of his receipt of a licence to the marked and "specified area was the mining owner of that area and entitled to work it, "his occupation for working purposes of any ground not given to him must "in my opinion, have been unlawful. His claim licence had delimited and "defined the area of occupation to which he was entitled; it had made that "precise which before its issue had been uncertain. Consequently land be- "yond that delimitation was open to location by anyone. John, having cho- "sen to jump could not either interfere with the lands supposed by him to "be within the claim, and as to 330 acres thereof actually a legal claim, or "take possession thereof. Reg. 94 (6). He did not locate but Cozier did, and "I am of opinion that Cozier's location was of land, in one aspect of the "circumstances and the provisions of the regulations, unoccupied, and in "any event if occupied unlawfully so. Thus appears the difference between "this case and *Fowler* v. *Mattis,* in that the occupation of the excess of area "was lawful because Reg. 4 (6) expressly enables a locator to work (and, "therefore to occupy for work) land located under a prospecting licence "until a claim licence has been issued or refused, and no claim licence had "yet been issued or refused. Here a claim licence had been issued for a "specific portion of the land located particularly delimited by the locator."

The appeal is dismissed with costs and the decision of the learned Chief Justice is affirmed.

Appeal Dismissed.

REPORTS OF DECISIONS

IN

THE SUPREME COURT

BRITISH GUIANA

DURING THE YEAR

1926

AND IN

THE WEST INDIAN COURT OF APPEAL

[SITTING IN BRITISH GUIANA]

[1926.]

Edited by S. J. VAN SERTIMA, B.A., B.C.L. (Oxon.)

Barrister-at-Law, British Guiana.

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JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1926.

SIR CHARLES HENRY MAJOR, KT.	..Chief Justice.
SIR MAURICE JULIAN BERKELEY	..Senior Puisne Judge.
WALTER JOHN DOUGLASS, M.A., LL.M.	..Junior Puisne Judge.
WILLIAM JAMES GILCHRIST	..Actg. Junior Puisne Judge.
RICHARD TYRER EGG	..Actg. Junior Puisne Judge.

TABLE OF ABBREVIATIONS.

(ADDITIONAL TO THE USUAL REFERENCES TO ENGLISH REPORTS).

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

WEST INDIAN COURT OF APPEAL.

As, at present, no reports of decisions in the West Indian Court of Appeal are published separately, the decisions in that Court, and, on appeals therefrom, in the Judicial Committee of the Privy Council, are included in the British Guiana Law Reports.

METHOD OF CITATION.

The Reports will be cited as 1926 L.R.B.G.

ERRATA.

Page	*Line*	*For*	*Read*
23	last line	orth	forth
28	22 from top	Connsel	Counsel
33	19 from top	Order i	Order I
33	16 from bottom	plaintiff	party beginning
34	10 from bottom	(par. S	(par. 5)
44	7 from top	Brett, J. A.,	Brett, J.
53	24 from bottom	Orabral's	Cabral's
79	3 from top	held	hold
84	17 from bottom	ohjection	objection
85	20 from top	coat	costs
87	13 from bottom	appeals	appeal
95	5 from top	license	licence
102	19 from top	and	"and
102	20 from top	"such	such
105	7 from bottom	The admittance	"The admittance
105	3 from bottom	Court	Court"
106	11 from top	making	marking
107	3 from bottom	futher	further
110	19 from bottom	in as much	inasmuch
120	3 from top	house, property	house property
136	17 from bottom.	in variance	at variance

TABLE OF ABBREVIATIONS.

(ADDITIONAL TO THE USUAL REFERENCES TO ENGLISH REPORTS).

A.J.	.....	Appellate Jurisdiction, British Guiana.
G.J.	.....	General Jurisdiction, British Guiana.
L.J.	.....	Limited Jurisdiction, British Guiana.
L.R., B.G	.....	Law Reports, British Guiana.
Menzies	.....	Menzies Reports (Cape Colony).
N.L.R.	.....	Natal Law Reports.
S.C.	.....	Juta's Supreme Court Reports (Cape Colony).
T.P.D.	.....	South African Law Reports, Transvaal Provincial Division.
T.S.	.....	Supreme Court Reports (Transvaal).

TABLE OF CASES REPORTED.