# INDEX.

# CASES

DETERMINED IN THE

# SUPREME COURT OF BRITISH GUIANA.

## CANNON *v.* BRASSINGTON.

[No. 128 OF 1926.]

1926, DECEMBER 29; 1927, JANUARY 2, 10.

BEFORE DOUGLASS, J.

*Election petition—Georgetown Town Council Ordinance, 1918—Register of voters—Whether conclusive as to qualification of voter—Sections 15-25 of the Ordinance—Who can be voter—Meaning of the word "person" in section 9—Whether vote is that of company's or of its representative—Extent of conclusiveness of Register—Form of register not to affect substance of its meaning—Whether a person can exercise more than one vote —Finding on Scrutiny that there was a tie—Procedure—Whether section 61 applies to proceedings on Election Petition—Question of costs where a Scrutiny reveals an, equality of votes.*

The cumulative effect of sections 15 to 25 of the Georgetown Town Council Ordinance, 1918 is to render at the hearing of an Election Petition the register of voters conclusive as to the qualification of the persons named therein, and the Court is thereby precluded from inquiring into any such qualification.

Section 24 (1) of the Georgetown Town Council Ordinance, 1918, provides that the list of voters when finally settled and signed as therein before provided for shall be delivered by the Council to the Registering Officer who shall keep the same and shall cause the names in each list to be fairly and truly recorded in alphabetical order in a book to be by him provided for that purpose with every name therein numbered, beginning the numbers from the first name and continuing them in a regular series to the last name, and shall cause such recording to be completed within ten days after the delivery to him of such revised lists by the Council,

In the year 1924 the Town Clerk in making up such list had under the column designated "Surname and Christian name of voter" placed the name of the director first and that of the company after. In the years 1925 and 1926 the order had been reversed, the company's name appearing first and the director's after,

Section 24 (2) provides that the book in which such revised lists are recorded shall be the Register of Voters for the several wards for the ensuing year.

Section 9 provides *inter alia* that every male person shall be entitled to be registered in every year as a voter, and when registered to vote at the election of a member of the Council or a Ward who is qualified as follows, that is to say:—

(1) Has attained the age of 21 years; and
(2) Is under no legal incapacity; and
(3) Is a British subject by birth or naturalization or being any other person has actually resided in the Colony for a period or periods in all of not less than three years; and
(4) Possesses within the Ward some one of the following qualifications:—

Position as Attorney or as Director of any limited liability company owning property within the city which would give the necessary qualification as a voter to the owner thereof not being a company, etc,

*Held,* (*a*) That the word "person" referred to a living being and did not include a legal entity such as a corporation;

(*b*) That the vote was given to the person who was the Attorney or Director of the Company and not to the Company itself;

(*c*) That it made no material difference that in the year 1926 the name of the Company had appeared on the lists before that of the Director, that the fact that the director's name appeared was sufficient to entitle him to vote.

The conclusiveness of the Register is such that where a person is therein stated to be the Attorney of a Limited Liability Company the Court is precluded from inquiring whether the principal of such Attorney was in fact such a company or not, as any attempt to do so must necessarily involve inquiry into the qualification of a person whose name appears on the Register. Whether a person's right to vote be based on his own personal qualifications or on his being an Attorney or Director of a Company possessing the necessary property qualification, he can exercise only one vote.

Section 61 of the Ordinance provides that "where two or more candidates have an equal number of votes the Returning Officer shall make a special return of the result of the election and the Council shall have the right of electing by ballot one of such candidates to be a member of the Council,"

*Held,* that the procedure prescribed by the said section had no application to a finding by the Court at the hearing of an Election Petition that on a scrutiny there had been an equality of votes, and the Court must therefore declare the election void.

Where the Court on a scrutiny finds that there was an equality of votes the usual practice is for each party to the election petition to pay his own costs.

The facts appear in the judgment.

*G. J. DeFreitas, K.C.,* for the petitioner.

*P. N. Browne, K.C.,* and *S. J. Van Sertima* for the respondent.

DOUGLASS, J.: The election for a Councillor for Ward No. 3, South Cummingsburg—East and West—in the City of Georgetown took place on the 8th December, 1926, the petitioner Nelson Cannon and the respondent R. E. Brassington were the only candidates up for election, and the said R. E. Brassington was declared duly elected by the Returning Officer Harrie Emile DeCastro Belgrave, he had obtained 78 votes and Nelson Cannon 77 votes.

On the 15th day of December the said Nelson Cannon filed his petition asking the Court to determine that (1) the respondent did not receive the majority of lawful votes and was not duly returned, and that (2) the petitioner should be duly returned and elected, or (3) in the alternative that the election of the respondent was null and void.

The grounds relied on at the hearing to sustain the prayer were that:—

(1) Percy Claude Wight, a registered voter, exercised two votes at the said election.

(2) The B.G. Building Society, Ltd.; Booker Bros., McConnell & Co., Ltd.; Demerara Wharf & Storage Co., Ltd.; and Garnett & Co., Ltd.; were not "persons" within the meaning of the Town Council Ordinance, 1918 (hereinafter referred to as "the Ordinance") and its amendments, and therefore not entitled to vote.

(3) If the said companies were entitled to be registered as voters, they respectively did not register their votes according to law.

(4) Thomas Reginald Cowell, who exercised a vote, was not on the Voters' List and was not an attorney of a limited liability company registered as a voter.

Paragraphs 1, 2, 3, 4 and 11 of the petition were by consent taken as proved, they contained particulars of the proceedings up to and including the return of the poll, so that the only witnesses necessary to call were the returning officer who delivered to the Court the parcel of papers relating to the election in accordance with section 63 of the Ordinance, and gave details of his conduct of the polling station, and the representatives of the five companies concerned who gave evidence of their having voted on behalf of the Companies they respectively represented.

Before considering the various grounds relied on by the petitioner in support of his petition or by the respondent in reply the authority and finality of the Register of Voters must be ascertained, and the jurisdiction of the Court to alter or amend the same. It was indeed taken as a preliminary objection that those parts of the petition which attempted to question the correctness of the register should be struck out on the ground that the Court was not competent to alter or amend the list as settled, but after consideration I decided to leave the petition as it stood, for the inviolability of the register involved other objections to the poll raised by the petition, and the whole could better be dealt with at the close of the hearing.

The steps taken to arrive at the register in its final form are shortly as follows: claims by persons to be registered as voters must be sent in by the 15th February in each year, and if the registering officer is satisfied that the applicant "possesses the qualification in respect of which such claim is made" after enquiry, examination and investigation, he shall register such person. On or before the 15th March the registering officer shall cause an alphabetical list of all persons he considers qualified to be registered as voters to be published in the *Gazette*, and any person whose name appears on such list may object to any other person whose name also appears thereon, on or before the 15th April. To decide on these objections and for revision of the list the Mayor and Town Council of the city of Georgetown must

hold Court before the 15th May in each year, when they insert or strike out names as the case may be proved, and they "shall expunge from the list of "voters the name of every person who is proved to be dead and shall cor- "rect any error or supply any omission which is proved to exist in the list "in respect to the name, place of abode, description, or qualification of any "person included therein" (Section 21 (6)). When finally arrived at, the list is signed by the Mayor and delivered by the Council to the registering officer "who shall cause the names in each list to be fairly and truly recorded "in alphabetical order in a book . . . . . with every name therein num- "bered." (Section 24 (1)). "The book in which such revised lists are re- "corded shall be the register of voters for the several wards for the ensuing "year." (Section 24 (2)). "Such revised list shall be forthwith published "in the *Gazette* and one or more newspapers in the city." (Section 24 (3)). Section 25 declares that the decision of the Council so long as the same shall remain unaltered shall be conclusive on the parties claiming or objecting as above.

The first case relied on by learned counsel for the respondent in support of his contention that the register of voters is conclusive was *R.* v. *Tugwell* (1859. 33 J.P. 101). The head note reads: "Held . . . . that the rela- "tor could not be allowed to show that certain persons whose names were "on the Burgess' Roll and who had voted, were not entitled to do so, for "the Burgess' Roll is conclusive evidence of qualification to vote." This decision is based on the construction of 5 and 6 Will. IV c. 76 (Act for Regulation of Municipal Corporations, 1835), which contain very similar sections to our local ones, summarised above, for preparation of the Burgess' Roll. Section 22 enacted that the revised lists should be copied by the Town Clerk into a book and such book "shall be the Burgess' Roll of the "Burgesses of such borough entitled to vote." Blackburn, J., said, "without "enquiring into the authorities which have been referred to it seems to me "that it must have been intended that the Burgess' Roll should be conclu- "sive as to the persons upon it being entitled to be electors," and again, "while the Burgess' Roll remains it is intended to be conclusive." The same judge in giving his decision in the *Oldham Election Petition* (1869. 20 L.T.R. 302) on the construction of section 48 of 6 and 7 Vic. c. 18 (Parliamentary Registration Act, 1843), said, "It seems that if a name is placed "on a register any objection should be in the shape of an appeal, as the reg- "ister is intended to be conclusive;" this was with reference to section 60 which enacted that appeals should lie from the revising barrister to the Court of Common Pleas. It should however be noted that section 79 of this Act enacts that the register is to be conclusive evidence

that the persons named therein have the qualifications annexed to their names, a provision which the Ordinance does not contain.

*Stowe* v. *Jolliffe* (No. 2) (1874. 43 L.J. 265) also deals with the construction of 6 and 7 Vic. c. 18 and in addition with 35 and 36 Vic. c. 33 (The Ballot Act, 1872), section 7 of the latter reads, "At any election for a "County or Borough a person shall not be entitled to vote unless his name "is on the register of voters . . . . .and every person whose name is on such "register shall be entitled to demand and receive a ballot paper and to "vote." Lord Coleridge, in delivering a very interesting judgment in this case on the history of legislation upon the subject of the register, concludes, "from the Reform Act to the Ballot Act the tendency of legis- "lation has been to make, with certain exceptions, the register conclusive . ". . . I think the true construction of these sections . . . . . is to make the "register conclusive, not only on the returning officer but also on any tri- "bunal which has to enquire into elections."

I do not agree that *Middleton & ors.* v. *Simpson* (1880. 5 C.P. 193) relied on by learned counsel for the petitioner in any degree detracts from the weight of these decisions or even that it is applicable to the present case. That decision was based on the construction of section 28 of 5 and 6 Will. IV. c. 76 in conjunction with section 1 (2) of 38 and 39 Vic. c. 40 and it was held that a candidate for Town Councillor must be "entitled to be on" the Burgess' Roll as well as "on the Roll," and the Burgess' Roll containing his name is not exclusive evidence that he is "entitled to be on" the Roll; Grove, J., says that by such a construction "every word may be "given its full meaning, and there may be a very good reason for the legis- "lature thinking that to avoid difficulties they should add to the earlier "qualification that not only should the candidate be qualified but that he "should also be on the Roll." So the Municipal Corporation Act, 1882—on which our original Georgetown Town Council Ordinance of 1898 was apparently founded—contains in section 87 (1) the provision that "a munici- "pal election may be questioned by an election petition on the ground (c) "that the person whose election is questioned was at the time of the elec- "tion disqualified." Our ordinance, however, contains no such special modifications, as in the English Acts, of the conclusiveness of the register of voters.

I am of opinion that relying on the cases cited and on a true construction of sections 24 and 25 of the ordinance there can be no question but that the register of voters is binding and conclusive in all respects not only on the returning officer but also on the Court before which the petition is brought; every provision is made for the correctness of the register even to the extent of

an appeal to a judge for review (section 25), and if the contention of the petitioner were correct the whole register could be reopened and the Court might be called upon not only to decide a question already decided by the judge on review, but to investigate matters which ought to have been settled by the revising barrister.

Next, learned counsel for the petitioner submits if the register is held to be conclusive it is only in respect of *persons* thereon, for it is only male or female persons who can be qualified and registered as voters, and this is shown by section 9 of the Ordinance (as amended by Ordinance No. 19 of 1923), so that no company, corporation, nor firm may be registered as a voter, and if so registered it must be treated as a nonentity, and it leaves the number on the register assigned to it in blank so far as any capacity for voting goes, there is, in short, no voter shown in such a case, and any votes cast as representing that registered number are void and should be rejected.

The list of voters for 1926, on which this election was held, contains the following entries so far as relative to the present petition:—

| No. | Date of Registration | Surname and Christian Name | Nature of Qualification | Local or other Description of Land, &c. |
|---|---|---|---|---|
| 17 | Feb. 14, 1925... | B.G. Building Society, Ltd.—(Wight, Percy Claude—Director). | Transport.... | W½ of S½ 341, East Street, South Cumingsburg. |
| 18 | Feb. 3, 1925... | Booker Bros., McConnell &Co., Ltd.—(Smellie, William George—Attorney. | Transport.... | Mud Lot A 13, A 14, A 15, 22 and 23, South Cumingsburg. |
| 56 | Feb. 14, 1918... | Demerara Wharf and Storage Co., Ltd.— (Browne, Philip Nathaniel—Director). | Transport.... | Lots A and B, Water Street, South Cumingsburg. |
| 92 | Nov. 26, 1918... | Garnett & Co., Ltd.— (Smellie, Thomas Trail — Director). | Transport.... | Lots 17, 18 and 19, South Cumingsburg. |
| 167 | Feb. 14, 1925... | Sandbach, Parker & Co., Ltd.—(Cowell, Thomas Reginald—Attorney). | Tenancy of premises the rental whereof is not less than $15 per month. | Mud Lot Part, Company Path, South Cumingsburg. |
| 184 | Jan. 31, 1924... | Wight, Percy Claude... | Transport.... | N½ 187, South Cumingsburg. |

The 1925 Register is similar, except that the numbers are 14, 15, 51, 87, 170 and 183 respectively.

On the 1924 Register the B.G. Building Society does not appear, but with that exception the same companies are to be noted, viz.:—

| No. | Date of Registration | Surname and Christian Name | Nature of Qualification | Local or other Description of Land, etc. |
|---|---|---|---|---|
| 23 | Feb. 10, 1920 | Cassels, John Borlase—Director. (Booker Bros., McConnell & Coy., Ltd. | Same Particulars and Property above. | Same Particulars and Property above. |
| 11 | Nov. 23, 1918 | Browne, Philip Nathaniel—Director. (Demerara Wharf & Storage Coy., Ltd.) | Ditto. | Ditto. |
| 167 | Nov. 26, 1918 | Smellie, Thomas Trail—Director. (Garnett & Coy., Ltd.) | Ditto. | Ditto. |
| 128 | Feb. 15, 1924 | Osborne, Charles Kenneth—Attorny. (Messrs. Sandbach, Parker & Coy.) | Ditto. | Ditto. |
| 187 | Jan. 31, 1924 | Wight, Percy Claude | Ditto. | Ditto. |

Now the entries on both the 1924 and 1926 lists have been made in reliance on section 9 (4) (c) of the Ordinance, this subsection did not exist in the 1898 Ordinance and there is another slight difference for section 10 of that Ordinance starts, "the *property qualification* for a voter shall be," whereas the present section reads "*Possesses* within the ward some one of the following *qualifications.*" Sub-sections (a) and (b) of sec. 9 are similar to sub-sections 1 and 2 of sec, 10 of the earlier ordinance and subsections (c) reads, . . . . "Position as attorney or as director of any limited liability "company owning property within the city which would give the necessary "qualification as a voter to the owner thereof not being a company, . . . . . "and provided that not more than one representative of such company "shall be entitled to be registered as a voter under this sub-section."

This special provision was inserted, as counsel agree, to meet the cases where limited companies were in possession of ample property qualification but were incapable of exercising the franchise as "a person," and so to protect their interests as citizens. That it was the intention of the registering officers in 1924 and 1926 respectively that the same firms should be represented on each list there can be no doubt, in the case of the Demerara Wharf and Storage Company, Limited, and of Garnett and Company, Limited, the entries are the same with the difference that the firms and the directors thereof are reversed on the later list, but in all cases the property qualification is the same. I am not surprised that the registering officers should have differed in their opinions as to how the companies should be entered on the voters' lists, their very difference however shows their anxiety to get the right entry, and that the section was duly consulted. The company in the first place has to prove possession of property which would if it were a person qualify it as a voter

and no objection has been taken that this was not done. I can only construe the sub-section as intending that the attorney or director of the company should be entered on the register, for it concludes "provided that not more "than one representative of such company shall be entitled to be registered "as a voter," *i.e.*, as a representative of the company. This is also indicated by the commencement of the section: "Every *person* shall be entitled to be registered," etc., who is qualified as follows (*inter alia*) (4) possesses in the ward some one of the following qualifications, sub-section (c) naming that qualification.

It would be the merest quibble to say that because the company's title is entered first and its attorney or director following that the representative was not registered, especially in the circumstances now disclosed, and I do not intend to spend more time over this objection except to quote the old maxim "*omnia praesumuntur rite et solemniter esse acta donee probetur in contrarium.*"

But it is objected that even if the entry on the register is a good and sufficient one yet no one has been defined by the ordinance as the proper person to exercise the company's vote, and consequently the votes given by the respective attorneys or directors especially if they have not been authorised to exercise it by their company, have been thrown away, or were invalid and should consequently have been rejected; finding however as I do that the representative in each case has been entered on the register, though not perhaps as definitely as he might have been, the contention is not of much avail for the person entered is the only person who is entitled to vote and the register is conclusive in that respect. It is also contended that the case of Sandbach, Parker and Company does not stand on the same footing with the other companies whose votes through their representatives are objected to, for it is not a limited liability company and should never have been entered on the register and consequently its attorney is not entitled to any vote. A certificate by the Registrar of Joint Stock Companies was put in evidence showing that there was no such company as Sandbach, Parker & Co., Ltd., on the Companies' Registry, and apparently it is only a partnership, but the first portion of this objection must be referred to the same criterion whether the register is conclusive or not; the said company and its representative have been entered on the register since 1924, no objection has been taken by any person at the many opportunities that have been offered since that date. I have already held it is not for the Court to revise the register when other and ample machinery is provided for checking mistakes. Mr. Cowell is the attorney for the said company and, as his principals reside in England, presum-

ably he has the power to act in all their concerns, and in any event sub-section (*c*) empowers the attorney or director of the limited liability company to register and vote, but quite apart from this he appears as representative of the company on the register. If the Court cannot correct the register, it also cannot find that any person is not a voter in respect to the property qualification entered against his name. The returning officer read out the complete entry opposite No. 167 on the register before handing Mr. Cowell the voting paper, and was satisfied with his identity. At first I had some doubt in this matter but were I to cancel his vote as being null and void I should in effect be destroying the value of the register in refusing to accept a person entered thereon, and so entitled to vote.

There remains only the objection that P. C. Wight exercised two votes at the same election and that both the votes are, or one of them is, null and void. The evidence showed that the two voting papers were handed to Mr. Wight at the same time and that the entries on the register against No, 17 and No. 184 were read to and acknowledged by him, the one as Director of the B.G. Building Society, Ltd., in respect of its property in East Street, and the other in respect of his own property N½ 187, South Cumingsburg; in these circumstances the questions allowed to be put to voters under section 50 of the Ordinance could have been freely answered by Mr. Wight and without in any way contravening section 65 of the Ordinance as suggested in paragraph 6 of the petition. The point raised is a very important one, and before attempting a solution section 9 must be considered as a whole. The section is headed and has as its side-note "Qualification of Voters," and proceeds, as amended, that every male and female person "shall be entitled to be registered as a voter, and, when registered, to vote "at the election of a member of the Council for a ward who is qualified as "follows," then follow four sub-sections each with the necessary qualification, he must be (1) 21 years of age, (2) under no legal incapacity, (3) British by birth or naturalisation and (4) possess within the ward "some one of the following qualification." These qualifications are divided into three heads: (*a*) possession individually or in other stated capacities of premises of a certain value, (*b*) tenancy of premises of a certain rental, (*c*) represent a company who owns one of the said property qualifications.

Sub-section (c) clearly does not intend to add to the male and female persons eligible to vote some body who is not a person, or create a legal "person" neither male or female who should be entitled to a vote, although Mr. P. N. Browne, K.C., for the respondent suggests section 5 (25) of the Interpretation Ordinance No. 14 of 1891 as supporting a view that it does; it reads

"'Person'" shall include 'any body of persons corporate or incorporate,'" but that section starts "Unless the contrary intention appears," and section 9, sub-sections (1) and (2) of the Georgetown Town Council Ordinance do express the contrary intention, and apart from this if "person" had been intended to include "a body of persons" there would have been no need to add sub-section (4) (*c*). The "person" after having satisfied requirements under sub-sections (1), (2) and (3) must possess some one of the other qualifications set out, not be it noted one or more of those qualifications but some *one* of them. The respondent on the other hand says Mr. Wight is entitled to be registered and to vote in his personal capacity as possessing the necessary property, and again in his representative capacity as director of a company which possesses the necessary property qualification. Can it be that this was the intention of the legislature? A reference to the law on the subject in England does not assist to a solution for the provisions of sub-section (4) are apparently peculiar to this colony, and in England no executor or trustee, director or attorney could claim to register and vote in that capacity, it being the policy of the legislature to put a check on double voting (See *Knill* v. *Towse*, 1890. 24 Q.B.D. 687).

The respondent's line of reasoning necessarily implies that the legislature intended to create a legal person entitled to be on the voters' list other than a male or female person and I have already expressed my opinion that it did not. intend to do so, it is the representative of the company who is entitled to be registered and it is he who has to state his age and British nationality. Mr. Wight is the same personality when he represents the B.G. Building Society, Ltd., as when he qualifies for his own vote, it will be admitted I think that he could not enter his name in respect of two separate qualifications because he owned two different properties of the required value, so why should he be entitled to qualify under sub-section (*c*) when he has already done so under sub-section (*a*)? Surely he would then be claiming and exercising his voting capacity twice. That the policy of the ordinance is one man one vote is to my mind very clearly indicated by the word "or" appearing at the end of sub-section (*a*) and at the end of sub-sections (*b*), the person can take his choice (if so qualified) of any of the sub-sections either (*a*) or (*b*) or (*c*) but not of any two of them which would be the case were the respondent's contention correct. Such an interpretation need create no hardship for the limited company is free to appoint a representative who either had no personal vote, or did not wish to exercise it as an elector. To sum up a straightforward reading of the section does not lead one to believe that it was intended

to confer the franchise on a limited company as such but only to enable its representative to vote in respect of the property qualification it possessed. No precedent has been quoted that such double voting power has ever been exercised before, and the suggestion that the register being conclusive it would be inconsistent for the Court to refuse to accept the votes of persons entered thereon does not hold ground. As was said in *Knill* v. *Towse* referred to above "I see no inconsistency in holding that though a person "may be registered in several divisions he can only vote at the same elec- "tion for one of those divisions. There is nothing in the nature of things to "make it a necessary consequence of being on the register for more than "one division that a person should be entitled to vote more than once at the "same election," and in a still greater degree does this argument hold good when a person is registered more than once for the same ward, and unless the word "person" is wide enough to include limited companies no construction of sub-section (*c*) will enable Mr. Wight to exercise his voting capacity twice. I would like to quote here from the judgment of Lord Robertson in *Nairn* v. *University of St. Andrews* (1909. Ap. Ca. 147), "A "judgment is wholesome and of good example which puts forward subject "matter and fundamental constitutional law as guides of construction never "to be neglected in favour of verbal possibilities."

There is no evidence to show which vote of Mr. Wight was cast first but it is of no importance only the one was good and the second was void and of no effect. In the Stepney Case (1886. 4. O'M & N, 34) it was held that when it appears on a scrutiny that a voter had voted in each of two divisions for which he was registered, if he had done so honestly and believing that he was entitled to do so, and if he voted first in that division for which he was registered in respect of the place of abode . . . . such first vote would he held good but the second would be disallowed.

I therefore hold that one of the votes cast by Mr. Wight was void and consequently there was an equality of votes for each candidate. This raises the question what is the proper course to adopt taking into account section 61 of the Ordinance; this section reads as follows: "Where two or more "candidates have an equal number of votes, the returning officer shall make "a special return of the result of the election, and the council shall have the "right of electing by ballot one of such candidates to be a member of the "council."

I am of the opinion that the section was only meant to apply to the original finding by the returning officer of the result of the election and in the present case he declared and returned a

majority of 1 for the respondent, it is now over a month since the returning officer made his return and in the interval a new Mayor has been elected as provided for in section 80 of the Ordinance. Section 77 (2) of the Ordinance states that "at the conclusion of the trial, the judge shall determine "whether the councillor whose return or election is complained of, or any "other or what person, was duly returned or elected, or whether the election "was void," this section makes no provision for shifting the responsibility of the decision from the judge to any other person:

For this reason, namely that each candidate has obtained equal votes I find and determine that the said R. E. Brassington was not duly returned nor elected, and that the election was void. I propose to follow the English practice that where an election is avoided only by their being an equality of votes upon a scrutiny each party has to pay his own costs, I therefore make no order as to costs.

Solicitors for Petitioner: *Cameron & Shepherd,*

Solicitor for Respondent: *A. V. Crane.*

RAMOTAR *v.* RAMOTAR.

RAMOTAR *v.* RAMOTAR.

[No. 403 OF 1926.]

1927. JULY 23. BEFORE GILCHRIST. ACTG. J.

*Husband and Wife—Suit for judicial separation—Application for Alimony pending suit—Principle on which granted.*

The payment of alimony pending suit is enforced on the ground of necessity only, the supposition on which it is founded being that the wife has no sufficient means of support.

Where, therefore, it is proved that the wife has sufficient means independently of her husband to maintain herself according to her accustomed mode and standard of life, the Court will decline to make an order for alimony.

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

*J. A. Luckkoo, K.C.* and *S. J. Van Sertima* for the respondent.

GILCHRIST, J.: This is an application for alimony by the petitioner (the wife), hereinafter referred to as the applicant, pending her suit for judicial separation.

2. The marriage of the parties has been proved.

3. The power of the Court to make an interim order for payment of money by way of alimony is contained in the Matrimonial Causes Ordinance No. 34 of 1916, and in the Rules made under section 44 of the said Ordinance.

4. The object of alimony is to enable the wife to support herself in the rank of life to which she has been accustomed (*Edwards* v. *Edwards,* 17 L. T. Rep. 584).

5. The applicant herself and other witnesses gave evidence in support of the application.

6. At the close of the applicant's case counsel for the respondent submitted that no case had been made out for an order for alimony *pendente lite* on the ground that the evidence of the applicant clearly establishes that she is in possession of means of her own sufficient for her condition of life.

7. Alimony *pendente lite* is an *ad interim* arrangement. It is payable pending the litigation. Its payment is therefore enforced on the ground of necessity only, the supposition on which it is founded being that the wife has no sufficient means of support and that unless the husband is ordered to give up a fair proportion of his income to her she will be without sufficient means of sustenance and may have to beg, or be driven to vice. See *Coombs* v. *Coombs* (1866. 1. P. & D. 218) *Leslie* v. *Leslie* (1911) p. 203.

8. In *Bass* v. *Bass* (112 L. T. Rep. 70) Kennedy, L.J., laid down that the question of alimony depends upon the possession or non-possession by the wife of sufficient means of support. In

the same case Swinfern Eady, L.J., said that it would not be proper to order the husband to pay alimony *pendente lite* if the wife has sufficient means of support independently of him.

9. The applicant in the course of her evidence stated she is possessed of the following property—$1,431.10 less $600 belonging to her son, in the Royal Bank of Canada, five shares of $100 each in the British Guiana Building Society, Ltd., payable in seven years from 15th September, 1925, with bonus and interest, $297.96 on deposit with the British Guiana Building Society, Limited, $1,514.75 in Barclays Bank, Saving Bank, balance due on a judgment for $1,550 obtained by her against her husband on the 3rd March, 1924, with interest at the rate of six per cent. from 3rd March, 1924, until paid less $936.27 paid on account, three cottages on leased land, in one of which she lives and in respect of the other two receives a rental of $10.64 per month, three cows and two calves.

10. She also stated that when she and her husband lived together at Greenfield their household expenses amounted to $50 per month, that she would like an order against him to pay her $45 until the proceedings are determined. This evidence is indicative of the rank of life to which she has been accustomed.

11. In cross-examination the applicant was asked why she did not enforce payment by the respondent of the balance due under the judgment of the 3rd March, 1924. She replied she did not have the heart to do so, nevertheless she brings these proceedings for alimony pending suit. Apart from any other means she has she could by enforcing payment of the said judgment place herself in possession of ample means to maintain herself pending the determination of her suit.

12. In my judgment it is clear from the foregoing facts that the applicant is possessed of sufficient means of maintaining herself pending the determination of the proceedings. If it turns out that she is right the sum she may expend on account of her sustenance during the suit ought to be taken into consideration in allotting permanent alimony (*Coombs* v. *Coombs*).

13. In the circumstances I make no order. The question of costs of this application is reserved for argument.

25.7.27.—After argument no costs allowed.

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

Solicitor for the respondent, *L. Ramotar.*

CHEE-A-LUNG, Appellant,
AND
SOOGNY, Respondent.

[No. 230 OF 1927.]

1927. SEPTEMBER 9.

BEFORE DOUGLASS, J., AND GILCHRIST, ACTG. J,

*Bastardy—Complaint—Informality of same—Sufficiency of facts to indicate offence—Comments on modern tendency to disregard technical objections.*

Where in summary proceedings for an affiliation order the complaint through not complying with the forms usually adopted discloses sufficient information and particulars to enable the defendant to know what he is called upon to answer such lack of formality does not invalidate a subsequent conviction.

The facts appear in the judgment.

*E. F. Fredericks* for the appellant.

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

The judgment of the Court was delivered by GILCHRIST, J., on the 9th September, 1927, as follows:—

This is an appeal from the decision of the Stipendiary Magistrate of the Berbice Judicial District, adjudging the appellant to be the putative father of the respondent's child born on the 4th June, 1921, and ordering him to pay a weekly sum for its maintenance and education.

2. The reasons for appeal argued for are—

(*a*) That the decision is erroneous in point of law because "the word-"ing of the complaint is not statutory but somewhat of a para-"phrase of section 3 (3) of Ordinance 13 of 1903, which is illegal;"

(*b*) That the decision is altogether unwarranted by the evidence in that the complainant did not discharge the onus cast on her of proving non-access to her by her husband before and during the period of gestation.

3. As regards (*a*). Whilst it is true the wording of the complaint is not strictly in accordance with the wording of subsection 3 of section 3 of Ordinance 13 of 1903, it nevertheless gave to the appellant sufficient information and particulars to enable him to know what he was called upon to answer. This reason of appeal is founded on an objection of a merely formal and highly technical nature. Modern decisions have led to a growing disregard of objections that do not directly or indirectly implicate the truth or merits of the issue. There is no merit in this reason of appeal,

4. As regards (*b*). It was within the province of the magistrate sitting as a jury to come to the conclusion on the facts that the appellant is the father of the child born to the respondent on the 4th June, 1921. It has been repeatedly held by this Court that it will not interfere with the decision of a magistrate in such a case.

5. The appeal is dismissed with costs.

CROMWELL *v.* CHUNG.

[No. 130 OF 1927.]

1927. OCTOBER 22. BEFORE DOUGLASS, J.

*Loan of money—Prescription Ordinance, 1856, section 6—Acknowledgment—Whether need be in writing.*

An acknowledgment of a debt and a promise to pay need not be in writing to take the case out of the Prescription Ordinance, 1856.

*Hack* v. *Hoyte* (1919. L.R.B.G.219) and *Khouri* v. *Elcock* (1924. L.R.B.G. 52) followed.

The facts appear in the judgment.

*E. F. Fredericks* for the plaintiff.

*McL. Ogle* for the defendant.

DOUGLASS, J.: Though the statement of claim is somewhat curiously worded, the evidence shows clearly that the plaintiff is claiming for money lent to the defendant, $500, and the defendant admits in his defence that he received the $500, whether by cash or cheque does not enter into the question.

The defence raised is twofold, that the plaintiff's claim is barred

(1) by reason of a Deed of Arrangement—"accepted by a unanimous resolution of the creditors present at a meeting held on the 24th February, 1922"—(this by the way was not proved) whereby all the defendant's property was handed to Trustees, and

(2) by the provisions of the Prescription Ordinance No. l of 1856, section 6.

To take the second objection first: the evidence showed—and it was not denied (1) that in a letter dated 14th February, 1922, the defendant enclosed an authority to the plaintiff to collect the $500 lent him on 21st November, 1921, from his fees as director of the Stabroek Butchery, Ltd., for the years 1921-1922, as it happened there were no fees and the suggestion that that docu-

ment relieved the defendant of responsibility is too absurd to notice further, and (2) that on a variety of occasions from 1922 onwards the defendant promised payment of the $500 and more especially in July, 1925, when in the presence of the witness H. L. Ross the defendant admitted owing the $500 and made the excuse that times were bad, and he could not give him anything until September.

There was no "written acknowledgment" within section 6 of the Ordinance, but acknowledgments of the debt in person made since, are ample to take the debt out of the Ordinance. It is unnecessary to discuss the construction of law on the subject, as it was fully considered in two judgments delivered by myself. *Hack* v. *Hoyte.* 1919. L.R.B.G., p. 219, and *Khouri* v. *Elcock,* 1924, L.R.B.G. 52.

There was a Deed of Arrangement dated 20th March, 1922, entered into between the defendant therein called the debtor of the one part and Percy C. Wight and J. Fernandes of the other part and the persons, firms and companies whose names are entered in the First Schedule thereto and "all other the creditors of the debtor who shall in writing or otherwise sig- "nify their assent of the third part."

This document is executed by the defendant, and the said Percy C. Wight and J. Fernandes only.

Under "The Deeds Arrangement Ordinance, 1916"—adopted from the similar English Act, 1887—such a Deed of Arrangement is rendered void where certain statutory conditions are not complied with. The evidence showed that the provisions of the ordinance were not complied with in several respects, but whether it was rendered void or not does not affect the present case, for the plaintiff had nothing whatever to do with the said deed, was never notified of it, and had no interest under it, the surviving trustee did not even know the plaintiff was one of the creditors, and the defendant told him that he was not included in an arrangement he was making with his creditors as he would be paid in full. The plaintiff was not entitled to any benefit of the deed and did not assent to it. I only regret that he did not oppose the sale of the properties owned by the defendant as he has little chance, I fear, of now recovering in full.

I give judgment for the plaintiff for the amount claimed with costs.

Solicitor for the plaintiff, *G. L. Robb.*

Solicitor for the defendant, *A. McL. Ogle.*

RAMSALUK *v.* RAMSAROOP.

RAMSALUK *v.* RAMSAROOP.

[No. 404 OF 1925.]

1927. OCTOBER 18, 19, 24, 29. BEFORE DOUGLASS, J.

*Claim on promissory note—Loan by money-lender—Defence of Money-Lenders Ordinance, 1907, not pleaded—Alleged illegality—Necessity for pleading same—Amendment—Circumstances in which illegality though not pleaded is taken cognisance of.*

(a) Generally speaking, a defendant who intends to rely upon a plea of illegality under the Money-Lenders Ordinance, 1907, should plead same specifically.

(b) Where, however, the plaintiff cannot prove his case without disclosing that the transaction was illegal, then it is the duty of the Court *ex mero motu* to take notice of such illegality.

Application by defendant at close of plaintiff's case for leave to amend his defence in order to raise a plea of illegality under the Money-Lenders Ordinance, 1907.

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

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

DOUGLASS, J.: At the close of the plaintiff's case Mr. Luckhoo, K.C., on behalf of the defendant asked leave to amend the defence, the claim by the plaintiff against the defendant being for the sum of $350, and a small amount of interest—due on a promissory note payable on demand,—the suggested addition to the defence was as follows:—"the defendant will "contend that the plaintiff cannot recover against the defendant the sum "sued for or any part thereof inasmuch as the same forms the subject of a "money lending transaction between the plaintiff who is a registered "money-lender and the defendant, and was carried out at a place other than "the plaintiff's registered address and otherwise than in his registered name "in contravention of section 4 (*b*) and (*c*) of the Money-Lenders Ordinance "No. 16 of 1907."

In support of his application Mr. Luckhoo relies on Or. XXVI., r. 1, (English Or. XXVIII, r. 1) and referred to *Rainy* v. *Bravo* (1872. P.C. p. 287). There is no doubt that the matter was a money-lending transaction nor has the plaintiff denied the fact, but there is certainly no objection in describing his occupation as a rice-farmer, nor could that description be described as a variation between the declaration and proof so as to entitle either party to ask for an amendment in that respect. I cannot see that *Rainy* v. *Bravo* has any special application to this case for in that case it was the plaintiff who asked for an amendment that became necessary because the defendant had destroyed a certain document and the defendant did not appear by counsel or in person at the hearing.

But it is the case of *in re Robinson's Settlement Gant* v *Hobbs* that Mr. Luckhoo principally relies on in support of his application, and it appears very much to the point, the defendant in that case had apparently asked for an amendment to raise the defence that the transaction was illegal under the Money-Lenders Act, but the Court held that no amendment was necessary and based their decision on *Scott* v. *Brown & Ors.* (1892. 2. Q. B. 724) quoting the decision of Lindley, L.J., and A. L. Smith, L.J. Fletcher Moulton, L.J., stated: "In the present case the plaintiff was put to prove the va- "lidity of the document, it would have been quite possible for him to have "asked on what ground the validity was challenged by the defendant Ste- "vens. He did not do so, possibly because in the pleadings of the other de- "fendants it was clearly challenged on the ground that it was an illegal "transaction under the Act. On the hearing it comes out that it was un- "doubtedly an illegal transaction," and Buckly, L.J., "Order XIX., r. 15, "(our Order XVII, r. 15) provides that the defendant must by his pleadings "do various things, but it names no consequences if he does not do those "things. It is not confined . . . . . to a case where a statute is the thing to be "pleaded, it applies to all cases of grounds of defence or reply which if not "raised would be likely to take the opposite party by surprise or raise issues "of fact not arising on the pleadings. When the defendant ought to plead "things of that sort the rule does not say that if he does not the Court shall "adjudicate upon the matter, as if a ground valid in law did not exist which "does exist . . . . . If he does not do that the Court will deal with it in one of "two ways. It may say that it is not open to him, that he has not raised it "and will not be allowed to rely on it, or it may give him leave to amend by "raising it, and protect the other party if necessary by letting the case stand "over." The Court in short found that in the circumstances it might give effect to a defence alleging that a transaction was void without specifically pleading the Act. Had this been the final word on the subject, I should have felt inclined to allow the amendment asked for on terms but there is a later case which modifies or perhaps I should say explains the *rationes decidendi* of *Gant v. Hobbs.*

*Lipton* v. *Powell & anr.* (1921. 2 K.B.D. 51) was a case where the plaintiff, a money-lender, brought an action in the County Court on a pronote made in her favour by the defendants who did not deny that the sum had not been paid but omitted to give notice that they relied upon the statutory defence and were therefore prevented from setting up the defence at the trial. Nothing appeared in the course of the proceedings to suggest that the plaintiff was not registered, but the County Court judge held that the plaintiff must give strict proof of her registration

and as she had not done so gave judgment for the defendants. On an appeal to the Divisional Court, Lush, J., held that there are two cases in which the judge may intervene and refuse to enforce the contract, one where the contract *ex facie* shows illegality, and the other, where, in the course of the proceedings, an admission is made or evidence is given by which its illegality clearly appears. And he states that had the defendants taken the point at the trial that the contract was illegal by reason as they alleged of the non-registration of the plaintiff, they would have been met by the objection that it was a statutory defence and the learned judge continues: "It cannot be "controverted that in an action on a contract, whether in the High Court or "the County Court, the defendant cannot rely upon the defence that a con-"tract apparently lawful is illegal unless he pleads it." And later, "It cannot "be said that the burden is on the plaintiff of proving the legality of the "transaction unless the defendant has pleaded its illegality, which in this "case the defendants have not done." McCardie, J., refers to *Scott* v. *Brown* as a case where the facts before the Court satisfied it that the contract was illegal, and quotes the decision of Lindley, L.J., which I have referred to but carries it one sentence further which curiously enough is omitted from the report I read, and that is "If the evidence adduced by the plaintiff "proves the illegality the Court ought not to assist him." And the learned judge refers to *Gant* v. *Hobbs* as falling within the principle of *Scott* v. *Brown* and others.

This case is perhaps not conclusive on the question whether or not the amendment asked for should or might not be allowed at the close of the plaintiff's case, and indeed in the case of *Rainy v. Bravo* referred to above the Privy Council held that it was entirely at the discretion of the judge how late he should allow an amendment, so I will take the facts now before the Court to find if there is any reason why an amendment should be made opening a fresh defence. In the first place how does the present case differ from that of *Gant* v. *Hobbs*? Here the defendant adopts only one defence that the pro.-note sued on has been paid in full, and he is present in Court and represented by counsel who takes several pertinent objections as to the form of the statement of claim and the right to begin and not a word is mentioned of any illegality in the claim nor is the plaintiff or his. witnesses cross-examined on the subject, indeed in bringing forward his application for amendment at the close of the plaintiff's case learned counsel expressly disavowed his intention of objecting that the transaction was in any way unconscionable or the interest excessive the very foundation for the necessity of the first Money-Lenders Act. The plaintiff was not put to prove

the validity of the pro.-note, nor does the evidence adduced by the plaintiff prove any illegality. Or. XXVI. r. 1, states: "All such amendments shall be "made as may be necessary for the purpose of determining the real ques- "tion in controversy between the parties," the "real question" without any doubt, is, has the money secured on the pro.-note been paid or not? There is no other question. In addition I am certainly not convinced of the *bona fides* of the defendant, and have no hesitation in exercising the discretion left to the Court, and refusing leave to make any such amendment as asked for.

Solicitor for the plaintiff, *W. I. Sousa.*

Solicitor for the defendant, *L. Ramotar.*

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

ATTORNEY-GENERAL AND TOWN CLERK OF GEORGETOWN

*v.*

WILD & COMPANY, LTD.

[No. 272 OF 1927.]

1927. NOVEMBER 5. BEFORE DOUGLASS, J.

*Writ—Application to strike out writ of summons and set aside service thereof—Whether conditional appearance must be entered—Rules of Court, 1900, Order X, r. 20—Order VII, r.5—Meaning of "Forthwith"—Form of writ—Company sued—Company having an attorney—Whether attorney's name need be mentioned—Order III, r. 3—"Represented" by an attorney—Meaning of term—Mode of service on Company—Companies* (*Consolidation*) *Ordinance, 1913, section 251—Client's instructions to accept service—Intimation thereof communicated to intending plaintiff—Whether equivalent to an undertaking and so binding.*

Order X, r. 20, of the Rules of Court reads as follows:—"A defendant before entering an appearance, shall be at liberty, without obtaining an order to enter or entering a conditional appearance to apply to the Court or a Judge to set aside the service upon him of the writ or of notice of the writ or to discharge the order allowing such service."

*Held,* That the provisions of the said rule were only intended to deal with irregularities such as errors in the issue of the writ or its service but not with such grave issues as want of jurisdiction or fatal defects in the writ rendering it *void ab initio* and accordingly that the defendant company should have first entered a conditional appearance before seeking to set aside the writ as being *void ab initio.*

Order VII, r. 5, provides *inter alia* that the Marshal serving a writ of summons within the municipal limits of the city or town in which the Registrar's Office out of which the writ is issued is situate shall forthwith after service endorse on the original writ the date, place and manner of service.

*Held,* That the word "forthwith" is not equivalent to "immediately" but means within a reasonable time.

Order III, r. 3, provides that every writ of summons shall state at the head thereof the name of every plaintiff and defendant and where any plaintiff or defendant is represented in this colony by an attorney the name of such attorney.

*Held,* That the words "represented" in this colony refer to cases in which the principal is out of the jurisdiction or is under some incapacity but has no application to a company carrying on business in the colony, because such company is by reason of its so doing considered to be resident within the jurisdiction.

The effect of section 251 of the Companies (Consolidation) Ordinance, 1913, is to render good and valid service of any notice or process on a company incorporated abroad if the same is addressed to any person resident in the colony whose name has been filed as being a person authorised to accept service on behalf of the company and if the same is left or sent by post to the said address.

Such mode of service is not exclusive.

Where solicitors are instructed to accept service intimation thereof to the opposite intending litigant is not *per se* sufficient to bind them to accept service; in order to render the transaction binding there should be an undertaking to accept service and to enter an appearance.

*G. J. de Freitas, K.C., P. N. Browne, K.C., E. G. Woolford, K.C., H. C. Humphrys* and *S. J. Van Sertima* for the applicant.

*Hector Josephs, K.C.,* Attorney-General, *B. King,* Assistant to the Attorney-General, and *E. M. Duke* for the respondents.

DOUGLASS, J.: This is an application to strike out the writ of summons herein and set aside the service thereof.

A preliminary objection was taken by the Attorney-General to the first part of the application to strike out the writ, on the ground that the Court would not entertain such an application unless and until the defendant company had entered a conditional appearance and so submitted to the jurisdiction of the Court. Mr. G. J. de Freitas, K.C., in reply, submitted that this had ceased to be the practice, and he referred to (1) the notes in the Annual Practice for 1926 on Order XII, r. 30, (corresponding to our Order 10, r. 20), that applications under this rule are not in practice confined to setting aside the service, but include applications to set aside the writ for irregularity, or for irregularity in the service thereof, etc., and (2) to Chitty's Archbolds Practice (14 Ed., Vol. 1, p. 256 which states: "Formerly "if a defendant was desirous of applying to set aside a writ or notice of a "writ served on him on the ground of irregularity or impropriety in its issue "he had first to obtain leave *ex parte* to enter a conditional appearance but "this is no longer necessary, since by Order XII, r. 30, the defendant may "move to set aside the service without entering an appearance." A reference to Halsbury Laws of England, Vol. 23, p. 126, might be read as con-

firmatory of this statement. I would also refer to *Keymer* v. *Reddy* (1912. K.B.D., p. 219 wherein, delivering the decision of the Court of Appeal, Fletcher Moulton, C.J., states: "Two courses are open to the defendant who "objects to the jurisdiction. He may disregard the writ and refuse to enter "an appearance at all, or he may out of respect for the Court enter an ap- "pearance under protest reserving his right to object to the jurisdiction. "These authorities certainly confirm the view that in certain cases no ap- "pearance is necessary on an application to set aside a writ, but is the pre- "sent case covered by these authorities?" *Wills* v. *Dawson* (12 Ex. 24) was also referred to as showing that where there is irregularity in service of a writ the defendant may apply for a rule in the alternative to set aside either the writ or service thereof, and Mew's Digest so states, but it is incorrect, for on a reference to the case it will be found that it was not the service of the writ that was defective but the copy of the writ served.

It seems clear that excepting a case where the defendant objects to the jurisdiction of the Court—a question not involved in the present application—a defendant formerly had to enter an appearance before he took any further step in the action, but this rule was relaxed to the extent covered by our Order 10, r. 30, which has only been in existence in this colony since 1900. The authorities referred to show that the scope of this rule has been extended in English practice but apparently only so far as to cover irregularities in the issue or service of the writ, *e.g.*, where a writ has been issued without leave under Order III., r. 12, or has not been rightly issued under Order IX., such irregularities in fact as may be dealt with under Order LI., if it is more than an irregularity it is not within Order LI. which does not apply to proceedings void *ab initio* (see *Russell v. Andrew,* L.R.B.G., 30 June, 1969.

Now the grounds stated by the defendant company and on which they base their application to set aside and expunge the writ of summons are (1) that the defendant company is not incorporated in this colony and (2) the plaintiff have not complied with the provisions of Order III., r. 3. Either of which grounds if proved true might afford good reasons for setting aside the writ as void *ab initio,* they are certainly not mere irregularities which might be dealt with as such, or amended at the discretion of the Court.

In my opinion Order X., r. 20, was only intended to deal with irregularities such as errors in issue of the writ and its service, not with such grave issues as want of jurisdiction or fatal defects in the writ rendering it void *ab initio.* I hold therefore that the defendant company not having entered a conditional

appearance or under protest, the Court cannot entertain their application to set aside and expunge the writ of summons. Next there is the application to set aside the service of the writ of summons on the grounds stated above, and on the third ground that the said writ had been served on the 30th August, 1927, on Mr. H. C. Humphrys, one of the sub-delegated attorneys of the defendant company, the plaintiffs not having sued the company as being represented by any attorney. The irregularities of service complained of are contained in pars. 6, 7, and 8 of the affidavit by Mr. H. C. Humphrys dated the 8th September, 1927.

On the date of service of the writ, the 30th of August, 1927, by one of the Marshals of the Court J. A. Gardner, he endorsed the writ as follows: "On this 30th day of August, 1927, I have duly served a certified copy of "the within writ of summons on the within named defendants J. L, Wild "and Company, Limited, by handing same to Mr. H. C. Humphrys (who "informed me that he is one of the attorneys of the said company) at their "registered address at the office of Messrs. Cameron and Shepherd, Legal "Practitioners, at lot 2, High Street, Newtown, Georgetown, Demerara, at "the same time explaining to him the nature and exigency thereof." And on the 1st September after the words "Mr. H. C. Humphrys" the Marshal inserted the words "a partner in the firm of Cameron and Shepherd, Legal Practitioners." The Marshal was acting under Order VII, rr. 2 and 5, the latter states that the Marshal "shall forthwith after service endorse on the "original writ the date, place, and manner of service." The English practice is not of much assistance, for under Order IX, r. 15, it is not an officer of the Court who has to serve the writ, three days are given for endorsement, and an affidavit of service has to follow. Such an affidavit is only required by our law when the service is made by a person other than the Marshal and authorised by him, but it has been the practice to supplement, the endorsement by an affidavit, when necessary, to explain or elaborate it, for the Marshal is not an agent of the parties to the suit but an executive officer of the Court (Ord. 10 of 1915, sect. 17) and he has no legal training.

Under Order XLV, r, 4, the Court has power to enlarge the time appointed by the rule even after the expiration of that time, and as I am satisfied with the explanation contained in the affidavit by the said Marshal sworn to on the 14th September, 1927, I should certainly have extended the time allowed for endorsement if necessary, and had I been asked. After all, the word "forthwith" has not the same meaning as "immediately," Chitty's Archbold's Practice states, "forthwith"—the term used with respect to endorsement of service—generally means the act is to

be done in reasonable time but "immediately" must receive a stricter construction; I shall treat the endorsement as if it had been made within a reasonable time. It is argued that non-compliance with Order VII, r. 5, relating to the return of service by the Marshal is not an irregularity that can be waived under Order LI, r. 1, and reference was made to *Hamp-Adams* v. *Hall* (1911. 2 K.B.D. 942) in support. In that case judgment was signed by the plaintiff in default, and it was held that the rule requiring endorsement of service within three days not having been complied with the plaintiff was not entitled to proceed by way of default, and to obtain such a judgment was a wrongful act. In the present case no further steps had been taken by the plaintiff and an endorsement in consonance with the facts was made before any steps were taken by the defendant company.

Lopes, L.J., in *Anlady* v. *Praetorius* (1888. 20 Q.B.D. 771) states: "Or-"der LI., r. 1, was meant to apply where a party had made some blunder in "his proceedings," the Marshal is alleged to have done so here but put it right forthwith, and no hardship or injustice was suffered by the other side

We now come to the more substantial objections to the service, namely that the writ itself was bad, and that (apart from that) there was no proper service on the defendant.

The writ is in the form set out in Appendix A., Part I., to the Rules of Court of 1900 and is made between His Majesty's Attorney-General of British Guiana and the Town Clerk of Georgetown, plaintiffs, and J. L. Wild and Company, Limited, defendants, and is addressed to J. Wild and Co., Limited, c/o. "Cameron and Shepherd, Legal Practitioners, 2, High "Street, Newtown, Georgetown, Demerara." The said firm of J. L. Wild and Co. is a company incorporated outside the colony with a place of business within the colony, and consequently on the 24th July, 1924, the documents and particulars relating to the said firm required to be filed under the Companies (Consolidation) Ordinance, No, 17 of 1913, section 251 (1) (a) and (b) (as amended in 1918) were so filed, and the address for service in British Guiana of the defendant company is stated to be "Cameron "and Shepherd, Legal Practitioners, 2, High Street, Newtown, Georgetown, "Demerara," and this is signed by "W. Stuart Cameron, Solicitor, for J. L. "Wild and Co., Limited."

Particulars of the partnership of Cameron and Shepherd filed the 28th December, 1923, under the registration of Business Names Ordinance, 1919, showed the said W. S. Cameron and the said H. C. Humphrys to be two of the partners of the said firm of Cameron and Shepherd, the said H. C. Humphrys is also an Attorney (the cumbersome prefix sub-delegated may well be

omitted) for the defendant firm since the 11th May, 1927. Order III, r. 3, relied on by the defendant firm in their present application reads "Every "writ of summons shall state at the head thereof the name of every plain- "tiff and defendant, and where any plaintiff and defendant is represented "in this colony by an attorney, the name of such an attorney," and the objection is taken that although the defendant is represented in this colony by an attorney the name of such attorney is not stated at the head of the writ, and it is asserted that in every case, even where the principal is present, the name of his attorney (if he has one) must still appear. I can hardly believe this argument is seriously meant, it is so obvious that the words "*repre-* "*sented* in this colony by an attorney" (refer to those cases in which the principal is out of the jurisdiction (and see Order VII., r. 4) or is under some incapacity. To put it another way, a principal is not "represented" by his attorney if he (the principal) is present, he may have an attorney but he represents himself.

The two cases referred to by Mr. Woolford, K.C., on behalf of the defendant company the "*W. A. Sholten*" and *Wood* v. *Anderton Foundry Company* were long prior to the English Act, of 1907 re-enacted in the Companies (Consolidation) Act, 1908, which introduced the clauses with reference to companies established outside the United Kingdom, embodied in section 251 of our Ordinance No. 17 of 1913 (referred to herein as "the Ordinance")—with reference to companies established outside the colony, but the latter case is useful as confirmatory of the principle laid down in *Newby* v. *Van Oppen* (20 W. R. 383) that if you find a foreign corporation carrying on business within the jurisdiction then they could be treated as resident there. In such cases the question arises how should a writ be served on the corporation for being a mere legal entity there could not be persona] service. There appear to be two rules affecting such service, applying respectively when (1) there is no statutory provision regulating service of process, and (2) where such statutory provision does exist; in the first case Order VII., r. 12, provides for service on "the Mayor, Town "Clerk, Secretary, Manager, principal officer, or clerk to such Corpora- "tion." But in the present case the ordinance by section 257 provides for service, for by sub-section (1) (c) a company incorporated outside the colony shall file the name and addresses of some one or more persons resident in the colony authorised to accept on behalf of the company service of process and by sub-section (2) any process required to be served on the company shall be sufficiently served if addressed to any person whose name has been so filed as aforesaid, and left at or sent by post to the address which has

been so filed. The words "sufficiently served" are probably not exclusive, but service in such manner is conclusive in effect.

It is very evident from the English cases cited treating of foreign companies that J. L. Wild and Company, Limited, were properly made defendants and no question arises as to who are their attorneys, or persons authorised to accept service, and moreover the writ is properly addressed to the defendant company, c/o Cameron and Shepherd (*See Fester Fothergill and Hartung* v. *Russian Transport and Insurance Company*, 1927. W.N. 227). *Sedgwick Collins and Co., Ltd* , v. *Russian Insurance Company of Petrograd* (1927. 136 Law Times Reports, 72) confirms my opinion that the present case is rightly brought against the company itself, and I notice that Lord Blanesburgh in commenting upon the effect of section 274 (2) of the English Act, states that service upon the named person permitted by the section is not obligatory or exclusive, and with reference to the requirements of service whether under Order IX., r. 8, (Our Order VII., r. 12) or under statutory provision, he says: "All provisions with reference to service "of process upon artificial persons are adequate only to the extent to which "in their effect they approximate to that produced upon an individual by "service personally made upon himself."

On the 28th April, 1927, the Colonial Secretary on behalf of the Government wrote to Messrs. J. L. Wild and Company, Ltd., c/o Messrs. Cameron and Shepherd, Solicitors, that in case certain land, materials, plant, etc., were not surrendered, the Government would take proceedings to recover possession, and by letter dated 2nd May, Messrs. Cameron and Shepherd replied to this that their clients were well aware of their legal position and that they were instructed to accept service on their behalf.

On the 30th August, 1927, the Solicitors for the plaintiffs wrote Messrs. Cameron and Shepherd as follows: "We have today issued a writ "in the above matter and in accordance with the undertaking contained in "your letter the 2nd May, 1927, have instructed the Marshal to serve the "same on you."

On the same date, 80th August, the Marshal attended at Messrs. Cameron and Shepherd's office and left a sealed and certified copy of the said writ of summons handing the same to the said Mr. H. C. Humphrys, this is admitted and Mr. H. C. Humphrys adds that the Marshal "handed me the "writ of summons and asked me whether I was the attorney of J. L. Wild "and Company and I informed him that I was one of the attorneys of that "Company."

On the 31st August, Messrs. Cameron and Shepherd acknowledged receipt of the said letter of the 30th August,

and continued "in reply we have to say that no writ in the above matter has "been served upon our firm."

"The process," in this case the writ of summons, addressed to the persons "Cameron and Shepherd," whose names had been filed under section 251 (1) (c) of the ordinance, was left at the address which had been so filed (sub-section (2), and that is all that is needed. I do not enter into the question whether service on the attorney of the defendant company would not also have been perfectly good service taking into consideration Lord Blanesburg's opinion referred to above, because I do not consider it necessary. It is true that Messrs. Cameron and Shepherd stated in their letter of the 2nd May that they were *instructed* to accept service, but that is not at law sufficient to bind them in any way, the undertaking should be to accept service if they so intended, and they should also have undertaken to enter an appearance; the solicitors for the plaintiffs were in no way bound to rely on the loose language used in the letter of the 2nd May, but it is rather astonishing that a party in a firm of such good standing should attempt to take the advantage of such language or of the legal quibble contained in Messrs. Cameron and Shepherd's letter of the 31st August.

Returning then to the endorsement by the Marshal of the service of the said writ it is unnecessarily long and it would in my opinion be just as good had the words from "a partner in the firm" down to "of the said Company" been omitted. The Marshal was not the agent of either party, and what he thinks or says was clearly not binding on them, if he performs the duty for which he was employed satisfactorily. To supplement this I would quote from "*Hope* v. *Hope*" (1854. 4 Dg. M. and G., 342), "the object of all ser-"vice was, of course, only to give notice to the party on whom it was made, "so that he might be aware of, and able to resist, that which was sought "against him and where that had been done, so that the Court might feel "perfectly confident that service had reached him, everything had been "done that could be required."

I find that the service of the writ was sufficient and properly effected and see no merit in the application of the defendant firm. I accordingly dismiss it, and grant the plaintiff the costs of this application with the opinion that it appears to have been a mere speculative attempt to delay matters. I am willing, however, to consider an application on behalf of the defendant firm to extend the time for entering their appearance.

Solicitors for the applicant: *Cameron and Shepherd.*

Solicitors for the respondents: *The Crown Solicitor* and *Francis Dias.*

JASODIA *v.* ROOPLALL.

[No. 144 OF 1926.]

1927. NOVEMBER 9. BEFORE GILCHRIST. J.

*Contract of sale of land—Alleged agent of vendor holding himself out as principal—Effect thereof—Personal liability.*

Where a person so conducts himself in a transaction as to cause the other contracting party reasonably to believe that he is the principal, such person is liable on the contract even though in fact he was only the agent of another.

The facts appear in the judgment.

*G. J. de Freitas, K.C.,* for the plaintiff.

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

GILCHRIST, J.: In this action the plaintiff claims from the defendant the sum of $200.50, moneys had and received by the defendant to and for the use of plaintiff,

2.The defence filed is that the defendant is not indebted to the plaintiff, that the defendant as agent for his wife Marian Rooplall sold to Japsi, the reputed husband of the plaintiff, W. ½ of W. ½ lot 144, La Penitence, for the sum of $350, that the said Japsi paid $138 as a deposit in respect of the purchase, the balance to be paid on the passing of transport which was to be effected on defendant's wife receiving transport of the said property from one Reta Ferreira and others, that the said Japsi though requested to attend a lawyer's office to arrange for the passing of the transport to him, failed to do so and subsequently asked defendant's wife to pass transport to him and accept a promissory note for the balance of the purchase money, and on this being refused, asked the defendant's wife to cancel the sale and return him the earnest money ($138) paid, which was refused, that in consequence of the failure of Japsi to carry out his part of the agreement the sum of $138 paid as earnest money is forfeited.

3. The alternative ground of defence that the transaction between the said Japsi and the defendant on behalf of his wife cannot be enforced for want of sufficient memorandum in writing to satisfy section 3 (4) (*e*) of the Civil Law of British Guiana Ordinance, 1916, was abandoned at the hearing.

4. No evidence was led on behalf of the defendant. His counsel submitted that there was a verbal assignment by defendant as agent for his wife of the purchase of the said property to the plaintiff, Reta Ferreira consenting thereto. Now Reta Ferreira was not the sole owner of the said property. She was only one of several parties to the written agreement of sale of the said

property to Mariam Rooplall (Exhibit E). Having regard to my findings on the evidence on behalf of the plaintiff the submission is of no force.

5. I accept the evidence of the plaintiff and her witnesses taking it as a whole.

6. It is clear in my opinion that the plaintiff by the statements made to her by the defendant and by his acts believed and had reason to believe that the defendant was principal in the matter. In such a case the defendant even though he were the agent of his wife is liable (*Williamson* v. *Barton,* 7 H. & N. 899; *Turnbull* v. *Astrupp,* 3 T.L.R. 134; *Keightley Maxstead & Co.* v. *Durant,* (1901) A.C. (H.L.). 240; *Greer* v. *Downs Supply Co.* (1927) 96 L.J.K.B. 534).

7. I hold further as a question of fact that the evidence of the plaintiff fully satisfies me that the defendant personally contracted with her to sell her *W.* ½ of W. ½ lot 144, Albouystown, La Penitence, and that he would cause transport to be passed to her. He has totally failed to carry out his agreement. The evidence of Rita Ferreira is that in so far as she personally was concerned she was willing to transport to any one defendant requested her so to do. I accept the evidence of the plaintiff that she paid the defendant the several sums totalling $200.50.

On these grounds the plaintiff is entitled to judgment. I would state, however, that the evidence for the plaintiff also satisfies me that the defendant withdrew from his contract to sell the said property to the plaintiff and agreed to return to her the money she paid him. From the evidence of Ramsaroop Maraj, it appears there was some dispute as to the amount and that Japsi, the plaintiff's reputed husband, eventually said he would accept on behalf of plaintiff $158. There is no evidence that he had any authority to act for plaintiff. There is no evidence that plaintiff agreed to accept $158. As I have said above I accept the evidence of the plaintiff that she paid the defendant $200.50.

Judgment for the plaintiff with costs.

## HILL *v.* TRIEFUS AND ANOTHER.

[No. 428 OF 1925.]

1926, DECEMBER 20; 1927, JANUARY 22.

BEFORE DOUGLASS, J.

*Master and Servant—Employment—No specific terms as to notice—Servant employed as manager of diamond-merchant's shop in interior of colony—Notice of termination given manager—Further employment—Waiver of notice—What is reasonable notice—Circumstances of each case the true test.*

The plaintiff was employed as manager of a shop of the defendants, diamond-merchants, situate in the colony at a monthly salary of $200. On the 29th September, 1925, the plaintiff received a written notice dated the 9th September, purporting to terminate his employment on the 30th September. The plaintiff, however, was retained in employment up to the 31st October.

The plaintiff claimed damages for wrongful dismissal.

*Held*,—(a) That the notice purporting to determine the contract on the 30th September was waived by the defendants employing the plaintiff thereafter.

(*b*) That there is no fixed rule for determining what is reasonable notice; each case must depend upon its own circumstances and evidence of the length of notice given to other employees of the defendants holding positions similar to that of the plaintiff is relevant and admissible evidence on that question.

*E. M. Duke*, for the plaintiff.

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

HILL *v.* TRIEFUS AND ANOTHER.

DOUGLASS, J.: The plaintiff is claiming $600 damages from the defendants for wrongful dismissal.

The plaintiff, who was a clerk at the Royal Bank of Canada at $87.50 per month, was persuaded by the defendants who are diamond merchants, to enter their employ which he did on the 22nd day of March, 1924. He was employed up to the 13th July, 1924, in learning the business as assistant at their shop at Eping at a salary of $150 a month, and he then went as manager to their shop at Meamu transacting the ordinary business of the shop and buying diamonds for his employers at a salary of $200 per month. On the 29th September, 1925, the plaintiff was handed a letter dated 9th September, 1525, from the defendants to the following effect:—

PRIVATE.

4, ROBB STREET,
Georgetown,
British Guiana,
9th September, 1925.

Mr. VICTOR HILL,
c/o Triefus,
Meamu Creek,
Mazaruni River.

"DEAR HILL,

I very much regret to say that our shop returns for the last "twelve months or so have been very unsatisfactory, and as I do not see the "possibility of an improvement in the near future, I am compelled to re-"duce overhead expenses in order to make our shops self-supporting on the "basis of the trade we are having now.

"Will you please kindly note, therefore, that from September 30th we "shall have to dispense with your services. Mr. Cooper will hand you this "letter and will also make the necessary arrangements to take over your "shop and arrange a passage for you to come down to town by the earliest "opportunity, when you will report to the office to square up your account.

"I want to express here my appreciation of your services and you can be "sure that I will do my best to help you in getting back to the Bank if you "wish it, or any other position in Georgetown.

Yours faithfully,

J. BALASCH."

It is obvious on the face of it that the letter could have had no legal effect as a notice to determine the plaintiff's services, it was only a one-day notice, and to determine his services on the 30th September, was equivalent to dismissing him without

notice. I fail to follow the argument of counsel that it would hold good to determine his services at the end of the following month, and, in any event, it was waived by the defendants continuing the plaintiff's services for another month. The plaintiff, as a matter of fact, was unable to leave Meamu—as no clerk came to relieve him—until the 22nd October, and his actual employment was terminated on the 31st October up to which date he was paid. I have already said in the course of this case that there is not sufficient evidence to support the plaintiff's allegation for any special contract intended to be made between the parties, so the question is what notice was he entitled to at law, and the answer is 'reasonable notice.' It is quite unnecessary that the word 'reasonable' should appear in the statement of claim, the plaintiff (alternatively) claims three months' notice as an implied term of his contract of hiring, and it is the Court which has to find if that is reasonable notice, in order to ascertain what amount of damages the plaintiff is entitled to.

All the cases on the subject are fairly ancient, and of very little assistance, for each case must depend upon the facts proved and the inference of the terms of service, and the necessary notice to terminate such service to be drawn from them. There is no question here of menial service, but the defendants call evidence to show that in a similar business a month's notice is always given to shop managers, who are getting from $90 to $120 a month, and their attorney states that some of their managers—experienced men—get longer notice than one month, others only a month, he also states that the plaintiff's place had been filled by a man getting $70 a month.

The 'reasonable notice' cannot be determined by either the salary or the experience of the employee alone, nor by his failure or success; these may both assist to a solution, but it is the position occupied that is the determining factor.

Here the plaintiff after a three months' trial, was considered good enough to take the position of manager and get the same pay as another manager who was entitled to three months' notice, and no other manager in a post responsible enough to be thought worth $200 per month has been shown to get less than three months' notice. Under the head of "Service Contracts," page 570 in the Encyclopaedia of Forms and Precedents, edited by Sir Arthur Underhill, LL.D, (Ed. 1925) it is stated, "No very definite "rule can be extracted from these cases, but it may be suggested that in "most cases of servants in a position superior to that of a domestic or me-"nial servants three months' notice would be reasonable": and Pollock, C.B., in giving judgment in *Fairman v. Oakford* (1860) 5 H. & N. 625, says "from much experience of juries I have come to the conclusion that,

"usually the indefinite hiring of a clerk is not a hiring for a year, but rather "one determinable by three months' notice." I give judgment for the plaintiff for $600 and costs.

Solicitor for the plaintiff: *A. McL. Ogle.*

Solicitor for the defendants: *F. Dias.*

REED *v.* VIEIRA.

[No. 46 OF 1925.]

1927. NOVEMBER 16, 23. BEFORE DOUGLASS, J.

*Claim for sum not exceeding $250—Appeal from an interlocutory order—Costs of appeal—Barrister appearing uninstructed—Whether he can tax bill for his appearance on appeal—Costs fixed by Judge in Chambers—Whether addition of 33⅓% can be added thereto.*

*(a)* Where a barrister appears "uninstructed" on an appeal from an interlocutory order he cannot tax a bill for his hearing fee, because the latter is earned by him qua barrister, whereas Order XLVI contemplates that it is the solicitor of the party whose costs are to be taxed.

(*b*) Where a Judge in Chambers fixes the quantum of costs the usual addition of 33⅓% provided for by the Rules of the 29th December, 1920, cannot be added thereto,

Application for review of taxation.

The facts appear in the judgment.

*A. V. Crane,* for the applicant.

*P. A. Fernandes,* for the respondent.

DOUGLASS, J.: Two objections were taken to the taxation on the 3rd October, 1927, of a bill in this matter. The first objection was not disputed, that a fee having been fixed by the judge in chambers on an adjournment from the Court it could not be treated as an item on which the addition of 33⅓% under the Rules of the 29th December, 1920, should be allowed on its inclusion in the bill submitted to the Taxing Officer, indeed this surcharge is clearly excluded by Rule 16 B (3).

The other objection is to the fee allowed at $45 of counsel for respondent appearing in Court on appeal, when the appeal was dismissed and it was ordered that the costs of the appeal be taxed and paid by the defendant to the plaintiff —the respondent. The plaintiff was not represented by a solicitor, but Mr. Fernandes appeared "uninstructed" on the appeal.

It appears that the suit was one for an amount not exceeding $250, "and consequently the costs of the action were taxed under Appendix I., Part (c), to the Rules of Court." By Order XLVI., Rule 16—"Solicitors" *and* when amount claimed does not exceed $250, "Barristers" shall be entitled to charge fees set out in Appendix I., Part I. (*b*) and (*c*), *respectively,* the word "respectively" can only mean "solicitors" under (*b*) and "barristers" as well under (*c*), and this is shown by the titles to (*b*) and (*c*), the form commencing "Costs chargeable by Solicitors," and the latter "Costs chargeable by Solicitors or Counsel."

No solicitor has a right to appear before the Supreme Court except in those cases when a special exception has been made as under Order VI, Rule 3, and there is no exception now to his exclusion before the Full Court, as section 21 of the Magistrates' Decisions Appeals) Ordinance, 1893, was amended to exclude a solicitor on appeals from the decision of a magistrate under the Petty Debt Recovery Ordinance, 1893, (See Ordinance No. 33 of 1922, section 10 (2)).

A counsel cannot sue his client for fees and the client cannot sue him for negligence, for he is not the agent of his client and counsel must look for his fee to the solicitor and not the client. Consequently counsel cannot deliver a bill, much less present it for taxation, he certainly cannot, having earned a fee as a barrister say, "Now I will tax my bill as a solicitor because the cause of action does not exceed $250." The whole of Order XLVI, shows that it is the solicitor of the party (whose costs are to be taxed) who must prepare the bill of costs, and the notices necessary.

In any event the difference in the scales of fees allowed in a suit above and not exceeding a value of $250 have no application to costs incurred on appeal. I am of opinion then that Mr. Fernandes was not entitled to prepare or tax any such bill as this before me, and consequently not only must the sum of $50—(less $5) be disallowed, but also the taxation fee of $1, and the surtax of 33%.

I according allow all the objections taken by the abovenamed defendant, and give his solicitor $10 costs of the review of taxation.

# MENDES *v.* FERNANDES.

No. 49 OF 1927.

BEFORE SIR ANTHONY DEFREITAS, KT., C.J.

1927. MAY 2, 3, 4, 5, 6, 10, 11, 12, 25.

*Election Petition—British Guiana Constitution Ordinance, 1891, Amendment Ordinance, 1909 Section 4 (5)—"Actually and Bona fide under cultivation"—Meaning of term—Procedure—Laxity of pleading—Comments thereon—Necessity for formulating case on the pleadings—Observations of Lord Parker of Waddington referred to.*

The expression "actually and *bona fide* under cultivation" occurring in Section 4 (5) of the British Guiana Constitution Ordinance, 1891, Amendment Ordinance, 1909, means what it says, that is, real cultivation and not pretended cultivation.

A case ought to be formulated upon the pleadings (after amendment if any is required) with the precision necessary to elucidate either the principles of law which may be applicable or the issues of fact which may be involved.

(See Lord Parker's observations in *Banbury* v. *Bank* of Montreal, 1918 A.C. 626, at page 710).

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

*G. J. DeFreitas, K.C.,* and *E. F. Fredericks* for the respondent.

The Chief Justice (SIR ANTHONY DEFREITAS) delivered judgment on the 9th of August, 1927, as follows:—

This is an election petition by Antonio Caetano Mendes complaining of "the undue election *and* undue return" of the respondent, Premio Augustine Fernandes, as a member of the Court of Policy to represent Electoral District No. 4, the City of Georgetown. The petition is presented to the Supreme Court under the authority of section 127 of Ordinance 1 of 1891.

In paragraph 4 of his petition Mr. Mendes states that "on the 5th day of March, 1927, the said Premio Augustine Fernandes delivered or caused to be delivered to the said returning officer a statutory declaration of his qualification for election as a member of the said Court of Policy, in which he alleges his property qualifications for election as a member of the Court of Policy to be ownership by transport No. 779 dated the 26th day of July, 1926, of Pln. Concord, East Coast, Demerara, which said plantation contains not less than eighty acres of land unencumbered by mortgage situate in the colony, of which not less than forty acres are actually and bona fide under cultivation." Paragraph 5 of the petition says: "And your petitioner states that the said Premio Augustine Fernandes was not on the 3rd day of March, 1927, a duly qualified candidate for nomination for a seat in the Court of Policy as required by law nor was he at the time of his election, to wit, on the 10th and 11th days of March,

1927, duly qualified to be elected as a member of the said Court of Policy inasmuch as the said Premio Augustine Fernandes did not at any of the said times possess, as alleged in his said declaration, ownership under title by transport or otherwise of not less than eighty acres of land unencumbered by mortgage, situate in the colony, of which not less than forty acres are actually and bona fide under cultivation as required by section 4 (5) of the British Guiana Constitution Ordinance, 1891, Amendment Ordinance, 1909."

The terms of section 4 (5) of Ordinance 24 of 1909 (referred to in the fifth paragraph of the petition), so far as they are material, are as follows: "No person shall be capable of being elected a member of the Court of Policy . . . . . who . . . . . (5). Does not possess some one of the following property qualifications, namely:—(a) ownership, under a title by . . . transport . . . of not less than eighty acres of land unencumbered by mortgage situate in the colony, of which not less than forty acres are actually and bona fide under cultivation."

In the course of discursive observations made to the Court on behalf of Mr. Mendes, insinuations were made in relation to supposed misconduct of Mr. Fernandes in the manner he acquired Concord and created cultivation there, and expressions such as "evasion of the Ordinance" and "fraud on the Ordinance" were used. On objection from the other side as to vagueness and irrelevancy, it was said that evidence of such misconduct would be tendered and that there would be submitted a definite proposition of law to establish that the election was invalid notwithstanding the existence of the physical qualification in respect to land and cultivation. No such evidence was offered, and notwithstanding invitations and an express request from the Bench, no such proposition was submitted. So, no issue in this connection arises for decision. But, from all that was said, it was clear that there was no foundation in law whatever for any such proposition. With the usual expectation in my past experience, that they would soon be followed by the submission of a definite proposition based on definite facts, I allowed the observations to be made. I regret that I was so indulgent. That mistake was due to my lack of experience of this Court. In the future I hope to remember to insist always that a case shall be formulated upon the pleadings (after amendment, if any is required) with the precision necessary to elucidate either the principles of law which may be applicable or the issues of fact which may be involved; and to bear in mind Lord Parker of Waddington's well known views in that respect.

The delivery of this judgment has been delayed for the purpose of awaiting the Full Court's decision on an appeal on the

ground that there is no legal authority to tax the costs of an election petition awarded to the successful party by the trial judge. The decision on the appeal was given to-day.

By oral and documentary evidence given on his behalf Mr. Mendes has conclusively established that Mr. Fernandes at all material times possessed the required statutory qualification by unencumbered ownership of much more than eighty acres of land at Plantation Concord in this colony, of which more than forty acres were at all material times actually and bona fide under cultivation in coconuts; and this was confirmed by evidence given for the respondent, although confirmation was unnecessary. The expression "actually and bona fide under cultivation" in section 4 (5) of Ordinance 24 of 1909, means what it says: it means real cultivation and not pretended cultivation.

This simple issue of fact—the sole issue presented for decision at the trial—being decided in favour of the respondent, I determine that Mr. Fernandes was validly and duly elected, and was duly returned as the person elected to be a member of the Court of Policy to represent Electoral District No. 4, the City of Georgetown.

The petition is dismissed, and the petitioner is ordered to pay the respondent's taxed costs of these proceedings, including the fees of two counsel.

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

Solicitor for the respondent, *J. Gonsalves.*

DENNERY FACTORY COMPANY, Appellant,

AND

COLONIAL TREASURER OF ST. LUCIA, Respondent.

ON APPEAL FROM THE ROYAL COURT OF SAINT LUCIA.

1927. AUGUST 23.

BEFORE SIR P. J. MCDONNELL, KT., PRESIDENT, STRONGE, C.J. AND RAE, C.J.

*Income Tax—Income Tax Ordinance, 1924, section 41 (2)—Objections to assessment lodged—Delay in deciding same on part of Commissioners—Amount partly admitted—Amount partly in dispute—Whether Treasurers notification of intention to collect amount not disputed can ipso facto add interest and fine to amount due—Reasonable notice of intention to charge interest and fine required.*

Section 41 of the St. Lucia Income Tax Ordinance, 1924, enables a taxpayer to give written notice to the Income Tax Commissioners of objection to the assessment,

Section 47 (2) of the said Ordinance reads thus:—

"Collection of tax shall in all cases where notice of an objection or an appeal has been given remain in abeyance until such objection or appeal is determined; provided that the Colonial Treasurer may in any such case enforce payment of that portion of the tax (if any) which is not in dispute,"

and section 48 provides (1) Tax shall be payable within one month after the service of a notice of assessment under section 41 of this Ordinance (2) Where payment of *Tax* in whole or in part has been held over pending the result of an objection or an appeal, the tax outstanding under the assessment as determined on such objection or appeal as the case may be shall be payable within one month from the receipt by the person assessed of the notification of the tax payable.

The appellant Company had on the 21st of November, 1925, under section 41 of the Ordinance given notice to the Income Tax Commissioners of objection to the assessment, but the latter took no steps to dispose of the matter until the last week in April, 1926, In the interval the Treasurer on the 8th December, 1925, served on the Appellant Company a demand note demanding (a) the sum not in dispute, (b) a fine and (c) interest on the said sum.

*Held,* (*a*) That on a taxpayer lodging an objection to the sum named in his assessment, he can defer payment thereof, of the portion to which he has objected until that objection has been finally determined, and also of the portion not in dispute, unless in the interval the Colonial Treasurer notifies the taxpayer of his intention to collect and enforce payment of the sum not in dispute.

(*b*) That such notification cannot *per se* forthwith add to the sum not in dispute fine or interest, but reasonable notice of intention so to do must first be given to the Taxpayer.

The Judgment of the Court was as follows:—

This action was brought by the plaintiff company to recover the sums of £30 4s. 6d. and £4 10s, moneys paid under protest to His Majesty's Treasurer.

The material facts are as follows:—

On the 7th November, 1925, notice of assessment was served on the plaintiff company by which the net income tax payable by the company was assessed at £719 15s. On 21st November,

1925, the plaintiff company gave written notice pursuant to section 41 (2) of the Income Tax Ordinance, 1924, to the Income Tax Commissioners of objection to the assessment, claiming to be entitled to a deduction under section 10 (d) of the Ordinance of the sum of £921 14s. 3d. representing the cost of spurwheels for repairing their manufacturing plant. The amount of income tax on this sum of £921 14s. 3d. would be £115 5s. So that of the £719 15s. at which the income tax payable by the company was assesssed, £115 5s. was disputed by them, and as to the balance of £604 10s. there was no dispute.

The Income Tax Commissioners on receipt of the company's notice of objection took no steps under section 41 of the Ordinance to dispose of the matter until the last week in April, 1926, but meanwhile the Treasurer upon the lapse of one month from service of notice of assessment on the company inasmuch as no payment had been made to him of the £604 10s. as to which there was no dispute, served on the company on the 8th December, 1925, a demand note claiming payment (a) of the £604 10s. (b) of £30 4s. 6d. being a fine at the rate of 5 per cent., on the amount of such tax on account of its non payment within one month from service of the notice of assessment, and (c) of interest at 6 per cent., from the said 8th December, till payment. Some correspondence ensued and eventually the company on the 19th January, 1926, paid under protest the amounts claimed by the Treasurer's Demand Note.

The plaintiff company now seeks in this action to recover back the £30 4s. 6d. fine so paid and the £4 9s. l0d. paid as interest their contention being that though under section 47 (2) of the Ordinance the Treasurer can elect whether he will or will not enforce payment of the portion of income tax not in dispute he must if he elects to enforce it notify the person assessed of his intention to do so, and the person assessed cannot be held to be in default so as to render him subject to pay fine and interest unless and until he has had notice of the Treasurer's intention to enforce payment of the amount of tax not in dispute.

On behalf of the respondent it was argued that in all cases of disputed assessments, the person assessed, if he is to avoid liability to pay the fine and interest specified by sections 49 and 50 (2) of the Ordinance must pay any undisputed portion of the tax within the time specified by section 48 (1) that is, within one month from service on him of the notice of assessment, and if he omits to make such payment within that period the fine and interest are payable, and the Treasurer is entitled to proceed to recover payment by issuing a Demand Note claiming payment of the undisputed tax, together with the fine and interest.

To consider these arguments it is necessary to interpret section 47 (2) and section 48 of the Ordinance which are as follows:—

"47 (2) Collection of tax shall in all cases where notice of an objection or an appeal has been given remain in abeyance until such objection or appeal is determined; provided that the Colonial Treasurer may in any such case enforce payment of that portion of the tax (if any) which is not in dispute.

"48 (1) Tax shall be payable within one month after the service of a notice of assessment under section forty-one of this Ordinance.

"(2) Where payment of tax in whole or in part has been held over pending the result of an objection or of an appeal, the tax outstanding under the assessment as determined on such objection or appeal as the case may be shall be payable within one month from the receipt by the person assessed of the notification of the tax payable."

Reading these sections together it will be seen that tax must be paid within one month after service of notice of assessment—section 48 (1)—but the other provisions of the two sections show that 'Tax' here means tax as to which no objection is lodged; if there is no objection then the whole tax must be paid within the month. But the taxpayer may lodge an objection and if he does so, his position is regulated by section 47 (2) and section 48 (2). The former allows collection of tax to remain in abeyance pending the determination of objection or appeal in regard thereto, and the latter speaks of "payment of tax in whole or in part" being "held over pending the result" of the same.

The phrase "collection of tax" in section 47 (2) seems to us to have the same meaning as the phrase "payment of tax in whole or in part" in section 48 (2); the former phrase looks at the matter from the point of view of the taxing authority by using the word "collection," the latter, from the point of view of the taxpayer by using the word "payment" but both imply the same thing, namely that when an objection has been lodged, the objecting taxpayer can defer payment of the whole tax specified in his assessment until that objection has been determined. If this permission were given to the taxpayer *simpliciter*, it would enable one assessed for a definite sum to lodge objection as to a minute part thereof and keep the Government waiting for payment of the much larger portion as to which the taxpayer had lodged no objection and which consequently was "not in dispute." The proviso to section 47 (2) seems to us to provide the remedy for this. While "payment of tax" is being "held over"—section (48) (2)—or while its "collection . . . . . remains in abeyance"—sec-

tion 47 (2)—the Colonial Treasurer can intervene and "enforce payment" of this portion "not in dispute." What is the meaning of this power to the Colonial Treasurer? The respondent argues that it means that the moment the month allowed for payment by section 48 (1) has elapsed, the five per centum fine imposed by section 49 (a) automatically adds itself to the tax due to the whole tax if no objection has been lodged, to the portion not in dispute where objection to a portion has been lodged, and also interest on the combined sum of tax due and fine by section 50 (3), and that the Colonial Treasurer sends a demand note to the taxpayer for the total sum of tax due and fine and interest, and that he had no power to demand merely the tax due, but that he must demand tax due and fine and interest. In other words the proviso to section 47 (2) confers no power on the Colonial Treasurer which he does not possess by sections 49 and 50. Whether he "enforces payment" under the sub-section 47 (2) or does not do so, the result would be the same; once the month allowed for payment by section 48 (1) has elapsed, the fine and interest must be added to the tax not in dispute.

We are bound to say that we differ from this argument, and for a reason implicit in the statement of it as put for the respondent, namely, that it deprives the proviso of all content, for it admits that the result is the same whether the Colonial Treasurer acts under the proviso or does not, and so offends against the rule that some meaning must be given to every proviso in a statute. Further, the interpretation of the proviso contended for by the respondent, would render the rest of the sub-section equally insensible. The collection of tax could only remain in abeyance for one month, the one month allowed for payment by section 48 (1), then the provision as to collection being in abeyance would be otiose and the two provisions taken together would have to mean this, that tax not in dispute is to be paid within one month and not to be collected sooner, except that where objection has been lodged, tax not in dispute is still collectable and so to be paid within one month. The argument that leads to this result cannot be sound. On the ordinary canons for the interpretation of statutes, we are bound to give a meaning to section 47 (2) and to both portions of it, to the general rule and to the qualifying proviso, and we conclude its meaning to be that on the lodging of an objection to an assessment, collection of the tax stated therein is suspended but that if the objection does not go to the whole of the assessment, if being only as to part of the sum stated therein, there is a part as to which there is no objection, and so not in dispute, the Treasurer can intervene and require payment of or in other words can collect that part not in

dispute. He has, in fact, an option whether to allow collection of the undisputed part to remain in abeyance or whether to enforce payment of it, to collect it. But if he has an option to collect and enforce payment, then he must notify the taxpayer that he intends to exercise that option and until he has given the taxpayer that notification, he cannot add to the tax due dot in dispute the fine provided in section 49 (a) or the interest provided in section 50 (3). To hold otherwise, viz., that *eo ipso* the notification, the fine and interest attach and add themselves to the tax due not in dispute, would, as we have said deprive section 47 (2) of content or meaning.

Consideration of section 48 (2) strengthens us in the view we come to as to section 47 (2). It contemplates the taxpayer holding over payment of the whole or part of the tax he has been assessed at, pending determination of his objection. Such determination decides what he has to pay, namely the portion he did not dispute and either the whole or some or none (as the case may be) of the portion he did dispute. It is now possible to notify him of the "tax payable," and the sub-section 48 (2) gives him a month after receipt of the notification wherein to pay it. But if the argument for respondent were sound, the words "the tax payable," would have to read "the tax "payable including fine under section 49 (a) and interest under section 50 "(3) in case payment of any part of the tax not in dispute has been held "over beyond the one month allowed for payment by section 48 (1)." Clearly such words cannot be read into the statute, above all since it is one creating or empowering a tax. It is worth noticing that section 41 (4) dealing with the case of agreement between the taxpayer and the Commissioner after objection lodged makes a similar provision; the taxpayer is to receive "notice of the tax payable" and his assessment is to be amended conformably to what he and the Commissioner have agreed on, and he has under section 48 (1) a month thereafter in which to pay it.

It might perhaps be argued that the "enforcing payment" mentioned in section 47 (2) refers only to the powers given by section 50, those namely of treating the amount due as a judgment debt and executable on accordingly. But these powers presuppose an amount to which the fine under section 49 (a) and the interest under section 50 (3) have been added and therefore such an argument will be equally open to the objection that it deprives section 47 (2) of content or meaning.

We conclude then that the meaning of these sections 47 (2) and 48, is that on a taxpayer lodging an objection to the sum named in his assessment, he can defer payment thereof of the portion to which he has objected until that objection has been

finally determined either after discussion with the Commissioner or on appeal, and of the portion to which he does not object, that "not in dispute" also until final determination of the objection, unless in the meanwhile the Colonial Treasurer acts under the proviso in section 47 (2) and notifies the taxpayer of his intention to collect and enforce payment of the portion not in dispute. Such notification cannot forthwith add to the sum not in dispute the fine provided by section 48 (a), still less the interest provided by section 50 (3); it must give the taxpayer notice that if he do not pay the sum not in dispute, the Treasurer will add thereto the fine and interest, and it must give the taxpayer a reasonable time wherein to pay the sum not in dispute if he wish to escape the addition thereto of the fine and interest. It is impossible to define what would be reasonable time but the analogy of other provisions in the Ordinance suggests a period of one month after receipt of the notification.

If this be the right interpretation of these sections of the Ordinance, then the defendant has received the moneys claimed by the plaintiff company under error in law and is bound to restore them, Civil Code, Article 979.

For the foregoing reasons we are of opinion that this appeal must be allowed with costs here and below and that judgment must be entered in this case for the plaintiff company for the amount claimed by it. We certify for two counsel on appeal and for one counsel in the Court below.

PHILLIPS, Appellant,
AND
LAKE, Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE LEEWARD ISLANDS—ANGUILLA CIRCUIT.

1927. AUGUST 20.

BEFORE STRONGE, C.J., AND RAE, C.J.

*Trespass—Possession—Onus of proof—Trust Realty—Requirement of writing—Statute of Frauds.*

(*a*) Proof of possession on the part of the plaintiff is essential to maintain a cause of action for trespass

(*b*) Declaration of trusts of realty must be in writing as required by the Statute of Frauds.

The facts sufficiently appear in the judgment.

The judgment of the Court was as follows:—

This action is one of trespass based upon an unjustifiable intrusion upon the plaintiff's possession of the lands mentioned in the writ.

Plaintiff's contention is that his mother advanced to his father (J. J. P. Lake) money to buy the lands in question for him, and that, therefore, a trust of personalty was created and the subsequent possession by J. J. P. Lake and Mrs. Phillips was that of trustees, and their possession being that of *cestui que* trust, the present plaintiff, he was in possession and entitled to maintain the action. The onus of proof on this point rests on the plaintiff and the sole evidence advanced as to it is the evidence of the plaintiff himself, who at the time of purchase (1872) was about 6 years old, and the learned trial judge stated that he was unable to come to a conclusion on this point, that is that the plaintiff has not discharged the onus of establishing this fact. Therefore, we must assume that no trust of personalty has been satisfactorily established.

Then, was there a trust of realty? Section 7 of the Statute of Frauds requires a declaration of trust of real estate to be made or proved by a writing signed by the person who creates it. There is no evidence before the Court of any writing evidencing a trust signed by J. J. P. Lake by whom the trust (if any) of this land was created, and there is no evidence, therefore, of a trust of realty, and consequently none of any trustee whose possession being that of the present plaintiff as *cestui que* trust, would enable the latter to maintain the present action, Neither has the plaintiff himself ever been in possession of the land in question.

It follows consequently on the authorities that he not having been actually or constructively in possession of the land when the action was brought was not entitled to succeed in the present action being one of trespass.

There is, however, an action still on the file No. 1A between the same parties, and by consent of counsel for both parties it was agreed that this court should, if possible, in order to dispense with further and possibly expensive litigation dispose of the question as to the right or title to the land in question. The majority of the Court on consideration, are, however, of opinion that in the present state of evidence, and having regard to the possibility of further evidence being available, it would be more satisfactory for the determination of the questions as to such title or right for the Court to order that the plaintiff be at liberty to proceed with his pending action No 1 A in the Supreme Court, adding thereto if he so desires such claim for a declaration of title or for possession as may determine the whole matter in dispute between the parties and the Court accordingly so orders.

The appeal against the decision now before us is allowed with costs here and below, the plaintiff, to be at liberty to proceed as above.

# THE ST. KITTS (BASSETERRE) SUGAR FACTORY, LTD. AND DAVIS.

## THE ST. KITTS (BASSETERRE) SUGAR FACTORY, LTD., Appellant,
AND
## DAVIS, Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE LEEWARD ISLANDS—ST. CHRISTOPHER CIRCUIT.

1927, SEPTEMBER 5,

BEFORE SIR PHILIP MACDONNELL, KT., PRESIDENT, STRONGE, C.J., AND RAE, C.J.

*Easement—Licence—Distinction—Right in praesenti—Exercise in futuro—Rule against perpetuities—Incumbrance—Meaning thereof within Schedule A. of the Title by Registration Act, 1886—Circumstances in which subsequent purchaser for value may be affected by licence granted by vendor—Acquisitive prescription—Principles governing same—Estoppel—Acquiescence by conduct—Undertaking permitted by acquiescence indivisible in nature—Extent of effect of estoppel.*

The appellant company had entered into a written agreement with the respondent's predecessor in title giving it power *inter alia* to run a railway in and over the G. estate. The agreement did not contain any reference to a dominant tenement for the sake of which such powers had been granted nor did it state any *terminus a quo* the said line was to be run.

*Held,* (a) That in the absence of a dominant tenement and a *terminus a quo,* both characteristics of such an easement as chat claimed, the agreement amounted to nothing more than a licence.

(b) That a licence in contradistinction to an easement confers no interest in and over the land with reference to which it is granted.

The clause in the agreement conferring the said powers gave a present right to do something which need not necessarily be done within lives in being and 21 years thereafter.

*Held,* that even if the said clause had conferred an easement it was void as being obnoxious to the rule against perpetuities.

By Schedule "A" of the Title by Registration Act, 1886, "incumbrance" is defined as follows:—"All burdens, securities or liens upon land arising whether at law or in equity, other than mortgages, by which the land is subjected to interests in favour of individuals, or the revenues thereof are affected for the payment of annuities or temporary charges; and also any dealings with land which in the event of sale would limit the free use and disposal thereof by the purchaser, such as leases for three years and upwards; and all temporary attachments by judgments; and all caveats forbid-ding registration of dealings."

*Held,* That on the principle *noscitur a sociis* the term "incumbrances" includes pecuniary burthens on land other than mortgages and interests in land less than an estate in fee simple, but that they do not include a licence to build and maintain a railway.

Ordinarily, a subsequent purchaser for value of land is not affected by a licence relating thereto granted by the vendor because a licence is merely a personal contract and does not run with the land. A purchaser may however become bound thereby if he bought with notice and made no objection or if he by words or conduct subsequently estops himself from denying the licence.

A person cannot establish a right by lapse of time and acquiescence against his neighbour unless he shows that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim without an unreasonable waste of labour and expense.

The court will not permit a man knowingly though but passively to

encourage another to lay out money under an erroneous opinion of title and the circumstance of looking on is in many cases as strong as using terms of encouragement.

There is no authority for the proposition that when a person is estopped from denying a statement of fact by reason of another having suffered dam-age by acting on his statement, the only damage recoverable is the damage so arising.

The judgment of the Court was as follows:—

This is an appeal from a decision in the St. Christopher Circuit dismissing the plaintiff's action with costs.

The facts are briefly these: the plaintiff company acquired land in St. Kitts and prior to the 31st of January, 1912, erected thereon a sugar factory, and it also at some date prior to the 8th of January, 1913, built a railway from that factory across two estates known as Ottleys and Stone Fort on to and for a quarter of a mile over Garvey's Estate then belonging to Mrs. Virginia Ryan as registered proprietor under the Title by Registration Act, 1886. In the year 1920, Mrs. Ryan sold this Garvey's Estate to the defendant who, from the 5th of July, 1920, continuously to this date has been registered proprietor thereof under the said Act. On the 8th of January, 1913, the plaintiff company made with Mrs. Virginia Ryan, her heirs, executors, administrators, and assigns, the agreement under seal on which this action, as will be seen, is brought, but prior to making this agreement it had already built the factory mentioned above and, in 1912, the railway over Garvey's Estate, Mrs. Ryan's property. No evidence was led, nor were any admissions asked for, as to how the plaintiff company came to build this railway over Mrs. Ryan's Estate, but it must be taken that the railway was built by virtue of some parol agreement between the plaintiff company and Mrs. Ryan.

This Court was asked to infer that this parol agreement was such as to confer on the plaintiff company an easement—private right of way—over Mrs. Ryan's land. In the absence of any evidence as to the nature of this parol agreement, it would be impossible so to hold. To give to this parol agreement, which is a matter of inference and not evidence, the definite character of an agreement for an easement would be to supply evidence affecting the defendant which it was the duty of the plaintiff company to have led had it wished to. All that this Court can possibly do is to infer, from the defendant's admission, that the plaintiffs laid a railway upon the said Garvey's Estate in or about the year 1912, that the plaintiff company had some sort of licence from Mrs. Ryan so to do and that they were not trespassers in so doing.

It has been stated above that on the 8th of January, 1913, the plaintiff company and Mrs. Ryan, her heirs, etc., and assigns

entered into an agreement under seal. This document was in a set form sent out from the plaintiff company's registered office in London. By it Mrs. Ryan bound herself for a limited period to keep 20 acres of her estate under sugar canes each year, and to sell all canes grown on her land to the plaintiff company which on its side agreed to receive and pay for them, such agreement after expiration of the limited period to be terminable by two years' notice on either side (Clauses 1, 2 and 3). The next clauses of the agreement must be set out at length.

"4. The company shall be at liberty to make and maintain a railway or tramway over any part of the said plantation (*scil.* Garvey's Estate) and to use the same for the carriage of canes (whether from the said plantation or elsewhere) or of any other matters or things without charge by the proprietor (*scil* Mrs. Ryan) and shall have such right as long as the company requires the use of such railway or tramway for any purpose but so that the company may remove the materials of such railway or tramway at any time. For the purposes aforesaid and also for the purpose of making up the factory yard the company shall have the power to take stones, gravel and sand from the said plantation but paying compensation for damage done if any.

"5. The company shall also be at liberty at any time during the period mentioned in clause 1 to purchase any land forming part of the plantation for the purposes of a railway or tramway or for site of factory and necessary buildings and for roads and access thereto at the rate of £60 per acre for cane land and £50 per acre for pasture or waste land paying extra compensation for growing crops on any cane land purchased.

"6. In the construction and maintenance or removal of any railway or tramway (whether made under clause 4 or on land purchased under clause 5) the company shall use reasonable care to avoid causing unnecessary damage or detriment to the said plantation."

This agreement also contained clauses enabling the plaintiff company to enter into similar agreements with other owners of sugar plantations (clause 7) and to work canes for them (clause 8) stating the conditions on which the agreement would become void (clause 9—it is admitted that the agreement did not become company void by virtue of them), enabling the plaintiff company to enter and cultivate itself if the owner did not keep 20 acres under cane (clause 10), provisions also as to the rights of owners entering into this or a similar agreement to certain shares in the

plaintiff company (clauses 11-14). as to power to the plaintiff company to increase its capital (clause 15), and as to arbitration in event of dispute (clause 16), but these clauses did not come in question before us and so can be disregarded. We return to the discussion of those that did come in question, viz., Nos. 4, 5 and 6.

It was admitted in argument for the plaintiff company that for the purposes of this case the option to purchase conferred by clause 5 was of the nature of an obligation personal to Mrs. Ryan and that it could not be enforced against the defendant, her successor in title. It does not, therefore, concern this action.

Now we are asked to find that clause 4 created an easement in favour of the plaintiff company over Garvey's Estate, Mrs. Ryan's property, and it will be convenient to deal with this argument at once, since it is important to ascertain the precise rights of the parties, the plaintiff company and Mrs. Ryan, before the defendant, her successor in title, has to be considered. We are of opinion that this clause 4 did not create an easement over her property but a licence merely. It does not specify any dominant tenement from or for the benefit of which the railway is to run, and it is so worded as to give the plaintiff company the right to start the railway from any *terminus a quo* that it pleases and thereafter to alter the alignment of that railway so that it runs from another terminus. It and clauses 5 and 6 are so worded as to give to the plaintiff company complete freedom of action with regard to this railway and to confer a benefit upon that company but not upon any tenement express or implied. If so clause 4 confers a licence on the plaintiff company but not an easement. But we are asked to find an easement by some such argument as this. It is admitted that there was a railway in existence from the company's factory on to and over Garvey's Estate, prior to the execution of the agreement, and it is argued that the factory and the land on which it stood, being the company's property, are the dominant tenement for whose benefit the railway was made, and that by combining the parol agreement between the plaintiff company and Mrs. Ryan which must have been made to enable the plaintiff company to construct the railway at all, with clause 4 of the agreement under question this clause is to be read as if the factory and the land on which it stands had been mentioned therein as the dominant tenement for whose benefit the railway had been made. But the parties have chosen to embody their respective rights in an agreement under seal, perfectly unambiguous in its terms, and giving to the plaintiff company entire freedom of action whither the railway is to go and from where it is to start and we cannot vary those clear terms by reading into them something which the parties to that

agreement under seal have not seen fit to insert. Moreover, to assume that the previous parol agreement specified a dominant tenement for whose benefit the railway was to be made, would be to infer with regard to that parol agreement definite terms which are not proved in evidence and which require evidence for their proof. We conclude, then, that this clause 4 particularly when read with clauses 5 and 6, confers upon the plaintiff company a licence to make a railway over Garvey's, Mrs. Ryan's property, but not an easement properly so called.

But there is a further objection to treating clause 4 as creating an easement. This clause, giving a present right to do something which need not necessarily be done within lives in being and 21 years after, seems to us obnoxious to the rule against perpetuities. In *Smith v. Colbourne* (1914) 2 Ch. 533, there was a clause in an agreement that "the grantors of the licence and all persons deriving title under them, might at any time thereafter at the expense of J.S., his heirs and assigns enter upon the premises, remove the windows and fill up the openings, in default of S. doing so," and Swinfen Eady, L.J, says at p. 543, "In my opinion this clause is a mere "licence passing no interest and not binding upon the purchaser after con-"veyance. If it amounted to an easement which in my judgment it does not "it would be void under the rule against perpetuities. As to the same clause "Cozens Hardy, M. R. had already said at p. 541 'I think it is a mere li-"cence but if it is more, it seems to be void as a perpetuity.' It is worth no-"ticing that Swinfen Eady, L.J., when a judge of first instance, had said in "*S. E. R.* v. *Associated Portland Cement Manufacturers,* (1910) 1 Ch. at "pp. 24-25 'the second point was that the provision was void for perpetuity "'according to L. S. W. v. Comm. 20 Ch. D. 562. But the conveyance re-"'serves an immediate right or easement of tunnelling. It is not a right to "'arise at some future time, it is an immediate right.'" (In passing so was the agreement in *Smith v. Colbourne supra*). "The conveyance was made "subject to the legal reservation of the easement. That is not like Comm's "case, where the covenant was to reconvey on the happening of a future "event which might not arise within the period of time allowed by the rule "against perpetuities." It almost looks as if Swinfen Eady, L.J., had in *Smith* v. *Colbourne* intentionally withdrawn the opinion expressed by him in the earlier case. In any event the later case, *Smith* v. C*olbourne* is authority that if the right *in praesenti* conferred on the plaintiff company by clause 4, to do something *in futuro* purported to be an easement then it would be bad as a perpetuity. It can be saved only by being treated as a personal contract, as a licence from Mrs. Ryan to the plaintiff company.

The plaintiff company had the following reason for contending that clause 4 of the agreement created an easement. Mrs. Ryan was the registered owner of Garvey's under the title by Registration Act, 1886, and at the time of her agreement with the plaintiff company the section of that law dealing with easements (now section 11) reads as follows:—"No certificate "of title heretofore issued or hereafter to be issued under the provisions of "this Act shall in any way affect any rights of common, rights of way or "rights to or to be exercised over any ponds, streams or other water or any "other easement or profits *a prendre* or the ownership of any public road." There is one other section in this Act 25—which does provide for the registration of easements against land held by registered title under the Act, but that section only applies where the dominant tenement is itself held by registered title under the Act and it was conceded by both sides in argument that the plaintiff company's land from which the railway started, the land on which its factory and railway terminus stand is not so held. Consequently section 25 cannot apply to this matter and section 11 governs it. Registered Title, it says, does not affect easements, in other words they are of full force as against the land over which they are exercisable even though not noted against the registered title to that land. The plaintiff company had never noted its agreement, or any part thereof, against Mrs. Ryan's registered title to Garvey's, but if clause 4 of that agreement created an easement over Garvey's, then that easement would continue to attach to that estate into whose soever hands it might come.

Alternatively the plaintiff company argued that if the right conferred by clause 4 of the agreement must be held to be a licence, then section 11 of the Act of 1886 must be read as applying to such a licence, as if the words "other easements or profits *a* "*prendre*" included licences also. We cannot accede to this argument. What does section 11 specify not to be affected by a registered certificate of title? It specifies the ownership of a public road which is neither easement nor profit *a prendre* nor licence and besides is a matter which does not here come in question. It also specifies "rights of common" which are nearly always profits *a prendre*, "rights of way" which are either those enjoyed by all the King's subjects, rights by virtue of dedication not by virtue of easement or profit *a prendre* or licence, or are private rights to utilise the servient tenement as a means of access to or egress from the dominant tenement for some purpose connected with the enjoyment of the dominant tenement and so easements properly so called, and "rights to or to be exercised over any ponds, "streams or other water" which again are ease-

ments properly so called, in so far as they are something more than the natural right to water incidental to the ownership of land.

The section has specified certain rights, which so far as they are capable of ownership are either easements or profits *a prendre,* and it then speaks generally of "any *other* easements or profits *a prendre,*" but a licence is quite distinct from an easement or profit *a prendre,* and the section says nothing which would justify us in so reading it as to include licences. We were also invited to hold that the section used the terms "easements" and "profits *a prendre*" in a popular sense, so as to include licences. On the contrary, the section seems to use those terms not in a popular sense but in a strict one. The right, then, which the plaintiff company acquired by clause 4 of its agreement was not one protected by section 11 of the Act of 1886, that is to say, it was not a right which followed this laud held under that Act by registered title into whosesoever hands the land might come.

Anticipating the appearance of the defendant in the story of this ease, we will next take for consideration the argument put to us on his behalf that the right conferred on the plaintiff company under clause 4 to make a railway was an "incumbrance" within the meaning of section 9 of the Act of 1886 and so requiring registration if it was to bind the land in the hands of a subsequent registered owner. Section 50 of the Acts says: "An incum-"brance shall be created and constituted over and upon any land in the "same manner as a mortgage by the noting thereof by the Registrar of Ti-"tles upon the certificate of Title." Schedule A. defines "Dealings" with land to include "incumbrances" and section 6 says: "(1) From and after the "time when any land is brought under the operation of this Act all dealings "with such land shall be in the forms and governed by the principles set "forth in this Act and all such dealings shall take effect from the date and "act of registration.

"(2) Dealings with lands brought under the operation of this Act which "are not in accordance with the provisions of this Act shall operate as con-"tracts only and shall not confer any right in respect to the land, except the "right of enforcing the contract as against the parties and persons claiming "otherwise than as purchasers or mortgagees for value under such parties." If, then the right to make a railway conferred by clause 4 was an incumbrance, it would require to be noted on the Registered Title to the land if it were to be enforceable against a subsequent holder for value by Registered Title, but admittedly it was at no time noted on Mrs. Ryan's Registered Title. The question is, then, was this right an incumbrance?

Incumbrance is defined in Schedule A. as being "All burdens, securities "or liens upon land arising whether at law or in equity, other than mort- "gages, by which the land is subjected to interests in favour of individuals, "or the revenues thereof are affected for the payment of annuities or tempo- "rary charges; and also any dealings with land which in the event of sale, "would limit the free use and disposal thereof by the purchaser, such as "leases for three years and upwards; and all temporary attachments by "judgments; and all caveats forbidding registration of dealings." It is further defined by the latter part of section 9: "Any rights for life or rights in "the land for terms of years or any other limited or conditional rights are "hereby declared to be incumbrances on the said lands."

Taking these sections together they suggest that, apart from judgments and caveats with which this case is not concerned, incumbrances include pecuniary burthens on the land other than mortgages, and interests in the land less than an estate in fee simple, but not anything else. "Burdens, securities and liens upon land . . . . . other than mortgages by which the land is subjected to interests in favour of individuals"; but "a dispensation or licence properly passes no interest," *Thomas* v. *Sorrel.* Vaugh 351. "Any dealings with land which in the event of sale would limit the free use and disposal thereof by the purchaser, such as leases for three years and upwards:" but the licence conferred by clause 4 is in no way analogous to a lease for three years or upwards, and on the principle *noscitur a sociis*, a "dealing" if it is to be an "incumbrance" must limit the use or disposal of the land in the event of sale in the same manner that a lease for three years or upwards would: a licence is *ex vi termini* a personal contract which would not bind or affect a purchaser. Furthermore, it is not—section 9—a right for life or for a term of years nor a "limited right," *e.g.*, a base fee, nor a "conditional right," *e.g.*, a shifting use.

But there is also section 55 which seems to us to point in the same direction. It says "an incumbrance which is not specially limited to payment out of revenue or other special incumbrance of a like nature shall extend over the land constituted in the certificate of title upon which it is noted and upon all fixtures, houses, out-houses, growing crops, stock or other property over which a mortgage extends." The section seems to say that incumbrances may be of two kinds, those "limited to payment out of revenue or other special incumbrance of a like nature:" the licence conferred by clause 4 of the agreement has nothing to do with "payments out of revenue" or things "of a like nature" and those which, like mortgages, extend over and attach them-

selves to all the land affected and also to the buildings thereon. This section, read with definition in Schedule A. and the partial definition in section 9 strengthens our conclusion that in the Act of 1886 incumbrances include pecuniary burthens on land other mortgages, and interests in land less than an estate in fee simple but that they do not include anything else. Then they do not include the licence to build and maintain a railway granted by clause 4 of the agreement, then such a licence is not an incumbrance nor registrable as such. Further, it was not suggested that there were any other section or sections of the Act of 1886 under which it could be registered. In effect there is nothing in the Act of 1886 which would entitle a subsequent assignee of the land for value to say that, as this licence had not been registered the Act protected him, as registered owner, from being affected by such licence.

We will endeavour to put in another way our view of the Act of 1886 as affecting licences. For the defendant it has been contended that "incumbrances" include licences: for the plaintiff company that "easements" do also. This was an Act altering the Common Law, of which we must assume ordinary knowledge on the part of its draftsmen.

If we are to read "incumbrances" as including by implication licences, then, since "dealing with land" includes "incumbrance (Schedule A.) and "incumbrance" is to include licence, section 6 (2) must read as follows:— "Licences with regard to land brought under the operation of this Act "which are not in accordance with its provisions, *i.e.*, which are not Regis- "tered shall operate as contracts only and shall not confer any right in re- "spect to the land except the right of enforcing the contract as against the "parties and persons claiming, otherwise, than as " purchasers or mortgages "for value, under such parties." But such a provision is otiose, for at common law personal contracts such as licences, made by an owner of land, do not affect a purchaser of it for value. Then, whether "incumbrance" includes licence or not, the common law with regard to unregistered licences—this was an unregistered licence remained the same and is unaltered.

In 1887 the year following its enactment, this Act was amended by the addition of what is now section 11 (itself amended in 1914, but that amendment was subsequent to Mrs. Ryan's agreement with the plaintiff company) to the effect that no registered title should effect easements and profits *a prendre* that is, certain interests permitted by law to be annexed in permanence as burdens on land. But a licence is not something that can be annexed to land as a burden, it is a contract personal

to him who grants and to him who receives the licence. Now, the law as to unregistered licence was, as we have observed, the same after the Act of 1886 as it had been before, the Act had not altered it at all. Then, one of two things. Either this amending section 11 was necessary as a declaration that those burdens that can permanently be annexed to land known as easements and profits *a prendre,* continued to be so annexed even though unregistered, and that the Act of 1886 must not henceforward be read as having made any alteration of the law with regard to them in which case it would be an impossible method of interpretation to read by implication into such a declaration the word licences, and so by implication alter the common law with regard to them by making them what they had never been previously, burdens that can permanently be annexed to land, or (an eminently arguable position) this amending section 11 was unnecessary as a declaration, and did not alter the law as it stood after the Act of 1886, in which case *cadit quaestio* as to it affecting licences.

If, then, we have correctly stated the rights respectively of the plaintiff company and Mrs. Ryan, as to the power to make and maintain a railway under clause 4 of the agreement the position between them would be that she had not granted the plaintiff company something, namely an easement, which, though unregistered, would, either at common law or by section 11 of the Act, run with the land as against a subsequent purchaser for value, nor had she created an incumbrance which in the absence of registration would not affect a subsequent purchaser for value of that land, but that she had granted to the plaintiff company a licence which, since the company had spent money on the faith of it with her encouragement, had as against her become irrevocable, but which, being a licence only and not an easement, would affect a subsequent purchaser for value only if he bought with notice and made no objection or if he by words or conduct subsequently estopped himself from denying that he also had granted the plaintiff company a licence to make or maintain this railway and that against him, too, such licence had become irrevocable.

This, then, was the state of affairs when on the 15th of July, 1920, the defendant became registered owner of Garvey's, after purchase of that estate for value from Mrs. Ryan. As against him the plaintiff company in its statement of claim refers to its agreement with Mrs. Ryan, and particularly to clause 4 thereof, and avers due performance thereof on its side and says in the alternative (paragraph 6) that "in contemplation of the execution of "the agreement Mrs. Ryan permitted plaintiff to enter

"into possession and occupy those parts of Garvey's Estate now occupied "by plaintiff and to erect or lay a railway thereon and that thereafter the "said agreement was executed on the 8th January, 1913," also averring (paragraph 7) continuous possession and occupation by plaintiff for more than twelve years before the commencement of the action. The plaintiff company goes on to aver (paragraph 9) that since defendant purchased the estate he has sold its canes to plaintiff and that plaintiff has "accepted and "paid for the same in accordance with the terms of the said agreement" and it recites (paragraph 10) its notice of intention to exercise the option of purchase given it by clause 5 of the agreement and (paragraph 11) defendant's refusal to sell. It may be noticed in passing that (paragraph 9) of the statement of claim, and paragraphs 10 and 11 as dependent thereon, would probably be demurrable and liable to be struck out as not alleging that defendant sold canes to the plaintiff company "under and by virtue of the agreement": as the pleadings stand they contain nothing to show that defendant had notice of or adopted or was bound by the agreement between Mrs. Ryan and the plaintiff company, and his admission of facts filed in the action, take this point quite clearly.

The statement of claim concludes by asking for "(1) specific perform-"ance of the contract of 8th January, 1913, for the sale of the land occupied "by the plaintiffs' railway to the plaintiffs, or (2) for a declaration that the "plaintiffs are entitled to continue to occupy and use the said lands for the "purpose of a railway, or (3) in the further alternative that the plaintiffs "have acquired a title to the said land under the Real Property Limitation "Act, 1877, or (4) such other order or declaration as the Court may think "just in the premises."

At the hearing (1) was abandoned, and counsel for the plaintiff company said expressly that he could not claim as against defendant the option to purchase given to the plaintiff company by Mrs. Ryan under clause 5 of the agreement, but he asked for judgment on (2), declaration that the plaintiff company was entitled to continued use and occupation of the land across which the railway ran, alternatively on (31 title by prescription under the Act of 1877.

What is the evidence as affecting the defendant disclosed by this action?

The plaintiff company, on whom the onus lay, called no witness whose knowledge of Garvey's Estate went back beyond 1923 consequently it produced no evidence as to its dealings with Mrs. Ryan or as to its, or her, dealings with the defendant at the time he purchased Garvey's from her or immediately after

The defendant gave evidence denying that he knew of the agreement when he purchased Garvey's or that he was bound by it, and the learned trial judge evidently accepted his evidence. There can be no question, then, of the defendant having bought Garvey's with notice of the agreement between his predecessor in title, Mrs. Ryan, and the plaintiff company. If the plaintiff company is to have any claim against him it must be on some other ground: and first we will consider that of prescription under the Real Property Limitation Act, 1877.

As to this the law is as laid down by Willes, J., in *Webb v. Bird* 10 C.B.N.S. at p. 284 cited in *Sturges* v. *Bridgman*, 11 Ch D. at p. 858): "A "man cannot establish a right by lapse of time and acquiescence against his "neighbour, unless he shows that the party against whom the right is ac- "quired might have brought an action or done some act to put a stop to the "claim without an unreasonable waste of labour and expense." How could Mrs. Ryan have "brought an action or done some act to put a stop to the "claim?" The plaintiff company and its railway are there either under some parol agreement prior to the agreement under seal of 8th January, 1913, as to which parol agreement the plaintiff company has called no evidence and for which parol agreement the subsequent agreement under seal has been substituted, or are there under the agreement under seal of 8th January, 1913, in which case it would have been impossible for Mrs. Ryan to have brought any action or done any act to put a stop to the claim: she was bound by her contract to permit the plaintiff company to make and maintain its railway across her land. As against the defendant who from July, 1920, onwards could have brought action the plaintiff company has only been in occupation, if it be occupation, for some seven years and not for the twelve years required by the Act. Furthermore, if by the year 1929 the plaintiff company had acquired by occupation a prescriptive title to the land on which the railway is laid, why did it in 1926 offer to buy that land, and give notice that it would exercise the option given it under clause 5? If the land belonged to it already, why offer to purchase it? The letters offering to do so are an admission that in 1926 the plaintiff company had not, and did not consider itself to have, acquired a title by prescription. The claim under the Act of 1877 therefore fails.

The next ground to be considered is that of estoppel, namely, that the defendant by words or conduct has granted to the plaintiff company a licence to make and maintain this railway which licence has become as against him irrevocable. The evidence on this is brief and can be quoted in full. The defendant in cross-examination said, "I took it that Mrs. Ryan allowed the

company to come on the land and it suited me to allow them to continue. It suited me to let them build a bridge which replaced the culvert. It suited me to run the line there. I did not wish to prevent the company putting the bridge there and in re-examination he said "the line over my estate is on "my land, I drive my stock across it. I bought it." There is also a letter from the defendant of 22nd September, 1924, to the manager of the plaintiff company—who, by the way, is his brother—"I see that you are widening the cutting at Garvey's to till up the dump. Just my luck. Not content with washing away all that land, you now want to increase the lost area. Not so much of the "calm and calculating," even the Union Messenger has found you out. What about that manner that "inspires the confidence that is able "to restore order out of chaos by removing all that debris down below." There was also the evidence of Mr. Davis, the manager for the plaintiff company. "In 1924 the railway over Garvey's was badly damaged by "storms, the company went on the land and replaced a culvert washed away "by a bridge. The bridge was more expensive than the culvert, we put it up. "The defendant raised no objection except by letter (quoted from above) "sent with reference to some workmen. The material to make the embank-"ment came from the factory lands."

The effect of this evidence seems to be this: It is not proved that when the defendant purchased Garvey's he knew of the existence of the railway at all, though he would become aware that there was a railway on his land, operated by the plaintiff company, as soon as he occupied the estate, which clearly he did as early any way as 1921. If between 1920 when he purchased the estate and 1924 he said and did nothing with regard to the railway this would at most amount to a tacit, revocable licence to the plaintiff company to continue to operate its railway. But in 1924 the plaintiff company spent money on the railway by building a bridge to replace a less expensive culvert, and by doing the embankment] work incidental to such bridge, and the defendant knowing that it proposed to do this work and expend this money, lay by, made no objection and gave no warning that the company would be incurring this expense at its own risk and on property to which it had no claim. Applying the canons laid down in *Wilmott* v. *Barber*, 15 Ch. D. at p. 105 (1) the plaintiff company made a mistake as to its legal rights as against the defendant, as is shown by its acts in running the railway and in making improvements to it, these being the acts of a person who thinks he has legal rights. Had the plaintiff company not so thought, it would either have refrained from such acts or have asked the defendant's permission before doing them: but it is clear that it did not ask his permis-

sion and that it did do the acts. (2) The plaintiff company expended money and did acts on the faith of this mistaken belief: if it had not had that mistaken belief it is difficult to see why it spent the money or did the acts. (3) The defendant, possessor of the legal right (*scil.* to exclude the plaintiff company from his land and to prevent it operating the railway) knew of the existence of his own rights inconsistent with those claimed, mistakenly, by the plaintiff company, as is shown by his evidence quoted above, particularly that bit where he says "the line over my estate is on my land . . . . . I bought it." (4) The defendant, possessor of the legal right, knew of the plaintiff company's mistaken belief as to its own rights. This is a natural inference from his evidence generally and is conclusive against him by reason of a letter dated four days later than his own quoted above, wherein the plaintiff company's manager says to him "We at any rate will do our best to safeguard our railway and your property." (5) The defendant, possessor of the legal right encouraged the plaintiff company in its expenditure of money and in other acts which it did by abstaining from asserting his legal right; his letter of 22nd September, 1924, was the opportunity for asserting that right but is silent thereon, and the whole tenor of his evidence is inconsistent with his having ever asserted as against the plaintiff company his legal right. With "all these elements existing the Court is entitled to restrain the possessor of the legal right from exercising it." (*Wilmott* v. *Barber,* 15 Ch. D. at p. 105), since the Court will not permit a man knowingly though but passively to encourage another to lay out money under an erroneous opinion of title, and the circumstance of looking on is in many cases as strong as using terms of encouragement, per Lord Eldon in *Dann* v. *Spurrier,* 7 Ves. 232; 32 E.R. 94, and since the defendant was "a party who "could object but who lay by and knowingly permitted another to incur an "expense under the belief that it would not be objected to," and so a kind of permission may be said to have been given to that other to alter his condition, and so defendant may be said to have "acquiesced," per Lord Wensleydale in *Archibold* v. *Scully,* 9 H. L. C. p. 383; 11 E.R., p. 778. This acquiescence by the defendant is "an instance of estoppel by words or conduct," *De Bussche* v. *Alt,* 8 Ch. D. at p. 314.

What is the extent of this estoppel? Could the defendant be heard to say that he was estopped as regards interfering with the bridge and the embankment proved to have been made by the plaintiff company with his acquiescence, but not as regards the rest of the railway as to which there is no evidence of his behaviour? We think not. We infer from his total inaction be-

tween 1920 and 1924 that he granted a revocable licence to the plaintiff company to maintain its existing railway over his land and that he made this licence as against himself irrevocable by his conduct at the time in 1924 when the bridge and embankment were being made. There is no case that we can discover which holds that an irrevocable licence with regard to part of an indivisible undertaking or enterprise is irrevocable, also as against the rest of it, but common sense is against the proposition that a man could admit he was restrained from interfering with part of such an undertaking or enterprise but that he was still free to interfere with the rest of it whereby the part as to which he was restrained would become useless to the owners for the purposes for which they had made that part. The analogy of the cases—*McKenzie* v. *British Linen* Co., 6 A. C. p. 82; *Ogilvie* v. *West Australian,* etc., Corporation, (1896) A.C. 257, (P.C.): *Henderson* v. *Williams,* (1895) 1 Q. B. 521, and *Compania Naviera v. Churchill* (1906) 1 K. B. 237 which are authority for the proposition that when an estoppel has been made out, its consequences are not measured by the amount of damage or prejudice sustained, certainly points in this direction: see especially per Channell, J., in the *Compania Naviera* case at p. 251: "There is no au- "thority for the proposition that when a person is estopped from denying a "statement of fact by reason of another having suffered damage by acting "on his statement, the only damage recoverable is the damage so arising."

We conclude then, that the defendant has by estoppel given to the plaintiff company an irrevocable licence to maintain the existing railway constructed by it in 1912 over Garvey's Estate, and to use and operate the same, but it follows from this conclusion that the plaintiff company is not at liberty as against the defendant to make any other railway over that estate or to alter the existing railway so to make it run wholly or in part over other land parcel of that estate.

We desire to mention, lest it may otherwise seem to have escaped our attention, that the concluding sentence of clause 4 in the agreement under seal between Mrs. Ryan and the plaintiff company gave to the latter "power to take stones, gravel, and sand" from Garvey's for the purpose of its railway and for making up its factory yard. The plaintiff company made no claim, however, to this profit *a prendre* in its statement of claim, nor did it raise the matter before us in argument.

For the foregoing reasons we are of opinion that this appeal must be allowed and that judgment in this action must be entered for the plaintiff company for a declaration that it is entitled as against the defendant to maintain, use and operate the railway

constructed by it over Garvey's Estate and now existing thereon and also for an injunction restraining the defendant from interfering with the maintenance, use and operation by the plaintiff company of the said railway. The remainder of the prayer to the plaintiff company's statement of claim to stand dismissed. The plaintiff company to have its costs here and below.

KINCH, Appellant,
AND
ADAMS, Respondent.

ON APPEAL FROM THE COURT OF COMMON PLEAS OF BARBADOS.

1927. SEPTEMBER 10.

BEFORE SIR P. J. MACDONNELL, Kt., PRESIDENT, SIR ANTHONY DEFREITAS, Kt., C.J., AND STRONGE, C.J.

*Hearing of action—Libel—Misconduct of jury—When ground for ordering a new trial—Principles to be applied—Whether there has been a fair trial—Whether there has been a scandal to public justice—Opinion of trial judge—Weight thereof.*

It is not every type of misconduct on the part of a juror or the jury that necessarily entitles the Court to order a new trial. For example, a new trial will be granted where a juror has before being sworn, expressed a determination to find a verdict one way or where a juror has before hearing the case said that one party should never have a verdict whatever witnesses be called. But an expression of opinion by a juror against the case of a litigant after hearing same does not *per se* necessarily entitle such litigant to a new trial.

In considering the question of a new trial the opinion of the trial judge as to the fairness of the verdict is a factor to be considered.

New trials are granted *inter alia* on the following grounds:—

(1) Where the misconduct of a juror has been such as to convince the Court that there has not been a fair trial.

(2) Where something has occurred which can be described as a scandal to public justice.

These two principles sometimes overlap.

The facts appear in the judgment of the Court.

The President read the judgment of the Court in this appeal as follows:—This was an action for libel wherein the jury found for the respondent, plaintiff below, with damages £375. The appellant, defendant below, now asks for a new trial on the grounds (1) that the learned trial judge should have set aside the

verdict of the jury because after being sworn one of the jurors was guilty of misconduct and (2) that he should also have set aside the verdict of the jury because the damages were excessive. At the argument, however, before the learned Chief Justice, from whose ruling this appeal was brought, it was admitted that the second ground of appeal was not maintainable unless the first ground could be established and that if the first ground failed, the second ground must fail also. The same admission was made to this Court, consequently the only point to consider is whether there was misconduct by a juror and if so whether it was of such a nature as to require an order for a new trial.

Disregarding certain matters alleged and denied, it is stated of one of the jurors sworn in this case (1) that on the 23rd June, 1927, after the defendant's case had closed and while the plaintiff was still being examined in chief in rebuttal, the juror said that "the defendant would have to face "the libel and would have to pay heavy damages" and (2) that after the Court had risen that same day and while plaintiff was still under cross-examination he said he "considered defendant had libelled plaintiff and "would have to pay up to the hilt" and further (3) that after verdict given he had said that "but for him plaintiff would not have got a cent." As to the first of these remarks attributed to the juror, it is clear that it was made to some of his fellow jurors and in the hearing of, but not addressed to, the members of the public who report it, but it is also clear that the second and third remarks attributed to him were made not to his fellow jurors but to members of the public. It should be added that the juror admits having uttered remark (1) and does not deny having uttered remarks (2) and (3).

We agree with the learned Chief Justice that the juror in making these remarks was guilty of misconduct and that the only question is whether it was such misconduct as to necessitate a new trial.

It is conceded that a new trial on the ground of misconduct by a juror is in the discretion of the Court. In exercising this discretion the Court must, as urged on it in argument for the appellant, address itself to the question of whether there has been a fair trial and also whether there has been anything that can be described as scandal to public justice; the two principles, when applied, sometimes lead to a cross division.

The cases in point on the first principle—we admit those decided on the ground that a juror has been or may have been influenced by threat, reward, interest, or the like external matter, as not germane to the present case—seem to show that a new trial will be granted where a juror has, before being sworn, expressed a determination to find a verdict one way, *Ramadge* v.

*Ryan*, 9 *Bing.* 333, or where a juror has, before hearing the ease, said that one party should never have a verdict whatever witnesses he called, *Dent* v. *Hundred of Hertford*, 2 *Salk.* 645; 91 E. R. 546, or where a juror, before hearing the case of the party against whom he eventually decides, has formed an opinion against that party—"formed a conclusion before he had a right to form any,"—*Allan* v. *Boultbee*, 23 L. J. Ex. 208, or *a fortiori* where the jury having heard the case for one party expresses as a body the desire to find for him before ever it has heard any part of the case of the other party. *DeFreville* v. *Dill* 43 *T.R.L.* 243 (1927). These cases rest on the principle that a juror must not form his opinion against a party until he has heard the case of that party. They do not apply here, since the juror now in question had heard defendant's case, the case of the party against whom he ultimately decided, before he expressed any opinion at all.

These cases show, then, that a Court, asked in its discretion to grant a new trial, must satisfy itself on the question of a juror, or the jury, having formed a premature opinion on the matter at issue but there is a further question that such a Court should inquire as to, namely, the opinion of the trial judge on the verdict impugned. Thus in *Allum* v. *Boultbee ut supra,* the trial judge expressed himself as dissatisfied with the verdict, and this dissatisfaction was one of the matters which the other members of the Court in banc took into consideration when asking themselves whether they should or should not grant a new trial. Now in the case before us the learned trial judge was perfectly satisfied with the verdict and with the damages awarded, as being in complete accord with the evidence and it was conceded by appellant's counsel that he was unable to differ from this opinion.

We have then before us a line of cases which do not support the present application but are by implication authority against it, and we have also the unchallenged opinion of the learned trial judge that the verdict and damages were entirely in accordance with the evidence. If that is so, then there is no justification for us to say that there should be a new trial on the ground that the trial in this case was not a fair one.

These considerations answer the argument strongly pressed on us for the appellant that remark (3) of the juror, viz., that "but for him plaintiff "would not have got a cent" was sufficient in itself to justify an order for a new trial. It must be remembered that when the juror said it, he had already joined with his fellows in giving a verdict and was thus *functus officio*, and in view of the fact that the remarks (1) and (2) attributed to him were uttered after hearing defendant's case and not before, this remark (3), so strongly pressed on us for the appellant, does not, how-

ever improper and unseemly, amount to much more than a reiteration of the other remarks attributed to him; he had after hearing evidence for the defendant formed a strong opinion against the defendant and boasted of this after the verdict, taking credit to himself for the damages awarded. The remark (3)—we readily concede its impropriety—cannot be separated from the other two that the juror uttered but must be taken with them. But the other two remarks are on the authorities no new ground for a new trial. Consequently this amplification, or emphasizing, of the other two remarks cannot be ground for new trial either. (Statements after verdict by a juror as to anything said or done by the jury before verdict are "improper, deplorable and "dangerous" but not, it would appear, in themselves reason for setting aside the verdict given. See *Rex v. Armstrong*, 27 *Cox* at 245.

The second principle on which a Court may in its discretion grant a new trial is that there has been in the trial impugned something that scandalizes public justice, and on this *Cooksey* v. *Haynes*, 27 L. J, Ex. 371, was cited to us. This was the case in which the jurors got food and beer passed up to them by a string to the room where they were enclosed. No doubt in the particular circumstances of that case the Court was warranted in granting a new trial, but there was no such incident at this trial or anything analogous thereto, Consequently this second principle affords no ground here for granting a new trial. If it be urged that this second principle, something that scandalizes public justice, includes wrongheaded verdict—we stated earlier that the two principles are not mutually exclusive but can lead to a cross division—then we need only repeat that admittedly the verdict here was not wrong-headed but the only one possible on the evidence.

For the foregoing reasons which are substantially those of the learned Chief Justice from whom this appeal is brought, we are of opinion that this appeal must be dismissed with costs.

# LAM *v.* WONG.

[No. 380 OF 1925.]

1926, NOVEMBER 17; DECEMBER 8. 1927, JANUARY 10, 22.

BEFORE DOUGLASS, J.

*Detinue—Property of bankrupt—Property not delivered to Assignee in bankruptcy—Discharge of bankrupt—Release of assignee—Subsequent dealings by discharged bankrupt with property—Bailment—Refusal by bailee to re-deliver—Whether discharged bankrupt can claim return thereof.*

The plaintiff had been declared bankrupt in the year 1904. At his public examination be stated that a piano then in his possession was held by him in trust, and consequently the piano was never taken into possession by the Assignee in bankruptcy. In the year 1910, the Assignee obtained his release and fix years later the plaintiff was discharged from bankruptcy.

Subsequently thereto the plaintiff lent the piano to the defendant who refused to deliver up same on demand.

The plaintiff brought a claim in detinue and at the hearing stated that the piano had always been his.

The defendant objected that the piano had vested in the assignee in bankruptcy and that consequently the plaintiff had no *locus standi* to bring the action.

*Held,*— (*a*) That an undischarged bankrupt has a right against all the world save his Assignee to sue in trover for property acquired by him after bankruptcy and can maintain an action against a wrongdoer to recover same in the absence of intervention by the Assignee.

(*b*) That by a parity of reasoning the plaintiff had a good "locus standi" and the defendant could not set up a "jus tertii."

The facts appear in the judgment.

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

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

DOUGLASS, J.: On the facts I am quite satisfied that the piano—the subject matter of this action—was the property of the plaintiff, and was a loan and not a gift.

The only reason for reserving a decision in this case is because of a point of law raised by Mr. Stafford on behalf of the defendant that as the plaintiff was adjudged insolvent on the 20th September, 1904, the piano now in question, if belonging to him at that date, vested in the assignee in bankruptcy for the benefit

of the creditors, and although the plaintiff was discharged by. order of discharge of 7th March, 1914 (effective on the 7th March, 1916), learned counsel submitted that the assignee in bankruptcy is still in possession of the property which never re-vested in the debtor, and that consequently he has no *locus standi* to bring the present action.

He referred to section 40 of the Insolvency Ordinance, 1900, which sets out that the property of an insolvent divisible amongst his creditors comprises "all such property as may belong to or be vested in the insolvent "at the commencement of his insolvency, or may be acquired by or devolve "on him before discharge" and section 49, that "immediately on a debtor "being adjudged insolvent the property of the insolvent shall vest in the "assignee."

The piano was never actually taken possession of by the assignee, as apparently on the debtor's examination at the date of the insolvency he stated it was held by him in trust, whether that was so, or the present story that he purchased the piano, is the true story it would equally give him a right to sue for its detention apart from any insolvency law that might affect his position.

The last sentence in paragraph 2 of the defence appears to contradict the defence raised at the hearing in stating that all the plaintiff's property was seized by the Official Receiver and sold.

Both the cases relied on by Mr. Stafford *Ebbs* v. *Brulnois* and *ex parte Witt Re Armstrong* were decided under the old Bankruptcy Act of 1869, which was so completely altered by the later Bankruptcy Acts that it is difficult to ascertain how far they now apply, one of the main differences is that there was no such thing as a Receiving Order until 1883; our Insolvency Ordinance, 1900, is founded on the Bankruptcy Act, 1883.

The first case referred to apparently decided that under the old law a discharged debtor's after acquired property was his own and released from the liquidation, the second case relates to proceedings in liquidation by arrangement—not the case here—and decided that all the property continued to vest in the trustee in spite of the discharge of the debtor and that he was competent to give a receipt for outstanding property, Mr. J. A. Luckhoo on behalf of the plaintiff contends that even if the property of the debtor when he had obtained his discharge does not re-vest in the debtor, yet after the release of the trustee of the 16th February, 1911, even if not before, the debtor was, and is, entitled to sue for property withheld by the defendant, and he referred to the following cases:—(1) *Webb v. Fox* (1797, 7 Term Reports 391) where it was held that an uncertificated bankrupt had a right to

goods acquired by him since his bankruptcy against all the world but his assignees, and to maintain trover for them against a stranger, and (2) *Semple* v. *London and Birmingham Rly. Coy.* (1838. 2 Jurist 296), that an uncertificate bankrupt has a title against all the world except the assignees. To these I would add (3) *Tomlinson v. Dighton* (cited 3 Dow & Ry. K.B. 543) where to an action by an attorney for his bill of costs defendant pleaded that when bill was incurred plaintiff was an undischarged bankrupt: Held, no defence to plaintiff's right to sue inasmuch as if the assignees did not intervene the bankrupt could maintain an action, and defendant could not set up the *jus tertii* of the assignees, and (4) *Buchan* v. *Hill* (1888. W. N. 233); plaintiff an undischarged bankrupt brought an action for an account in respect of partnership agreement, held plaintiff could sue without his trustee unless the trustee intervened. The facts of the present case are stronger than any of these for: (1) the plaintiff is a discharged bankrupt since 10 years ago; (2) the assignee obtained his release nearly 16 years ago; (3) the plaintiff and his wife were presumably from the evidence married in community of property (*i.e.*, married before the Marriage Persons Property Ordinance, 1904) as his eldest child was 19 in 1904, and it is more than doubtful if such property would pass to the trustee—especially if a chose in action—unless reduced by him into possession.

In order to succeed on the facts the plaintiff must prove that (1) he has a right to immediate possession of the piano and (2) that the defendant is in possession and is wrongfully withholding, Of the first there is ample evidence, to the second the defendant sets up the defence that the piano is in the possession of Louisa Wong, his wife, and not of himself. The parties themselves are directly at variance on this point and the only really independent witness is Corporal Critchlow, and he stated that it was Wong who offered to return the piano if expenses were paid, and again, that he wouldn't deliver it unless he got an order from the magistrate; the whole of this witness's evidence is contradicted by Mr. and Mrs. Wong, which makes me doubt all their evidence as the Corporal has so obviously no interest in stating anything that did not occur. The defendant was the tenant of the house where the piano was kept, and it was he who asked the plaintiff to let him have it for his children, moreover the action—as Mr. W. Blake Odgers remarks—is not confined to the person who directly violates the plaintiff's right of possession but lies against an Assignee who has subsequently come into possession of goods, whether innocently or in collusion with the original trespasser.

On the particular facts in this case, and that to refuse the plaintiffs would be to perpetrate an injustice seeing that after

this lapse of time since the assignee was released there is no person to act in the plaintiff's or the creditors' interests, and that to hold otherwise would be to encourage the defendant in what amounts to fraudulent conduct, I hold that the plaintiff is within his rights in suing as he has done and accordingly give judgment for the return of the piano or $150 its value. It is still left open to the Official Receiver or any of the creditors to take any action in the matter if they are so advised but the defendant has no merit on his side, nor does his defence benefit the creditors. In the circumstances I make no order as to damages, but give the plaintiff his scale costs.

PATTERSON, Appellant,
AND
COZIER, Respondent.

ON APPEAL FROM THE COURT OF COMMON PLEAS OF BARBADOS.

1927. SEPTEMBER 10.

BEFORE SIR P. MACDONNELL, KT., PRESIDENT, SIR ANTHONY DEFREITAS, KT., C.J., AND STRONGE, C.J.

*Detinue—Title-deeds—Loss thereof by solicitor—Affidavit by solicitor relating to loss put in evidence—Whether Court could impound same—Circumstances in which Court may impound documents—Question of value of affidavit in intended application under Property and Conveyancing Act, 1891—Whether jury entitled to speculate on value thereof—Question of law not of fact—Measure of damages—Circumstances in which Court will order new trial on that ground—Substantial miscarriage of justice—New trial—Common Pleas Act, 1911, section 250.*

The appellant, a solicitor, had lost certain title-deeds, the property of the respondent's testator. The appellant swore to an affidavit setting out *inter alia* the circumstances of the loss with a view to enabling the respondent to produce same in evidence in an intended summary application under section 21 of the Property and Conveyancing Act, 1891. Counsel for the appellant asked that the said document be impounded and one of the jurors inquired whether the Court could order the affidavit to be given to the respondent (plaintiff).

The trial judge held that he had no power to impound the document and directed the jury to "disregard the fact that the defendant had put in this affidavit."

*Held,* (*a*) That the trial judge was right in refusing to impound the document; the principle upon which the Court's jurisdiction to impound a document is exercised is the advancement of public justice and has no application to a case where an innocent document produced in a civil case may be of use to one of the parties in future litigation.

(*b*) That the learned judge's direction was correct because the question of the possible value of the said affidavit in the intended proceedings was one of law and not of fact, and to have left same to the jury would have been to invite them to speculate on the legal merits of a document.

(*c*) That in any event the measure of damages not being excessive the Court would not grant a new trial as there had been no substantial miscarriage of justice.

The judgment of the Court was delivered by SIR ANTHONY DEFREITAS as follows:—

Mr. Peter Patterson, the appellant, was the solicitor of the late Mr. Edward Clifford Hoppin. As such solicitor he prepared a deed of conveyance of Prerogative plantation from Mr. Hoppin to Mr. R. A. Evelyn for the purchase price of £7,500, subject to mortgage in the same deed to secure the payment of £3,750 to Mr. Hoppin, being the balance of the purchase money not yet paid by Mr. Evelyn. That deed was executed by the parties on the 21st of December, 1920; but it was not recorded, although Mr.

Hoppin had given the appellant the necessary money for the purpose of doing so; and no draft of the deed had been made. On the same date, the 21st of December, 1920, Mr. Evelyn also confessed judgment to Mr. Hoppin for the £3,750, the note of which confession was witnessed by the appellant. A foreclosure suit was subsequently tiled on behalf of Mr. Hoppin against Mr. Evelyn, on the mortgage and the confession of judgment, but this suit was withdrawn. Next, on the 25th of June, 1922, there was endorsed on the deed of the 21st December, 1920, a conveyance of Prerogative by Mr. Evelyn to Mr. Hoppin in consideration of the £3,750 still unpaid.

In 1924 Messrs. Yearwood & Boyce became Mr. Hoppin's solicitors, and on the written authority of Mr. Hoppin they demanded from the appellant delivery of the deed of the 21st of December, 1920, with the conveyance endorsed on it on the 25th of June, 1922. The appellant replied that the deed was lost or mislaid and could not be found. On the 26th of September, 1924, Yearwood & Boyce wrote to the appellant as follows:—"With reference to previous correspondence passing between you and us, "and Mr. W. S. Patterson and us, relative to the loss by you of certain of "the title deeds of Prerogative plantation, the property of Mr. E. C. Hoppin, "and of which he has agreed to sell a portion to Mr. George Thomas Ford, "we are now about to take the necessary steps to perfect Mr. Hoppin's title "to the plantation, in order to enable him to complete the contracts of sale "of the same with Mr. Ford and the various other purchasers. 2. We are "advised by counsel that a summary application to the Vice-Chancellor "under section 21 of the Property and Conveyancing Act, 1891, should "meet the needs of the situation, and we are also in favour of adopting the "procedure. We are advised, however, that there is little or no chance of its "being successful unless the following affidavits are first obtained, on "which to base the application, namely:—(1) An affidavit by you of the "contents, &c, of the two deeds and the loss of the same without having "been recorded, (2) an affidavit by Mr. W. S. Patterson of his having suc-"ceeded you as solicitor for Mr. Hoppin, and of his having made a diligent "search for the deeds without avail, (3) an affidavit by Mr. R. A. Evelyn "(who, we believe, is a client of Mr. W. S. Patterson) and of Mr. E.C. Hop-"pin, of the contents of the deeds as far as they are able to prove same. 3. "We shall be glad to know whether you will be willing to make the neces-"sary affidavit, and we are also writing to Mr. W. S. Patterson to ask "whether he and Mr. Evelyn will be willing to do the same. 4. Mr. Hoppin "will, of course, expect that all expenses in perfecting his title will be borne "by you. This we estimate at the sum of

"£25 5s. Kindly let us have an answer by Thursday next, 2nd October, as "the matter has been of very long standing and we are anxious to bring the "game to a close." Yearwood & Boyce on the same date wrote to Mr. W. S. Patterson inquiring if he and Mr. Evelyn would be willing to make the necessary affidavit. On the 3rd of October, 1924, Mr. W. S. Patterson wrote in reply that he would have nothing further to do with the matter. Section 21 of the Barbados Property and Conveyancing Act, 1891, No. 13 of 1891, is taken from section 9 of the English Vendor & Purchaser Act, 1874.

The appellant not having replied to Yearwood & Boyce's letter of the 26th September, 1924, an action against him was filed on behalf of Mr. Hoppin on the 15th November, 1924, in respect to the trial of which this motion for a new trial has been made to us. In the statement of claim in that action the plaintiff claimed "the return of the said title deeds, or their value, "and damages for their detention and £200 special damages."

After five months' delay the appellant replied to Yearwood & Boyce in a letter of the 17th of February, 1925, as follows: "In answer to your letter "of the 26th of September, 1924, and your Mr. Boyce's interview on the "14th with Mr. W. S. Patterson, I beg to state that I am willing (1) to make "an affidavit of the loss of the two deeds and of their contents as required "by you, (2) to obtain an affidavit of the loss of the two deeds and of the "contents of the deeds so far as he is able to prove same, and (3) I am will-"ing to pay the taxed costs of the application to the Court under the provi-"sions of the Property & Conveyancing Act, 1891, and any stamp duty on, "and the cost of recording, the above deeds, not exceeding the sum of £25 "as estimated by you. 2 As Mr. Hoppin is your client I take it that there will "be no difficulty as to his joining in the affidavit in support of any facts "that are within his knowledge."

The interview referred to by the appellant, between his son, Mr. W. Stanley Patterson and Mr. Boyce was mentioned by Mr. Boyce in his evidence at the trial; and the judge's notes of what he said on the point are as follows: "About February, 1925, I met Stanley Patterson one day in Trafal-"gar Square. Action took place 3rd January, 1925, had been adjourned. "Asked me whether we would still settle in accordance with letter 26th "September, 1924. I said Yes—always ready and willing. Asked me if we "would write to his father and tell him so. I said we had written before and "had no reply. Few days after that conversation we received a letter, 17th "February, 1925."

On the 5th of March, 1925, Yearwood & Boyce replied by letter to the appellant as follows: "We are in receipt of your letter of the 17th ultimo. "With regard to the costs of the

"proposed application we are quite willing that same shall be taxed but we "cannot agree to limit the amount to a sum not exceeding £25, nor was any "such limit stated in our letter. We must therefore insist that all costs atten- "dant on perfecting Mr. Hoppin's title to the plantation be paid by you. 2. If "you are prepared to accept this arrangement we shall be glad if you will at "once prepare the necessary affidavits (in which Mr. Hoppin will join to "the extent mentioned in your letter) and submit same for our perusal, so "that the matter may be completed without further delay."

Mr. Hoppin died in October, 1925; and Mr. Edward Lemuel Cozier, the executor of Mr. Hoppin's estate, was by an order of the Court of the 26th of October, 1926, substituted in the place of Mr. Hoppin as plaintiff in the action against the appellant filed on the 15th of November, 1924.

After a further delay of eleven and a half months, the appellant in a letter of the 24th of February, 1926, replied to Yearwood & Boyce's letter of the 5th of March, 1925, as follows: "With reference to the previous corre- "spondence between us on the subject of the loss of certain title deeds, the "property of the late Mr. E. C. Hoppin, I beg to state that I am willing that "the matter of the title of Prerogative plantation should be settled as sug- "gested by you by a summary application to the Vice-Chancellor under "section 21 of the Property and Conveyancing Act, 1891. 2. I am also will- "ing to pay the taxed costs of the above-mentioned proceedings and to fur- "nish the necessary affidavits by myself and Mr. Evelyn and to pay the "usual solicitor's fees for perusing the affidavits on behalf of your client, "Mr. Cozier. Any expenses of stamp duty and proving and recording of any "deed that may be necessary to put the title straight will also be paid by "me."

At last, the appellant agreed (without any condition as to a limit of the amount of costs) to the proposals made seventeen months before by Yearwood & Boyce in their letter of the 26th of September, 1924. These proposals were made seven weeks before the action was filed, and they were accepted fifteen and a half months after it had been filed.

On the 26th of February, 1926, Yearwood & Boyce wrote to the appellant as follows: — "We are in receipt of your letter of the 24th instant and "welcome your acceptance of our suggestion for the curing of the defect in "the title of the prerogative plantation. 2. We shall be pleased to receive the "drafts of the proposed affidavits of yourself and Mr. Evelyn, on the swear- "ing of which we shall take the necessary steps to bring the matter before "the Court." On the 15th of March, 1926, Yearwood & Boyce wrote to the appellant as follows: "With further reference

"to your letter of the 24th ultimo relative to the title of Prerogative plantation, and our reply to same to 16th idem, we shall be glad to know when we can expect to receive the drafts of the affidavits to be sworn by you and Mr. Evelyn. . ." To this the appellant replied in a letter of the 19th of March, 1926: "In answer to yours of the 15th inst. I beg to state that I will "have the draft affidavit ready for your perusal on Wednesday next, the "24th instant. I regret the delay, but I have been indisposed."

On the 31st of March, 1926, a draft of a joint affidavit by the appellant and Mr. Evelyn was perused and settled by Mr. Boyce and returned to the appellant. On the 26th of April, 1926, Mr. Boyce received the engrossed copy of the joint affidavit and the previously approved draft of it, which he examined and returned to the appellant on the same day, for the affidavit to be sworn by the deponents and sent back to him. The sworn affidavit was never sent to Yearwood & Boyce. On the 26th of October. 1926, the appellant was told orally that so soon as he sent the sworn affidavit to Yearwood & Boyce, Mr. Boyce would make the proposed application to the Vice-Chancellor, and that if the application was granted he would immediately withdraw the pending action against the appellant. Nevertheless, nothing further was done by the appellant. The action had come on for trial on the 3rd of January, 1925, but had been adjourned. The trial was actually begun on the 3rd of January, 1927, resulting in a verdict of the jury for the plaintiff for £600 damages; and we now have a motion in this Court by the appellant for a new trial.

The first of the two grounds of the motion for a new trial now before us is stated as follows: "that the learned trial judge misdirected the jury by "directing them that he had no power to impound the documents produced "by the defendant and put in evidence at the trial (particularly the "affidavit "of the defendant sworn to on the 6th day of November, 1926) so as to "make the same available for use by him in any proceedings he might be "advised to institute in the Court of Chancery of this Island to perfect his "title to the lands in question in this action." The pleader here does not condescend to particulars. He does not describe the documents so as to enable them to be identified. He does not even send up with the appeal papers a copy of the affidavit of the 6th of November, 1926; nor a copy of any of the documents referred to. But this Court has been shown the affidavit; and reference to the other documents has been abandoned, It appears to have been sworn to by the appellant and to give information as to the execution and loss of the deed of the 21st of December, 1920, and the conveyance by Evelyn endorsed on it on the 25th of June, 1922. An affidavit by

the defendant appellant of the 24th of January, 1927, was before Chief Justice Furness at the bearing of defendant's motion for a new trial; and in a foot-note to that affidavit the trial judge (Mr. Poyser) says that he told the jury to "disregard the fact that the defendant had put in this affidavit and "that the affidavit would only affect proceedings in the Court of Chancery "to establish a title to the land in question and one could not anticipate "whether this affidavit would or would not have any influence on the Court "of Chancery,"—the affidavit, that is, of the 6th of November, 1926. So, it is clear that it was rejected by the trial judge as evidence. Section 250 of the Common Pleas Act, 6 of 1911 (following R.S.C, Order 39, r. 6) provides that a new trial shall not be granted on the ground of improper rejection of evidence unless the Court is satisfied that substantial wrong or miscarriage has been thereby occasioned.

The copy sent up to this Court of the judge's brief notes at the trial ends with the following: Case for plaintiff closed. "Defendant calls no evi- "dence. Mr. Clarke addresses Court. Verdict for plaintiff £600. Judgment "for plaintiff and £600 damages and costs." There is no note of what was said by Mr. Clarke, counsel for defendant. It does not appear that the trial judge made any note of an application to him (if any was made) to "impound" any document, or made any note of his direction to the jury. Neither to the learned Chief Justice from whom this appeal comes on his refusal of a new trial, nor to this Court, have counsel sent up an agreed statement, made from their notes, showing what application was made to the trial judge as to "impounding" or showing what directions were given to the jury by the judge. The meagre material before us is supplemented by the appellant's affidavit of the 24th of January, 1927, which says that the foreman of the jury told the trial judge that "the jury desired to know "whether the affidavit before the Court would be given to Messrs. Year- "wood & Boyce"; and the affidavit goes on to say that "another juryman "stated that what they wanted to know was whether the Court could order "the affidavit to be given to Messrs. Yearwood & Boyce" and that the trial judge said "No, gentleman, what you are asking me to do amounts to im- "pounding a document and I do not think I have the power . . ." In his first ground of appeal the defendant appellant appears to complain that the trial judge would not order him to give his affidavit to the plaintiff's solicitors. But it does not appear why he did not give it without an order to do so. This affidavit was sworn to by the appellant alone. It was not a joint affidavit by him and Mr. Evelyn, such as he had undertaken in February, 1925, to deliver to Yearwood & Boyce. To order a document to be given to a party is not to

"impound" it. It is otherwise. An impounded document cannot leave the custody of the Court except when it is delivered to one of the Law Officers of the Crown or to the Director of Public Prosecutions or when it is produced at a criminal trial in which it is put in evidence.

However, before both the judges in the Courts below the matter was dealt with as a question of "impounding" the affidavit. Upon what principle is the jurisdiction to impound a document exercised? Wharton's Law Lexicon, 11th edition, 1911, at page 421 has: "Impound": to place a suspected document in the "custody of the law when it is produced at a trial"; and we find at page 919 of volume 2 of Stroud's Judicial Dictionary, 2nd edition, 1903: "A document is impounded when it is ordered by a court to be kept "in the custody of its officer." The advancement of pubic justice is the purpose of impounding a document and retaining it in *custodia legis.* Similarly it is for the advancement of public justice that when a person is arrested for committing crime any property in his possession which will form material evidence in prosecuting him for the offence may be seized and detained as evidence in support of the charge, and the property may be taken from him by using necessary force. It is in the interest of the State, in the public interest, that a person charged with crime should be brought to justice and that his prosecution should be finally determined judicially. It is in the public interest that a compromise to stifle a prosecution is held to be illegal, and that reasonable and probable cause for instituting a criminal prosecution is held to be a defence in an action for malicious prosecution. And it is also in the public interest that a prisoner may lawfully be killed to prevent his escape from lawful custody. The public interest in the prosecution of a person charged with crime extends to the impounding and preservation of material evidence relating to his guilt. This reason for impounding a document is expressly recognised by the Barbados Evidence Act, 1905, which provides for the impounding by the Court of spurious documents admitted in evidence at the request of the party against whom they have been admitted. There could not have been an impounding of the affidavit of the 6th of November, 1926, in the circumstances. Those circumstances have no relation to the advancement of public justice or a prosecution for a crime. The first ground of appeal therefore fails.

The second ground of appeal is that £600 damages was excessive. On this point Mr. Hannays, in an interesting discussion, rested his application for a new trial. He urged that an excess of damages must be taken to have reasonably resulted from the withdrawal from the jury by the trial judge of the affidavit of the 6th of November, 1926. The affidavit, he urged, afforded some

evidence of the execution and loss of the title deeds, and it accordingly afforded some material for consideration by a judge in chambers on an application under section 21 of the Barbados Act 13 of 1891 (corresponding with section 9 of the English Vendor and Purchaser Act, 1874) to cure the defect in the title arising from the loss of the deeds; however little weight the affidavit might have in that connection, he contended it was material proper to be left to the jury for their consideration and that on such consideration less damages might have been awarded for the reason that the jury might have taken into account that such affidavit would assist to lessen the defect in the plaintiff's title and to reduce to some extent the inconvenience and loss resulting to him from that defect. It was submitted in effect that all material that might tend to mitigate damages should be given to the jury. The fallacy of this in the present circumstances is that the function of a jury is to consider facts and nothing else. But this affidavit and any effect it might have is not *quaestio facti* but *quaestio juris* to which therefore *non respondent juratores*. It is wholly speculative what weight such an affidavit might have with a judge in chambers but the speculation is as to question of law not as to question of fact. Assuming (but not deciding) that the affidavit (without an affidavit from Mr. Evelyn) might have some weight in support of an application in chambers, it is clear that it is not possible to say before hand what would be the pecuniary value of its weight—and remember that it can have weight only as a legal document, only as a legal not a factual element in the case. In our view the learned trial judge was right in withdrawing from the jury the affidavit and its possible legal effect in circumstances yet to arise.

We will suppose circumstances not too remote to be useful as an, analogy, namely, that the appellant had at his own charges settled a case for opinion on the facts in this case and had, again at his own charges, obtained from some eminent equity counsel an opinion thereon and that somehow this opinion of counsel had been mentioned and discussed in the hearing of the jury. Clearly such opinion, a legal document of speculative value, must have been withheld from the jury nor could any request of theirs with regard to its destination have been considered; it and its contents and destination were no *quaestio facti* and not therefore anything for them. And the affidavit here is in like case; it too is a legal document of speculative value.

If however it be suggested that the jury wanted something done with regard to this document so that it could in some way use this document as evidence of the conduct of the appellant, as evidence, that is, that he had done or tried to do something towards lessening the respondent's incon-

venience and loss, then the answer seems twofold; the jury was not entitled to have anything done with regard to the document itself for the reasons given above, and it did have before it the conduct of the appellant as to lessening respondent's inconvenience and loss from the evidence generally and from the letters put in which show that in March, 1926, respondent's solicitors settled the draft of the affidavit which was sworn by appellant in November, 1926. That evidence and those letters proved the fact of appellant having made an affidavit, and that fact was sufficient before the jury for any effect it as a fact might have on the question of damages. The affidavit itself the jury was not entitled to make any request about for the reasons already given.

It cannot, we think, reasonably be said that £600 was an excessive sum to be awarded as damages. The claim for £200 special damages was established by the resulting loss of interest on the unpaid balance of purchase money owing by many purchasers of land for more than three years. That unpaid balance amounts, as Mr. Hannays has shown, to $9,971.03 and the interest on this sum at 6 per centum for three years would be well in excess of the £200 claimed. But even for general damages, in our view £600 is not an excessive sum having regard to the plaintiff's inconvenience and to his loss, actual and prospective, resulting from the depreciation in the marketable value of his title following from the defect in that title caused by the defendants loss of the deed, and also having regard to the expenses that the plaintiff has incurred and must incur in relation to demands by purchasers for title of the lands they bought from him.

Further, it is quite clear that no substantial wrong or miscarriage of justice has resulted from the rejection of evidence at the trial of this action, by the withdrawal from the jury of the affidavit of the 6th of November, 1926; consequently, a new trial should not be granted.

For these reasons which are in the main an amplification of the reasons given by the learned Chief Justice, we are of opinion that this appeal must be dismissed with costs to the respondent.

MEETOO, Appellant,

AND

ALEXANDER, Respondent.

ON APPEAL FROM THE SUPREME COURT OF GRENADA.

1927. SEPTEMBER 29.

BEFORE SIR P. J. MCDONNELL, KT., PRESIDENT, RAE, C J. AND FURNESS, C.J.

*West Indian Court of Appeal—Notice of Appeal—Necessity for stating grounds of Appeal—Weight of evidence—Ground of Appeal—What appellant must prove to establish such ground of appeal.*

*Armoogum* v. *Trinidad Leaseholds* (W.T.C.A. June, 1927) followed.

Rule 4 of the West Indian Court of Appeal Rules is in part as follows:—"Notice of motion shall clearly state the grounds of appeal, whether the whole or "part only of the judgment or order is complained of, and in the latter case shall "specify such part."

*Held,* that this rule makes it necessary for the appellant to set out clearly the grounds of appeal, and it is not sufficient to state merely that the judgment was erroneous in point of law.

Where an appellant appeals on the ground that the verdict was against the weight of evidence to succeed he must establish either that the verdict was wholly unreasonable or that it involved a misdirection or that it depended upon a wrong inference of fact.

The judgment of the Court was as follows:—This was an action brought in the Supreme Court of Grenada in its summary jurisdiction by respondent (plaintiff below) for trespass to his freehold on 14th March, 1926, and other dates by appellant (defendant below) wherein the respondent gave particulars of the trespasses alleged and claimed £50 damages and an injunction. The action being summary, there were no pleadings by appellant defendant in reply. From his evidence it clearly appeared that the appellant admitted that the freehold in the *locus in quo* was in respondent, and admitted further that he had broken and entered it on the date or dates alleged but he justified this breaking and entering under the plea of right of way. The onus then was on the appellant to establish in this action a right of way over respondent's freehold.

The action was tried on 28th January, 1927, and subsequent days by the acting Chief Justice, Grenada, when both plaintiff and defendant gave evidence and called witnesses. On the 3rd February, 1927, the acting Chief Justice gave judgment in the following terms: "Judgment for the plaintiff "for £5 damages and costs and I grant an injunction to restrain the defend-"ant from continuing his acts of trespass."

From this judgment the appellant (defendant below) now appeals on the following grounds:—

(1) that the judgment was against the evidence and weight of evidence.

(2) that the judgment was erroneous in point of law.

The notice of appeal did not state in what respect the judgment was erroneous in point of law but it would appear that about the middle of August last counsel for respondent wrote to counsel for appellant objecting that no error in law had been specified in the notice and that about a month later, on September 17th, counsel for appellant replied that the judgment was erroneous on two grounds because the evidence shewed (i.) an implied grant of a right of way over the *locus in quo* and (ii.) a title to such right of way under the Prescription Act, Cap. 128; also that three days later, on 20th September, counsel for appellant sent in writing a third ground, namely that there had been "a grant of a right of way over the road in ques- "tion to Simon Ross by the partition deed of 1885 and that by the convey- "ance in 1908, Simon Ross to Bedassee, there was a grant of right of way "to Bedassee over the same road."

It will be seen that these grounds of appeal were only specified in this present month, within a week of the date on which the appeal had been set down for hearing and some seven months after appeal had been noted. This practice is not to be encouraged. Rule 4 of the West Indian Court of Appeal Rules is in part as follows:—"Notice of motion shall clearly state the "grounds of appeal, whether the whole or part only of the judgment or or- "der is complained of, and in the latter case shall specify such part." If counsel for the respondent had said that he was embarrassed by the late hour at which these errors in law had been specified, and that he required an adjournment in consequence, it might have been difficult to refuse such a request with the result that appellant would have had to pay costs of the adjournment and that the hearing of this appeal might have been postponed for months. This would have followed from the ruling of the Court in *Armoogum v. Trinidad Leaseholds*, argued in Trinidad last June. There also appellant had contented himself with saying that the judgment appealed from was erroneous in law, adding however that it was the whole judgment that he appealed from. This judgment, in writing, contained at most two pronouncements on points of law, and on appellant's counsel specifying definitely what those two propositions of law were and undertaking to confine his case to the two propositions so specified, he was allowed to proceed with his argument. Here the respondent might have had even better cause for alleging embarrassment since, as has been seen, the judgment is of the briefest and does not enter on legal points at all.

Further, however, it appears that shortly before this appeal

was to be heard counsel for respondent invited counsel for appellant to join with him in a request to the learned trial judge to give in writing his reasons for the judgment appealed from, but that counsel for appellant declined. We must regret this. Even though six months had elapsed since judgment was delivered, still written reasons for it would have been of assistance to this Court, and presumably to counsel also. We would certainly have approved of such request being made to the learned trial judge.

In this case the onus was on defendant to establish the right of way alleged. At the trial he gave evidence himself and called several witnesses. It follows logically from the judgment now appealed from that the learned trial judge did not consider that the defendant and his witnesses had established the existence of the right of way claimed. It was argued that such a finding was against the evidence and the weight of evidence. For this argument to succeed, the appellant defendant must shew that the verdict of the learned trial judge was, having regard to the strength of defendant's evidence and the weakness of that of the respondent plaintiff, a wholly unreasonable verdict, or that it involved a misdirection or that it depended on wrong inferences of fact, and we are unable to say that appellant's argument has established any one of these positions.

The defendant and plaintiff are each of them owners of adjoining lands which originally formed part of Staunton Grove Estate owned by one Simon Ross, deceased; their lands are actually separated by a ravine. When Simon Ross died in 1876, the devisees of Staunton Grove Estate, namely his sons Simon and James and a certain Forrester, mutually agreed to a division of that estate which was embodied in a partition deed of 1885. In 1888 James conveyed the land now belonging to the respondent plaintiff to Thomas Alexander, and it was subsequently acquired by plaintiff in 1900. It appears that the son Simon died and that thereafter his widow and his son William conveyed a portion of the deceased man's share of the partitioned estate to one James Bedassee in 1908, and that this land of James Bedassee was sold by the Court to the appellant defendant Meetoo about the year 1925; no assurance to him has so far been executed. The appellant defendant claims that there is a right of way across the lands of purchasers from and tenants of Simon Ross, junior, across appellant defendant's own land, thence across respondent plaintiff's land, thence across other land formerly belonging to James Ross, to a public bye-way, and that this is the only outlet from his land. To support this contention, appellant defendant produced three witnesses, Joseph Aberdeen, Thomas John and Neddie Christopher who allege that this way was used for over 20 years, all of them

being owners of land formerly belonging to Simon Ross, junior. They are corroborated by other witnesses who give evidence of user for less than 20 years, namely Eliza Jetah and George Bedassee. Plans were also put in at the trial as to which defendant alleged that they shewed the existence of a right of way across plaintiff's land, but the plans when examined did not bear this out. The argument for appellant defendant invited us to infer that a road shewn on land once belonging to a certain Amelia Peterson, continued to and linked up with a road shewn on the plan of the land bought by James Bedassee and now appellant defendant's property. But this would be to infer something which it is for appellant defendant to establish and which the plans put in do not establish for him.

The plaintiff on the other hand maintained by his evidence at the trial that the road now claimed by defendant, was a foot-path used by his watchman for his and for plaintiff's convenience, and that it was only since the storm of 1921 that he, plaintiff, had allowed other people to use this path. The persons so permitted by plaintiff to use this path, included James Bedassee, defendant's predecessor in title. Plaintiff gave evidence to this effect himself, and also called three witnesses to support his contention Two of these were Angelina Alexander, the widow, and Fitz Brown Alexander, the son of a former owner of plaintiff's land. In passing, we may perhaps observe that these two witnesses seem to be people without any interest in the dispute, one way or another. The third witness, Moylan William, had worked on the land prior to 1921 and became in 1922 plaintiff's watchman thereon. Plaintiff explained that James Bedassee and others had asked permission after the storm to use plaintiff's path because the road previously used by them had been damaged by the storm. The plaintiff, however, says that he withdrew this permission before this action was brought.

While the evidence adduced at the trial was undoubtedly of a contradictory nature, there is nothing in it to shew that the learned trial judge should not have given thereon the judgment that he did give; in other words there was nothing unreasonable in the conclusions he arrived it.

This being so, there is no ground for this Court to interfere, and it follows also that the examination of the cases cited for the appellant defendant, becomes unnecessary. Those cases would be in point if a right of way had been established by evidence of user, but the judgment appealed from implies that the learned trial judge was not satisfied that the evidence did establish this right of way. We have already stated that we see no reason to differ from this finding.

Counsel for the appellant defendant read to us the learned

trial judge's note of an argument for plaintiff to the effect that "whatever opinion the Court had on the facts of the case" and that "even if the Court believed every word that the witnesses for the defence stated," still plaintiff was in law entitled to recover, and from this argument so noted down, counsel for appellant defendant asked us to infer either that the learned trial judge was wrong in his finding on the facts, or that he did not give a finding on the facts at all. If counsel's argument implied the former, then we have already said that we see no reason to think that the finding on the facts was wrong. If his argument implied the latter, then it is pertinent to observe that counsel for appellant defendant had himself addressed the Court of trial just before on the evidence and its credibility, as appears from the learned trial judge's note of his argument, viz., "Tenants used this road for over 40 years" (such an argument can only mean that he invited the Court to believe the evidence he had called), and we must assume that the learned trial judge took both arguments into consideration. If he did, then he must have estimated and given a decision on the credibility of the witnesses on both sides. If he did not, then it should be remembered that counsel for appellant defendant admits that he was invited to obtain from the learned trial judge his reasons for the judgment and that he declined to take any step to obtain them. If he had any reason to believe either that the learned trial judge was not in his favour on the facts, or that he had not considered the facts at all but had given his decision exclusively on a point of law, then there was all the more cause for his endeavouring to obtain written reasons for judgment from the learned trial judge, or at least for accepting the invitation from counsel for the respondent plaintiff to obtain them.

For the foregoing reasons we are of opinion that this appeal must be dismissed, with costs to the respondent.

# HAZELL, Appellant,
AND
# GONSALVES, Respondent.

ON APPEAL FROM THE SUPREME COURT OF ST. VINCENT.

1927. DECEMBER.

BEFORE SIR P. J. MCDONNELL, C.J., PRESIDENT, RAE, C.J., AND SIR ANTHONY DEFREITAS, C.J.

*Husband and wife—Matrimonial home—Separation of spouses—Wife's continued occupation of home—Nature of occupation—Married Women's Property Ordinance, 1906—Effect thereof—Whether a married woman made feme sole for all purposes—Statute of Limitations—When time begins to run—Effect of possession being referable to a lawful title.*

Husband and wife were married prior to 1883 when the husband became the owner of a property in the island of St. Vincent. In or about the year 1890 the husband left St. Vincent, returning thither twice but there was no evidence whether on either occasion he returned to the said property, their matrimonial home. The wife continued to reside in the property from 1890 to 1918. Shortly before her death in 1925 she executed a deed whereby she purported to convey the property to the defendant (respondent). The husband died in 1924 and by his will dated the 5th December, 1916, he devised the property to the plaintiff (appellant.)

The trial judge held that by virtue of the St. Vincent Real Property Limitation Act, 1851, and the Married Women's Property Ordinance, 1906, the wife had acquired a prescriptive right to the property in question.

The plaintiff appealed.

*Held,* (*a*.) That the Married Women's Property Ordinance, 1906, has not made a married woman a *feme sole* for all purposes. The true effect thereof is that it confers in certain specified cases new powers upon the wife and in others new powers upon the husband, but it neither abrogates nor infringes upon any existing principles or rules of law in cases to which its provisions do not apply.

(*b*.) That the wife's occupation of the property was by virtue only of her duty and right to occupy the matrimonial home and until she changed the character of her occupation, such occupation continued to be the husband's possession.

(*c*.) That time runs against an owner out of possession only from the time when he can by an action seek to recover the land from a person in actual possession of it to his exclusion, *i.e.*, in adverse possession, but in this case for the reasons aforementioned the husband could not successfully have brought an action of ejectment against his wife.

(*d*.) That possession for the purpose of the Statute of Limitations is never considered adverse if it can be referred to a lawful title, and in this case the wife's first entry being referable to her said right and duty and there being no evidence of change in the character of her occupation the Statute of Limitations did not apply.

The judgment of the Court was delivered by SIR ANTHONY DEFREITAS, C.J., as follows:—

This is an appeal from the judgment of the acting Chief Justice of St. Vincent in favour of the defendant in a case for the recovery of possession of a piece of land with a house on it, at St. James's Place in Kingstown.

One James Webb became the owner of that property in the year 1883, at which time he was already married. He left St. Vincent in or about 1890. His wife continued to live in the house on the property, the matrimonial home. He came back to St. Vincent twice, the last time being in 1907 or earlier but there is no evidence to show whether on either occasion he returned to the matrimonial home or not. Mrs. Webb continued to live in the house from 1890 to 1918. She received, and used for her maintenance, all the rents paid by tenants of rooms in the house down to the time of her death in 1925. These rents were her only means of support, derived from her husband. Shortly before her death she executed a deed whereby she purported to convey the property to the defendant.

Webb died on the 8th of August, 1924. By his will of the 5th of December, 1916, he devised the property to the plaintiff, and it is on that devise that she bases her present claim.

In his "Reasons for Judgment" the trial judge says that the defence was "that the wife having been in undisputed possession for twelve years since "1906 and received the rents and profits and accounted to no one, acquired "the property under the Statute of Limitations." The St. Vincent Real Property Limitation Act, 1851, No. 84 of 1851, and Married Women's Property Ordinance, 1906, No. 15 of 1906, are in their material parts transcripts of the corresponding sections of the English Real Property Limitations Acts, 1833 and 1874 (3 and 4 Will. 4, c. 27 and 37 and 38 Vict. c. 75) and Married Women's Property Act, 1882 (45 and 46 Vict. c. 75). The trial judge continues to say: "Section one of our local Married Women's Property "Law which follows the English law allows a married woman to acquire "property as if she were a *feme sole*; by section 7 she can bring an action to "protect it against any one, including her husband, and the defendants, in- "cluding her husband, can put up what defence they like, including the "Statute of Limitations. Why cannot she do the same when her husband "brings a suit against her? If the husband brought this action against a "stranger woman she could set up this defence, why cannot the wife, as in "all these proceedings she is to be treated as a *feme sole* (that is without a "husband). This defence is open to every *feme sole*, why not to this particu- "lar one? I have not been able to discover that relationship is a bar to this "defence, *i.e.*, between mother and son, brother and sister, aunt and niece, "nor at what degree of relationship the privilege is lost. It is not disputed "that the wife has been in undisputed possession for twelve years since the "passing of the Married Women's Property Ordinance, 1906, and in my "opinion this defence is good and, the action must be dismissed with "costs."

The Married Women's Property Act, 1882, has not made a married woman a *feme, sole* for all purposes; nor has it entirely done away with the old rule that a husband and wife during covertures are one person in the eyes of the law. The effect of the Act is to put in abeyance the husband's marital rights of ownership of his wife's property, by enabling her to hold it as separate property and as though she was not married. But the Act does not put her completely in the position of a *feme sole* in all circumstances and for all purposes; for example, though the right of alienation is incidental to the beneficial ownership of property, section 19 of the Act permits restraint upon anticipation or alienation to be validly imposed upon her in the future as in the past, where it provides that nothing in the Act shall invalidate or render inoperative any restriction against anticipation already attached or to be attached to the enjoyment of any property or income by a woman under a settlement or will. An absolute gift to a man or a spinster cannot be fettered by any such restraint. Notwithstanding section 1 (1) of the Act (section 1 (1) of 15 of 1906), which provides that a married woman shall be capable of acquiring property as her separate property in the same manner as if she were a *feme sole,* English decisions—which still have force in St. Vincent—have held that where there has been a disposition of property to a husband and wife and another person, unless a contrary intention is indicated the husband and wife count as one person and get one-half of the property and the other person gets one-half (see *Re* Jupp (1888) 39 Ch. D. 148; 57 L.J. Ch. 774; *Re* Jeffrey (1914) 1 Ch. 375; 83 L.J. Ch. 251). If her position were equivalent to that of a "stranger woman" she would take one-third. It was to avoid the effect of these decisions that section 37 of the English Law of Property Act, 1925, enacted that "A husband and "wife shall for all purposes of acquisition of any interest in property under "a disposition male or coming into operation after the commencement of "this Act, be treated as two persons." Notwithstanding section 1 (2) of the Act which provides that a married woman shall be capable of suing and being sued as if she were a *feme sole* a husband is still liable to be sued with his wife for a tort committed by her during covertures even though they may be permanently living apart; unless she is living apart under a judicial order, or unless the tort is directly connected with a contract with her and is the means of enforcing it (see Utley *v.* Mitre Publishing Co. (1901) 17 T.L.R. 720; Edwards *v.* Porter (1925) A.C.1, H.L; 94 L.J.K.B. 65). Lord Sumner said in *Edwards* v. *Porter,* "To assume that the Act was "intended to revolutionize the law of Baron and Feme and to dissolve their "legal unity so completely, that in litigation at any rate they twain should "no longer be one

"is to beg the question." In some respects a husband and wife are, still one person in the eyes of the law, *e.g.*, no criminal agreement to which a man and his wife are the only parties can amount to the crime of conspiracy; where the only publication of a libel is by husband and wife to each other there is no evidence of publication to go to a jury, inasmuch as husband and wife are for that purpose but one person in law (see *Wenhak* v. *Morgan* (1888) 20 Q. B. D. 625); a wife cannot acquire a separate domicile of her own while her husband is alive and the marriage exists (see *Lord Advocate* v. *Jaffrey* (1921) A, C. 346, H. L; A-G for *Alberta* v. *Cook* (1926) A. C. 444, P. C). In *Butler* v. *Butler* (1885) 14 Q. B. D. 835, Mr. Justice Wills said: "I take the Act to mean exactly what it says. It is said that it de-"stroys the doctrine of the common law by which there was what has been "called a unity of person between husband and wife. I do not see why. It "confers in certain specified cases new powers upon the wife, and in others "new powers upon the husband, and gives them in certain specified cases "new remedies against one another. But I see no reason for supposing that "the Act does anything more than it professes to do, or either abrogates or "infringes upon any existing principles or rules of law in cases to which its "provisions do not apply."

There is a special relationship between husband and wife, until the marriage ceases to exist, and, in consequence, the wife's occupation of his real property or custody of his personal property is on behalf of the husband. Her possession of his property is his possession. There is no conversion where a wife takes possession of the chattels of her absent husband (see *In re Williams* (1881) 50 L. J. Ch. 495). The question for our determination in this case is whether Mrs. Webb entered into possession of the property and the character of that possession; and, if not originally a possession adverse to the husband ("adverse" in the modern sense, as used by Lord St. Leonards), did its character change, and when, so as to start the Statute of Limitations running against the husband? In determining that question due regard must be had to the status and condition of spouses and their legal obligations arising from such status and condition.

In *Shipman v. Shipman* (1924) 2 Ch. 140. C.A.; 93 L.J. Ch. 382, because of a husband's misconduct, an interim injunction was granted to restrain him from entering his wife's house, her separate property, which was the matrimonial home. In ordering the injunction the Court put into operation section 12 of the Married Women's Property Act, 1882, for the protection of her property. Referring to the wide rights given by that section, Lord Justice Atkin said: "She was intended to have all the rights and all the "remedies that every owner of property was intended to have, in-

"cluding the right to exclusive possession, and the question is whether she "has those rights in respect of the matrimonial home against her husband"; and he also said: "It is a remarkable thing that if a wife has under the Act of "1882 the right which is claimed here [to exclude her husband in any cir- "cumstances] there is no correlative right given to the husband." A wife's right of possession of a house as her separate property is an exclusive right against all persons, including her husband, but subject to the husband's right to be on the premises in the exercise of his marital right to matrimonial consortium. If he is guilty of such conduct as would be a ground for a divorce petition by the wife, or as would enable her to resist a petition for restitution of conjugal rights, the effect is that he forfeits his privileged position and is relegated to the position of any other person. A husband as owner of the matrimonial home is not ordinarily entitled to prevent his wife from entering and remaining in it. It is both her duty and her right to reside in the matrimonial home provided by her husband, and her entry not being wrongful or adverse to him, the husband cannot maintain an action against her, by way of ejectment, for the recovery of possession of the premises. She is in occupation but never in actual possession of her husband's house by virtue only of the performance and exercise of her duty and right to occupy the matrimonial home, and she continues to occupy the house in the same marital character. Until she changes, the character of her occupation there can be no action against her for recovery of possession. Her occupation continues to be his possession, and there is no dispossession of the husband so as to make his right of entry accrue and the statute to run. In *Hill* v. *Hill* (1916) W.N. 59, a husband and wife were living apart, while the wife occupied the matrimonial home, which was his property. He advertised the house for sale with the view of paying a mortgage debt. She refused to allow an intending purchaser to inspect the house. The husband thereupon brought an action claiming delivery of possession. The Court made an interlocutory order directing her to deliver possession, but suspended its operation until the husband provided a home for her.

When the trial judge held that the wife acquired a possessory title to the husband's property under section 2 of the local Act 81 of 1851 (corresponding with section 1 of 37 and 38 Vict. c. 57) by virtue of having been "in undisputed possession for twelve " years," it would appear that he overlooked the provision that the period of twelve years begins to run against the owner of land only from the time when he can bring an action to recover the land from a person in actual possession of it to his exclusion. But in the ease before us the husband was always in possession of the

property through his wife's occupation of it in the character of wife; an occupation that began and continued with his permission, in fulfilment of his legal obligation to provide a home for her. In *Kirby* v. *Cowderoy* (1912) 81 L. J. P. C. 222, Lord Shaw, quoting from Lord O'Hagan, said that in determining the sufficiency of a possession it must be considered with reference to the peculiar circumstances. The suitable and natural mode of using the property and the course of conduct which the proprietor might reasonably be expected to follow must be taken into account. It is emphasized that Mrs. Webb's occupation was "undisputed," but, in the circumstances, it could not reasonably be expected that it would be disputed, as if she were a stranger, Mrs. Webb's occupation was in pursuance of a marital right which does not involve exclusive possession. She was in occupation in a position analogous to that of a representative or bailiff of her husband; and she must be held to have continued as a bailiff unless and until that relationship is dissolved. There was no one in possession against whom Webb could bring an action for the recovery of the property, no one who held it against him. Time could not run under the statute. He cannot be said to have been dispossessed or to have discontinued his possession of the house, unless there was some other person who had such a possession, to his exclusion, as would enable ejectment to lie as his suit. The statute does not apply to the mere going out of physical possession: it can only operate where there is actual exclusive possession by someone else to the exclusion of the owner (see *Trustees Agency Co.* v. *Short* (1888) 13 App. Cas. 793 P.C.; 58 L.J.P.C. 4). If Webb had brought an action against his wife to recover possession of his house, which she occupied in the exercise of marital right to do so, he would have been seeking to get the Court to enable him to evade an obligation which the law had imposed upon him as a husband. And it should be remembered that in every case the possession which will cause time to run against the owner involves an *animus possidendi*, that is an occupation with the intention of excluding the owner as well as other persons; and such a possession must be shown unequivocally by the defendant (see *Littledale* v. *Liverpool College* (1900) 1 Ch. 19, C. A.; 69 L.J. Ch. 87; *Philpot* v. *Bath* (1905) 21 T.L.R. 634, C.A.).

There is no evidence that there was ever any change in the character of Mrs. Webb's occupation of her husband's house, as a wife living in the matrimonial home and maintaining her husband's possession of his property. There was never any such change as could show if and when she began actual possession to the exclusion of her husband, so as to enable time to begin to run against him. *Lyell* v. *Kennedy* (1889) 14 App. Cas. 437. H. L. 59 L.J.

Q.B. 268, where an agent of the owner was in possession, Lord Selborne said: "The respondent (the agent) had no title to the land; he was never in actual possession of it; and until he claimed to change his position . . . . I do not see how there could be a right of action against him for recovery of that land." In *William* v. *Pott* (1871) L.R. 12 Eq. 149, a principal was held to have acquired a possessory title to land by receiving the rents during the statutory period through an agent, although that agent was the person really entitled to the land. There the Master of the Rolls said: "The possession of the agent is the possession of the principal and he could not have made an entry as long as he was in the position of agent for his mother; he was not in possession, and could not get into possession, or make any entry for that purpose without first resigning his position as her agent." In *Thomas* v. *Thomas* (1855) 2 K. and J. 79; 25 L.J. Ch. 159, a father entered upon the estate of his infant children. It was held that it must be presumed that he entered as their natural guardian and bailiff and that if he retained possession after the children had attained the age of 21 years, his possession must be considered in the character in which he entered, Vice-Chancellor Wood said: "But there is another principle which affects the case, namely, that "possession is never considered adverse if it can be referred to a lawful "title. An important authority on this point is Doed. *Milner v. Brightwen* "(1809) 10 East 583, where a party who had taken possession of copyholds "on the death of his wife, by an adverse title, lived more than 20 years af- "terwards, and it was then found that there was an old custom of the Manor "by which he had a right to curtesy and therefore his possession was re- "ferred to that title which was consistent with the title of the other party." This rule of referring possession to a lawful title was applied by the Privy Council in *Corea* v. *Appuhamy* (1912) A.C. 230; 81 L.J.P.C. 151, where it is said in the judgment: "The principle recognised by Wood, V.C., in *Tho-* "*mas* v. *Thomas* holds good; possession is never considered adverse if it "can be referred to a lawful title." The rule was again applied by the Privy Council in *Muttunayagan* v. *Brito* (1918) A.C. 895, where it was held that the question whether possession is adverse depends on what was the character of the defendant's possession as a matter of right. In the West African case of *Summonu* v. *Disu Raphael* (1927) A.C. 881 the Privy Council held that the Statue of Limitations did not apply to give a possessory title to the defendant, Sommonu. The radical title to the land was in the Crown and the usufructuary title was in the whole family. At the death of the father of the parties in 1895, Sommonu and other members of the family were in possession. Shortly afterwards the others departed

leaving Sommonu in sole possession, who claimed in his defence to have acquired title by long possession. It was held that he must be taken to have entered into possession by virtue of his usufructuary right as a member of the family and consistently with the title of his brother and sisters. Possession was also referred to entry as a matter of right in *Tinker* v. *Rodwell* (1893) 9 T.L.R. 657. In that case Romer, J., said: "The plaintiff is admit-"tedly, in right of his mother, entitled to one-fourth of the cottage and "premises unless he is barred by the Statue of Limitations. The defendant "claims through her late husband, the father of the plaintiff, and undoubt-"edly the father, and the defendant since the father's death, have been in "possession since 1848. But when the father went into possession the plain-"tiff was an infant, and the law is undoubted that the father must be held to "have taken possession as natural guardian and on behalf of the son, so that "the statute would clearly not run during the son's infancy . . . . . It fol-"lows that the father must be held to have continued his possession after "the son attained 21 on behalf of his son, so that the statute would not run "in his favour (as it would in favour of a stranger entering into possession "of an infant's land) unless and until something was done to change the "character of the possession. Now, can I hold that in the present case there "was a change in the character of the possession? I think not. At first I "thought, having regard to the long period during which the father field "possession after the plaintiff attained 21 and after the plaintiff knew his "position and having regard to the fact that the plaintiff did not take pro-"ceedings to assert his claim for nearly seven years after his father's death, "that I should be justified in holding as a fact that some change in the char-"acter of the father's possession took place at a period anterior to 12 years "before this action was brought. But on further consideration I have reluc-"tantly come to the conclusion that I am not justified in so holding. It "would be too dangerous to infer a change merely from the circumstances "stated above. The *onus of proving a change lies on the defendant*, and that "onus has not been discharged. I cannot lay hold of any circumstance "which would enable me to fix a date for any such change. There is no evi-"dence of any act on the part of the plaintiff or of the father which can be "relied on as establishing or showing clearly any change."

In the case now before us we think this Court should apply the principle of referring possession to a lawful title, consistent with Webb's title, and hold that Mrs. Webb's occupation began and continued in the exercise by her of the right of a wife to live in her husband's house, and that there was no possession by her to which the Statute of Limitations could apply, for the defen-

dant has failed to discharge the onus of proving that there was at any time any change in the character of a wife's occupation of her husband's house so as to begin a possession by her exclusive of her husband. And as the statutory period of 12 years did not elapse between the date of Webb's death in August, 1924, and the commencement of this action in May, 1927, it follows that the plaintiff is entitled to recover the property she claims.

No Irish reports are available in this colony, but it appears from a note in Mew's Digest for 1924 (and in 158 L.T. Jo. 450) that the decision in the Irish case of *Keelan* v. *Garvey* (1924) 1. Ir. R. 107, was based on facts and circumstances similar to those in the case now before us. Keelan, who was tenant of a farm where he lived with his wife, quarrelled with her in 1897 and went away, leaving her on the farm. She continued in occupation of the farm up to the time of her death in 1923. Except by two letters written to his wife within a week after leaving the farm, the husband had no communication with her and he never returned to the farm during her lifetime. At her death he claimed to be entitled to recover the farm from the executor of his wife's will. It was decided by Chief Justice Molony that the wife had acquired title to the land under the Statute of Limitations, as she had had exclusive possession. He observed that in the majority of cases it might be difficult for a wife to prove that she had acquired a title to her husband's land under the statute, but that the evidence in the case before him was conclusive as to her exclusive possession and full beneficial enjoyment. A note in Mew's Digest for 1925 shows that in the same case on appeal, (*Keelan* v. *Garvey* (1925) 1 Ir. R. 1, C.A.) the decision of Molony C.J., was reversed, and that it was held by the Court of Appeal that the absent husband never ceased to be in possession of the farm; that his wife never entered into possession adversely to him, that she was provided with a residence and with support on his farm in fulfilment of his marital obligations and that the Statute of Limitations never ran against him.

We are of opinion that this appeal should be allowed with costs; and that the judgment of the Court below should be set aside and judgment entered for the plaintiff for recovery of possession with costs.

# HART AND JARMAN.

HART, Appellant,
AND
JARMAN, Respondent.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1928. FEBRUARY 13, 14, 16.

BEFORE SIR P. J. MACDONNELL, KT., PRESIDENT, FURNESS, C.J. AND SIR ANTHONY DEFREITAS, KT., C.J.

*Husband and wife—Marriage before Married Persons' Property Ordinance, 1904—Antenuptial contract—Contract not deposited in Registrar's Office—Registrar's Ordinance, 1880, Section 28—Deeds Registry Ordinance, 1919, section 15* (*1*)*—Contract by wife—Claim by wife "assisted by husband"—Whether in the circumstances claim maintainable—Roman-Dutch law—Effect of Married Persons' Property Ordinance, 1904 on status of married women—Meaning of the words "married woman" in section 7* (2) *thereof*.

The appellant (plaintiff) who was married to her husband prior to the coming into operation of the Married Persons' Property Ordinance, 1904, brought a claim against the respondent (defendant) based on an implied contract to pay for board and lodging of the respondent's wife while living apart from the respondent. Evidence was adduced to show that the appellant and her husband had entered into an ante-nuptial contract prior to their marriage but the said contract had not been deposited or recorded in the Registry as required by the Registrar's Ordinance, 1880, and the Deeds Registry Ordinance, 1919, and could therefore not be put in evidence.

At the close of the plaintiff's case it was submitted on behalf of the defendant that as the contents of the ante-nuptial contract could not be given in evidence, it must be presumed that the parties were married in community of property and that therefore the plaintiff could not sue in such manner and form as she had done.

On behalf of the plaintiff it was urged that even if the objection was tenable, the Court ought to grant leave to amend by adding the husband as co-plaintiff. The trial judge upheld the objection, refused leave to amend and dismissed the claim.

The plaintiff appealed.

At the hearing of the appeal counsel for the respondent contended that whatever might be the procedure in South Africa, there was no such practice approved by the Courts of British Guiana as would entitle a woman married in community to sue in her own name assisted by her husband.

*Held,* (*a*) That the Courts of British Guiana had habitually looked to South African decisions for the interpretation of Roman-Dutch law, and, accordingly, the Court was entitled so to do in deciding such a question as that raised by the appeal.

*(b)* That however much it might be a gloss upon the original Roman-Dutch system of law, or an *inelegantia juris*, a wife married in community can sue on a personal action in her own name assisted by her husband.

*(c)* That independent of Roman-Dutch law, the appellant was entitled to bring the action in her own name *simpliciter* because by virtue of the provisions of section 7 (2) of the Married Persons' Property Ordinance, 1904, any married woman, whether married before or after the said Ordinance can sue or be sued on her contracts in her own name and without reference to her husband as if she were *a feme sole.*

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

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

The judgment of the Court was delivered by MACDONNELL, C.J.: In this case the appellant sued the respondent for $450, being eighteen months' boarding and laundry for the respondent's wife at $25 *per mensem*, alleging that the respondent requested the appellant to board the said wife, alternatively that the said wife was entitled to pledge and did pledge the respondent's credit for such board, alternatively that the respondent was bound to provide for such board as a necessary of life of the said wife and to pay for same but that he neglected and failed to do so. In effect, the action is a common money count for money paid out to the use of defendant.

In answer the respondent pleaded that it was not competent in law for the plaintiff (appellant) to maintain the action; a denial of any request express or implied to the plaintiff to board his wife or of any right in the circumstances of the wife to pledge his credit; and an allegation that his wife had deserted him the defendant at a date prior to that at which the plaintiff's claim is stated as commencing.

In reply the appellant joins issue on so much of the defendant's answer as is a traverse and to the allegation of desertion, pleads a lengthy denial, alleging an "abandonment" of the wife by defendant during the period for which appellant is claiming for boarding the defendant's wife, also pleading that plaintiff is a sole trader.

At the hearing evidence for plaintiff was taken at considerable length, but on the view the learned trial judge took of the matter it became unnecessary for defendant to lead evidence in reply, consequently the plaintiff's evidence can be summarised very briefly. It appears that the appellant plaintiff is the mother of the wife, Mrs. Jarman, and that the respondent defendant is therefore her son-in-law; that the defendant and his wife, *nee* Hart, married in British Guiana in 1921, that relations between them were not happy and that their married life was much broken up by the absences of respondent defendant either because his work took him elsewhere or because he left his wife unprovided for to live with her relations here and in Barbados. It also appears in evidence that for the period specified in this action, namely March 1st, 1925, to August 31st, 1926, the wife, Mrs. Jarman, was living and boarding with her mother the appellant plaintiff, and not with her husband, the respondent defendant. It appears further, and is not denied, that the appellant plaintiff married her husband Edward Mcintosh Hart in 1899, that is at a date prior to the enactment on 20th August, 1904, of the Ordinance to amend the law relating to the Property of Married Persons, No. 12 of 1904, and that if such marriage was, as is alleged, a marriage by ante-nuptial contract such contract was never registered as required by section 28 of Ordinance 6 of 1880, read in conjunction with section 15 (1) of

Ordinance 17 of 1919. In any case, there was no proof at the hearing of the existence of any ante-nuptial contract between appellant plaintiff and her husband, still less of its terms.

On these facts, counsel for defendant submitted at the close of plaintiff's case that the action was not maintainable, and argued that in the absence of any proof of an ante-nuptial contract registered as required by law, the marriage must be treated as one in community and that consequently the plaintiff's sole justification for maintaining the action would be that she was a sole trader; that this justification was only alleged in plaintiff's reply the nature of such sole trading not being specified. Counsel for the defendant argued further that as a sole trader the plaintiff could bring an action only in respect of or arising out of the trade carried on by her as such sole trader, and that the evidence established that her sole trading if any was as a dealer in and seller of milk but not as a person boarding other persons for remuneration.

The learned trial judge acceded to this submission and held that the action was not maintainable. In his judgment he discussed the question of ante-nuptial contracts stating that as no such contract had been produced, it was impossible to say whether or not the plaintiff was under disability to issue the writ in this action. Counsel for the appellant assigned various reasons for error, but in the event the appeal was argued to us on this ground, that plaintiff could sue in her own name if assisted by her husband, even though she was married in community of property. As the ante-nuptial contract, if any, had never been produced at the trial and as it had not been suggested that that contract had been registered—assuming such registration to be required by law—it was conceded for the plaintiff that the marriage must be treated as one in community, and that the question at issue must be argued on the authorities applicable to marriages in community. In effect, then, the point before us for decision was: can a woman married in community sue in her own name if assisted by her husband?

The authorities cited to us show that a woman married in community, seeking to bring a personal action such as the present one, may do so either by her husband appearing as plaintiff—the formula being "John Smith as husband of Mary Smith married in community of property"—or in her own name assisted by her husband. These authorities were numerous, but perhaps it is sufficient to cite *Ashby* v. *Franker*, (1920) B.G. Reports, 177, where the Court, relying on *Klette* v. *Pfitze* 6, E.D.C., 134, ruled that a woman married in community may be sued assisted by her husband, or the husband can be sued in the capacity of husband in community to the wife, and *Campbell* v. *Campbell*

(1921) B.G. Reports 3, where the converse, namely that the wife when herself suing can do so assisted by her husband, is treated as settled law. We are quite satisfied that this decision is in accordance with Roman-Dutch law, and with the practice of the same, as settled for a considerable period. It is certainly in accordance with the law and practice of the Roman-Dutch system of law as existing in South Africa, as was clear from a number of decided South African cases cited to us. It was argued, however, that this rule, namely, that action can be brought by a married woman in community in her own name assisted by her husband was an unwarranted gloss on the authoritative doctrines of Roman-Dutch law, one that had not been followed in the practice of this colony and which its Courts therefore were free to disregard. On the contrary, it seems to us from cases cited to us—we have specified two of them—that the Courts in British Guiana have adopted and acted upon this gloss, if one must so call it, and have allowed the woman married in community to sue in her own name if assisted by her husband. Furthermore, it seems clear that the Courts of British Guiana have habitually looked to South African decisions for the interpretation of Roman-Dutch doctrine and have at no time expressed divergence from those decisions or their general trend.

A case was cited to us, *in re Collins and Cooper* (1919) Natal, P.D., 142, wherein the judges of the Natal Provincial Division ruled that for the passing of transfer of deeds it was not enough for the wife if in community to execute the power of attorney even though with the assistance of her husband; the husband must himself execute an authorising power of attorney. But this case, whatever its authority, must be confined to the point decided and cannot be extended to the bringing of personal actions by a woman married in community. Such an extension is not warranted by anything in the judgment itself and would be a complete departure from an unbroken succession of South African decisions extending over many years.

We can freely concede that the older practice under Roman-Dutch law was for the husband to bring the action himself on behalf of his wife, and it may well be that the introduction of an alternate method, namely the wife herself suing assisted by the husband is an *inelegantia juris* and one that has produced consequences, perhaps inconveniences, not foreseen by those who first permitted the novelty. However that may be, the practice is far too well established for us to interfere with it.

On the other hand it seems to us that apart from authority this novelty or development, call it which we will, which allows the wife married in community to sue on a personal action in her own name assisted by her husband, is a reasonable development in the law

which has evolved it. The husband by stating that he assists his wife in bringing her action estops himself from again litigating the same point against the same defendant. Conversely, the requirement that the husband must state that he assists his wife as a *sine qua non* to her bringing the action at all, safeguards the community of goods whereof he is the *dominus* from being dissipated by actions brought by the wife without his knowledge or wanting his consent.

We are satisfied then that on Roman-Dutch law and assuming the point raised to be one determinable under it, the objection to plaintiff's action was without substance.

We are of opinion, however, that this appeal can be allowed on another ground also, namely that by the Married Persons Property Ordinance, 1904 (No. 12 of 1904), section 7 (2), the plaintiff though married to her husband in community, was entitled to bring this action, being one in contract, in her own name, without any reference to her husband. During the course of argument we drew the attention of counsel to this statute as having a possible bearing on the matter at issue, namely the sufficiency of the writ in this action.

The point raised by us was clearly a novelty and we were told that it had always been assumed that the term "married woman" in section 7 of the Ordinance, meant "woman married after the commencement of the Ordinance." We are of opinion that the term cannot be so restricted. The words "married woman" where occurring *simpliciter* and without qualification in the Ordinance —see sections 7, 9, 10, 21 and 22—are according to the canons of interpretation to receive their normal meaning, unless you can show from the Ordinance that they ought to receive a restricted meaning and this is the more difficult since in many sections—see especially sections 8, 11, 12, 13, 14, 17, 18, 19—the operation of the Ordinance is specifically restricted to a certain class of married women, that is to women married after its commencement. The obvious inference is that where no such restriction is expressed, no such restriction is intended. We desire to make an examination of the provisions of the Ordinance to ascertain if this is the case.

The Ordinance is based on, and to a large extent is a verbal reproduction of, the English Married Women's Property Act, 1882. Section 3 declares in effect that the respective matrimonial rights of husband and wife married before the ordinance shall continue to be governed by the law in force before it was passed, "except where hereinafter otherwise expressly provided." This section, or its equivalent, is not in the English Act of 1882, and we conceive that the law in the colony would have remained the same as to the matters specified in section 3 had that section been omitted from this ordinance; it was inserted, it seems to us, *ex maiore cautela.* Section 4 enacts that the respective matrimonial rights

of husband and wife married after the ordinance shall be governed by it as to movable property, and section 5 enacts the same as to immovable property. Section 6 enacts that there shall be no community of goods between husband and wife married after the Ordinance.

Section 7 (1) reads: "Any married woman shall in accordance with the "provisions of this Ordinance be capable of acquiring, holding and dispos- "ing by will or otherwise, of any movable or immovable property as her "separate property in the same manner as if she were unmarried." The words "in accordance with the provision of this Ordinance" refer *inter alia* to sections 3, 4 and 5. If a woman married before the Ordinance is married in community of property, then her powers of acquisition and disposition under section 7 (1) will be governed by the community which is the condition of her marriage. If a woman married before the Ordinance is so by ante-nuptial contract, then her powers of acquisition and disposition under section 7 (1) will be ruled by the term of that contract. If she was married after the Ordinance, then, community being excluded by section 6, she will, by the conjoined effect of section 7 (1) and section 4, be able to acquire and dispose of movable property and by the conjoined effect of section 7 (1) and section 5, to acquire and dispose of immovable property, as if she were a *feme sole.*

The rest of section 7 reads thus: "(2) a married woman shall be capable "of entering into and rendering herself liable in respect of and to the extent "of her separate property on any contract and of suing and being sued in all "respects as if she were unmarried and her husband need not be joined with "her as plaintiff or defendant, or be made a party to any action or other le- "gal proceedings brought by or against her, and any damages or costs re- "covered by her in any such action or proceeding shall be her separate "property and any damages or costs recovered against her in any such ac- "tion or proceeding shall be payable out of her separate property and not "otherwise." "(3) Every contract hereinafter entered into by a married "woman otherwise than as an agent, (a) shall be deemed to be a contract "entered into by her with respect to and to bind her separate property "whether she is or is not in fact possessed of or entitled to any separate "property at the time when she enters into such contract; (b) shall bind all "separate property which she may at that time or thereafter be possessed of "or entitled to; and (c) shall also be enforceable by process of law against "all property which she may thereafter while discovert be possessed of or "entitled to."

"(4) Every married woman carrying on a trade separately from her "husband shall in respect of her separate property be subject to insolvency "laws in the same way as if she were unmarried."

This section 7 is based on and is almost verbally the same as section 1 of the English Act. It enables a married woman to sue on and be sued for contracts as if she were *feme sole*; is this right given only to women married after the ordinance? In answering this question we would refer particularly to the words in subsection (3) (a) "whether she is or is not in fact pos- "sessed of or entitled to any separate property at the time when she enters "into such contract." These words are not in the corresponding section of the English Act of 1882. We must assume that they were inserted with a purpose and with reference to the law of the colony. They provide in sufficiently express terms for the case of the woman retaining by ante-nuptial contract her separate estate and its management who yet at the time has in fact no separate property, and for the case of the woman married in community who *ex definitione* cannot be possessed of or entitled to any separate property at all. They would also, certainly, provide for the case of the woman married after the ordinance, and therefore after the abolition of community of goods, who yet had no separate property of her own. We were invited for the defendant to say that this latter was the only case to which these words were intended to apply. Why must we so limit this application? These words apply equally well to the ease of the woman married in community and in view of that fact and of their being specially inserted in the Ordinance, we would be offending against canons of interpretation if we did not give to them what seems to be their plain meaning. But if they do refer to women married in community, this can only mean women married prior to this Ordinance. Here then is one of the after exceptions expressly provided, which section 3 means the reader to expect and subject to which that section was enacted. We are of opinion, then, that in section 7 the term "married woman" must be given its ordinary meaning, namely any married woman, and not be restricted to woman married after the date of the ordinance.

Examination of other sections where the term "married woman" occurs *simpliciter*, gives a like result. Section 9 deals with rights of creditors of the husband to the separate estate of a married woman, who has lent it to her husband. It seems (Lee, Introduction to Roman-Dutch Law, 1915, pp. 91, 92) to reproduce the ordinary Roman-Dutch law on the matter and creates no difficulty if we give to the term married woman its normal meaning. But if we restrict it to a woman married after the Ordinance we go out of our way to raise a doubt whether the Ordinance intended the ordinary rule as to the claim of creditors of the husband still to apply.

A restrictive interpretation of the terms "married man or

woman" in section 10 would again lead to a gratuitous doubt. If a man married before the Ordinance appoints by will under a power, is the property appointed not to be liable for his debts? It is more reasonable to suppose that this section was intended, as its words plainly imply, to protect creditors of married persons generally, whether married before or after the Ordinance.

Section 15 enables a married woman to effect a policy of insurance on her own life or on that of her husband, "by virtue of the power of making "contracts hereinbefore contained," *i.e.*, by section 7. The interpretation of married woman in this section is conditioned, therefore, by its interpretation in section 7.

Section 16 (2) was put to us as an argument for a restrictive interpretation of the term married woman since it uses the words "Every married "woman whether married before or after the commencement of this Ordi- "nance," while the other sections previously considered speak of married woman *simpliciter*. But it should be noticed that section 16 (1) deals with remedies of a married woman for the protection of her separate property, while 16 (2) deals with proceedings for divorce, an incongruous junction of subjects. As in sub-section (1) the draftsman had spoken in terms of women married after the ordinance perhaps he thought it necessary in subsection (2) to make the definite distinction. But is this fact to be used as showing that in sections 7, 9, 10 and 15 the normal canons of interpretation are not to apply? It is also worthy of remark that the English section 12, which section 16 (1) copies faithfully, begins with the words "Every woman, whether married before or after this Act," the only place in the English Act that we can discover where this precise definition is used. The English section 1, from which the the British Guiana section 7 was taken, says "married woman" *simpliciter*, yet it has never been held that because the English Act for once, *i.e.*, in its section 12, says "whether married before or after this Act," therefore where, as in its section 1, it uses the team "married woman" *simpliciter*, that term must be given a restricted meaning. The draftsman of the Ordinance had just been copying this section 12 verbatim and when he came to draft his sub-section (2) of section 16, what more natural than that he should insert from the section of the English Act he had just been copying, the words whether "married before or after," etc., *ex majore cautela*?

Section 20, making a wife liable to criminal proceedings for offences against her husband's property, is a clear instance of the word "wife" meaning "woman married after the ordinance," because the section 20, is in terms the converse of section 16 (1)

so far as that sub-section deals with criminal proceedings. In a revised edition of this Ordinance, section 20 would be a sub-section of section 16.

Section 21 provides that questions between husband and wife as to property are to be settled in a summary way, and section 22, that a married woman who is a sole executrix or sole trustee can sue or be sued. Again, if we give to these words a restricted interpretation, we must suppose that such questions cannot be settled summarily where the parties were married before the Ordinance, and that where a married woman is a sole trustee but married before the Ordinance, the *cestius que trustent* will not have the remedy against her which section 22 gives. The onus is clearly on anyone arguing that the legislature intended in these section anything so lame and incomplete.

We would recapitulate the reasons why we are satisfied that this Ordinance Where it says married woman *simpliciter* means a woman married before or after the Ordinance. Section 3 which preserves the former law as to persons married before the Ordinance contains a definite reference to exceptions to follow later in the statute. One of those exceptions seems to be section 7. There is nothing in that section which says that the normal canons of interpretation should be disregarded so as to restrict the meaning of married woman where occurring therein, and there is a positive reason in the section why those canons should be followed, namely the words in subsection (3) "whether she is or is not in fact possessed of . . . . . any separate property at the time when she enters into such contract," which words are capable of providing for the case of the woman married in community, and seem expressly to refer to her. Other exceptions to section 3 seem to be sections 9, 10, 21 and 22, and in each of these a restricted interpretation of the term married woman would tend to make the law doubtful of arbitrarily to narrow remedies given, inconveniences which can all be avoided by following normal canons of interpretation and giving to the term its natural interpretation. In many of its sections the Ordinance does restrict the term married woman definitely, a strong argument that where it does not state a restriction, none should be implied. Finally the Ordinance is undoubtedly intended to improve the position of married women generally and is based on an English Act which beyond question in many of its sections and particularly in that which corresponds to section 7 of the Ordinance conferred rights on married women generally irrespective of when they were married.

We have no doubt then that section 7 of Ordinance 12 of 1904 enables a woman married in community, and therefore married before the Ordinance, to contract and to sue and be sued on he contracts, in her own name and without reference to her husband

exactly as if she were a *feme sole.* If that is so, the plaintiff's writ is good and the words "assisted so far as need be by her husband" are surplusage, and should be omitted.

It was argued to us that, deciding this case under Roman-Dutch law, there was no proof that the contract was entered into by plaintiff but rather by her husband, she being at most an agent. We think that there was sufficient evidence to justify the contention that it was her contract and she the party who made it.

In the result plaintiff succeeds in this appeal, both on the Roman-Dutch law and under the statute, Ordinance No. 12 of 1904, but the decision on this latter point renders the decision on the former one merely of academic interest.

The appeal is allowed with costs. The judgment appealed from is set aside, and it is ordered that the Court below do continue the trial of this action *sub nomine* Fanny Hart *v.* Alick David Jarman, and that the costs in. that Court do abide the event.

*Appeal allowed.*

Solicitor for the appellant: *Albert Ogle.*

Solicitor for the respondent: *J. F. Henderson.*

# D'ORNELLAS *v.* WILLIAMS.

[No. 177 OF 1925.]

1926. DECEMBER 13; 1927. JANUARY 22.

BEFORE DOUGLASS, J.

*Opposition—Contract of purchase—Part payment by purchaser—Claim in Magistrate's Court for return of money paid—Judgment for plaintiff—Subsequent action by plaintiff in Supreme Court to restrain transport of said property.*

The plaintiff had paid the defendant the sum of one hundred dollars on account of the purchase price of a parcel of land sold by the defendant to the plaintiff. Subsequently thereto the plaintiff brought an action against the defendant in the Magistrate's Court for the return of the said sum and obtained judgment therefor. The defendant then advertised transport of the said property to a third party to whom the defendant had since sold the said property. The plaintiff opposed the passing of the said transport.

*Held,* That the plaintiff having elected the remedy of suing for the return of the part of the purchase-money in the Magistrate's Court and having obtained judgment could not oppose the passing of the transport because firstly the plaintiff "ex hypothesi" no longer had any interest in the land, and, secondly, to allow the plaintiff so to do would in effect be to enable her to recover twice on the same cause of action.

*B. B. Marshall,* for the plaintiff.

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

DOUGLASS, J.: This is intended to be an opposition suit to the transport of property in Georgetown, and the plaintiff claims the return of $100 paid to the defendant on account of the purchase price of the said property on 17th February, 1921.

The general rule is that any person having an interest in the property can oppose the sale, but the statement of claim discloses no reasons for opposition in the usual form in cases

such as this, and on that account alone the claim as an opposition to the sale is not a good one (see *Porter* v. *Jones* (L.R. B.G. 1915. 37)), but it was suggested, the defendant dissenting, that the Court might refer to the reasons filed in the Deeds Registry in May, 1925; I have done so, but it should be understood that this must not constitute a precedent. It appears that $100 was paid to the defendant by the plaintiff and acknowledged by her as "guardian of her minors," but the plaintiff chose to sue her in the Magistrate's Court in her individual capacity—and perhaps rightly so—and obtained judgment against her on the 8th June, 1922, for the said amount. At the date of her contract with the plaintiff the defendant had no right to sell the property, and if he now succeeds against her, in her representative capacity there would be two judgments against her and he would be entitled to receive $200 instead of $100, for this Court has no jurisdiction to cancel the judgment in the lower Court.

Moreover were this Court to declare the opposition just and well founded it would in effect penalize the minors' property for a debt not incurred by them, and which was entirely personal to their guardian Mrs. Williams, her laches or ignorance cannot give the plaintiff a right to any claim on the minors' property.

For all these reasons I am of opinion that the plaintiff cannot succeed in his opposition suit and I accordingly give judgment for the defendant with costs.

RAMSAROOP, Appellant,
AND
RAMSALUK, Respondent.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

BEFORE SIR P. J. MACDONNELL KT., PRESIDENT, FURNESS, C.J., AND SIR ANTHONY DEFREITAS, KT., C.J.

1928. FEBRUARY 14, 15, 16.

*Claim on promissory note—Loan by moneylender—Defence of Money-lenders Ordinance, 1907 not pleaded—Alleged illegality—Application for amendment—Principles on which granted.*

The plaintiff (respondent) claimed the sum of $350 alleged to be due on a promissory note. The defendant (appellant) pleaded payment.

At the close of the case for the plaintiff, application was made on behalf of the defendant for leave to amend the defence by raising a plea of illegality under the Money-Lenders Ordinance, 1907.

The trial judge refused the application on the ground *inter alia* that the only true question was whether the debt had been paid or not.

The defendant appealed.

*Held,* (*a*) That the learned judge erred in so holding because the amendment asked for showed that another question, going equally to the root of the matter, had arisen, namely whether the plaintiff a registered moneylender, was legally entitled to maintain the action.

(*b*) That however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.

*J. A. Luckhoo, K.C.,* and *S. J. Van Sertima* for the appellant.

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

The judgment of the Court was delivered by MACDONNELL, C.J.: In this case plaintiff sued defendant on his promissory note for $350, the defendant pleaded payment, which plaintiff denied. In the course of his evidence plaintiff stated that he was a registered money-lender; as such he would be required to conduct his money lending transactions in compliance with Ordinance 16 of 1907, in particular with section 4 thereof. At the close of plaintiff's case, the defendant applied for leave to amend his defence of payment by adding thereto the following paragraph, viz., "that the "defendant will contend at the trial that the plaintiff is not entitled to re- "cover the sum sued for or any part thereof inasmuch as the same forms the "subject of a money-lending transaction between the plaintiff who is a reg- "istered money-lender and the defendant and was carried on at a place "other than the plaintiff's address and otherwise than in his registered name "in contravention of section 4 (1) (b) and (c) of the Money-Lenders Ordi- "nance,

"No. 16 of 1907." The learned trial judge refused leave to make this amendment and also later on disallowed questions sought to be put in cross-examination to the plaintiff on his recall, tending to show where the loan, the subject of the case, was in fact made. It is from this refusal of leave to amend that defendant brings this appeal.

Other points were assigned as reasons for the appeal and some of them were argued before us, but counsel for the defendant eventually abandoned these and asked for a ruling simply on the refusal to allow the amendment.

The reasons given by the learned trial judge for refusing leave to amend were as follows: After stating that he takes the facts before the Court "to find if there is any reason why the amendment should be made "opening a fresh defence," he refers to Order xxvi., rule 1, and says "the "'real question' is, without any doubt, has the money secured on the prom- "issory note been paid or not? There is no other question. In addition, I am "certainly not convinced of the *bona fides* of the defendant and have no "hesitation in exercising the discretion left to the Court and refusing leave "to make any such amendment as is asked for!" It is contended that these reasons involve a misapprehension of the question for decision, and we agree with this contention.

In applying the rule as to allowing an amendment, if this can be done on terms that will protect the other party from injustice, the learned trial judge misdirected himself and thereby restricted the ambit of his discretion. He said he had to find if there was any reason why the amendment should be allowed, whereas he should rather have considered if there was any reason why it should not be allowed, for instance, the likelihood of injustice from which the other party could not be safeguarded.

"However negligent or careless may have been the first omission, and "however late the proposed amendment, the amendment should be allowed "if it can be made without injustice to the other side. There is no injustice if "the other side can be compensated by costs;" per Brett, M. R. *Clarapede* v. *Commercial Union Association,* 32 W. R. 263.

The learned trial judge was also mistaken in supposing that the only question at issue was whether the debt had been paid or not. The amendment asked for showed that another question, going equally to the root of the matter, had arisen, namely whether the plaintiff, a registered money-lender, was legally entitled to maintain the action at all. Such a question constituting a complete defence to the action, rendered irrelevant any speculation as to the *bona fides* of the defendant, whereas the learned trial judge based his ruling in part on the absence of such good faith.

For these brief reasons we consider that there was a misapprehension by the learned trial judge of the principles he should have applied to the question before him.

The appeal then must be allowed with costs and the judgment set aside, the defendant below to pay costs there from and including the plaintiff's reply and the costs of the trial up to and including the costs of the 24th October, 1927; other costs incurred below to abide the event of the new trial ordered herein. We order a new trial with leave to defendant to amend his defence by pleading the Money-Lenders Ordinance, No. 16 of 1907, and with leave to plaintiff to amend his reply as he may think fit.

*Appeal allowed.*

Solicitor for the appellant: *L. Ramotar.*

Solicitor for the respondent: *W. Sousa.*

# DASILVA *v.* FERNANDES.

[No. 110 OF 1926.]

1926. DECEMBER 14, 15, 16, 17, 21, 22, 23, 30, 31.

1927. JANUARY 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 25; FEBRUARY 11

BEFORE EGG, ACTING J.

*Election Petition—Election to Court of Policy—British Guiana Constitution Ordinance,1891, Amendment Ordinance, 1909, section 4* (5)*—Meaning of "bona fide" cultivation—Notice to electors of disqualification—Notice of several facts—Some facts incorrect—Some found at hearing to be true—Whether notice such as to entitle other candidate to be declared elected—Whether voters can be said in the circumstances to have acted perversely.*

Section 4 (5) of the British Guiana Constitution Ordinance, Amendment Ordinance, 1909, enacts that no person shall be capable of being elected a member of the Court of Policy, or having been so elected, shall sit or vote in the said Court who does not possess among others the following qualification:—Ownership under a title by grant from the Crown, transport, letters of decree, inheritance *ab intestato vel ex testamento*, devise or marriage or possession under a licence of occupancy from the Crown of not less than eighty acres of land unencumbered by mortgage situate in the colony of of which not less than forty acres are actually and bona fide under cultivation.

*Held*, That the intention of the legislature was not to qualify a person on the hurried preparation of land hitherto uncultivated but by a cultivation of the reality and bona fides of which there could be doubt.

Previous to the holding of an election the voters were notified by the candidate opposing the respondent (a) that the respondent did not possess eighty acres of land, (b) that he did not have cultivation to the extent of forty acres and (c) that the property had been bought by one M. in trust for the respondent and that the transaction was a doubtful one.

At the hearing of the election petition the facts stated in (a) and (c) were found to be incorrect and those stated in (b) to be correct.

*Held*, That the notice given to the electors was in the circumstances so confusing that they could not be held to have acted perversely and so thrown away their votes when they voted for the respondent.

The facts are stated in the judgment.

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

*E. F. Fredericks* and *B. B. Marshall*, for the respondent.

EGG, J.: Petition by Jose Louis DaSilva who alleged that he was a registered voter for the election of two members for the Court of Policy for the city of Georgetown, that the election of the respondent Premio Augustine Fernandes who had been duly

returned as elected by the Returning Officer on October 16th, 1926, was void on the ground that the respondent Fernandes was not duly qualified to be elected as a member of the said Court of Policy,

The petitioner further prayed that Philip Nathaniel Browne, the next candidate with the highest number of votes, be returned as duly elected.

It appears the Returning Officer fixed Friday, 8th October, 1926, as the day for receiving the nomination of the candidates to fill the two seats in the Court of Policy for the city of Georgetown and that on the 9th October, 1926, the said Fernandes delivered to the Returning Officers a statutory declaration of his qualification for election as prescribed by section 17 of the British Guiana Constitution Ordinance, 1891, Amendment Ordinance, 1909, in which he declares *inter alia:*—

"I possess the following property qualification, viz.:—

"I am owner by transport No. 779 dated the 26th day of July, 1926, of Plantation Concord, East Coast, Demerara, which said plantation contains over 80 (eighty) acres of land, unencumbered by mortgage, of which said land over 40 (forty) acres are actually and *bona fide* under cultivation with permanent economic products."

In his petition the said Jose Louis DaSilva states (*a*) that the said Fernandes was not on the 8th October, 1926, a qualified candidate for nomination for a seat in the Court of Policy, nor was he at the times of his election, to wit, on the 15th and 16th days of October, 1926, duly qualified to be elected as a member of the said Court of Policy inasmuch as he did not at any of the said times nor at the presentation of this petition possess ownership under title by transport or otherwise of not less than 80 acres of land unencumbered by mortgage situate in the colony of which not less than 40 acres are actually and *bona fide* under cultivation or any of the other property qualifications required by section 4 (5) of the said Ordinance.

(*b*) That Plantation Concord at the date of nomination and election of the said Fernandes and at the presentation of this petition was and is not under actual and *bona fide* cultivation with permanent economic products or with any other cultivation whatsoever to the extent thereof of 40 acres or at all—and that Plantation Concord is mainly a Courida swamp open to the Atlantic Ocean which covers a considerable portion of the said lands twice daily with salt water and there was not in fact at the time of making the said declaration 40 acres of land of the said plantation actually and *bona fide* under cultivation. (*c*) That the purchase money of $1,450 between one James Mitchell and the said Fernandes was never paid, that the said James Mitchell who

had bought the plantation previously from one McTurk for $300 had bought same in trust for Fernandes, and that the whole transaction was a fraudulent design intended to frustrate the law.

Mr. Fredericks, as counsel of the respondent Fernandes, took the point *in limine*, (1) that the statement in paragraph 5 of the petition, viz., "or any of the other property qualification required by section 4 (5) of the British Guiana Constitution Ordinance, 1891, Amendment Ordinance, 1909."

(2) The statement in paragraph 6, viz.:—

"The said Plantation Concord is mainly a Courida swamp open to the Atlantic Ocean which covers a considerable portion of the said lands twice daily with salt water and there was not in fact at the time of making the said declaration 40 acres of land of the said plantation actually and *bona fide* under cultivation;" and (3) Paragraph 7 should be struck out on the grounds as regards (1) that under section 4 of the aforesaid Ordinance of 1909 the petitioner was attacking the qualification under sub-section 5 (*a*) of the said section and none other and to allow the particular paragraph to remain in the petition was raising an issue other than the one referred to before.

As to 2—That that statement was merely a description of Pln. Concord and an issue which the Court had to try.

As to 3—That the whole paragraph was unnecessary and irrelevant as it went into the vicissitudes of purchasers and vendors and not an issue that could be raised in this petition and that the only issue the Court had to try was whether the respondent Fernandes was owner by transport of not less than 80 acres of land of which not less than 40 acres are actually and *bona fide* under cultivation.

Mr. Browne as counsel of petitioner in reply thereto admits that so far as the first objection the words used were verbiage and nothing more. As to the 2nd—that that paragraph was giving particulars of the plantation not being actually and *bona fide* under cultivation, but as to the 3rd point, he submits that the transaction showed that Mitchell held the property in trust for the respondent Fernandes and that the price alleged to be paid for Pln. Concord was in fact not paid by Fernandes to Mitchell.

The Court reserved decision on these points until all of the evidence had been taken reserving the right to reject what evidence was unnecessary.

At the trial of an election petition the procedure shall be the same as circumstances will admit as the trying of a civil action—*vide* section 129 of Ord. 1 of 1891 and under the Rules of Court, 1900, Order 17, Rule 29, the Court may at any stage of the proceedings order to be struck out or amended any matter in

any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action. Unfortunately at the time the Court could not foresee the wisdom or otherwise of the statements alleged, in the absence of pleadings on behalf of the respondent consequently the Court had to be burdened with the necessity of taking the evidence, and deciding afterwards. Now that has been done, it realizes and agrees in the main objection that paragraph 7 (except the last statement of that paragraph beginning from the third line of the end of that paragraph with "The said . . . . . to whatsoever)" was unnecessary and tended to prolong the trial and should be struck out—for after all the whole issue resolved itself into one of whether the respondent owned not less than 80 acres of land of which not less than forty acres are actually and *bona fide* under cultivation and that whether or not the $1,450 had been paid and whether or not Mitchell held the transport in trust for Fernandes were issues which did not arise and the evidence tendered in this respect did not clearly establish to my mind that the amount of $1,450 had not been paid or that Mitchell in law held the transport in his name as trustee for the respondent Fernandes, because by section 3 of Ordinance 26 of 1925 it is enacted that every transport of immovable property other than a judicial sale transport passed after the 1st January, 1920, shall vest in the transferee the full and absolute title to the immovable property therein, until declared void by the Supreme Court within a certain time as having been obtained by fraud, hence in the absence of such declaration I must hold the respondent Fernandes, the owner by transport dated 26th July, 1926, of Plantation Concord in the East Mahaica Country District in this colony.

Having held that the issue to be decided is the one stated in paragraph 5 of the petition it is necessary to repeat same at length for the examination in detail of the statements contained therein, which is as follows: "That the said Premio Augustine Fernandes was not on the 8th day of October, 1926, a qualified candidate for nomination for a seat in the Court of Policy, nor was he at the times of the election, to wit, on the 15th and 16th days of October, 1926, duly qualified to be elected as a member of the said Court of Policy inasmuch as the said Premio Augustine Fernandes did not at any of the said times nor at the presentation of this petition possess ownership under title by transport or otherwise of not less than 80 acres of land unencumbered by mortgage situate in the colony of which not less than 40 acres are actually and *bona fide* under cultivation.

Satisfying myself that the respondent Fernandes is the owner by transport of Plantation Concord containing approximately 205

English acres of land situate in this colony and unencumbered by mortgage and that he possessed same before the day of nomination and such possession by ownership under transport is part of the wording of the sub-section dealing with the property qualification I pass on to the other part of the said sub-section which reads—"of which (80 acres) not less than 40 acres are "actually and *bona fide* under cultivation" to see whether the evidence establishes that 40 acres of land are actually and *bona fide* under cultivation for which purpose I propose to deal with same under two sub-heads:

(a) the amount of acreage of land (if any) under cultivation;
(b) and if 40 acres or more whether such acreage is actually and *bona fide* under cultivation.

There were two plans of Pln. Concord produced during the hearing, one by Durham and the other by Seymour, both Land Surveyors practising in this colony. Durham's plan showing two areas lettered "A" & "B," but Seymour's only showing areas not lettered, but in both cases the relative position of the areas on the plans are similarly placed, on which are planted cocoanuts—the remainder of the plantation being in Courida bush and wild mangrove bush. Area "A" being in the shape of the letter L. and large, whereas "B" is small and of no particular shape.

The evidence of Barlow, Gordon, Robinson and Williams who were the first of the witnesses in point of time to visit Pln. Concord after the 8th October, 1926, having gone there seven days after, proves that they saw the areas mentioned on the plans cleared, saw cocoanut seedlings planted in rows on the ground in those areas, saw drains dug from the canal side in area "A" going north—16 drains in all—of which the first 6 drains went across the area the next 6 for 6 rods in, then drain would go round a tree stump and onwards but not right across—then the next four drains dug for about 3 or 4 rods across; that those drains were dug 6 to 7 rods apart and that the 16th drain stopped about 20 or 25 rods before the end of the clearance on "A" and that no cocoanut seedlings were planted north of or beyond the 16th drain in "A" and that the seedlings had not been planted longer than three to six weeks—there was a trench and dam on the western side of the plantation from the Mahaica Canal and going north for about 150 rods—trench freshly dug and self-contained dam also recently made up and two hollow mora tree trunks, not in place yet, to be used as kokers for drainage. As to the condition of the cocoanut seedlings they swear a certain percentage was dead and dying and that in their opinion the cocoanut seedlings had not caught root in the ground.

The next witness to visit the plantation in point of time is Greaves, an ex-agricultural instructor of 20 years' experience—who visited 15 days thereafter and swears he saw by walking south to

north on dam on western side of the plantation cocoanut seedlings in the ground, some were dead and dying and others look green—especially those in the eastern section of the tail piece of the letter L—which the evidence shows was planted some time before the other seedlings, that the land had not been prepared for cultivation, that the drainage was imperfect and from the general conditions the land was not suitable then for cocoanut cultivation and in his opinion the whole area of seedlings would not thrive but die.

Again on the 18th November, 1926, we have Gordon, Barlow and others accompanying Durham, the Surveyor, and the statement of Gordon and Barlow that three more drains had been dug north of the 16th drain making nineteen drains in all as shown on Durham's plan and that more cocoanut seedlings had been put into ground north of the 16th drain since their previous visit and that on the whole there were no improvements in the general appearance of the plantation.

The witnesses who testify to area "B" all agree that it was sandy soil, no drain dug—the cocoanut seedlings thereon all but dead and those not dead—useless.

The other witnesses, Mearns, Clarke and Sheppard, gave evidence of their practical experience as planters as to what should be done in the preparation of the land for a cocoanut cultivation, of the effect of planting in the drought and of stagnant salt water on the land.

The witnesses called on behalf of the respondent are Jardine, Dodds, Roberts and Beckett who speak of the estate as being prepared though not perfect for cocoanut seedlings—that the general conditions were consistent with the drought from which the colony was suffering, that on the whole though the appearance of the leaves of the cocoanut seedlings may show wilting and appear dead, nevertheless the terminal bud of the seedling was still alive and that the estate was laid out and seedlings planted with a view to permanency and settlement but the earliest date of the visits of any of these witnesses to Plantation Concord is the 31st October, 1926, by Dodds—or 23 days after the eighth day of October, 1926.

There is no rebuttal of a salient feature of the evidence sworn to by Barlow, Robinson and Williams that no cocoanut seedlings were planted in area "A" beyond the 16th drain on their visit to Plantation Concord on 15th October, 1926,—no attempt has been made to dispute that fact—no explanation has been offered why so important a piece of evidence which goes, as I shall demonstrate, to the root of this petition should remain unchallenged. Taking the survey of Seymour as shown on his plan as correct—in spite of the evidence of Hohenkerk, another Surveyor, whose evidence as to the correctness of Seymour's survey I respect and also the

evidence of the reservation of the land adjoining the canal—his (Seymour's) measurement proves that the acreage of the eastern part of the letter "L" is 9.432 acres, the acreage of the long piece L. from the southern boundary to the 16th drain is 21.1 acres and the acreage of area "B." is 5.027 acres thus giving a total acreage of just over 35 acres, thus I have, assuming that the method employed by the respondent in the preparation of the land for cocoanut cultivation was the correct one and that the 35 acres were under cultivation, it would not give the respondent the quantity of acres required by law to be under cultivation so as to qualify him for nomination or election as a member of the Court of Policy, consequently I hold in answer to (a) that the amount of acres of land under which the respondent relies as being under cultivation is less than 40 acres of land—and that the respondent Fernandes was not duly qualified candidate for nomination and was not capable of being elected a member of the Court of Policy and his election must be declared void.

Finding so, it is therefore unnecessary for me to adjudicate as to what is meant by "actually and *bona fide* under cultivation," except to say that the court has had interesting and expert evidence on the mode of preparation of land for cocoanut cultivation, the kind of soil suitable for such cultivation and as to what is meant by cultivation, but the witnesses on behalf of the respondent swear to a period when they made their first visit to Plantation Concord too long after the 8th day of October, 1926, the day on which the nominated candidate must be duly qualified—for be it remembered that in the case of cocoanut seedlings it is common to both sides that a cocoanut seedling when planted in the ground takes 6 to 8 weeks and perhaps longer to take root in the earth, and the mere act of putting same in the soil, and in soil where there is such a conflict of evidence as to the suitability for planting cocoanuts without preparation and within such a short period of the 8th October, 1926,—for up to September, 1926, the respondent was still getting delivery of seedlings he had purchased from Pln. Enmore—cannot be deemed to be actually under cultivation when at that date the doubt still existed as to whether or not the seedlings in the earth had taken root or not. With respect to the orange, grapefruit and nutmeg plants, the evidence of Abraham, the Acting Superintendent of the Botanical Gardens, proves that they were only delivered on the 5th October, 1926.

I concur in the statement made by Douglass, J., in *Laing* v. *Dodds* decided in December, 1926, wherein he stated: "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," in this case I repeat that there was no intention of

qualifying a person on the hurried preparation (if any) of laud which undoubtedly for years was overrun by Courida bush and other wild bush and the inserting of cocoanut and other seedlings into the ground and calling it "actually and *bona fide* under cultivation"—but by a cultivation the existence of which there can be no doubt as to its reality and *bona fides.*

The election of Premio Augustine Fernandes being void it remains to determine whether Philip Nathaniel Browne, the candidate next with the highest number of votes at the poll, was duly elected and returned or whether the election was void. It has been held that if a candidate is disqualified to be a candidate and the candidate next with the highest number of votes at the poll desires that all votes given for the candidates so disqualified should be treated as null and void and to 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 al-"ways necessary."

The nomination in this case 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. In *Hobbs* v. *Moray,* 1904, 73 L.J. K.B.D., p. 49, Kennedy, J., said: "If the nomina-"tion is valid upon the face of it the election proceeds. The question then is "not simply between the candidates but is referred to the electorate, and has "become a matter of public concern. It can then only be reviewed on a peti-"tion. No doubt, if one or two candidates is so disqualified that he is not to "be, in the word of Lord Watson in *Pritchard* v. *Bangor* treated as a person "for whom votes could be given before the Returning Officer, in such a "case the other candidate although he actually obtained a minority of votes, "might be declared elected. This applies to a Municipal as well as to a Par-"liamentary election *Beresford Hope* v. *Lady Sandhurst*—where the nomi-"nation paper shows that the candidate is manifestly disqualified as for example, by defect of *status*": "If," to quote the language of Wright, J., in *Hurford* v. *Lyersky* "the nomination paper is on the face of it, a mere abuse "of the right of nomination or an obvious unreality, as for instance, if it "purported to nominate a woman or a deceased sovereign, in such a case "there can be no doubt that it ought to be rejected. Those who vote for a "person so nominated must know or be taken to know that their votes are "worthless, and the votes may be treated as thrown away. But if the dis-"qualification does not

"appear upon the face of the paper and is not known or to be taken as "known to the electorate, then the votes given for the candidate cannot be "treated as thrown away."

What was the notice and what has been proved? It will be conceded that the publication of Fernandes' disqualification did not start until the evening of the 12th October, 1926, at the meeting held by P. N. Browne at Albouystown, when P. N. Browne himself went into the history of Concord, said that there was no cultivation on the land and that he did not believe that Fernandes had paid $1,450 or any sum for Plantation Concord which was followed by publication of a paragraph and an editorial in two of the local daily newspapers and a pamphlet, but such publication of the notice and what some of the witnesses swear they told the voters did not confine itself to one particular fact but to a series of facts which may be grouped under three heads, viz.:—

1. That the respondent did not possess 80 acres of land of which 40 acres are under cultivation.

2. That he did not have cultivation to the extent of 40 acres; and

3. That the property was bought by Mitchell in trust for Fernandes for $300 and that it was subsequently sold by Mitchell to Fernandes for $1,450 which amount had not been paid and that the transaction was a shady one.

Lord Coleridge, C.J., in the Launceston Election Petition, *Drinkwater* v. *Deakin*, 1874, 30 L.T.N.S. 832 said: "In a Parliamentary election, in or-"der 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 fair inference of wilful perverseness on the part of "the electors voting for the disqualified person," and Brett, J., said similarly: "Where there are certain circumstances existing in fact, and notice of "those circumstances would tell a person of ordinary care, sense and intel-"ligence that they produced incapacity in the candidate, then the voter who "nevertheless votes for the said candidate throws away his vote."

Now, in answer to that sound construction of the law can the Court hold that those series of facts as stated to the electorate constitute when taken separately, facts positive and definite as to lead to the fair inference of the wilful perverseness on the part of those electors voting. I say not. For these reasons, that those facts are not all true because the respondent Fernandes owned by transport at the time of his nomination more than 80 acres of land in this colony unencumbered by mortgage, which fact complied with the first part of the qualification required by law, that the fact as I held before whether Mitchell bought in trust for

Fernandes or whether the price was paid by respondent Fernandes to Mitchell for Pln, Concord had no connection with this particular qualification leaving only the fact of not having less than 40 acres of land actually and *bona fide* under cultivation, in other words, the notice of the fact of a candidate at the time of his election being disqualified must be conveyed to the voters in a form sufficiently definite in order that after such notice and the voter nevertheless votes for the disqualified candidate, that his vote is thrown away. Take the opposite view of the notice—the respondent Fernandes might have had not less than 40 acres of land actually and *bona fide* under cultivation but not owning by transport not less than 80 acres of land unencumbered by mortgage, or 80 acres of land in fact—all very confusing, and I cannot hold that the voters understood from those facts as stated to them that they could discard what was true and misleading and just confine themselves to a positive and definite fact existing at the time of polling, *i.e.*, that the respondent Fernandes did not possess not less than 40 acres of land actually and *bona fide* under cultivation—and say that they were guilty of wilful perverseness and that they "threw away" their votes.

I am of opinion and determine that the election of the respondent Fernandes must be declared void as no person was duly elected and returned and to that effect therefore pursuant to the provisions of the 128th section of the said Ordinance 1 of 1891 I am to certify to the Governor.

The allegation of fraud not being proved and unnecessary I disallow costs to the petitioner on that issue but he is entitled to his costs on the remainder of the petition.

Costs of two counsel allowed.

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

Solicitor for the respondent: *J. Gonsalves.*

LAING *v.* DODDS.

LAING *v.* DODDS.

[No. 116 OF 1926.]

1927. JANUARY 10; FEBRUARY 13. BEFORE DOUGLASS, J.

*Costs—Election Petition—British Guiana Constitution Ordinance, 1891, section 129—Rules of Court, 1900, Part II, Order 1,r.8, 13,—Appendix I., Part I.* (*6*)*—Supreme Court Ordinance, 1915, Sections 46 and 47—Whether costs of election petition to be taxed on same basis as costs of a petition under Rules of Court, Part II., Order I.—Order XLVI., r. 16* (*a*)*—Special directions—Costs certified for two Counsel—Whether "appearance" of Counsel in Appendix I, Part I of Rules of Court includes consultations prior to appearance—Witnesses summoned—Witnesses not called—Whether fees for their attendance taxable—Principles governing such question.*

(*a*) An Election Petition brought under the British Guiana Constitution Ordinance, 1801, is by section 128 thereof assimilated to a civil action.

(*b*) Accordingly, the costs ordered on such a petition are not to be taxed according to the tariff or scale governing petitions brought under Part II., Order 1 of the Rules of Court, 1900.

(*c*) In the absence of any special direction a taxing officer is entitled to tax the costs of such an election petition on the higher scale because that has been the practice which has been confirmed by judicial decisions.

That apart, the certifying for two counsel fairly indicated the scale under which the costs were to be taxed.

(*d*) The words "For appearance on hearing of any application" occurring in the NOTE to Appendix I., Part 1 (b) of the Rules of Court, 1900, refer to the actual appearance of counsel at the hearing and do not include consultations prior thereto.

(*e*) It is not a sufficient reason to disallow costs in respect of witnesses summoned that they were not called. The general rule is to allow such costs except in cases where facts or documents were admitted so as to do away with the necessity of their further attendance. To that extent such costs may be disallowed.

(*f*) The amount of evidence used in Court is not necessarily the limit of the evidence the costs of which will be allowed between party and party.

Review of Taxation on the application of the respondent to the petition.

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

*S. J. Van Sertima,* for the respondent.

DOUGLASS, J.: The respondent has applied to the judge under Or. XLVI., rr. 6 and 9, for a review of taxation of the petitioner's bill of costs. The proceedings by election petition were brought under sections 127 to 129 (inclusive) of the B.G. Constitution Ordinance No. 1 of 1891, and although costs of such proceedings are not dealt with specifically the judge is clearly "empowered by such ordinance to award costs" within the meaning of Order XLVI., r. 16 (a), on a reasonable construction of section 129 of the said Constitution Ordinance when it enacts, "and the judge shall have the same powers, jurisdiction and authority as if he were trying a civil action without a jury," that being so the first objection taken is to the scale on which the bill has been taxed, and it is

suggested that not being an action the proceedings should have been taxed under Part II., Or. I. of the Rules of Court as a petition, under which Order I, rr. 8 and 13, define what fees and costs may be charged, and Appendix I., Part I (6) sets out the scale. The petitions which come within Part II., Order I., are those to which the procedure provided by r. 2 of that Order is applicable, and the costs are suited to that procedure. An election petition is directed to be tried as near as circumstances will permit as if it were a civil action by section 129 of the said Constitution Ordinance, and is therefore taken out of the scope of Order I. I therefore agree with the decision of Mr. Justice Berkeley in *Wood* v. *Fernandes* (1925. L.R.B.G. 64), strengthened by the practice that has always existed—so far as I can trace it—to tax the costs as in a civil action, and also taking into account that even under the simplified procedure of Order I., the costs are allowed on the higher scale though limited in extent, and no provision is made by the Supreme Court Ordinance, 1915, or by the Rules thereunder, (see Secs. 46 and 47 of Ordinance No. 10 of 1915) for the costs of election petitions and they thus remain at the discretion of the judge. I feel bound to uphold the practice of allowing the higher scale, especially as the lower scale would be impossible of application.

When I gave judgment for the petitioner with costs, it would be impliedly on the scale as finally settled on the review of taxation in *Wood* v. *Fernandes,* I agree that Order XLVI., r. 16 (a), applies for the petition was a proceeding "not being an action," and the judge is empowered to give such special directions as may be deemed just as to the determination of the amount of the costs, that, is as I construe it, give such special directions to enable the registrar to tax the costs submitted to him, in the present case not only has there been a constant practice in the taxation of such costs but that practice has been confirmed by a judicial decision and there was therefore no necessity to give any special direction although as a matter of fact by certifying for two counsel the judge in effect indicated the scale under which it is understood that the costs were to be taxed.

The next objection is to the allowance to junior counsel of any fees in respect of matters outside his actual *appearance* at the hearing and the solution depends to a considerable extent upon the construction of the "Note" to Appendix I., Part 1 (b), which reads as follows: "Fees shall be allowed "in respect of the appearance of one counsel only, but in cases of excep- "tional length or difficulty the Court may allow fees in respect of the ap- "pearance of two counsel in which case the fees allowed to the second "counsel shall be one-half of those allowed in respect of the appearance of "the first counsel." The heading of the paragraph of fees to which the "Note" refers reads: "In respect of the employment

"of counsel," two items are "For appearance on hearing of an application . . ". . $10 to $50," and "for appearance on hearing of any action . . . from $25 "upwards." If the "Note" had meant to apply to the "employment" of two counsel and allow fees to both one would expect it to have clearly stated so, but it deliberately confines the fees to "the *appearance* of counsel." It is so obvious as hardly to need argument that separate fees to each of two counsel for the same consultation and for drawing the same document is not a charge that any party should incur. Two partners of a firm of solicitors might just as well charge their client double fees for each consultation and for every document prepared if that were allowed, and although it has been the practice of the taxing officer to allow such fees—but unconfirmed by any judicial decision—I must express my dissent, and equally to the allowance to the solicitor for the two attendances, in each case, I accordingly refer the bill of costs back for alteration in this respect, drawing attention to items 2, 11, 14, 16, 33, 39, 41 and 65 of the bill of costs.

It is usual under English Practice to tax the costs of election petitions as between solicitor and client, and several consultations are often necessary and may be allowed. I see no reason to interfere with the discretion of the taxing officer if he is not acting on a wrong principle, and consequently I shall not disallow or alter the fees complained of in paragraph 3 (b) and (c) of the Notice of Review. With regard to paragraph 3 (e) the case of *Wichstead* v. *Biggs* (1885 52 L.T. 428) is to the point, where it was held that witnesses not being called was not sufficient reason for disallowing the costs, unless of course facts and documents were admitted which did away with the necessity of further attendance of any such witness; in the cases of the witnesses Nicolson, Sardan Mohamed, and Payne (see items 66), this appears to have been the case. *In London Chatham and Dover Railway Go.* v. *S. E. Railway Co.* (1889. 60 L.T. 753) it was held that the amount of evidence used in Court is not the limit of the evidence the costs of which will be allowed between party and party. In that case a photograph was taken for the purposes of evidence but apparently not seen by the judge, but the costs were directed not to be excluded if it were reasonable and proper to provide such proof in case the necessity arose. Mr. Justice Kekewich said "the solicitor's duty with the assistance of junior counsel is "to bring the case into Court armed at all points. It is the leader's duty in "the conduct of the case to use his armour and his weapons in the most ef-"fective way in which the exigencies of the moment dictate."

As there is nothing to show me whether the taxing officer took into account the fact that there was no necessity for the three witnesses mentioned above, and perhaps for others to attend,

after the preliminary decision given by me on the 29th November, I refer these particular items back for his re-consideration. As the respondent has only succeeded on minor details in his objections, he should pay the costs of this review. I fix the costs at $15.

BAHADOUR, Appellant,
AND
BENN, Respondent.

[No. 240 OF 1926.]

1926, AUGUST 27; 1927, FEBRUARY 18.

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

*Full Court of Appeal—Powers of Court to affirm, modify or amend Magistrate's decision—Extent of power—Magistrates' Decisions* (*Appeals*) *Ordinance, 1893, Section 31* (*1*) (*a*)*—Appeal from conviction under Spirits Ordinance 1905—Fixed maximum penalty imposed by law—Discretion given Magistrate to impose a sum not less than one-fourth of the maximum—Whether Court of Appeal can impose less than the said one-fourth—Spirits Ordinance, 1905, Sections 93* (*1*) *and 122* (*3*)*.*

The appellant was convicted under section 93(2) of the Spirits Ordinance, 1905, of having been in the unlawful possession of spirits exceeding in quantity a pint. Section 93 (1) of the said Ordinance prescribed a maximum penalty of five hundred dollars for such an offence and section 122 (3) enacted that it, shall not be competent for the Magistrate, if he convicts the defendant for any offence under the said Ordinance, to award a less penalty than one-fourth of that imposed by law.

The Magistrate imposed the minimum penalty thereby prescribed, to wit one hundred and twenty five dollars.

The defendant appealed.

Section 31 (1) (a) of the Magistrates' Decisions (Appeals) Ordinance, 1893, enacts that in giving judgment the Court, *i.e.*, the Court of Appeal may (a) affirm, modify, amend or reverse the decision either in whole or in part.

*Held,* (Berkeley, J., dubitante) that by virtue of the provisions of section 31(1) (a) of the Magistrates' Decisions (Appeals) Ordinance, 1893, the Court of Appeal had power to reduce the sentence below the minimum prescribed by the Ordinance which bound only the Magistrate trying the case and not the Court of Appeal.

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

*S. J. Van Sertima,* Acting Assistant to the Attorney General, for the respondent.

BERKELEY, Acting C. J.: Under Ordinance No. 13 of 1893 (s. 31, a,) this Court in giving judgment may "affirm, modify, amend or reverse the decision of the magistrate either in whole or in part" or (c) "make such other order for disposing of the case as justice may require." The appellant was convicted under Ordi-

nance No. 1 of 1905 and section 122 (3) provides that it shall not be competent for the Magistrate to award a less penalty than one-fourth of that imposed by law. The penalty is $500, and the Magistrate ordered him to pay $125.

Mr. Justice Douglass holds that the Court has power to amend a penalty fixed by the statute or make such order as referred to above. This was the procedure adopted by Major, C.J., in *Wellington* v. *Headley* L.R.B.G 1916, 105.

I have great doubt as to the Court's power to reduce under either of these two sub-sections a fixed penalty which the Magistrate can reduce by one-fourth, but in view of the opinion of Sir Charles Major and the circumstances connected with the present case I consent to the penalty being reduced to $26 and $1.80 costs, or 6 weeks' imprisonment with hard labour.

DOUGLASS, J.: This case was referred back to the Magistrate to ascertain whether he was of opinion on the evidence that the rum in question was lawfully obtained within the meaning of section 17 (1) and (2) of Ordinance No. 8 of 1868, and on the 20th November, 1926, he replied that he was of such opinion. The Court then sees no grounds for this appeal and are of opinion that the magistrate's decision was warranted by the evidence, but on Mr. Luckhoo's plea for a reduction of the sentence as being the only one the magistrate could give in the circumstances, I am of opinion that it is within the power of the Court "to modify or amend" the sentence of the magistrate, within the meaning of section 31 (1) and (2) of the Magistrates' Decisions (Appeals) Ordinance, 1893. The maximum fine under section 93 of the Spirits Ordinance, 1905, as amended by the 1911 Ordinance is not to exceed $500, and section 122 (3) states it shall not be competent for the magistrate to award a less penalty than one-fourth of that imposed by law, and it has, I believe, always been held that this means one-fourth of the maximum imposed by law. But this limits only the magistrate trying the case and there is no minimum put to the jurisdiction of the judges who only have to consider section 93 and that the fine should not exceed $500. There were certain facts in the present case which appear to the Court to warrant a reduction of the fine, and accordingly they modify and amend the sentence imposed. The penalty will be reduced to a fine of $26 and $1 80 costs, or six weeks' imprisonment with hard labour and the appellant must pay the costs of this appeal fixed at $15.

*Appeal Dismissed.*
*Order Varied.*

HART *v.* JARMAN.

HART *v.* JARMAN.

[No. 319 OF 1926]

1927. FEBRUARY 28; MARCH 1, 7. BEFORE GILCHRIST, Actg. J.

*Husband and wife—Marriage before passing of Married Persons' Property Ordinance, 1904—Antenuptial Contract—Contract not deposited in Registrar's Office—Registrar's Ordinance, 1880, section 28—Deeds Registry Ordinance, 1919, section 15 (1)—Contract by wife—Claim by wife "assisted by husband"—Whether in the circumstances claim maintainable.*

The plaintiff who was married to her husband prior to the coming into operation of the Married Persons' Property Ordinance, 1904, brought a claim against the defendant based on an implied contract to pay for board and lodging of the defendant's wife while living apart from the defendant. Evidence was adduced to show that the plaintiff and her husband had entered into an antenuptial contract prior to their marriage but the said contract had not been deposited or recorded in the Registry as required by the Registrars Ordinance, 1880 and the Deeds Registry Ordinance, 1919, and could therefore not be put in evidence.

On behalf of the defendant it was submitted at the close of the plaintiff's case that as the contents of the antenuptial contract could not be given in evidence, it must be presumed that the parties were married in community of property and that therefore the plaintiff could not sue in such manner and form as she had done.

On behalf of the plaintiff it was urged chat even if the objection was tenable the Court ought to grant leave to add the husband as a co-plaintiff.

*Held,* (1) That the contents of the antenuptial contract could not be given in evidence as the document had not been deposited in the Registrar's Office in compliance with section 28 of the Registrar's Ordinance, 1880, or with section 15 (1) of the Deeds Registry Ordinance, 1919.

(2) That presuming that the parties were married in community of property the wife had no status to bring the action as it did not come within the exception of a contract made by her as a sole trader.

(3) That as the Court was cognisant of the fact that there was an antenuptial contract and as it was impossible to say whether the husband had any rights in respect of the claim the application for an amendment could not be granted.

*E. M. Duke,* for the plaintiff.

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

GILCHRIST, J.: In this action Fanny Hart, assisted as far as need be by her husband Edward McKintosh Hart, claims from the defendant the sum of $450 being 18 months' board and lodging of the defendant's wife at defendant's express or implied request at Georgetown at the rate of $25 a month. The claim therefore clearly indicates that plaintiff was married by antenuptial contract.

2. On the close of the case for the plaintiff Mr. Stafford for the defendant urged that on the evidence produced by the plaintiff this action is not maintainable by her in that the evidence establishes that plaintiff was married to her husband, the said

Edward McKintosh Hart, in the year 1899, long prior to the coming into force of the Married Persons' Property Ordinance, 1904 (No. 12); that previous to marriage they entered into an antenuptial contract in writing; that such contract has not up to the present time been deposited in the Registrar's Office or Deeds Registry and further that there is no evidence to show that community of property was excluded by the parties to the said marriage. He submitted that before the antenuptial contract is valid and effectual in law or can be in any way pleadable or allowed to be pleaded in any Court of justice in the colony it must be shown to have been deposited in the Registrar's Office as required by Ordinance 6 of 1880, section 28. (this Ordinance was repealed by Ordinance 17 of 1919) or duly proved and filed as of record in accordance with the provisions of section 15 (1) of Ordinance 17 of 1919.

3. Mr. Stafford further submitted that assuming plaintiff and her husband were in the position of having been married in community of property the only justification for plaintiff bringing this action would be that of a sole trader, that as a sole trader she could only bring an action in respect of or arising out of the trade carried on by her. That the evidence establishes that her sole trade is that of a dealer in cattle and seller of milk. He referred to Van Leeuwen, Vol l, pp. 43-44, and Van Zyl (Judicial Practice), p. 4.

4. Now an antenuptial contract is an agreement made by two intended spouses regarding the rule by which their future marriage is to be governed, and regulating the disposal of property acquired by them before marriage, or of that which they may subsequently acquire. Such contract may, among other things stipulate that there shall be community of property with certain exceptions, or may exclude community of property. It may or may not exclude the marital power of the husband.

5. I agree with the submission of counsel for the defendant.

6. Mr. Duke, counsel for the plaintiff, asks that the plaintiff's husband be added as a co-plaintiff under Order XIV., r. 13, of the Rules of Court should the court uphold the submissions of counsel for the defendant.

7. On the evidence for the plaintiff it is impossible for me in the absence of the antenuptial contract to say whether the plaintiff was under disability to issue the writ herein. Would the joinder of the husband as a co-plaintiff so frame the case that it could be adjudicated upon by the Court? In my opinion it would not as it would be impossible on the evidence adduced to say whether he had any rights in respect of the claim. In short Mr. Duke's application is to ask me to speculate in whom the right of action is vested. The application is declined.

8. I accordingly give judgment for the defendant with costs. Leave granted to bring any further action if so advised.

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

Solicitor for the plaintiff: *A. Ogle*

Solicitor for the defendant: *J. F. Henderson.*

*REX v.* WEBBER AND SMALL.

*Ex parte* THE ATTORNEY-GENERAL.

[No. 5 of 1927.]

1927. MARCH 15. BEFORE SIR A. DE FREITAS, KT., C.J., DOUGLASS, J., AND GILCHRIST. J.

*Contempt of Court—Procedure—Contempt committed out of Court—Order nisi to show cause why a writ of attachment should not issue—Whether order should have been to show cause why* a *writ of committal should not issue—Proceedings on the Crown side of the King's Bench Division.*

(*a.*) Where a contempt of Court has been committed "dehors" the Court the procedure of moving for an order *nisi* calling upon the delinquent to show cause why a writ of attachment should not issue against him is correct. Such order need not call upon him to show cause why a writ of committal should not issue.

(*b.*) When however the party called upon to appear does so appear the Court has power either to fine him or to commit him to prison for an indefinite term or both.

Preliminary objections by the respondent Webber in person to alleged defects in the order *nisi* calling upon him to show cause why a writ of attachment should not issue against him for contempt of Court.

*Hector Josephs, K.C.,* Attorney General, and *B. King,* Assistant to the Attorney General, for the Crown.

The Respondent *Webber* in person.

The judgment of the Court was delivered by DE FREITAS, C.J.:

On the 21st of February, 1927, the respondent Albert Raymond Forbes Webber raised several preliminary objections in points of law to the validity of the proceedings in this matter because of alleged defects in them. Having considered these objections, we are unanimously of opinion that they are not sustainable in law.

One of the objections rested on the contention that the order *nisi* of the 10th of January, 1927, (made on motion of the Attorney General) was invalid and should be set aside, because it ordered the respondent to show cause why a 'writ of attachment' should not issue against him for his contempt of Court in publishing an article entitled "A Judicial Scandal" in "The New Daily Chronicle of Events" newspaper of the 19th of December, 1926, when it should have ordered him to show cause why a 'writ of committal' should not issue. The respondent read to the Court passages from the 1908 edition of Short and Mellor's Crown Office Practice, but he overlooked the following statement in the section on Attachment for Contempt at page 342 of that book: "The following proceedings are in use on the Crown side for "dealing with offenders:—1. Summary punishment by committal or other-"wise for contempt committed in *facie curiae.* 2. By motion, ex parte in the "first instance, for an order *nisi* calling upon the party sought to be attached "to show cause why a writ of attachment should not issue against him. If "the party appears when cause is shown, he may be dealt with then and "there; if he does not appear, the order may be made absolute. This is iden-"tical with the practice of the old Common Law Courts before the Judica-"ture Acts, and is now regulated by rule 240. On the Crown side this has "become the common practice as well in dealing with newspaper editors "and publishers, as in "the case of other contempts."

It will be observed that if the respondent appears in obedience to the order *nisi*, as he has in this case, then "he may be dealt with then and there" by committal, fine or otherwise,

Mr. Webber's preliminary objections are overruled.

# *REX v.* WEBBER AND SMALL.

## *Ex parte* ATTORNEY-GENERAL.

[No. 5 OF 1927.]

1927, MARCH 16. BEFORE SIR A. DEFREITAS, KT., C.J., DOUGLASS, J., AND GILCHRIST, Actg J.

*Contempt of Court—Scandalous references to a judge's decision—Distinction from criticism—Imputation of partiality—Responsibility of printer—Ignorance of Contents of offending article no excuse.*

Judges and Courts are alike open to criticism, but it is a contempt of Court to indulge in scurrilous abuse of a Judge qua judge or to impute unfairness and lack of impartiality to a Judge in the discharge of his judicial duties.

The printer and publisher of a newspaper is responsible and punishable for any contempt of Court in anything that appears in the said newspaper and ignorance of the contents of an offending article constitutes no excuse.

Rule *nisi* calling on Albert Raymond Forbes Webber, Editor of the New Daily Chronicle, Limited, and Roland Augustus Small, the printer and publisher thereof, to show cause why they should not be attached for contempt of Court in respect of an article published in the edition of the "New Daily Chronicle" newspaper of the 19th December, 1926, which it was alleged was calculated to lower the authority of Mr. Justice Berkeley and to bring him into contempt.

*Hector Josephs, K.C.,* Attorney General, and *B. King,* Assistant to the Attorney General, for the Crown.

The respondent *Webber* in person.

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

The judgment of the Court was delivered by DE FREITAS, C.J.: In these proceedings instituted by the Attorney General he asks that the punitive jurisdiction of the Supreme Court be exercised in regard to a contempt of Court committed in an article entitled "A Judicial Scandal" published in "The New Daily Chronicle of Events" newspaper of the 19th December, 1926, and also in regard to Albert Raymond Forbes Webber, the editor of that newspaper and the sole person carrying on the business of "The New Daily Chronicle Printing Company." The proceedings were also instituted against Rowland Augustus Small, the printer and publisher of the same newspaper. Mr. Small has apologised and has explained his ignorance of the matter. He has been dealt with separately by the Court.

Mr. Webber has appeared before the Court in person, and, in relation to the article in question, he has stated to the Court as

follows: "I cannot disclaim responsibility like Small. I accept full responsibility." He has filed no affidavit. The article purports to be written with reference to a judgment delivered by a judge of the Supreme Court of the colony on the 18th of December, 1926, at the conclusion of the trial by him of an election petition. Early in the article it is said: "It has been suggested "that a newspaper should do nothing to undermine the respect of the popu- "lace for the judiciary, and to that view we cordially subscribe." Towards the end of the article reference is made to the judiciary as that "on which "rests the whole fabric of law and order." It is to be inferred from those views that Mr. Webber is not an ignorant man. In his personal exposition of his case before the Court he has certainly shown us that he is an intelligent man. Yet in the body of that article a criminal contempt of Court has been committed a contempt of Court of the class known as "Scandalising a Court or a judge." Any act done or writing published that might bring a Court or a judge of the Court into contempt or lower his authority is a contempt of Court. The article contains much personal scurrilous abuse of a judge as a judge, abuse in reference to his conduct while sitting as a judge. Amongst other scurrilous statements, it says that the trial judge "promul- "gated his judgment without any regard for the canons of righteousness, "because he hugs the conviction to himself that there is no appeal, and that "he can therefore outrage any law, so he serves the man with whom it is "stated he is associated in sundry financial ramifications." The article is a gross contempt of Court. That which is called "the liberty of the Press" is no greater and no less than the liberty of every subject of the King.

Mr. Webber cited numerous cases to us from English Law Reports, and among them he referred the Court to Gray's case in 1900. Cray was the editor of a Birmingham daily newspaper. Before beginning the trial of a case at which evidence of an indecent and obscene nature would have to be given, the Assize Judge, Mr. Justice Darling, warned the Press against publishing the evidence in full. The judge may not have been aware that there had been no publication of indecent matter in the reports of the preliminary proceedings in the same case before the magistrates, and the probability is that he had in his mind the popular but erroneous belief that there is impunity for the publication by newspapers of anything that is said or read in a Court of justice. The trial of the prisoner in respect to whose case the warning had been given by the judge was concluded by a conviction on the same day, and he was thereupon sentenced. Gray published next day an article entitled "A Defender of Decency," written with reference to the observations of warning made by

the judge. Before he appeared in the contempt of Court proceedings instituted by the Attorney General, Gray made an affidavit in which he humbly apologised. Lord Russell of Killowen, the Chief Justice, in delivering the judgment of the Court, said that it was an article of personal scurrilous abuse of a judge as a judge and was a contempt of Court. The Chief Justice also said; "If it had not been for the conduct of Gray since the publication "of the article, and especially if it had not been for the affidavit which he "has put before the Court for its consideration we should all have thought it "our duty to send him to prison for a not inconsiderable period of time. But "he has come forward and frankly acknowledged his own individual and "sole responsibility in the matter. He has done more. He has in the affidavit "expressed his regret for what he has done. . . . . In his affidavit he says that "he wrote the article under a strong feeling that sufficient trust had not been "placed in the judgment, good taste and discretion of the journalists and "reporters for the Press." He proceeds: "That was the only motive present "to my mind in writing the article, and I wrote it on the impulse of the mo-"ment. In doing so I used language referring to Mr. Justice Darling in terms "which were intemperate, improper, ungentlemanly and void of respect due "to his person and office. The expressions applied to Mr. Justice Darling "were not deliberately intended to bring discredit on him, but were the out-"come of my strong feelings. I know they cannot be justified and I do not "seek to justify them. I deeply regret the publication of the article, and the "inexcusable and insulting language in which it referred to one of Her Maj-"esty's Judges and I humbly apologise to Mr. Justice Darling and the Court "for my conduct. I submit myself to the merciful consideration of the "Court."

The Chief Justice concluded by saying that the judgment of the Court was that Gray should be kept in prison until he paid a fine of £100 and £25 for costs That is how and why an editor of an English newspaper succeeded in having his punishment measured leniently.

In a recent English case in November, 1925, on the motion of the Attorney General one Freeman was adjudged guilty of contempt of Court in publishing abusive letters to and concerning Mr. Justice Roche, who in January, 1924, had dismissed an action brought by Freeman. The Chief Justice, delivering judgment, said that Freeman had been ordered to attend the Court to answer for his contempt in sending to Mr. Justice Roche and divers other persons letters containing personal scurrilous abuse of the judge as a judge, and that Freeman throughout the proceedings in Court had adhered to all the expressions without a word of apology or

regret. Freeman was ordered to be imprisoned for eight months. That is how and why a recalcitrant offender was not leniently dealt with for a contempt of Court.

It will be observed that Gray was the editor of one of the Birmingham newspapers, which had scrupulously maintained the proper course in publishing reports of the preliminary inquiry into an indecent case, and that strong feeling was aroused in him in consequence of a public warning to the Birmingham Press against being guilty of impropriety in respect to reports of the same case in its final stage. It will be observed that Freeman also had a strong feeling of personal grievance. In the matter now before us Mr. Webber's position was not analogous to that of Gray or. Freeman.

On the 21st of February, 1927, this matter was before the Court when Mr. Webber submitted several preliminary objections and the Court yielding to his special request adjourned to the 15th of March to deliver its ruling on the objections.

On the 15th of March all the objections were overruled.

To-day, the 16th of March, we have resumed. At last at the final stage of these proceedings, Mr. Webber to-day has expressed his regret and contrition for the article entitled "A Judicial Scandal," and he has submitted himself to the judgment of the Court. The Court accepts his expression of regret as indicating that he is, at last, sorry for what he has done, and the Court will give full weight to his contrition. The judgment of the Court is that Mr. Webber be imprisoned until the 16th of June, 1927, or until the further order of the Court. The order for his committal to prison will lie in the Registry until the 31st of March, 1927. If before the 31st of March, 1927, Mr. Webber pays a fine of £200 the order will not be put in force.

Roland Augustus Small, you have explained that you were absolutely ignorant of the contents of the article entitled "A Judicial Scandal." which undoubtedly offends as a contempt of Court and you have explained that you were a mere foreman printer although you were registered as the printer and publisher of the newspaper; and you have also apologised and expressed your regret without reserve. The Court will give full weight to your contrition, and it will deal with you as leniently as Mr. Thomson was dealt with in the British Guiana case which your counsel, Mr. Luckhoo, brought to our notice. But be warned that you will assuredly be punished on the next similar occasion. There can be no doubt in law that from the fact that you are the printer and publisher of a newspaper, you are responsible and you are punishable for any contempt of Court in anything that appears in your newspaper. Ignorance of the contents of an offending article is no excuse whatever. In an old English

case it was so held where Lord Hardwicke, the Lord Chancellor, said: "With regard to Mrs. Bead, the publisher of the St. James's Evening Post, "by way of alleviation it is said that she did not know the nature of the pa- "per; and that printing papers and pamphlets is a trade and what she gets "her livelihood by. But though it is true this is a trade, yet they must take "care to do it with prudence and caution; for if they print anything that is "libellous it is no excuse to say that the printer had no knowledge of the "contents and was entirety ignorant of its being libellous. Therefore Mrs. "Read must be committed." Although this case was decided as long ago as in 1742, it was followed in a case in 1867 as correctly laying down the law. It was also followed in a modern English case. In this modern case the person whose name appeared at the foot of a newspaper as the printer and publisher of it, satisfied the Court in proceedings for contempt of Court that he did not see the offending article until he was served with the notice of motion to commit him for having printed and published it, that he held a subordinate position as merely the foreman printer, and that his duties did not require him to read the matter that was printed, either before or after it was printed. Nevertheless the Court held that he was answerable for publishing the article complained of, although he was entirely ignorant of its contents, and that he was liable to be committed to prison for contempt of Court. But in consideration of his having apologised and expressed his regret to the Court and of his having given an undertaking that the offence shall not be repeated, he was leniently dealt with by being ordered to pay the costs of the motion.

With an admonition to take heed of the warning you have received, the judgment of the Court is that you be discharged, Mr. Small.

We hope that you are sufficiently grateful to Mr. Luckhoo for his human and correct presentation of your case.

HARDY *v.* COGHLAN.

HARDY *v.* COGHLAN.

[No. 378 OF 1926.]

1927. MARCH 12, 19. BEFORE GILCHRIST, Actg. J.

*Security for costs—Plaintiff visitor to colony on business—Subsequent intention to reside permanently—Whether can be compelled to give security for costs—Rules of Court, 1900, Order 46, r. 17* (*a*)*—Order 46, r. 17* (*b*)*—Principles on which security for costs ordered in such cases.*

Rule 17 (b) of Order 46 of the Rules of Court, 1900 was intended to cover cases in which a foreigner ordinarily resident out of the jurisdiction would not be here when wanted, and, therefore, has no application to the case of a person who though coming from abroad has *bona fide* made up his mind to reside within the jurisdiction.

Application by the defendant for an order directing the plaintiff to give security for costs.

The relevant facts appear in the judgment.

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

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

GILCHRIST, J.: The defendant in this matter (hereinafter referred to as the applicant) applies to the Court for an order that the plaintiff (hereinafter referred to as the respondent) may be directed to give him security for costs in the action on the ground that the respondent ordinarily resides in Great Britain and or Ireland out of the jurisdiction of the Court though he is temporarily resident within the jurisdiction.

2. The grounds of the application are set out in the affidavit of the applicant dated 24th February, 1927. In paragraph 5 applicant states that the respondent owns no property in the colony and is otherwise possessed of no means.

3. The respondent in his affidavit dated 4th March, 1927, states:

(a) he became acquainted with the applicant in England in October, 1924, and they became very close friends (paragraph 2).

(b) the applicant whilst in England repeatedly expressed to him a strong desire to have him out in this colony (paragraph 3).

(c) the applicant left England in May, 1925, and shortly before he (respondent) obtained an appointment with Wisehead Buildings, England, with whom he was negotiating before he met the applicant (par. 4).

(d) on the 6th January, 1926, he received a cable from the applicant to come out to this colony and he arrived here on the 21st March, 1926, (par. 5).

(e) from the glowing terms in which the applicant spoke to him in England of the great possibilities of this country, possibilities which he has realised for himself since his advent he decided on

the receipt of the applicant's said cable to resign his position and come out here for the purpose of remaining permanently and earning a livelihood, that purpose has not in any way diminished but on the contrary has become more set since he had the opportunity of seeing the place for himself, it therefore follows that he will be here for the trial of the action and whenever he is wanted (par. 6).

(f) since his dismissal from the applicant's service he leased some land at La Grange, West Bank, Demerara, and has been experimenting in agriculture with a view of following it up and he has also been endeavouring to obtain employment (par. 7).

4. (f) above is vague and indefinite as to the interest in or extent of the land leased.

5. Counsel for the applicant in support of the application cited the following cases:

*Sacker v. Besser & Co.* (1887) 4 T. L. Rep. 17.

*In re* Percy & Kelley Nickel, &c.; Iron Mining Co. 1875-6. 2 Ch. D. 531,

Crozat & Brogden (1894) 2 Q.B.D. 30.

[*Pray & ors.* v *Eadie* 1 *Durn & E.* 267.]

In all these cases the party from whom it was sought to obtain security for costs resided out of the jurisdiction. These cases would be of special assistance in an application for security for costs under O. 46, r. 17 (a) of the Rules of the Supreme Court which reads as follows:

"Security for costs may be ordered by the Court where an action is in-"stituted on behalf of a plaintiff resident out of the jurisdiction of the "Court."

(6) Rule 17 (b) of O. 46 under which this application is brought reads as follows:

"Security for costs may be ordered by the Court Where an action is in-"stituted by or on behalf of a plaintiff ordinarily resident out of such juris-"diction but temporarily resident within the jurisdiction."

7. This rule 17 (b) is in terms similar to O. 65, r. 6 (a) of the English Rules.

8. Counsel for the respondent cited *Michiels* v. *Empire Palace, Ltd.* (1892) 66 L. T. Rep. 132 and the local case *Chapman* v. *Nascimento,* 28th February, 1902.

9. Lindley, L.J., in *Michiels* v. *Empire Palace, Ltd.*, says: "The case turns upon the construction and application of rule 6 (a) of Order LXV. which provides that a plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction. That rule was inserted to correct what was found to be an inconvenience in the former practice. Previously when a person resided in this

country temporarily he could not be required to give security for costs. The rule was purposely made vague and elastic for anything short of a man actually living in this country might be a temporary residence. I apprehend that the real object of the rule was to cover a case in which a foreigner ordinarily resident out of the jurisdiction would not be here when he was wanted. In the ordinary case of an Englishman who could not pay he would not be ordered to give security for costs.

10. I here draw attention to the applicant's statements in paragraph 5 of his affidavit "the plaintiff (respondent herein) owns no property in the "colony and is otherwise possessed of no means" and to the words of Lindley, L.J., in the above case "in the ordinary case of an Englishman who "could not pay he would not be ordered to give security for costs."

11. Having regard to the respondent's statement in his affidavit I am of opinion that he must now be regarded as a resident of the colony. Further even if he were only temporarily resident in the colony following the principles as laid down in the case of *Michiels* v. *Empire Palace, Ltd.*, I am of opinion that there are no special circumstances such as to warrant an order that the respondent be required to give security for costs.

12. Application refused with costs.

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

Solicitor for the respondent: *E. A. W. Sampson.*

# BRADFORD *v.* BRADFORD.

[No. 153 OF 1926.]

1927. FEBRUARY 18; MARCH 21. BEFORE DOUGLAS, J.

*Husband and wife—Divorce—Alimony pendente lite—Principles on which granted—Quantum.*

When the fact of a marriage is established, alimony *pendente lite* follows as a matter of course except where the respondent has means of her own sufficient for her condition of life and proportionate to the means of her husband.

The amount of *alimony pendente lite* usually allowed is one-fifth of the joint income of husband and wife.

Application for an order for alimony *pendente lite.*

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

*J. S. McArthur, K.C,* for the respondent.

DOUGLASS, J.: This is an application for alimony by the respondent pending the suit, and the respondent herself with other witnesses gave evidence in support of her application under Rule 37 of Rules of Court (Matrimonial Causes), 1921. The power of the Court to make an interim order for payment of money by way of alimony is contained in section 17 (3) of the Matrimonial Causes Ordinance, 1916, and in the Rules made under section 44 of the said Ordinance.

In *Miles* v. *Chilton* (1849. 1 Rob. Eccl. 700) it was laid down that it was a well established principle of law that when the fact of marriage is established, alimony follows as a matter of course, except where the wife has means of her own, sufficient for her condition of life and proportionate to the means of her husband.

The petitioner has filed no statement showing his means, but has submitted his books which have been examined by the Accountant of the Court who obtains from them an approximate income for 1916 only, amounting to between $300 and $400 a month, Mrs. Bradford has satisfied me that she is able to obtain an average income of $25 a week in the U.S.A., but there is no evidence as to her income here.

The amount of alimony *pendente lite* allotted is usually fixed at one-fifth of the joint income of husband and wife so that I fix the alimony to be paid by the petitioner at $35 a month, to be paid the respondent personally, or, in the case of her absence, to a trustee to be named by her and approved by the Court, and to date from the service of the citation on the 22nd September, 1926.

The applicant is entitled to her costs of her application.

Solicitor for the applicant: *A. Ogle.*

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

WOEJEERAN, Appellant,
AND
JAGDAI, Respondent,

[No. 292 OF 1926.]

1927. MARCH 25; APRIL 1. BEFORE DOUGLAS, J., AND GILCHRIST, Actg. J.

*Magistrate's Court—Civil Jurisdiction—Claim for a sum less than one hundred dollars on a balance of account—Petty Debts Recovery Ordinance, 1893, section 3 (1) (a) and (2)—Married woman plaintiff—Magistrate's Court Rules, 1911, r. 1—Whether such claim is made in a representative capacity—Meaning of term "representative capacity"—Magistrate's Court Rules, 1911, r. 20—Defence not taken at trial—Whether amendment will be allowed to permit of same being taken on appeal.*

Section 3 (1) (a) of the Petty Debts Recovery Ordinance, 1893, provides that all actions for the recovery of any debt or demand where the amount claimed whether on balance of account or otherwise is not more than one hundred dollars may be commenced in the Court,

and section 3 (2) that where in any action the debt or demand claimed consists of a balance not exceeding one hundred dollars after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the Court shall have jurisdiction to hear and determine such action.

*Held,* That where the plaintiff's claim was for the balance of an account section 3 (1) applied and there was no necessity in such a case for an admitted set-off.

A woman married before the coming into operation of the Married Persons Property Ordinance, 1904, sues under certain conditions, it is true, but she does not do so in a representative capacity but *in proprio nomine*.

The term "representative capacity" in rule 1 of the Magistrate's Court Rules, 1911, refers to such persons as executors, administrators, trustees and the like.

The Court of Appeal will not allow an amendment for the purpose of taking a defence not raised in the Court below where no satisfactory explanation is given for the omission.

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

*E. M. Duke and Mungal Singh,* for the respondent.

The judgment of the Court was delivered by DOUGLASS, J.: This is an appeal from the decision of the Stipendiary Magistrate of the Georgetown judicial district who gave judgment for the respondent (the plaintiff) for $95 and costs on his claim for balance of account for money lent to the appellant (the defendant).

The first objection taken in the reasons of appeal 1 (a) that the magistrate had no jurisdiction, is not sustainable. The respondent claimed a balance of account under section 3 (1) (a) of the Petty Debts Recovery Ordinance and there is no such limitation set to it as in sub-section 2 of that section, "after an admitted set-off." The amount is claimed on a balance of account for a sum brought within the prescribed limits after payments received and the plaintiff has to prove his claim in the usual manner, the case

of *Luckjoy* v. *Cole* (1894. 2 Q.B.D. 861) has no special application as it relates to an "admitted set-off" as also the local case of *D'Aguiar* v. *Monteiro* (2nd April, 1902). The Court is of opinion that the Magistrate's Court did not exceed its jurisdiction, as alleged in reasons of appeal '2.'

The third ground of appeal is that there was no evidence (a) that the plaintiff was a sole trader so as to give her *locus standi in judicio*, or (b) that the contract sued upon was one made in the course of the plaintiff's trade as such sole trader.

Mr. Duke for the respondent referred to rule 1 of the Magistrates' Court Rules, 1911, "if any plaintiff sues. . . . . "in any representative ca- "pacity it shall be expressed in the statement of claim or plaint. The repre- "sentative capacity of the plaintiff. . . . . mentioned in the statement of "claim shall not in any case be in issue unless the same be expressly de- "nied," and he relies on this as effectually preventing the defendant from raising the question at the present time whether the plaintiff was a married woman or a trader, as it was no part of the defence. I do not think the plaintiff is within the scope of this rule for the following reasons: the law recognizes two classes of persons as possessing rights (1) natural persons, and (2) artificial persons, and under the first division it gives certain rights to persons (a) suing in *forma pauperis*, (b) suing in a representative capacity, (c) under some disability, (d) privileged. Persons suing in a representative capacity are principally (a) executors and administrators, (b) trustees in bankruptcy. Persons under qualified disability are (a) infants, (b) married women and (c) lunatics.

In the case of *DeFreitas by his attorney* v. *Mendonca* (B.G.L.J. 26.8.11) an objection was raised that Order 4, Rule 4 had not been complied with as the endorsement did not show in what capacity, the plaintiff, who, it is alleged, sued in a representative capacity, did so sue, and Hewick, acting C.J., in his decision, stated "the plaintiff is not suing in a "representative capacity, he sues by his attorneys in his individual capacity. "A representative capacity means executor, administrator, trustee, and such "like." The rule in question is evidently only meant to deal with such representation and not with persons under qualified disability. The respondent as a married woman could not sue except under certain conditions, she represents herself as having qualified under those conditions and sues *in proprio nomine*.

Rule 1 then has no application to this case in any way, but rule 20, also referred to by Mr. Duke is more to the point. It reads: "it shall not be suffi- "cient for a defendant in his defence to deny generally the claims contained "in the plaint, but he must state clearly and specifically the ground or "grounds upon which he

"relies by way of defence." The magistrate's notes of the defence read, deny each and every allegation in the claim. "Deny specifically having any "money transactions with plaintiff at any time whatever. Further says this "claim is speculative." No objection was taken that the plaintiff was not a woman married in community of goods or not trading in her own right, and such a defence cannot now be raised, to allow it would be to deprive the plaintiff of the opportunity she might have had in the Magistrate's Court of supporting her claim to sue, this point indeed has already been decided in *Hamia* v. *Atkins* (B.G.A.J. 17.6.06), that the Court cannot properly allow an amendment for the purpose of a defence not raised before the magistrate being raised on appeal, no satisfactory explanation of its not having been previously raised having been given (And see also *Fernandes* v. *McNiel*, L.R.B.G 1918, p. 112).

The magistrate found that the weight of evidence was sufficient to support the plaintiff's claim and the Court is not satisfied that such a finding was unreasonable. The appeal is dismissed with costs.

GILCHRIST, J.: I concur.

Solicitor for the respondent: *W. Dinally.*

# VIEIRA *v.* CORREIA.

[No. 263 OF 1925.]

1927. MARCH 28; APRIL 11. BEFORE DOUGLASS, J.

*Chose in Action—Assignment thereof by parol—Equitable assignment—Notice to debtor—Whether notice need be in writing.*

Section 16 of the Civil Law of British Guiana Ordinance provides that "any absolute assignment, by writing under the hand of the assignor . . . . . of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action shall be effectual in law to pass and transfer the legal right to such debt or chose in action from the date of such notice."

*Held,* That the said section does not forbid or destroy equitable assignments or impair their efficacy, for where the rules of equity and the rules of common law conflict, the rules of equity are to prevail.

Where an equitable assignment of a chose in action is made and the debtor or fund-holder has notice thereof the fact that such notice was not in writing does not render the assignment invalid.

The facts appear in the judgment.

*McL. Ogle* for the plaintiff.

*E. M. Duke* for the defendant.

DOUGLASS, J.: The plaintiff as administrator of his wife's estate claims from Mary Correia, the sole executrix under the will of her late husband John Correia, an inventory and account of her dealings with his estate and such other order as the Court may deem just.

It is admitted on the pleadings that the late Eliza Clarice Vieira was one of twelve children born to Mr. and Mrs. Correia and that Agnes Leonilda Vieira is the only child of the said E. C. Vieira and the plaintiff, and entitled under the will of the said J. Correia to a share in one-half of his real and personal property.

It further appeared in the course of the hearing that the plaintiff did not deny that the said share of his late wife in the said estate was valued at, and is now represented by, a sum of $550. This sum, the defendant acting on the advice of her counsel, has paid into Court, consequently an inventory and account is no longer demanded, and the only question to be decided by the Court is whether the said sum of $550 should be paid over to the plaintiff as administrator of his late wife's estate, or whether—as alleged by the defence—a trust of that amount in favour of the said A. L. Vieira was bona fide created by her mother the said E. C. Vieira and is valid against the claim of the plaintiff to have the amount paid over to him.

The evidence of the defendant supported by her son Emanuel Correia goes to prove that when the said A. L. Vieira was born on the 15th March, 1925, the defendant was in constant attendance on her daughter who became seriously ill at the time. On the 20th of March the said E. C Vieira told her mother (the defendant) that if she died she must take the baby and keep the money due her from her father's estate for the baby (the said A. L. Vieira), and the defendant agreed to bank the money for the child. And again on the 23rd March her daughter repeated she must take baby and put up the money for her. On the 25th March the said E. C. Vieira died and the defendant took the child home with her, and only returned it to the father when he married again on the 7th July, 1926. There is no evidence to the contrary of these facts, all that the plaintiff's witnesses prove being that they were not aware of any such request or desire on the part of the said E. C. Vieira.

Now the right of the said E. C. Vieira to her share in the estate of her late father at the time of her death was a chose in action, a term which includes all personal chattels which are not in possession, and her intention to transfer it, if effective at all, was in the nature of a declaration of trust and not a *donatio mortis causa,* the latter would certainly have been ineffective as amongst other conditions to render it valid the gift must have been of chattels actually delivered to the donee or to some one for the donee's use.

Counsel for the plaintiff contended that such a declaration of trust must be in writing and referred to (1) section (4) (e) of the Civil Law Ordinance of 1916, but this section does not affect the trust of pure personalty, and (2) section 16 of the Civil Law Ordinance, which directs that "Any absolute "assignment, by writing under the hand of the assignor . . . . . of any debt or "other legal chose in action, of which express notice in writing shall have "been given to the debtor, trustee, or other person from whom the assignor "would have been entitled to receive or claim such debt or chose in action, "shall be. . . . . effectual in law . . . . . to pass and transfer the legal right to "such debt or chose in action from the date of such notice." This section is similar to section 25 (6) of the Judicature Act, 1873.

In 1862 it was laid down in *Milroy* v. *Lord* (4 D. F. and J. 264) that it was well settled law "That in order to render a voluntary settlement valid "and effectual, the settler must have done everything, which, according to "the nature of the property comprised in the settlement was necessary to be "done in order to transfer the property and render the settlement binding "upon him," and "that the Court of equity will not make perfect an imper-"fect gift." In *Harding v. Harding* (1886, 17 Q.B.D. 442) Wills, J.

in the course of his decision, said: "When the subject matter of the transact-"tion is an equitable right or estate and the legal title cannot be given, then "if the settler has done all in his power and nothing remains to be done by "him equity regards it as though he had completed the legal title, and gives "effect to his intention."

In *Brandts & Company v. Dunlop Rubber Company* (1905. A. C, 454) it was held that section 25 (6) of the Judicature Act, 1873, does not forbid or destroy equitable assignments or impair their efficacy, for where the rules of equity and the rules of the common law conflict, the rules of equity are to prevail.

It is indeed true that no notice in writing was given to the said M. Correia, but it has been held that the mere fact that notice of assignment of a debt was not given to the debtor does not render the gift incomplete (Re Patrick. 1891. 1. Ch., 82), and it is stated in *Griffin* v. *Griffin* (1898. 1 Ch., 408) that "the test is whether anything remains to be done by the donor, "and the fact that notice was not given to the bank does not render the gift "incomplete, although the omission to give notice might under some cir-"cumstances enable a better title to the subject matter of the gift to arise in "a third person." In this case however I am of opinion that as the said M. Correia had parol notice of the intention to create a trust in favour of the said A. L, Vieira and assented to take up the obligation the Court would in exercise of its equitable jurisdiction regard the said A. L. Vieira as the *cestui que* trust of the said E. C. Vieira, and that the title to the equitable interest in the $550 became complete upon the said M. Correia accepting the trust. Such a declaration of trust is in equity equivalent to a transfer of the legal estate at law and if the transaction by which the trust is created is complete it will not be disturbed on the grounds that it is voluntary or by parol. Judgment will therefore be given for the defendant but in the circumstances each party will have to bear their own costs.

Solicitor for plaintiff, *A. McL. Ogle.*

Solicitor for defendant, *S. W. Ogle.*

SEARS *v.* MENEZES.

[No. 269 OF 1925.]

1927, APRIL 12, 26. BEFORE GILCHRIST, ACTG. J.

*False imprisonment—Arrest by private individual—In what cases warranted—Pointing out accused person to police officer—Whether that per se renders person pointing out liable for subsequent arrest by officer.*

(*Semble*) The mere pointing out by A. to a police officer of a person suspected of having committed a crime does not *per se* render A. liable for the subsequent arrest of that person.

A private individual is entitled to arrest a person when he has reasonable grounds for suspecting that a felony has been committed and that the person arrested has committed it.

The facts of the case appear in the judgment.

*A. V. Crane* for the plaintiff.

*E. F. Fredericks* for the defendant.

GILCHRIST, J.: The plaintiff's claim is for $250 damages for assault and false imprisonment on and of the plaintiff by and at the instance of the defendant on or about the 17th May, 1925.

2. In paragraph 2 of the statement of claim the plaintiff alleges that the defendant caused the plaintiff to be imprisoned on the false charge made by the defendant that the plaintiff had stolen from the defendant one canary and cage of the value of $1.44.

3. In the course of the hearing plaintiff tendered in evidence a certified copy of the charge and certificate of dismissal of the said charge.

4. The said charge is by Corporal of Police No. 2468 Luke, who charged the plaintiff and one Ernest Phillips jointly with the larceny of a cage and a canary being ordinarily kept in a state of confinement for amusement, the property of the defendant.

5. After due trial Phillips was convicted and the charge against plaintiff dismissed. It may be well to here point out that the charge as laid was bad for duplicity in that it alleged the commission of the offence of simple larceny (the cage), and a statutory offence (stealing a bird ordinarily kept in a state of confinement for amusement, section 85 of Ordinance 17 of 1893).

6. The evidence of the plaintiff is that on Sunday, the 17th May, 1925, the defendant came to where he lives and held him and said "Come, you steal my bird," that he refused to go. The defendant then pulled him along and over a bridge on to the road and handed him over to rural constable Thompson who took him

to Stewartville police station. He there saw Ernest Phillips who in his presence told Corporal Luke that (he) plaintiff wrote a note for him and he (Phillips) so got the bird and cage. He and Phillips were then put in the lock-up. It was then about 9 a.m. At 5 p.m. the same day he was released on bail and on the Wednesday following he appeared before the Magistrate at Stewartville Court and the charge against him dismissed.

7. The evidence of the plaintiff is supported by witnesses called on his behalf.

8. For the defence the evidence of the defendant is that he kept a canary bird in a cage, that on Saturday night, 16th May, 1925, on his return home his wife told him something. In consequence, on the following morning he went to rural constable Thompson and made a report. He and Thompson then went to Phillips' house. On their arrival he saw Phillips leaving the house with his cage and told Thompson to take him to Stewartville Police Station to make enquiries about the cage and bird. The three then went to the station. Phillips told Corporal Luke who was then in charge of the station that Sears (plaintiff) was connected with the matter. Up to then he knew nothing about Wilfred Sears and the matter. Corporal Luke then told rural constable Thompson to go and bring Sears to the station. Thompson told the corporal he did not know Sears. He (defendant) said he knew Sears. The corporal then told him to go with Thompson and point out Sears. He went with Thompson to where Sears lives, that they both went into the yard together and he pointed out Sears to Thompson who requested him (Sears) to come to the station and he did so.

9. The evidence of the defendant is supported by Corporal Luke and rural constable Thompson.

10. Mr. Crane for plaintiff submits that on the defence the defendant is liable as a person assisting in inflicting the injury on plaintiff. That Corporal Luke and rural constable Thompson had no power of arrest. That defendant in pointing out plaintiff as the person mentioned by Phillips at the station assisted in the arrest. I do not agree that the pointing out of a person to a police officer on his request is assisting in the arrest of a person but even assuming that it is, it is clear from the evidence that there were reasonable grounds of suspicion that a felony had been committed, namely, larceny of a cage and that the plaintiff was implicated in such felony. A private individual is justified in himself arresting a person or ordering him to be arrested where a felony has been committed and he has reasonable grounds of suspicion that the person accused is guilty of it (*Walter* v. *W. H. Smith and Son, Limited,* 1914. 1. K.B. 595). In the circumstances, not only had Corporal Luke and rural constable

Thompson full power to arrest the plaintiff but defendant also. The fact that Corporal Luke subsequent to the matter being brought to his notice laid a charge against plaintiff and Phillips for the larceny of the cage and the bird under the Summary Conviction Offences Ordinance, 1893, does not affect the position.

12. In my opinion on the evidence for the defence the defendant is not liable in damages. A like result follows even if the evidence for the plaintiff is accepted.

Judgment for the defendant with costs.

DE BRETTON, Appellant,
AND
CAMERON, Respondent,

[No. 106 OF 1927.]

1927. APRIL 29.

BEFORE SIR A. DEFREITAS, KT., C.J., DOUGLASS, J., AND GILCHRIST, ACTG. J.

*Criminal Law—Spirits Ordinance, 1905—Imposition of a maximum penalty by Legislature—Discretion to reduce given to Magistrate—Limits to discretion—Statutes—Canons of Construction—Spirits Ordinance, 1905, sections 93* (*1*) *and 122* (*3*).

Section 93 (1) of the Spirits Ordinance, 1905, says:—

"Every person unlawfully possessing spirits shall be liable to a penalty not exceeding five hundred dollars and a further penalty of two dollars for every gallon or part of a gallon of spirits so possessed and such spirits shall be seized and shall be forfeited."

With reference to "any charge or complaint that may be brought under *any* Excise Law" section 122 (3) of the said Ordinance enacts thus:—"In adjudicating on any such charge or complaint relating to a penalty it shall not be competent for the Magistrate, if he convicts the defendant thereunder to award a less penalty than one-fourth of that imposed by law."

*Held*, that the words "imposed by law" in section 122 (3) referred to the maximum penalty created by section 93 (1) and not to any shifting penalty that a Magistrate might award thereunder.

It is a cardinal rule of statutory interpretation that the words of a statute should be construed "*ut res magis valeat quam pereat.*"

Appeal from a decision of the Stipendiary Magistrate for the Berbice Judicial District who had imposed a fine of $48 on a conviction of the respondent for the offence of unlawful possession of spirits under section 93 (1) of the Spirits Ordinance, 1905.

*B. King,* Assistant to the Attorney-General, for the appellant.

*J. S. McArthur, K.C.,* for the respondent.

DEFREITAS, C.J.: The defendant was charged before a stipendiary magistrate with the offence of unlawful possession of spirits under section 93 (1) of Ordinance 1 of 1905, the Spirits Ordinance, 1905. He pleaded guilty. He was thereupon convicted and ordered to pay a fine of $48 or, in default of payment, to be imprisoned for five weeks with hard labour and also ordered to pay a further fine of $2 or, in default of payment, to be imprisoned for four days with hard labour. The magistrate says that the fines were "imposed under sub-section (3) of section 122 of the principal Ordi-"nance," that is, Ordinance 1 of 1905.

2. Section 93 (1) says:—

> "Every person unlawfully possessing spirits shall be liable to a "penalty not exceeding five hundred dollars and to a further pen-"alty of two dollars for every gallon of part of a gallon of spirits "so possessed, and such spirits shall be seized and shall be for-"feited."

3. With reference to "any charge or complaint that may be brought under *any* Excise Law," section 122 (3) says:—

> "In adjudicating on any such charge or complaint relating to a pen-"alty it shall not be competent for the magistrate, if he convicts "the defendant thereunder, to award a less penalty than one-"fourth of that imposed by law."

And section 2 of Ordinance 1 of 1905 says: "'Excise Law' means any "Ordinance or rule or regulation having the force of law for the time being "in force relating to spirits."

4. The complainant appealed on the sole ground "that the decision is "erroneous in point of law, as it was not competent for the magistrate to "impose a fine of less than one hundred and twenty-five dollars."

5. The Legislature in forty-nine sections of Ordinance 1 of 1905, from section 6 to section 113, prescribes penalties "not exceeding" a stated maximum sum (in two cases, as much as $2,000) for contravention of excise laws. In all the 49 cases the words "not exceeding" are employed, clearly showing that it is intended to give magistrates a power of mitigating punishment. Instead of adding to each of those 49 sections words restricting the extent of the power of mitigation, the Legislature, still speaking in the same Ordinance, goes on to limit that power by saying generally in section 122 (3) that upon a conviction for any offence under *any* excise law it shall not be competent for the magistrate to award a less penalty than one-fourth of that imposed by law. Although it is obvious that a restriction of the

mitigating authority is intended, yet it is now contended for the respondent in this case that by omitting the word "maximum" and thereby not saying one-fourth of the maximum penalty, the Legislature has frustrated its clear intention to limit the power of mitigation, and that the sub-section is consequently a nullity and inoperative. Counsel for the respondent is of opinion—and so is the magistrate—that "not exceeding" in section 93 (1) authorises a magistrate to order the payment of a penalty in any one of the 50,000 sums from one cent to $500; and that since sub-section (3) of section 122 does not mention the "maximum" penalty as the penalty imposed by law, when it purports to fix the "minimum" penalty at one-fourth of the penalty "imposed by law" then the sub-section is inoperative, and it must be ignored for being meaningless and absurd. Counsel sought to show its absurdity by contending that the penalty "imposed by law" is not only the $500 prescribed by section 93 (1), but it is any one of the 50,000 penalties that shall have been ordered by the magistrate within the ambit of the words "not exceeding"; and that if the magistrate exercised his authority to order the payment of a penalty of one cent it would be absurd to think that a penalty of one-fourth of a cent could *then* be ordered or recovered under section 122 (3). Counsel refrained from discussing a suggestion that the penalty "imposed by law" should be taken to mean a constant factor, such as the $500 in section 93 (1) and not one of the various sums that a magistrate might hit upon; and he also avoided a suggestion that "imposed by law" might operate to prevent the occurrence of the possible absurdity of measuring one-fourth of the cent, or of any other of the various sums, *already awarded* by a magistrate under section 93 (1) as the punishment for an offence, so as to arrive at the proper sum *to be awarded* by the same magistrate under section 122 (3) as the punishment for the same offence. It seems to me that counsel has given us a modern instance of the old *circulus inextricabilis* and that whatever absurdity there may be is not in the enactment.

6. It is a cardinal rule in the construction of statutes that the whole of an Act of Parliament must be regarded, so that language used in an enactment must be construed in the light of the context in which it appears, to avoid an absurdity or nullity. A County Court Act having provided that where in an action of contract in the High Court the claim does not exceed £100 a judge in chambers might order the action to be tried "in any court in which the action might have been commenced, or some court convenient thereto," it was argued for an appellant against such an order that the provision could not apply to an action for a sum between £100 and £50 such as was claimed in the action

in the appeal, for such an action could only have been commenced in the High Court. Counsel for the appellant, in countering a suggestion as to absurdity, submitted that there was no absurdity in the provision, for the only effect was to limit the power of transfer to actions in which an amount not exceeding £50, is claimed. In his judgment Bowen, L.J., said:—

> "The rules for the construction of statutes are very like those which "apply to the construction of other documents, especially as re- "gards one crucial rule, viz., that if it is possible, the words of the "statute must be construed *ut res magis valeat quam pereat.* I "propose to apply that rule in the present case. If we were to hold "that under section 65 the judge has no power to order that an ac- "tion shall be tried in a county court unless it is an action which, "as regards the amount claimed, might have been commenced in "a county court, we should be making nonsense of the section. "We must avoid such a construction if the language will admit of "our doing so. . . In order to give a sensible meaning to the "words some addition must be made to them, because the action "being, by reason of the amount claimed, a High Court action, it "could not have been commenced in a county court. I think we "must introduce some words to this effect 'if it had been a "'county court action'; and then the section will read 'in any "'court in which the action, if it had been a county court action, "'might have been commenced.' That will make the section sen- "sible. The selection of the particular county court is to be made "with regard to those county courts in which, if the action had "been a county court action it might have been commenced or "some court convenient thereto. On the ground that the words of "the section clearly refer to a choice which is to be made among "county courts, I think that the judge at chambers took a right "view of the section."

In the present case before us the words "a less penalty than one-fourth "of that imposed by law" do not give rise to so much difficulty as did the language interpreted by Lord Justice Bowen. It is clear that our section 122 (3) intends that no excise penalty shall be mitigated without limit and that it intends that the minimum penalty of one-fourth of some definite sum prescribed by an enactment (imposed by law), shall be the limit of mitigation; so, to avoid unreasonable doubt of its meaning, the subsection might be read as saying "a less penalty than one-fourth *of the maximum* of that "imposed by law." But in my view it is

not necessary to read the word "maximum" into it, for that meaning is already clear from the sub-section as it stands.

7. I am not unmindful of the rule that a penal statute shall be construed strictly, but that rule requires no more than that the language must be so construed that no case shall be held to fall within it which does not fall both within the reasonable meaning of its terms and within its scope. That sense of the words is to be adopted which best harmonises with the context and fulfils the policy and object of the Legislature. In penal enactments the Courts have many times filled up a lacuna by supplying words. Thus in *Williams* v. *Evans,* where the appellant was convicted of furiously riding a horse on a highway under section 78 of the Highway Act, 1835, which enacts that "if any person riding any horse or driving any sort of carriage, "shall ride or drive the same furiously, every person so offending shall for "every such offence forfeit any sum not exceeding £5 in case such driver "shall not be the owner of such wagon, cart or other carriage, and in case "the offender be the owner of such wagon, cart or other carriage, then any "sum not exceeding £10," the Court confirmed the conviction notwithstanding that the word "rider" was not mentioned in the penal part of the clause. They read in the word "rider" so as to avoid a manifest absurdity and to carry out the intention of the enactment. They construed it *ut res magis valeat quam pereat.*

8. The arguments for the respondent that have been addressed to us are in my opinion entirely lacking in merit. They do no more than raise a futile logomachy, a trivial battle of words. I think it would be well for all concerned to bear in mind Baron Piatt's advice in Garby's case, that "Acts of Parliament must be construed with a candid mind, and with an intention to understand them."

9. In my view the true construction of section 122 (3) of Ordinance 1 of 1905 is that it restricts a magistrate's authority to mitigate punishment and makes him incompetent to award a less penalty than one-fourth of the maximum penalty prescribed by any law. I agree with the appellant's ground of appeal.

10. I think that this appeal should be allowed and that the case should be remitted to the magistrate with directions to him to convict the defendant and, under section 122 (3) of Ordinance 1 of 1905, to award as penalties a sum not less than one-fourth of the maximum penalty of $500 and also the sum of $2 prescribed by section 93 (1).

DOUGLASS, J.: I agree with the decision contained in the judgment of the Chief Justice and for the reasons set out therein. I have already expressed my opinion on the construction of

section 122 (3) in the case of *Sheik Bahadour* (appellant) *and Benn* (respondent), before the Full Court on the 18th February, and my opinion is strengthened on a reference to the Summary Conviction Offences Ordinance, 1893, section 13. That section declares that the Court may adjudge any person convicted before it of a summary conviction offence to any less penalty than the "penalty prescribed" by the ordinance for such offence, this only applies however to offences punishable under that ordinance, so that in fixing a penalty for offences arising under the Spirits Ordinance, 1905, it was necessary to insert the words "not exceeding" in order to give the magistrate a similar power. The penalty prescribed by section 93 (1) is $500, and the expression "imposed by law" used in section 122 (3) can only refer to the penalty prescribed, and not to the discretionary power of the magistrate to reduce it.

GILCHRIST, J.: I agree.

## *Re* KHUSIHAL, *Ex parte* RAMDULAR.

INSOLVENCY.

[No. 2 OF 1927.]

1927. APRIL 26, 27. MAY 3. BEFORE GILCHRIST, ACTG. J.

*Insolvency—Petition for receiving order—Debt due partly on mortgage deed—Estimated value of security stated in petition—No evidence thereof given at hearing—No notice challenging its correctness given by debtor—No mention of interest in petition—Mortgage deed providing therefor—Whether liquidated sum within section 5* (*i*) (*b*) *of the Insolvency Ordinance 1900—Amendment—Powers of Court—Observations on the nature of bankruptcy proceedings.*

A creditor filed a petition praying for a receiving order against a debtor, his claim being based *inter alia* upon sums due under a mortgage deed. In the petition the creditor valued his security at $1,500 but no evidence thereof was given at the hearing. The debtor had not given notice of intention to challenge the correctness of the creditor's said estimate. The petition made no reference to nor was any evidence given of interest due under the mortgage deed but the deed provided therefor at the rate of 6% per annum.

*Held*, (*a*.) That where the debtor raises a point at the hearing of which no notice has been given, if the debtor does in such case require proof of material matters which proof is not forthcoming, it is the practice of the Court to grant an adjournment in order that such proof may be given, and accordingly the Court would in this case, if necessary adopt such a course for the purpose of enabling the petitioner to prove the correctness of his estimate of his security.

(*b*.) That as it was clear from the mortgage deed that interest was due thereunder, the Court would, in the exercise of its powers of amendment, permit the petition to be amended by stating the amount of interest due

(*c*.) That the mortgage deed having fixed the interest at 6% per annum such interest was a matter of calculation and therefore a liquidated sum within the meaning of section 5 (1) (b) of the Insolvency Ordinance, 1900.

It is difficult to say that bankruptcy proceedings are in any sense criminal now that a debtor may petition against himself.

*A. B. Brown* for creditor.

*J. A. Luckhoo, K.C.,* for debtor.

GILCHRIST, J.: 1. Petition by Ramdular for a Receiving Order against Khusihal.

2. At the close of petitioner's case Mr. Luckhoo for the debtor submitted that the Court could not make an order on the petition on the grounds:

(a) That no evidence was given that the petitioner is willing to surrender his security, or that he gave any estimate of the value of the security held by him.

(b) That even if petitioner had given an estimate of the value of his security, he has not given evidence of the interest on the mortgage, in fact he has not stated interest in his petition at all.

(c) That he has founded his right to petition on debt of $1,726.80 being *firstly* $1,248, capital of the mortgage and *secondly* $478 80, balance due for money lent.

(d) Even had he stated interest on the mortgage and/or given evidence as to such it would be contrary to section 5 (1) (b) of the Insolvency Ordinance, 29 of 1900 (hereinafter referred to as the Ordinance) as such would not be a liquidated sum payable immediately or at some future time.

(e) That petitioner's claim is in respect of a debt ($1,248) and balance of loan $478.80, that he has made allegations as to one debt ($1,726.80) and that if the estimated value of his security, namely $1,500, is deducted from such debt there remains a sum of $226.80 which is an amount less than $240 and secured therefore insufficient to found a petition.

3. As regards (a) the petitioner in paragraph 4 of his petition states: "I estimate the value of such security at the sum of $1,500." It was, however, not elicited from him in evidence that he so estimated the value of his security. There is nothing in section 6 (2) of the Ordinance requiring a petitioner to prove on the hearing of the petition the estimated value of the security held by him as a condition precedent to the Court making a Receiving Order in pursuance of the petition. Assuming, however, that it is incumbent on the petitioner to do so, *re* Sanders (1 Mans. 382) is very much to the point. In that case Vaughan Williams, in the course of his judgment, said "where the debtor raises a point at the hearing of which no notice has "been given

". . . there is no express provision in the rules but in practice if the debtor "does in such a case require proof of material matters and such proof is not "forthcoming, the Court will grant an adjournment in order that the proof "may be given" and later "If the Registrar in the exercise of his discretion, "says he does not wish for proof of such matters outside the notice he may "do so,—he is acting within his discretion. But on the other hand, I should "not like it to be supposed that the petitioner may go to the Court thinking "he need not prove anything which the debtor has not given him notice to "prove, and I say that because bankruptcy is a quasi-penal proceeding and "must be treated strictly." This decision rather gains in strength by the statement of the same judge *in re* X.Y. *ex p.* Haes (1902. 1 K.B. 98). "Since 1869 the nature of bankruptcy proceedings has been considerably "altered. It is difficult to say that bankruptcy proceedings are in any sense "criminal now that a debtor may petition against himself." In his notice of objection under rule 125 the debtor takes no specific objection to the petitioner's estimate of the security held by him, and I should if and when necessary allow the petitioner to be recalled to remedy the omission.

In *ex p.* Vanderlinden (20 Ch.D. 289) it was held the omission of a statement in the petition of willingness to estimate the value of the security is merely a formal defect and will be amended by the court. Such power being vested in the Court I am of opinion that it has also the power to permit the recall of the petitioner to give such evidence. See also *re* a Debtor (1922.2 K.B. 109).

4. As regards (*b*), (*c*), (*d*) and (*e*) I am satisfied from the petition and the evidence of the petitioner that petitioner claims interest on the mortgage deed in addition to the capital sum of the mortgage ($1,248) and balance of loan ($478.80). It, however, is not stated in the petition nor was any evidence led as to the actual amount of interest due and payable at the date of the filing of the petition.

It is clear from the mortgage deed produced in evidence that interest is payable at 6 per cent. per annum. In my opinion the petitioner is entitled to have the amount of interest due on the mortgage at the time of the presentation of the petition added to the capital sum due under the said mortgage (*in re* Lehmann, 7 Mor. 181).

The evidence of the petitioner is that from the date of the passing of the said mortgage (12.5.1923) to the present time no interest has been paid thereon. The interest, therefore, from such date to the 23rd February, 1927, the day previous to the filing of the petition, is a matter of calculation and is a liquidated sum within the meaning of section 5 (1) (b) of the Ordinance.

The correct course appears to me to be that the Court should in accordance with the powers of amendment conferred by section 89 (3) of the Ordinance, allow the petition to be amended to state the amount of interest due and payable on the date previous to the presentation of the petition. The debtor would suffer no injustice by such amendment more especially as no receiving order has yet been made. Further that he could by calculation ascertain from the petition itself the true amount of interest (See *in re* Johnson (25 Ch. D. 112).

5. I therefore make an order that the petitioner make the necessary amendment to the petition within ten days, and adjourn the matter for the amended petition and affidavit in support thereof to be reserved.

The question of costs is reserved.

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

Solicitor for debtor, *L. Ramotar.*

FERNANDES, Applicant,

AND

DA SILVA, Respondent.

[No. 110 OF 1926.]

1927. MARCH 29, 31; MAY 3. BEFORE DOUGLASS, J.

*Costs—Election Petition—British Guiana Constitution Ordinance, 1891, section 129—Nature of petition—Not action proper hut assimilated thereto—Power to award costs—Rules of Court, 1900, Order 46, rr. 1, 16 (a)—Supreme Court Ordinance, 1915, section 47—Review of taxation—Necessity for giving reasons for objections to items—Rules of Court Order 46, r 9—"Qualifying fee"—Costs of an issue disallowed—Effect on expenses of witnesses summoned to prove said issue.*

An Election Petition brought under section 129 of the British Guiana Constitution Ordinance, 1891, although not an action, is by the said section assimilated thereto.

Order 46, r. 16 (a) empowers the Court to give special directions as to costs in such cases. Independently thereof, the question of costs is by virtue of section 47 of the Supreme Court Ordinance, 1915, in the discretion of the Court.

Any party who seeks a review of taxation must in his notice of objections state the grounds and reasons therefor.

"Qualifying fee" means expenses properly incurred in procuring the evidence and is peculiarly within the discretion of the taxing master. Where the costs of an issue are disallowed, the expenses of witnesses summoned to give evidence in support of that issue are not taxable.

Application for a review of taxation.

*E. F. Fredericks* for the applicant.

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

DOUGLASS, J.: The application for a review of taxation in this matter is grounded on reasons very similar to those put forward in the matter of the petition of J. A. Laing against J. Dodds (No. 116 of 1926) on which I gave my decision the 12th February, 1927.

I then expressed my considered opinion that the judge is empowered to award costs on such petitions, and to give such special directions as may be necessary to enable the Registrar to tax the costs on what is referred to as the 'higher scale,' that is under Appendix I, Part 1 (b) to the Rules of Court, 1900, and I have heard no argument on the present application to induce me to change that opinion. I may add that Mr. Fredericks admits that the Court might direct items to be taken out of each subhead (a), (b), and (c) in the schedule contained in Appendix I, Part 1, but says that no sub-head may be adopted in its entirety, he however states no grounds for this view, and as I said before there is no necessity to define the scale to be adopted and less the selections of items, as it has been the acknowledged still long established practice to tax the costs of election petitions under sub-head (b). (See *Luard v. Farnum,* 1892, and *Boodhoo* v. *Da Silva* 1922). It is indeed common ground that the trial of an election petition is not an "action," but under section 129 of the British Guiana Constitution Ordinance, 1891, the judge is to have the same powers, jurisdiction and authority as if it were an action, and even if this were not held to include the power in the Court to award costs under Order 46, Rule 1, there still remains Rule 16 (a) of Order 46 to cover the cases of "proceedings" not being an "action," and under section 47 of the Supreme Court Ordinance, 1915, subject to the . . . . . "Rules, the costs of and incident to any proceeding in the Court shall be in the discretion of the Court or judge."

I therefore disallow objections Nos. 1, 2 and 3 contained in the notice for review.

A preliminary objection was taken to each of the grounds for review numbers 4 and 5, and these objections I upheld to number 4 because the fees are a question of quantum and are for the Taxing Master to decide (See in estate of Ogilvie (1910. P.D. 243), and to number 5, because no reasons are given for the allegation that the amount awarded is wrong (Order 46, Rule 9), and it is impossible to say that the Taxing Master did not exercise his discretion, or acted on some mistaken principle.

The sixth ground taken is that certain items set out are not just and reasonable charges, because

(*a*) travelling by train could have served the purpose in each case expenses of car were allowed.

(*b*) witnesses testified that they were not "experts" and should therefore be paid at the rate of $2 per day and not $5 per day as allowed, and

(*c*) the amounts charged for their visits were unreasonable having regard to the time spent on the visits, the nature of the visits, and their not being experts, or specially trained in coconut cultivation.

Unfortunately under the practice and rules prevailing in this colony in cases of appeals from taxation of costs there is the greatest difficulty in arriving at any decision fair both to the Taxing Master and the party appealing, owing to the Court being without any knowledge of the real facts or materials for determining them and being asked to act on assumption only in most cases. In England the mode of procedure on questions of this kind is this: the Taxing Master has to make his certificate; the party dissatisfied has to carry in objections to the certificate; the Taxing Master has to answer the objections, and then the dissatisfied party appeals.

It is the duty of the Taxing Master to look into the evidence offered when any question arises and make necessary enquiries such as, were the attendances of such and such witnesses necessary? Did he attend solely to give evidence? and I must take it that he has done so in this case. How is it possible for me to say that the hire of cars, or that the amount charged for each visit was unreasonable?

With regard to the objection to certain witnesses appearing as "experts" it is stated in the footnote to sub-head (d) "Allowance to witnesses "of Appendix I, Part 1, in the case of professional, scientific, or expert wit-"nesses the taxing officer may allow such just and reasonable charges and "expenses as appear to have been properly incurred in procuring the evi-"dence and the attendance of witnesses"; the fee attaching for each day's attendance of such a witness being $5.

The qualification of such a witness is based on his competency to form an opinion acquired by a course of special study or experience in the subject on which he is to give evidence. Here again I am met by the difficulty of forming any opinion on the qualifications of the various persons objected to as "experts," it might be I should not consider some one or more to be expert witnesses but the Taxing Master who has had the evidence before him and has seen the witnesses' receipts for the various amounts paid them apparently says that they are experts, and it is within his discretion as to the *quantum.* With respect to a "qualifying fee" . . . . . which term I hold is covered by the expression "expenses properly incurred in procuring the evidence . . . ." it has been held that the amount of such fee is peculiarly within

the discretion of the Taxing Master, and also that a "qualifying fee" for the purpose of procuring evidence may be allowed on taxation even though the witness is not an expert or scientific witness.

I cannot therefore see my way to finding that any of the items included under Reason 6 are not just or reasonable, with the exception of items 137 and 142 which I refer to in the next paragraph.

The last objection number 7 is that "the allowance of costs for fraud "was not sufficiently considered by the Taxing Officer both in respect of "certain witnesses and of the fees for the appearances of counsel." In giving his decision on the petition the learned judge concluded "the allegation "of fraud not being proved and unnecessary I disallow costs to the peti-"tioner on that issue but he is entitled to his costs on the remainder of his "petition. Costs of two counsel allowed." The only paragraph in the petition alleging fraud is the last half of paragraph 7, "the said alleged purchase "money $1,450 was never paid by the said P. A. Fernandes to the said "James Mitchell but the said James Mitchell under the purchase made from "the said Edward McTurk held the said Plantation Concord in trust for the "said P. A. Fernandes. No growing cultivation as required by law existed "on the said plantation on the 26th day of July, 1926, and the whole trans-"action was a fraudulent design intended to frustrate the law which requires "the possession of certain property qualification by persons nominated for "election and elected as members of the Court of Policy."

The case of *Barnes* v. *Wormsley* referred to by Mr. Fredericks was not to the point, the Taxing Officer did not refuse to consider the allegation of fraud in taxing the items, he allowed $25 for drawing the petition (Item 27), that it is true is the maximum fee but the Taxing Officer informs me that the allowance being in any event so small—in a case like this I feel inclined to say ridiculously small—he would not reduce it for the reason only that half of one of the paragraphs of the petition was superfluous and related to fraud, but in assessing the fees for appearance of counsel and their examination and cross-examination of witnesses (Items 104 and 105) the effect of the allegation of fraud was duly considered and allowed for in arriving at the figure fixed on taxation.

I note however that there were two witnesses, James Mitchell and D. Singh, who did not give evidence, but had they done so would, as part of their testimony, have supported the allegation that the respondent in seeking election was endeavouring to frustrate and evade the law. In the case of *Browne* v. *Houston* certain witnesses were called on two issues, one of which was

material to the question of express malice, it was found by the jury that there was no express malice and the Taxing Master on taxation of the plaintiff's bill of costs disallowed the costs of all these witnesses. The learned judge on appeal from the Taxing Master held that he rightly disallowed these costs although, as he remarked, the rule laid down that it is impossible to allocate any portion short of the whole cost to one issue rather than the other, may sometimes occasion hardship.

It seems that both the witnesses Mitchell and Singh fall within this rule and their costs must be disallowed. I accordingly remit the bill of costs to the Taxing Officer for him to cancel Items 137 and 142 and make the necessary alterations in the total.

The respondent must pay the costs of this review. I fix the costs at $20.

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

HONIBAL *v.* DE FREITAS, *et al.*

[No. 254 OF 1926.]

1927. APRIL 12, 13; MAY 16. BEFORE DOUGLASS, J.

*Conversion—Conduct of plaintiff inducing others to believe that property was that of his paramour—Standing by—Acquiescence—Estoppel.*

Where a person stands by and allows his property to be dealt with by another person as that person's he will not be permitted to assert his own title against a tide created by such other person although he derives no benefit from the transaction.

The facts of the case appear in the judgment.

*P. A. Fernandes* for the plaintiff.

*E. M. Duke* for the first-named defendant.

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

DOUGLASS, J.: The facts of this case so far as they are admitted and on which the evidence adduced has satisfied the Court are as follows:

The plaintiff Honibal and the second defendant Ide Abrams were living together as man and wife between the years 1922 and June, 1926. In January, 1925, the plaintiff was the owner

of a Buick car purchased from the first defendant and was desirous of exchanging it for a Dodge car which the first defendant offered at $1,650, the Buick to be taken back in part payment at a value of $725.

The negotiations for the exchange were carried out by the second defendant, the Buick car was brought to the first defendant's garage by a chauffeur on Saturday, the 24th January, and the Dodge car taken away by her on the 27th January (Tuesday). The second defendant came in it to the garage and paid $400 on account of the price, and a hire-purchase agreement was signed by her and the second defendant. On that same date apparently the second defendant told the first defendant that the plaintiff was agreeable that the value of the Buick car should go towards the price of the Dodge, and the next day, the 28th January, the plaintiff called at the garage and said it was all right, and again on 18th August, when the plaintiff gave the first defendant a receipt for $725 for the value of the Buick car, he received no cash but again instructed him (the first defendant) to put it to the hire-purchase agreement of Mrs. Abrams. On the same day the first defendant received a further sum of $100 from the second defendant and gave her a receipt for $825 which amount includes the $725 allowance for the Buick. On August 29th, November 11th, and December 4th, 1925, the first defendant received further payment of $100 each from the third defendant and gave her receipts and another $100 on 7th January, 1926, and a final $25 on 3rd February, 1926, the last receipt being given "in full payment of Dodge car agreement."

This agreement was then destroyed in accordance with the practice of the Central Garage at that time, so parol evidence of its contents was admitted and indeed the agreement is not contested. The printed form then used was put in, and it will be seen that until the final instalment was paid the car remained the property of the first defendant as the owner and on its payment the Dodge car was to become the property of the second defendant, the hirer. The number of the Dodge car was 1744 on the copy of entry in Register of Motor Cars dated 28th January, 1925, and the plaintiff is stated as owner. I am also satisfied that the licence for it was paid by the plaintiff in 1925 and 1926 and it is this car which is the subject of this action. On the 17th June the plaintiff and Abrams had some difference and on the 18th she left him and took away the Dodge car with her. The next day she went to the Central Garage and made a bargain with the first defendant to take over the car and let her have a Chevrolet in exchange, and the matter was concluded by a hire-purchase agreement on the 21st June, 1926, signed by both parties, the price of the Chevrolet being fixed at $885,49, $700

to be paid down, though as a matter of fact the Dodge was valued and taken over by first defendant for $700, so no money passed on that transaction.

The Dodge was resold by the first defendant on the 16th July for $750. He states: "If I had known there would be trouble I would not have exchanged the Dodge for the Chevrolet." Mr. Duke for the first defendant submits two cases in support of his contention that there is no case against his client, *Nicholson* v. *Hooper* (1838. 4 M. & C. 179) and *Cornish* v. *Abrington* (1859. 4 H. & M. 549), the former lays down that "a party "claiming a title in himself, but privy to the fact of another dealing with the "property as his own, will not be permitted to assert his own title against a "title created by such other person although he derives no benefit from the "transaction;" and the latter that the rule is, "that if a man so conducts him-"self, whether intentionally or not, that a reasonable person would infer "that a certain state of things exists and acts on that inference, he shall af-"terwards be estopped from denying it."

I am of opinion that the first defendant was fully justified in believing the second defendant to be the owner of the Dodge car and treating her as such and that the plaintiff by his conduct strengthened that belief. I therefore give judgment for the first defendant with costs against the plaintiff in respect of the claim against him.

There is more difficulty in deciding the liability of the second defendant. An attempt was made late in 1926 after the suit was started to come to some arrangement between the parties, but it failed and has no bearing on the suit. The car being registered in the plaintiff's name is some evidence of his then intention. On the other hand the second defendant had in January, 1923, a balance of $1,700 in the Colonial Bank and this can only be treated as her property in the absence of evidence to the contrary. The $400 paid by her towards the Dodge car was a portion of a sum of $500 she drew from the bank on 27th January, 1925, all the receipts for instalments paid are also in her name and must be taken to be correct. It is true that the running expenses and supplies were mostly paid for by the plaintiff but in view of their relationship this is not astonishing and the fact is not sufficient in itself to upset her claim to have been the owner of the Dodge car. Then again there is the incident in February, 1925, of Mr. Fredericks applying to the plaintiff for loan of the car, and his reply that he had nothing to do with it as it was Abrams' property, and the loan was refused by her.

On the whole the plaintiff has not satisfied me that he intended to remain the owner of the car and did not make a present of it to Abrams, at the best he has attempted to prove he was joint

owner with her, his conduct all through, until she left him, would certainly lead one to believe that she was the sole owner and it lies upon him to prove his claim not upon her to defend hers, he has not done so and I must give judgment for the second defendant with costs.

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

Solicitor for the defendants, *W. Soma.*

# OBERMULLER *v.* OBERMULLER.

[No. 439 OF 1925.]

1927. APRIL 20, 21; MAY 16. BEFORE DOUGLASS, J.

*Land—Conveyance to trustee—Distinction between "express" and "constructive" trusts—Whether trusts existed in Roman-Dutch Law—Civil Law of British Guiana Ordinance, 1916—Power of local Courts to administer English principles of equity in questions of immovable property—Prescription—No application in case of express trust—Statute of Frauds—Circumstances in which parol evidence of trust admissible—Part performance.*

(*a*) An express trust can only arise between the cestui que trust and the trustee. A constructive trust is one that arises where a stranger to the trust already constituted is held by the Court to be bound in good faith and conscience by the trust in consequence of his conduct and behaviour.

(*b*) Ideas derived from the English law of trusts have by practice and judicial decisions been engrafted on to Roman-Dutch Law.

(*c*) Section 3 (3) of the Civil Law of British Guiana Ordinance, 1916, which states that the English common law of real property shall not apply to immovable property in the Colony does not conflict with section 3 (2) thereof which states that the common law of the colony shall be the common law of Eng-land as of the date thereof including thereunder the doctrines of equity as administered at the date thereof, and accordingly local Courts can apply English doctrines of equity to transactions relating to immovable property.

(*d*)Section 4 (2) of the Civil Law of British Guiana Ordinance, 1916 which limits the time within which an action must be brought to recover immovable property has no application to an action against a trustee under an express trust, though it will be a bar in the case of a constructive trust.

(*e*) Possession taken before but continued after a parol contract for a lease coupled with expenditure on the land by plaintiff to defendant's knowledge may constitute part performance sufficient to take a case out of the Statute of frauds.

(*f*) Section 3 (4) (e) of the Civil Law of British Guiana Ordinance, 1916, provides as follows:—"That no action shall be brought whereby to charge any person upon (1) any lease of immovable property for a period exceeding one year, (2) any contract or agreement for the sale, mortgage or lease of immovable property or any interest in or concerning immovable property or (3) any declaration, creation or assignment of any trust relative to immovable property, unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised."

*Held,* That the above section (which corresponds to the Statute of Frauds) does not prevent the proof of fraud and it is a fraud on the part of a person to whom land is conveyed as a trust and who knows it was so conveyed to deny the trust and claim the land. Consequently, notwithstanding the statute parol evidence of the trust is admissible in such cases.

*S. Gomes* for the plaintiff.

*E. M. Duke* for the defendant.

DOUGLASS, J.: The plaintiff is claiming

(1) a declaration of title in himself to a piece of land having façade of four roods on the right bank of the Pomeroon River in the county of Essequebo, and being the northern portion of a piece of land containing 44.7 acres, granted to the defendant on the 3rd November, 1904, and which formed part of the original 34 acres owned and occupied by the plaintiff;

(2) an order that the defendant pass transport of the said piece of land containing four acres to the plaintiff;

(3) an injunction restraining the defendant from passing transport of the said piece of land to any person other than the plaintiff, or in the alternative;

(4) $1,500 damages for breach of an alleged agreement of or trust with reference to the said piece of land.

The facts of the case are very clear from the evidence led, the only material diversity of opinion being in the extent of the piece of land claimed, but whatever its dimensions it was admitted that the plaintiff is and has been since 1899 in undisturbed possession of the piece of land, in other respects the defence is purely on legal grounds, those shortly stated are (a) the agreement or trust (if any) between the plaintiff and defendant is unenforceable not being in writing, and (b) the alleged right of the plaintiff to a declaration of title is barred by prescription.

It appears that Charles Henry Obermuller, the father of the parties to this suit, had transferred to him on the 11th May, 1899, the unexpired portion of the lease of Crown land granted on the 2nd August, 1891, the plan attached to the licence and dating from August, 1868, shows a piece of land with a façade of 122½ roods on the east bank of the Pomeroon River and containing 100 acres. In stating that he bad acquired about 139 acres C. H. Obermuller is evidently in error, but may be he included a piece of land on his southern boundary lying between himself and one Van Sluytman, for apparently in applying for a grant of land in 1903 he included this portion. However that may be, on obtaining the lease he immediately divided the land between himself and his two sons, taking for himself the northern portion of 70 roods façade, and giving the plaintiff the next piece with 34 roods façade, and the defendant the southernmost piece with 35

roods façade; he states he measured his portion and that there was an old time middle walk dam between himself and his next son; the sons measured their portion and a trench was dug between them and a dam thrown up, and each son entered into his portion and cultivated it, and lived peacefully on their portions until 1925.

On the 25th of July, 1904, the father obtained the grant (37½ roods below Van Sluytman) of 100 acres, this included the 70 acres he had apportioned himself and 30 acres belonging to his son Charles, and a paal was inserted on the southern boundary, 4 roods to the north of the trench between Charles the plaintiff and James the defendant. To secure the balance of land lying between himself and Van Sluytman he next obtained a grant dated 7th November, 1904, for his son James of that portion, containing a façade of 44.7 roods; this is made up of the four roods claimed by Charles on his side of their boundary trench, James' original 35 roods, and a further 5.7 roods which was given him on the further boundary of his son James, making a total façade of the father and sons' property of 144.7 roods.

A difference over money matters between the two brothers occurred in 1925 and Charles asked James to let him have transport at once of his portion of four acres. It is clear from the evidence that James never meant to lay claim to this portion, and would never have refused transport, unless differences had arisen, indeed it is admitted in evidence that James was willing to transport in his own good time, but now he relies on what he considers, his legal rights under the grant to him of the 7th November, 1904. It may be here noted that under the Crown Lands Regulations, 1910 (then 1903) this grant (which purports to pass 45 Rhynland acres) would after ten years from its date become in all respects subject to the same laws and regulations as private lands (R.27).

It is necessary to a proper consideration of the defence to ascertain, in the first place, what the exact relationship was between the plaintiff and the defendant, whether it was that of two parties to a contract, or whether that of trustee and beneficiary, and in the latter case whether the trust was an express or constructive one. The evidence shows clearly that there was no definite contract but that a scheme was initiated by the elder Obermuller, and known to his two sons, that they should have definite and as far as possible equal portions of land adjoining their father's, and the grant of 7th November, 1904, was taken out on that understanding and in furtherance of the scheme, and also to prevent a stranger acquiring any of the apportioned land between the elder Obermuller's southern boundary and Van Sluytman's property.

At first sight one would be inclined to look upon the transaction in the nature of a constructive trust, but on a consideration of the case of *Soar* v. *Ashwell* (1893. 2 Q.B. 390) I am convinced it is not. In the course of his judgment in this case Bowen, L.J., says "an express trust can only arise "between the cestui que trust and the trustee. A constructive trust is one "that arises when a stranger to a trust already constituted is held by the "Court to be bound in good faith and in conscience by the trust in conse-"quence of his conduct and behaviour . . . . . A constructive trust is there-"fore, as has been said, 'a trust to be made out by circumstances,'" and again, "there has been some variety and inconsistency . . . . . in the line of "demarcation that has been drawn between express and constructive trusts. ". . . One thing seems clear. It has been established beyond doubt by au-"thority binding on this Court that a person occupying a fiduciary relation "who has property deposited with him on the strength of such relation, is to "be dealt with as an "express, and not merely a constructive, trustee of such "property. His possession of such property is never in virtue of any right of "his own, but is coloured from the first by the trust and confidence in virtue "of which he received it. He never can discharge himself except by restor-"ing the property which he never has held otherwise than upon this confi-"dence, and this confidence or trust imposes on him the liability of an ex-"press or direct trustee." This case was approved and followed in *Roche-foucauld* v. *Boustead* (1897. 1 C.D. 196) (referred to below). The demarca-tion between the two classes of trusts is easier to follow if the term "de-clared" trust is used instead of express, the present case answers every re-quirement of a "declared trust" and the legal issue raised for the defence may be considered with this position in view that the defendant acquired and held the property in a fiduciary position with the liability of an express or direct trustee so far as the four acre piece is in question.

I understood Mr. Duke for the defendant to raise two objections to the applicability of the doctrine of trusts to lands in this colony. In the first place he submits that the Roman-Dutch Law will apply and trusts in the English sense were unknown to it. I refer later to the question whether in fact Roman-Dutch Law is appropriate to the present case, but supposing it were, "ideas derived from the English Law of Trusts have by practice and "judicial decisions been grafted on to Roman-Dutch Law," and I think that Ordinance No. 10 of 1887 must have escaped the notice of learned counsel, it is entitled "An Ordinance to provide for the better administration of "property held in trust." Morice in his English and Roman-Dutch law (1905 Edit.) states: "Even

"now the use of trusts cannot be said to be contrary to Roman-Dutch Law "and they are in frequent use in South Africa" Mr. Justice Dalton, too, in his Civil law of British Guiana, says that the designation of trustees in its English meaning of denoting persons entrusted with the control of property with which they are bound to deal for the benefit of others, is familiar in our practice. (See *Dalsing* v. *Omrasing,* 1903; *Barnard* v. *De Younge,* B. G. Cases, 1904; and *B. G. Bank* v. *Henery,* B. G. Cases, 1904).

And next Mr. Duke submitted that the English doctrine of equity is applicable to immovable property in this colony only where specifically applied by definite statute law, and not generally, for that in section 3 (2) of the Civil Law of British Guiana Ordinance, 1916—hereinafter referred to as the said Ordinance—it is stated "the Common Law of the Colony shall "be the Common Law of England as of the date hereof including therewith "the doctrines of equity as administered at the date hereof," and he infers the meaning to be that when the expression "Common Law" is used equity is included, so that the argument runs, it follows that by section 3 when it states "The English Common Law of real property shall not apply to im- "movable property in the colony," that neither is equity to apply to immovable property it is an ingenious but to my mind fallacious view of the meaning of these sub-sections. Sub-section 2 does not interpret the expression "Common Law" as *including* the doctrines of equity, but that with the application of Common Law equity is also to be administered, while subsection 2 in excluding the English Common Law of real property does not exclude the doctrines of equity, to hold otherwise would nullify the last paragraph of subsection 2, "and the Supreme Court of British Guiana shall "administer the doctrines of equity in the same manner as the Supreme "Court of Justice in England administers the same at the date hereof or at "any time hereafter."

It will be convenient to take first the defence that the alleged right of the plaintiff is barred by the provisions of section 4, subsection 2 of the said Ordinance, which limits the rights of any person to bring an action or suit to recover any immovable property to within twelve years next after the time at which the right to bring or recover the property has accrued. It appears to me that until the ten years fixed by the Crown Lands Regulations and commencing November, 1904, had elapsed the plaintiff was entitled to rest upon his possession of the four acres, for his right to obtain transport to himself of that portion would not arise until November, 1914, and consequently having taken the necessary action in December, 1925, he is well within the period of twelve years next after the time at which the right to bring an

action or suit to recover the property accrued to him, and this quite apart from the fact that he has remained in possession of the property the whole time. Moreover, so far as the property is the subject of a trust, whether its recovery is limited by the periods fixed by the law is referable to a doctrine of equity, stated in *Soar* v. *Ashwell* as clearly and long established, that lapse of time is no bar in the case of an express trust though it will be a bar in the case of a constructive trust. The conclusion of the judgment of Giffard, L.J., in *Burdick* v. *Garrett,* (5. Ch. 233,) is to the point. "I do not hesi-"tate to say where the duty of persons is to receive property, and to hold it "for another and keep it until it is called for, they cannot discharge them-"selves from the trust by appealing to lapse of time."

The other principal defence raised on the pleadings is that the agreement or trust alleged between the plaintiff and the defendant, is unenforceable by action by reason of the provisions of section 3 (4) (*e*) of the said Ordinance, but in his argument in Court learned counsel appeared to rely rather upon the conflicting defence that the said Ordinance had no application to the present case for it came within the saving of existing rights under section 2 (3) of the said Ordinance and that therefore Roman-Dutch Law would apply, it is obvious that these defences must be in the alternative and I propose to deal with section 2 (3) first. It reads: "Nothing in this "Ordinance contained shall be held to deprive any person of any right of "ownership or other right, title or interest in any property moveable or im-"movable of any other right acquired before the date of this Ordinance." Mr. Justice Dalton in his work referred to above remarks on this subsection that a right that was dormant or contingent upon something that had not come to pass before the 1st of January, 1917, or which arose after that date even though the result of something done before that date, would not come within it. It must be remembered that the plaintiff has always been in undisputed possession of the four acres of land that he claims, and that consequently the alleged breach of trust only occurred after the refusal of the defendant to transport the plaintiff's portion to him, namely in 1925. And even if there were any doubt whether the present case was affected by this sub-section, the Court has power under it and will give effect to Roman-Dutch Law or procedure only so far as it may be deemed advisable in the interests of equity (Sec. 2 (3))

With reference to the system of law to be applied in the special circumstances of this case, it is true that at any time after November, 1914, the defendant could have applied for and obtained a transport of the land he is in possession of, and that had he done so previous to the 1st January, 1917, the principles

of Roman-Dutch Law only would have applied, but no occasion arose for him to do so for none of the parties interested applied for transports for their portions, and no evidence has been offered to show the plaintiff was in any way guilty of gross laches in not taking steps to complete his title, he has been relying on his equitable title encouraged thereto by the defendant.

I hold then that the provisions of the Civil Ordinance, 1916, are applicable to the present case, and so it becomes necessary to consider whether Section 3 (4) (e) constitutes, as alleged, a defence to the present action; the essential parts of this sub-section read "that no action shall be brought "whereby to charge any person upon . . . . (3) any declaration, creation or "assignment of any trust relating to immovable property, unless the agree-"ment or some memorandum or note thereof shall be in writing and signed "by the party to be charged or some other person thereunto by him lawfully "authorised." It has been held in numerous cases, on a consideration of the parallel section 3 of the Statute of Frauds, that it would be a fraud upon a plaintiff and also upon any prospective purchaser of the defendant's property to permit the defendant to derive a benefit from his own breach of duty and obligation; and Pollock in his Principles of Contract (8th Edit.) in reference to this, remarks, "the plaintiff's right in the first instance rests not "on a contract but on a principle akin to estoppel, the defendant's conduct "being equivalent to a continuing statement to some such effect as this: It is "true that our agreement is not binding in law but you are safe so far as I "am concerned in acting as if it were."

Furthermore equity will enforce specifically agreements for breach for which the law gives no remedy, where they have been part performed by the party applying for their specific performance, or where he has altered his position on the faith of the agreement or undertaking; it is true that the plaintiff was already in possession of the four acres at the time of the creation of the trust and has remained in possession, but he has for years cultivated and expended money on the land with the knowledge and acquiescence of the defendant. My opinion that the nature of the transaction, and the character of the parties concerned, would justify the Court in exercising its discretion to apply the doctrines of equity is strengthened by the decision in *Hodson* v. *Heuland* (1896. 2 Ch. 428) that possession taken before but continued after a parol contract for a lease may constitute part performance sufficient to take the case out of the Statute of Frauds. I will conclude by quoting from the judgment of Lindley, L.J., in *Rochefoucauld* v. *Boustead* (referred to above): "It is further established by a series of cases, the "propriety of which cannot now be questioned, that the Statute of Frauds "does not prevent

"the proof of a fraud, and that it is a fraud on the part of a person to whom "land is conveyed as a trustee, and who knows it was so conveyed, to deny "the trust and claim the land himself. Consequently, notwithstanding the "statute, it is competent for a person claiming land conveyed to another to "prove by parol evidence that it was so conveyed upon trust for the claim-"ant, and that the grantee, knowing the facts, is denying the trust and rely-"ing upon the form of conveyance and the statute, in order to keep the land "himself."

The evidence showed that there was some doubt whether the piece of land claimed by the plaintiff was four acres in extent, and it may be that the trench and dam were included in that estimate, but whatever its size is, the plaintiff has proved that he is entitled to the strip of land on the southern portion of his thirty acres lying north of the boundary trench dug to separate the land allotted the two brothers by their father, and being also the northern portion, containing four acres or thereabouts of the tract of Crown land granted to the defendant on the 7th November, 1904, therein described as having a mean depth of 304.72 roods and containing 45 Rhynland acres, shown on the diagram attached thereto as having a depth running north east from the Pomeroon River of 306.7 roods.

The question of damages does not arise for the plaintiff has satisfied the Court that he is entitled to all that he asks for, and the Court has jurisdiction to grant specific performance of the "declared" trust between the parties. Storey in his Commentaries on Equity Jurisprudence (3rd Edit.) says that the exercise of the branch of equity jurisprudence respecting the rescission or specific performance of contracts is a matter in the discretion of the Court, and it will enforce the carrying out of a trust, because to refuse to do so would be inequitable to one of the parties.

I accordingly make an order.

(1) declaring that defendant is trustee of a piece or parcel of land commencing at a paal marking the upper boundary of a tract of 100 acres surveyed for C. H. Obermuller about 3 miles above the Akawini Creek, and extending in façade S. 28° 51′ E. 44.7 roods with a mean depth N. 51° 09′ E. 304.72 roods and containing 47.315 English acres, the said piece or parcel of land having a façade of about 4 roods commencing from the northern boundary of the said tract of land and extending thence by the full depth of the said tract of land;

(2) that the defendant do forthwith pass to the plaintiff transport of the said piece or parcel of land containing four roods or thereabouts;

(3) that in the event of the defendant failing or refusing to pass transport within four weeks from the date hereof then the Registrar of Deeds do and is hereby directed to pass transport of the said property to the plaintiff.

The plaintiff must have the costs of these proceedings.

Solicitor for the plaintiff, *C. Gomes.*

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

DANIEL *v.* EST. OF M. J. DE FREITAS, DECD.

[No. 175 OF 1927.]

1927. JUNE 17. BEFORE GILCHRIST, ACTG. J.

*Receiver of estate appointed—Claim subsequently filed against estate—No leave asked for—Objection to proceedings—Necessity for leave—Discretion of Court to grant leave after proceedings commenced.*

When a receiver has been appointed over the assets of an estate, persons claiming against such estate should first obtain leave from the Court before instituting legal proceedings, but in a special case the Court in the exercise of its discretion has power to allow a party to continue an action notwithstanding that such leave was not in the first instance applied for.

The relevant facts appear in the judgment.

*E. F. Federicks* for the plaintiff.

*G. J. de Freitas* for the defendant.

GILCHRIST, J.: In this matter the leave of the Court to proceed against the receiver appointed by the Court has not been obtained. Counsel for the applicant admits that such leave should have been obtained previous to the institution of the proceedings but submits that a special case is made out and asks the Court to exercise its discretion and allow the applicant to continue the proceedings against the Receiver.

2. In my opinion in a special case the Court in the exercise of its discretion has power to allow a party to continue an action notwithstanding that it was commenced after the appointment of a Receiver and that the leave of the Court was not in the first instance applied for in reference to the commencement (Kerr on Receivers, 7 Ed., p. 202).

3. The question is, is this a case in which such discretion should be exercised in favour of the applicant?

4. In considering this question it appears to me that it may best be approached by asking myself whether I would on the facts disclosed in the application had application been made for leave to proceed against the Receiver granted such leave.

5. Now the applicant in his application states that in the year 1923 he purchased from Alfred Gomes, the manager of the business carried on by the estate of Manoel Jose deFreitas, deceased, the property in respect of which this application is founded. Nowhere in the application or in the affidavit in support thereof is it alleged or shown that the said Alfred Gomes had power or authority to dispose of or sell such property.

6. I therefore, in view of the facts stated, answer the question in the negative and dismiss the application with costs. I, however, grant leave to the applicant (if such is necessary) to take such further or other steps as he may be advised.

Solicitor for the plaintiff, *V. Dias.*

Solicitors for the defendant, *Cameron and Shepherd.*

HALL *v.* FORDE, *et al.*

[No. 341 OF 1926.]

1927. JUNE 23, 24. BEFORE DOUGLASS, J.

*Opposition—Interest inland—Lease for twelve years with right of renewal for an indefinite period—Effect of omission to have such lease executed before a Judge— Deeds Registry Ordinance, section 12 (1)—Civil Law of British Guiana Ordinance, 1916, section 3 (4) (e)—Requirement of memorandum signed by party to be charged or his agent thereunto authorised—Signature of alleged agent—Part performance—Whether possession existing before agreement and continued thereafter per se sufficient.*

(*a*) A lease for 12 years with a right of renewal for an indefinite period must according to section 12 (1) of the Deeds Registry Ordinance, 1919, be passed and executed before a judge of the Supreme Court to be valid against any *bona fide* transferee of the property.

(*b*) Section 3 (4) (e) of the Civil Law of British Guiana Ordinance, 1916 provides *inter alia* that no action shall be brought whereby to charge any person upon any lease of immovable property for a period exceeding one year unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised.

*Held*, That an unnamed principal cannot be sued on a contract to which the section applies where he is not sufficiently described in the memorandum except in a case where by the memorandum the agent is himself liable on the contract.

(*c*) Where possession of land has been obtained before an alleged agreement of lease, the continuance in possession is not *per se* sufficient part performance.

Opposition by the plaintiff to restrain the defendant from passing transport of a parcel of land of which the plaintiff alleged that he was lessee.

*A. V. Crane* for the plaintiff.

*E. D. Clarke* for the defendant.

DOUGLASS, J.: In an opposition action the opponent, at the time he brings the action to restrain the conveyance to which the notice of opposition relates, must join his claim in respect of which a right of action has accrued. The plaintiff—the opponent—claims that he is lessee under an agreement of lease dated 3rd July, 1922, made between himself and the defendants for a term of twelve years with a right of renewal at the will of the lessee for an indefinite period. Such a lease should under the Deeds Registry Ordinance, 1919, section 12 (1) be passed and executed before a judge of the Supreme Court and if not so passed is not valid as against any bona fide transferee of the property, and in addition it must under section 3 (4) (e) of the Civil Law of British Guiana Ordinance, 1916—a section, in so far as it touches leasehold interests, derived from section 3 of the Statute of Frauds—be in writing and signed by the party to be charged or "some other person thereunto by him lawfully authorised."

The said agreement of lease was never registered, though that is not of importance in the present case as the action purports to be between the parties to the agreement, but was it sufficient to satisfy section 3 (4) (e)? In order to satisfy the requirements of that section the plaintiff must be able to show that the document was signed by the defendants or their duly authorised agents. In the case of *Lovesy* v. *Palmer* (1916. 2 C.D. 233) the defendants relied upon the concluding paragraph of section 4 of the Statute of Frauds, which so far as regards the agreement or memorandum to be signed is worded the same as the conclusion of section 3 of that Statute, and it was held that where a contract had been made by an agent in such terms that the agent is not himself liable as one of the contracting parties, the principal can sue on it only if his name appears in the memorandum of the contract, or his identity from the description of him therein appearing cannot fairly be disputed. It is in some respects a case the reverse of this but I refer to it because in his judgment Younger, J., declares, "I have been "unable to find any other case where it has ever been suggested that an un-"named principal can sue or *be sued* on a contract to which the statute ap-"plies where he is not himself sufficiently described in the memorandum "except in a case where by the memorandum the agent is himself liable on "the contract," that is an agent of an undisclosed principal. And in the same case the learned judge says that where the principal's name appears only on a document which is subsequent in point of date to the paper relied on as constituting the memorandum under the statute, this would not satisfy the statute.

The plaintiff has altogether failed to proved that B. M. Baptist who signed the said agreement for lease was agent for the defendants or indeed for anyone in the transaction, and none of the defendants' names appear on the document relied on, as principals, or at all.

Even the fact that there was a provision for renewal of the lease contained in the first agreement of 3rd July, 1882, and that it was so renewed once or twice, is not evidence to prove that B. M. Baptist on this occasion or even on the previous one was the lawful agent of, or indeed had any connection with the defendants.

The Courts of Equity have held that in certain cases where there has been part performance of such a contract equity will disregard the statutory requirements and let in parol evidence such for instance is the case where the plaintiff has been admitted into possession of land to which he previously had no title; but where possession has been obtained before the alleged agreement, the continuance in possession is not in itself a sufficient part performance, for this may be referable to a holding over. It has indeed been held that possession after the expiration of a lease which is *only* referable to a contract for renewal is part performance of such a contract sufficient to enable a Court of Equity to decree specific performance, but this again is not the present case. The Court is not asked for a decree of specific performance but to find that the opponent is the lessee for a term of years of the property of the defendants under the agreement of lease of the 3rd July, 1922, and the facts adduced in evidence do not so prove. Even the two receipts for rent of later date than the agreement and signed by one or more of the defendants, fall short of any definite proof for one reads that $20 is received "as rentage of a piece of land," &c, and the other, "for one year's lease" without reference to any agreement, and might well refer to a tenancy from year to year. Whilst sympathising with the plaintiff on the position in which he finds himself I can only hold that he has not proved his opposition to be well founded, and judgment must go for the defendants with costs on the lower scale.

# HOUSTON AND GINDER, LTD.

HOUSTON, Appellant,
AND
GINDER, LTD., Respondent.

[No. 155 OF 1927.]

1927. JULY 5, 12. BEFORE GILCHRIST, ACTG. J.

*Mining Regulations—Appeal from Warden's decision—Order granting extension of time within which to appeal—Effect of fame—Mining Ordinance, 1920, sections 92 and 93—Effect of location by person whose prospecting licence has expired—Mining Regulations 1924, r. 6 (1)—Meaning of previously lawfully occupied or previously located—Meaning of Regulation 88—Whether it prescribes jumping as the only remedy—Whether it merely states the circumstances in which a jump may be effected.*

Section 93 of the Mining Ordinance, 1920, provides that any person who appeals from a decision given under the Mining Regulations shall enter into a recognizance within one month after the date of the decision appealed against, and section 92 thereof provides that the appellant shall serve notice of reasons of appeal within six weeks after the said decision, subject to a proviso in the said section contained permitting an extension of time in certain circumstances.

*Held,* That an extension of time granted under the provisions of section 92 covers all acts necessary and requisite to allow the appeal to proceed and accordingly that the appellant may enter into a recognizance even subsequent to a month from the decision appealed against so long as such act was done within the time as extended.

The words "previously lawfully occupied or previously located" occurring in regulation 6 (1) of the Mining Regulations, 1924 connote an occupation or location that is lawful and consequently a person can lawfully locate land alleged to have been previously located by a person whose prospecting licence had expired at the date of the alleged location since such latter location is null and void.

Regulation 88 (1) of the Mining Regulations, 1924, provides that a claim for which a licence has not been issued may be jumped under certain circumstances only.

*Held,* That the regulation does not mean that the only remedy open to a person is jumping but that a person may not adopt the remedy of jumping unless the circumstances referred to in the regulation exist, leaving available any other remedy which may be open.

*Fowler* v. *Mattis* (1923 L.R.B.G. 9) and *Cozier* v. *John, et al* (1925, L.R.B.G. 69) followed.

Appeal from a decision of the Warden of No. 4 Mining District.

The facts appear in the judgment.

*E. M. Duke* for the appellant.

*H. C. Humphrys* for the respondent.

GILCHRIST, J.: 1. This is an appeal from the decision of Mr. V. Roth, Warden Nos. 3 and 4 Mining District.

2. Two preliminary objections to the hearing of the appeal were taken by counsel for the respondents: (*a*) That it was not competent for the appellant to obtain an extension of time within which to enter into the recognizance for the due prosecution

of the appeal; (*b*) That reason 1 (15) was bad in that it did not set out the grounds which rendered the evidence therein referred to inadmissible.

3. It is unnecessary to deal with objection (*b*) as the reason in question was not argued.

4. As regards objection (*a*) sec. 93 of the Mining (Consolidation) Ordinance 34 of 1920 provides that an appellant shall within one month after the date of the decision appealed against enter into a recognizance with at least one sufficient surety for the due prosecution of the appeal and for abiding the result thereof. By section 92 of the said ordinance service of notice of reasons of appeal is required to be effected within six weeks after the pronouncing of the decision, provided, however, that in any case where a person who is entitled to appeal from any such decision is unavoidably prevented from appealing within the time hereinbefore specified, it shall be lawful for such person to apply, by motion to the Court for leave to appeal from such decision and the Court may either refuse to grant such leave or may grant the same on such terms and conditions as it may think fit. Counsel for the appellant submits that in granting an extension to appeal it would necessarily follow that the extension would cover the doing of all acts necessary and requisite to allow the appeal to proceed. He further submits that the order of the Court of the 16th May, 1927, granting an extension of time within which to enter into the recognizance having been served on the respondents on the 18th May, 1927, and no steps having been taken to set aside the said order the objection is of no force. I agree with the submissions of counsel for the appellant. The objection is overruled.

5. Reasons 1 (1), (2), (3), (4) and (15) were not argued.

6. The complaint filed by the respondents in this case is in substance I think for a declaration of the complainant's rights to and in respect of the land in question.

7. The regulations hereinafter referred to are the Mining Regulations, 1924.

8. The essential facts are admitted by both parties. These are (*a*) On the 30th September, 1925, Desmond Egerton Pierre, a director of the respondent company, alleged he located certain lands in No. 3 Mining District. He admits that at the time the prospecting licence which he held had expired. (A prospecting licence is of force for twelve months from date of its issue.—Regulation 4 (3)).

(b) The appellant through his agent DeGroote becoming aware of the invalidity of Pierre's prospecting licence, on the 3rd October, 1925, located the said claim which he called "In Time." Thereafter in the said month he filed his application for a claim licence.

After due advertisement in the *Gazette* he obtained a claim licence (B9146), He has paid rent for the years 1925, 1926 and 1927.

(c) On the 16th November, 1925, Krakowsky Brothers commenced proceedings of jump against Pierre's location of 30th September, 1925, entirely ignoring or being ignorant of appellant's location of the 3rd October, 1925. The assertion of a right to jump by Krakowsky Brothers was heard in the Warden's Court on the 10th December, 1925, and the appellant's location not being brought to the notice of the Court the jump was allowed by the Warden. Krakowsky Brothers did not follow up the matter by paying the prescribed fee as required by Regulation 89 (9) and consequently never received a licence for the claim.

(d) Having allowed the whole of the year 1926 to pass respondents through their authorised prospector Fox on the 1st March, 1927, located the said claim and named it "Pennsylvania."

(e) On the 9th March, 1927, the respondents filed the complaint, the subject of this appeal.

9. Before proceeding further I may here say that in my judgment it is only reasonable to presume that had Krakowsky Brothers proceeded on the judgment obtained by them in the jump proceedings against Pierre and obtained a claim licence that such licence would be in the usual form which by its terms would be without prejudice to the rights of any other persons in respect of the same lands. The judgment therefore whatever its effect as between Krakowsky Brothers and Pierre cannot be taken to prejudice the appellant's rights.

10. Regulation 4 (5) provides that subject to the provisions of subsection (1) of Regulation 6 a prospecting licence shall entitle the person to whom it is issued to prospect and locate claims in every mining district but under and subject to the provisions of the regulations. Regulation 4 (6) provides that a prospecting licence issued to any person shall unless the location is null and void . . . . be deemed to entitle and to have entitled him to work the ground located thereunder from the date of location until his application for a claim licence can be published and such licence either issued or refused, provided that nothing contained in this section shall be held to make valid any location made by a person who has not previously taken out a prospecting licence. Regulation 6 (1) provides that a person on obtaining a prospecting licence may personally or by some person authorised by him with the approval of the Commissioner or Warden prospect for or locate claims on any of the Crown lands in the colony not previously lawfully occupied or previously located or reserved. Any location not made in compliance with this regulation shall be *null and void.*

11. In my opinion it is clear from the above regulations that the possession of a prospecting licence is a pre-requisite to the location of a claim and that a location by a person not in the possession of such a licence is null and void. The words in Regulation 6 (1) "previously lawfully occupied "or previously located" mean previously lawfully occupied or previously lawfully located. (See *Fowler* v. *Mattis.* 1923. L.R.B.G. 9); *Henry* v. *Swain* (L.J. 26. 2. 1903). Pierre's location of 30th September, 1925, was not a valid location, therefore of no force or effect. He was a wrongdoer. He was guilty of a breach of Regulation 6 (5) rendering him liable to a penalty not exceeding $100 (See section 100, Ordinance 34 of 1920).

12. On the 3rd of October, 1925, the appellant's representative located the said lands. At the time he was the holder of a valid prospecting licence. Counsel for the respondent submits he could not locate, that his only remedy was by way of jump under regulation 88. In *Cozier* v. *John, et al* (1925. L.R.B.G. 69) Sir Charles Major, then Chief Justice, held that the regulation does not mean that the only remedy open to a person is jumping but that a person may not adopt the remedy of jumping unless the circumstances referred to in the regulation exist, leaving available any other remedy which may be open. His decision was affirmed by the Full Court on the 10th September, 1926.

13. In my opinion two remedies were open to the appellant at the time he located the land in question on the 3rd October, 1925, namely, (*a*) Assert a right to jump under regulation 88 and proceed as provided by regulation 93. (b) Locate the said land the same not being previously lawfully occupied or previously lawfully located or reserved (Reg. 6 (1)).

14. The appellant adopted the latter course and thereafter made application for a claim licence which was issued to him on the 15th February, 1926, after due publication of his application in the *Gazettes* of the 7th, 14th, and 21st November, 1925. On the 1st March, 1927, when Fox, the representative of the respondents, located the said land he was too late. In my judgment the Warden was wrong in holding that the appellant's location was null and void.

15. Further as stated above the complaint of the respondents dated the 9th March, 1927, is virtually for a declaration of ownership of the claim in question, the respondents basing their rights thereto by virtue of an alleged location on the 1st March, 1927.

16. In considering the matter the Warden was called upon to determine in accordance with regulation 9 who was the first person locating the claim in accordance with the regulations. In my opinion the appellant was undoubtedly the first person to do

so and he should have so held and declared that the location made on the 1st March, 1927, by the representative of the respondents unlawful.

17. The appeal is allowed with costs both here and in the Warden's Court. The order of the Warden is set aside. There will be an order that the respondents do vacate the ground on the claim known as "In Time" and comprised within the boundaries of claim licence B9146 whereon they have purported to have located the claim "Pennsylvania" in so far as the location of the said respondents infringes the appellant's prior occupation of land described in the said claim licence.

18. On the question of costs I agree with the decision of Douglass, J., in *Humphrys* v. *Jarad, et al* (1925. L.R.B.G. 80). I direct that the costs of and incidental to this appeal be taxed on the higher scale.

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

FERNANDES, Appellant,

AND

DASILVA, Respondent.

[No. 9 OF 1927.]

1927. JULY 12, 13, 14.

BEFORE SIR A. DEFREITAS, KT., C.J., AND GILCHRIST, ACTG. J.

*Election Petition—British Guiana Constitution Ordinance, 1891, sections 127 and 129*—Costs—*The Supreme Court Ordinance, 1915, sections 47, 50—Rules of Court made thereunder—Rules of Court, 1900, Order 3, r. i; Order 46, r. i—Appendix I Scale of Costs—Canon of interpretation of Rules of Court—Order 46, r. i—Meaning of "proceeding"—Real significance of scale* (*c*) *in Appendix I to Rules of Court—Court's inherent ability to exercise its powers in the absence of procedural rules.*

(*a*) Rules of Court are to be interpreted as carrying out the statute under which they are made and the true principle is that where no express provision can be found in the Rules it is competent to the Judge to give such directions as justice and common sense alike call for.

(*b*) The effect of section 47 of The Supreme Court Ordinance, 1915, is to empower the Judges of the Supreme Court to award costs in all proceedings.

(*c*) The Rules of Court and scales of costs are matters of general procedure applicable to all proceedings within the *cursus curiae* so that whenever costs are ordered they, are taxable under the existing scales.

(*d*) "Proceeding" in Order 46, r. 1, includes any proceedings although it may not be an action commenced by a writ under Order 3, r. 1.

(*e*) Scale (*c*) in Appendix I to the Rules of Court, 1900, is merely an exception to the general scale of costs that is applicable to all proceedings in the Supreme Court and unless and until an amount or value not exceeding $250 is claimed it is scale (*b*) that is applicable and not scale (*c*).

(f) The combined effect of sections 127 and 129 of the British Guiana Constitution Ordinance, 1891, is to make an election petition brought thereunder the same as a civil action in the Court in relation to the Rules or the scales of costs.

*Lord* v. *deFreitas* (5. 12. 1911 L. J), *Archer v. Britton* (22, 3. 1906 L.J.); and *Teixeira* v. *Georgetown Livery Stables Coy.*, (1917. L.R.B.G 18) overruled.

*G. J. deFreitas, K.C.,* for the appellant.

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

The judgment of the Court was delivered by the Chief Justice on the 9th of August, 1927, as follows:—

The present respondent, J. L. DaSilva, was the petitioner in an election petition in the Supreme Court, the respondent to which was the present appellant, P. A. Fernandes. The proceedings were instituted under section 127 of Ordinance 1 of 1891 (Vol. 2. p. 38 of Mackenzie's 1923 edition of our Ordinances). In giving his decision Mr. Justice Egg, who tried the petition, said that "the allegation of fraud not being proved and being unnecessary I "disallow costs to the petitioner on that issue, but he is entitled to his costs "on the remainder of his petition. Costs of two counsel allowed." In his final order as drawn up and entered the trial judge ordered "that the costs of "and incidental to this petition be taxed and paid by the respondent to the "petitioner save and except costs on the issue of fraud."

2. The petitioner's bill of costs was taxed by the taxing officer under scales (*a*) (*b*) and (*d*) at pages 162, 166 and 168 of Part 1 of Appendix I. to the Rules of Court made in 1900. Scale (*a*) relates to fees to be taken by the Registrar, and (*b*) relates to costs chargeable by solicitors for letters, attendances, drawing documents, copies and counsel's fees and (*d*) to allowances to witnesses and their travelling expenses. Scale (*c*) relates to costs chargeable by solicitors or counsel (*i.e.,* a barrister practising as a solicitor) for all work done "in actions in which the amount claimed or the value of "the property in respect of which the action was brought does not exceed "$250." For all such work, (*c*) gives to a successful plaintiff one fee at the rate of 10 per cent, of the "amount recovered" and to a successful defendant it gives one fee at the rate of 10 per cent, of the "amount or value "claimed."

3. The taxation of the petitioner's bill of costs was reviewed by Mr. Justice Douglass on objections delivered on behalf of Mr. Fernandes. We now have before us an appeal by Mr. Fernandes from the decision of the review judge. We have already announced our decision that the appellant had failed in all his objections to the review judge's decision in respect to all the items of the bill of costs specifically mentioned in the grounds of the

appeal. There remains for our decision the general ground of appeal that the whole of the taxation was illegal and void. If we overrule that ground we have then to decide the question in the alternative submission that although disbursements might be taxed under scales (*a*) and (*d*) there cannot be any further taxation of costs.

4. It was submitted to us for the appellant that although it be conceded that the trial judge had power to award costs by virtue of section 129 of Ordinance 1 of 1891 (the British Guiana Constitution Ordinance) and section 47 of Ordinance 10 of 1915 (the Supreme Court Ordinance) at p. 318 of Vol. 2 of Mackenzie's edition), nevertheless the taxing officer was without any legal authority to tax the bill at all, and that the taxation was beyond his jurisdiction and is therefore null and void. That contention was based on the following four propositions: (1) An election petition is not an "action" within the meaning of O. 3, r. 1, and O. 46, r. 1 of the Rules; (2) The rules and scales of costs in Part 1 of the Rules and in Part 1 of the Appendix 1 relate only to "actions," the costs of which are in the discretion of the Court under O. 46, and that such costs are taxable under O. 46, rr. 2 and 16, in accordance with the fees, allowances and charges set out in Part 1 of Appendix I.; (3) Ordinance 1 of 1891 does not fix the costs of an election petition, which it authorises by s. 127 to be presented to the Supreme Court; (4) the trial judge did not exercise the discretion given to him by O. 46, r. 16a, to give special directions as to the determination of the amount of the costs he awarded in a proceeding which was not an "action."

5. It was also submitted for the appellant, in the alternative, that although it might be correct to say that the disbursement (in payments to the Registrar and in respect to witnesses) were legally taxed under scales (*a*) and (*d*) of Part 1 of Appendix I, yet the other costs (including fees paid to counsel by the solicitor) cannot be taxed at all because they do not come under scale (*b*) or (*c*), for the reason that no amount of money was claimed in the Election Petition and the petition was not brought in respect of any property.

6. On behalf of the appellant it was argued that an order in the Supreme Court, allowing or rejecting an election petition "with costs" to the successful party cannot be carried into execution in respect to costs, because the expression "with costs" denotes no more than such costs as are legally taxable under the Rules, and since the Rules make no provision for any scale of costs in any proceedings in the Supreme Court other than an "action," the costs of an election petition are not legally taxable at all, It was argued that as O. 46, r. 1, relates only to costs in an "action" that has been "commenced by the issue of a writ of summons"

(Order 3, r. 1), therefore, no costs can be taxed or recovered—even if awarded by a Court or judge—in an election petition or any other proceeding not so commenced, except under O. 46, r. 16a. Assuming (but without deciding) that the argument is well founded that O. 46, r. 1, and the scales, relate only to such "action," it is nevertheless clear that there are some proceedings in the Supreme Court, not commenced by a writ of summons, which cannot be instituted in any other Court. If the effect of the rules, as is contended, is to disallow the costs of a successful litigant in some proceedings properly instituted in the Supreme Court, even when they are expressly awarded by a trial judge under the authority of s. 47 of 10 of 1915, then the rules would appear to operate in violation of the principles of natural justice. We think it is not unreasonable to say that "with costs" in an order in a proceeding other than such an action means costs under the existing scales, whatever they may be, just as much as the provision in the Rules for "costs" in some proceedings that are not actions commenced by writ of summons (*e.g.*, interpleader. O. 42, rr. 1 (*a*), 5 and 14) must be taken to mean such costs as are prescribed in the scales, although those scales are headed as relating only to "actions." It would be an absurd view that although the very rules provide for a judge to order costs in such proceedings, yet such costs cannot be taxed under any of the only existing scales; especially when power is given to the taxing officer by O. 46, r. 16, to expand the scales by allowing items not mentioned in them. It is no less unsound a view that costs provided for by statute are prohibited by a rule, or by the head-note of a scale, from being taxed and recovered. Rules of Court are to be given an interpretation consistent with common sense (Lord Coleridge, C.J., in *Edwards* v. *Lowther* (1876), 24 W.R. 434). In *R.* v *Coles* (1907) 1 K. B., 1. C.A, at p. 4 Collins, M.R., said "although I agree that a "Court cannot conduct its business without a code of procedure, I think that "the relation of rules to the work of justice is intended to be that of hand-"maid rather than mistress, and that the Court ought not to be so far bound "and tied by rules, which are after all only intended as general rules of pro-"cedure, as to be compelled to do what will cause injustice in the particular "case." Rules of Court are to be interpreted as carrying out the statute under which they are made. (Brett, LJ., in *Longman* v. *East* (1877) 3 C.P.D. 156). The statute under which the Rules of 1900 were made was the Supreme Court Ordinance 7 of 1393, which related to all proceedings whatever in the Supreme Court. The present Ordinance 10 of 1915 takes the place of 7 of 1893. Section 58 (1) (c) of the repealed 7 of 1893 (Rayner's Edition, Vol. 3, p. 48), which was taken from Section 17 (3) of the English Judicature Act, 1875,

and was in exactly the same terms as section 50 (1) (c) of 10 of 1915 (Mackenzie's Edition, Vol. 2, p. 319), gave power to the rule-making body to make rules "for regulating matters relating to the costs, and the taxation "thereof, of *proceedings* in the Court," that is, for the regulation of costs in all proceedings whatever and not only a special class of proceeding called an "action." "Regulating" cannot mean or include extinguishing: it imports the existence of costs that are to be regulated in respect to all proceedings. O. 46, r. 1, says that "*Subject to the provisions of the Supreme Court Ordi-* "*nance* and of these rules, the Court shall have full power to award and "apportion costs in any manner it may deem just;" and section 47 of 10 of 1915, which is the same as section 55 of 7 of 1893) provides that "the fees "and costs payable and allowable in the Court shall be regulated by the "rules" and "the costs of and incident to *any proceeding in* the Court shall "be in the discretion of the Court or Judge." It is clear that our Legislature contemplated the costs of all proceedings in the Supreme Court being payable and allowable and that it thereupon gave an absolute discretion to the judges to deal with such costs, a discretion that is subject only to the condition that it must be exercised judicially, that is to say, according to the principles of justice. There can be no doubt that there is power in the judges to award costs in all proceedings, and a correlative right of successful litigants to be awarded them subject to the discretion of the judges. Equivalent power and discretion are given in similar terms by the English Judicature Act, 1890, section 5, in respect to all proceedings in the High Court, even where no express provision as to costs is made by statute or rule: *Re* Fisher (1894) 1 Ch. 450, C. A, in which it was held that where an Act enabling a public body to acquire land compulsorily contains no provision as to the costs of payment out of Court of moneys paid in under the Act, the Court has jurisdiction under that section 5 to order the public body to pay the costs of and incident to a petition for payment out; *Dartford Brewery Co.* v. *Moseley* (1906) 1. K.B. 462 C.A., where it was held that the issue of a writ of possession is a proceeding in the Court and that the costs of that proceeding, although there is no rule or statute dealing with such costs, are in the discretion of the Court under section 5; and the Court of Appeal ordered the costs to be paid; *Re Wartling Tithe Redemption* (1924) 2 Ch. 123 C.A., where it was held that, on an application to invest money paid into Court representing compensation paid under the Tithe Act on the redemption of rent charges, the costs of the application was in the discretion of the Court under section 5, although under the Tithe Act there was no power in the Court to award costs; and the Court of Appeal ordered costs to be paid.

It appears from section 47 of 10 of 1915 (and also O. 2, r. 1) that the Rules relate to actions and all other proceedings in the Court and that the scales of costs in the Appendix to the Rules are necessarily applicable to all such proceedings. The effect of the appellant's contention is, that the Legislature, having given judges the power and discretion to award costs in all proceedings and the right to litigants to be awarded them, subject to the discretion of the judge, has deputed to the rule-making body the function of determining whether, if at all, that power or right shall ever veritably exist; that until that body acts, the power and right are inchoate only; that it rests with that body to say when, if ever, that power shall be exercised or that right shall be enjoyed; and no machinery is provided for constraining that body to perform this delegated function. Of course, the Legislature is competent so to enact, but we think, that only words clear beyond any possible doubt can be deemed to express such an intention; and no such words have been brought to our notice, clear or doubtful. That right to costs cannot be taken away by the mere fact that the rules regulating costs do not appear, literally, to fit every case. The true principle is that where no express provision can be found in the Rules it is competent to the judge to give such directions as justice and common sense alike call for (Cozens-Hardy, M.R., in Commissioners of *Inland Revenue* v. *Joicey* (1913) 1 K.B. 445, C.A.). This principle is the ratio decidendi in *A. G.* (*Ontario*) v. *Daly* (1924) A. C. 1,011 where it was held by the Privy Council, that there is power in a Colonial Supreme Court (as in the High Court in England) to issue an order of mandamus to an inferior court, and that although no rules had been made regulating the method in which that power is to be exercised, that does not prevent the Court from making full use of its powers. So, the jurisdiction of a Court may be exercised although no appropriate rules of procedure have been made.

7, We think it is sufficient for us to say, at this stage, that since the Rules do provide for scales of costs and for taxation, they should be regarded as matters of general procedure within the *cursus curiae* and as applicable to all proceedings whatever in the Court, notwithstanding a *casus omissus* (if any) in the Rules; and that every judicial order for coats to be paid in any proceeding in the Supreme Court can be carried into execution, and that such costs should be taxed under the prescribed scales for the time being in force.

8. So far we have dealt only with the general aspect of the question before us. We shall now consider the particular argument that "proceeding" in the expression "action or proceeding" in O. 46, r. 1, does not include any proceeding not commenced by

a writ of summons (O. 3, r. 1), and means only an incidental proceeding in an action so commenced. Local decisions of single judges have been cited to us; but it appears that this is the first time that this question has come under the consideration of the Full Court sitting as a Court of Appeal from a single judge. O. 46, r. 1, says that "The Court shall have full power to "award and apportion costs in any manner it may deem just, and in the ab- "sence of any express direction by the Court, costs shall *follow the event of* "*the action or proceeding*." The very wide expression "action or proceeding" takes the place of "action, suit or other legal proceeding" in s. 5 of Ordinance 6 of 1855, which section related to the fees, allowances and charges that were taxable as costs. That Ordinance was entitled "An Ordi- "nance to regulate and establish tariffs or tables of law fees and other "charges connected with the administration of justice in the Supreme Court "of British Guiana." The corresponding English rule, in O. 65, r. 1, has "The costs of and incident to *all proceedings* in the "Supreme Court . . . . "shall be in the discretion of the Court or judge. . . . provided also that "where any action, cause, matter or issue is tried with a jury, the costs shall "*follow the event*, unless the judge by whom such action, cause, matter or "issue is tried; or the Court, shall for good cause otherwise order." Section 47 of 10 of 1915 enacts that, subject to the Rules, "the costs of and incident "to *any proceeding* in the Court shall be in the discretion of the Court or "judge." Our O. 46, r. 1, gives a similar discretion and so does the English O. 65, r. 1. In *Garnett* v. *Bradley* (1878) 3 App. Cas, 944, H.L., at p. 958, Lord O'Hagan said of a rule in similar terms in the schedule to the Judicature Act, 1875: "The operation of that rule is as large as words can make it "and it was apparently designed to extend to all proceedings the dis- "cretionary power which had governed only those in Equity." In addition to the use of the general word "proceedings" in section 47 of 10 of 1915 we find in the same Ordinance, in enactments relating to the jurisdiction of the Supreme Court, references to "every action and *proceeding* and all busi- "ness arising out of *the same*" (s. 25) and to "every cause or matter" (ss. 33, 34, 35); from which it reasonably appears that the "proceedings in the "Court," in section 50 (1) (c)—the costs of which are authorised by that sub-section to be regulated by Rules—comprise every proceeding in the Court whatever, whether matter, cause, action or other proceeding. It is to be observed also that when it is intended to refer to a proceeding in an action, and not to leave it to be regarded as necessarily a part or incident of an action, the Rules say "any action or any application or proceeding in an "action" in O. 32, r, 1, and "any action or proceeding in an action" in O. "46, r. 14. Having regard, *inter alia*, to the enactment

"in section 3 (2) of 10 of 1915 (section 3 (2) of 7 of 1893) that The Court "shall have and may exercise all the authorities, powers and functions be- "longing to or incident to such a Court according to the law of England," it is to be expected that our O. 46, r. 1, regulating costs, would be in harmony with the corresponding English O. 65, r. 1, in being applicable to all proceedings whatever. The word "proceeding" in O. 46, r. 1, on the face of it is generic, and "action" is only a particular species of proceeding. It has, however, been urged before us that the natural meaning of "action or proceeding" (which is an action or any other proceeding) should be ignored and that there should be adopted instead the implied meaning of "an action or proceeding in an action." thereby excluding any proceeding which is not either an "action" in itself or a proceeding incidental to an action. And it is submitted to us that effect should be given to that implied meaning so as to disallow costs in any proceeding which is not an action or is not in an action. There does not appear to us to be any reason why the natural meaning of the words should be abandoned, nor why any costs should be disallowed, when it is recollected that the rule was made under authority from the Legislature to "regulate" the costs of all proceedings in the Court. Such a disallowance of costs is inequitable, and it cannot be supposed that without any reason for it an innovation of this kind was contemplated by those who framed the rule or by the Legislature which sanctioned it.

9. The collocation of the juridical expression "follow the event" with the expression "action or proceeding" requires that both be interpreted together. The Court of Appeal in the case of *Howell* v. *Deering* (1915) 1 K.B. 54. has authoritatively interpreted "event," where Buckley, L.J., said: "An 'event' within the meaning of the rule is an outcome of the presenta- "tion to the tribunal of some claim made by the plaintiff against the defen- "dant which results in a finding that the plaintiff is or not entitled to relief "against the defendant," and we would add "or the outcome of that which "if decided in favour of the defendant would in itself be a defence." In the same case Kennedy, L.J., said: "I think it means result; but it must be such "a material result as does not constitute merely a link in a chain," and see *Reid, Hewitt & Co.* v. *Joseph* (1918) A.C. 717, H.L., at p. 740, per Lord Haldane. There can be a proceeding in an action the result of which is not the event of the action or an event at all, within the meaning of the rule. The restriction of the broad word "proceeding" to mean only a proceeding in an action is not congruous with the rule that the costs shall follow the event. In the argument before us this implied meaning of "action or proceeding" was based on the decision of a judge for whom we have the highest respect on a

review of taxation in the local case of *Teixeira* v *Sprostons* (November 26, 1903). In that case two *ex parte* applications were made for discovery and inspection under O. 27, rr. 12 and 19; and the taxation of the costs of these applications was reviewed by the judge, who said that: "Part I. of the Rules "of Court, 1900, applies to such original proceedings only as are actions; "*hence* the word, 'proceeding,' in O. 46, r. 1. must mean "'proceeding in an action.'" It was apparently not brought to the attention of the learned judge that the interpleader proceeding provided for by O. 42, rr. 1 (*a*) and 5, is in Part I. of the Rules and is not an "action." For the purpose of a decision of the question then before him it might have been sufficient for him to say that "proceeding" in the rule *includes* "proceeding in an action" instead of saying that it must *mean* that. But he was pressed by, and he expressly based his decision on the terms of O. 2, r. 1, then before him, and "hence" he held that Part I. of the Rules applied only to "actions." In November, 1903, O. 2, r. 1, said: "Any person who seeks to enforce any legal right "against any other or against property shall do so by a proceeding called an "action." Those words appear to mean that the Rules apply only to that class of proceeding called an "action." It is impossible now to discover why such a rule was made in 1900, apparently restricting the scope of the Supreme Court Ordinance and restricting the inherent jurisdiction of the Court. It did not follow the general intention of the Rules of 1893 (made under the same Ordinance 7 of 1893), which said in the first rule: "The "Registrar shall keep a record book for each county, in which he shall enter "all actions and proceedings *instituted* in each county." Regard was there had to proceedings other than actions being instituted in the Supreme Court. The O. 2, r. 1, as it stood in 1903, has been repealed and the following has been substituted for it: "Save and except where proceeding by way of petition or otherwise is prescribed or permitted by any Ordinance or Rule of Court [such as interpleader under O. 42, rr. 1 (*a*) and 5] or by the common law of this colony, any person who seeks to enforce any legal right against any other person or against property shall do so by a proceeding called an action." It is clear, therefore, that it cannot now be said that "Part I. of the Rules of Court, 1900, applies to such original proceedings only as are actions," as was said in *Teixeira* v. *Sprostons.* The decision in that case is no longer of any authority and it should not be followed, nor should decisions based on it.

10. For the foregoing reasons our decision is that "proceeding" in O. 46, r. 1, must be understood in the natural meaning of the word as including any proceeding instituted in the Supreme Court, although it may not be an action.

11. We must now turn our attention to the arguments for the appellant as to the meaning and application of the scale of costs numbered (c) at the page 168 of the Appendix to the Rules. The head-note of scale (c) is: "Costs chargeable by solicitors or counsel in actions in which the amount claimed or the value of the property in respect of which the action is brought does not exceed $250." Immediately below the head-note we find in the text: "There shall be payable in respect of all work done or services "rendered one fee, to be calculated at the rate of ten per cent, on the amount "recovered, or, in the case of a successful defendant, on the amount or "value claimed." We have already decided that the Rules and the Appendix are applicable to actions and to all proceedings that are not "actions," so that "action" in the head-notes in the Appendix must be taken as a finger-post briefly indicating that the contents of the scale relate to any "action or proceeding." It is argued—with citations of supporting decisions of single judges in local cases—that the "amount claimed" in the head-note to (c) must not be given its natural meaning, but it must be taken to mean the "amount recovered," that is to say, that the test of $250 (however large an amount may be claimed) is to be applied only to the amount of money that the adjudication of a tribunal has decided that a litigant is entitled to recover whether in respect of debt or damages; and in the case of a claim for the recovery of property, it is the amount of money that the tribunal actually finds by adjudication to be the value of the property that a litigant is entitled to recover. It is conceded, however, that in the case of a successful defendant the expression "amount or value claimed" means what it says, that is, the amount of money or the value of the property that is alleged in the claim asking for the recovery of either. It is further submitted that if no amount of money or no value is stated by the person bringing the suit and no amount or value is specifically assessed by the trial judge, then neither scale (*c*) nor scale (*b*)—where the head-note refers to claims exceeding $250—will be applicable, because there is no material upon which to apply the $250 test. So that if judgment is given for a plaintiff for the recovery of land or for injunction to restrain trespass to land, or the like, where no amount or value is alleged, or assessed by the trial judge, the plaintiff shall get no costs with a judgment in his favour, although the less expensive tribunal of a Magistrate's Court is without jurisdiction to entertain a claim for recovery of land or for injunction; and it is said that no costs at all can be taxed by a successful defendant who was forced to come into the Supreme Court by a contentious litigant. Among the local cases cited to us was *Lord* v. *deFreitas* (December 5, 1911. L.J.), where Mr. Justice Berkeley, after referring to the amount or value determined

by adjudication as the correct meaning of the amount or value claimed, states his *ratio decidendi by* saying: "This construction no doubt is the "proper one otherwise it would be open to the plaintiff to over-estimate the "value of his property or the amount to be claimed by him in order to have "his costs taxed on the higher scale." The Court's attention does not appear to have been drawn in that case to section 56 (2) of 7 of 1893 (now section 48 of 10 of 1915) which provided that: "No costs shall be allowed to a suc- "cessful plaintiff in any action brought by him in the Court which might "have been tried in a Magistrate's Court in its civil jurisdiction, unless the "Court is of opinion that the action was one which it was expedient to bring "in such manner." Nor does it appear that the Court's attention was directed to the absolute discretion as to costs given by O. 46, r. 1, and section 55 of 7 of 1893 (now section 47 of 10 of 1915) to a trial judge to deal with such a plaintiff who over-estimates, by awarding him costs equal only to 10 per cent, of the amount recovered or no costs at all. In our view *Lord* v. *deFreitas* was wrongly decided, and it should not be followed. Let us now look at the history of scale (c). The Supreme Court Ordinance 7 of 1893, section 68, abolished "the Inferior Courts of Civil Justice" and it repealed all Ordinances relating to those Courts' including 2 of 1856 (No. 80 in McDermott's, vol. 2). Section 40 of 2 of 1856 provided that when judgment is given against the plaintiff in an Inferior Court of Civil Justice (which was a Court with a jurisdiction limited to $240 and to a few classes of cases) and he is condemned in costs "such costs shall include a sum of "10 per cent, on the *amount of debt or of damages claimed* by the plaintiff "or upon the *alleged value by the plaintiff* of the chattel or of the land sued "for. . . ."; and section 42 provided "that whenever by any sentence [*i.e.*, "judgment] of such Inferior Court compensation of costs shall be awarded," or whenever it is necessary to tax costs in any suit as between solicitor and client, the fees of the solicitor "shall consist of and be taxable "at ten percent, upon the amount of capital or of value specified in the sen- "tence, if sentence shall have been pronounced, and if no sentence shall "have been pronounced then at ten per cent. upon the *amount of capital or* "*of value claimed* by the plaintiff," When Rules came to be made under 7 of 1893, scale (*c*) was inserted to take the place of the previous provisions as to costs in Inferior Court cases which cases were transferred to the Supreme Court on the abolition of the Inferior Courts; and it was inserted as an adaptation of the provisions of 2 of 1856, which were based on the jurisdiction of the Court in respect to the "amount of capital or of value" alleged or claimed by the plaintiff. Scale (*c*) is merely an exception to the general scale of costs in all Supreme Court proceedings, and it follows the abolished inferior courts in govern-

ing special cases in which the allegation is that the debt or damages, or the value of the chattel or land, sought to be recovered, does not exceed $250. Scale (*b*) applies to all proceedings in the Supreme Court; it does not need a head-note; it is the general scale for all proceedings except those special cases that fall under scale (*c*). The head-note of (*b*) cannot be given a meaning that will restrict the inherent or statutory jurisdiction of the Court or a judge. It is not necessary to have a head-note there, and it may have been put at the head of (*b*) merely from a desire for an antithesis in relation to the head-note to (*c*), or perhaps from a desire to round off the scales, springing from a chance misrecollection of the Horatian *totus teres atque rotundus.*

12. *Archer v. Britton* (March 22, 1906. L.J.,) is one of many local cases cited to us. In it the plaintiff claimed $1,000 for libel and recovered judgment for $50. His costs were taxed under scale (*b*). On review of the taxation the judge held that the whole of the costs of the successful plaintiff should be taxed at ten per cent. of $50 and no more under scale (*c*). The review judge correctly said in his judgment that "The real point is what "does the 'term claimed' mean, for the action was brought in the lowest "Court it could have been brought in." He was there referring to "claimed" in the head-note to scale (*c*). He correctly excluded the matter from section 56 (2) of 7 of 1893 (now section 48 of 10 of 1915). Having put the real question to himself the review judge decided that "the amount claimed" in the head-note to scale (*c*) means "the amount recovered"; and he expressly based that decision on the analogy of decisions of the Court of Appeal in the English cases of *Chatfield* v. *Sedgwick* (1879: 4 C.P.D. 459, C.A.) and *Solomon* v *Mulliner* (1901: 1 K.B. 76, C.A.). The analogy is quite inapt, and those English cases do not afford ground for the local decision. The decision in *Chatfield* v. *Sedgwick* is founded on the effect of two English enactments (similar in substance to our section 48 of 10 of 1915); on section 5 of 30 and 31 Vict., c. 142, which provided that if in the High Court a plaintiff recovers a sum not exceeding £20 in an action founded on contract or £10 in an action founded on tort he shall not be entitled to any costs unless the judge allows costs in certain special circumstances: and on section 67 of the Judicature Act, 1873 which provided that the provisions contained in section 5 of 30 and 31 Vict., c. 142 "shall apply to all actions "commenced or pending in the High Court of Justice in which *any relief is* "*sought which can be given in a county court.*" It will be observed that the "amount claimed" is not mentioned, but the relief which can be given in a county court is expressly mentioned. In that case the plaintiff claimed in the High Court on a balance of accounts a sum exceeding £50. At that time the jurisdiction of

county courts in such cases was limited to £50. The defendant pleaded a set-off and he also made a counterclaim. In the result judgment was given for the plaintiff for £16 on the claim and for the defendant on the counterclaim. On taxation the plaintiff was disallowed all costs, by virtue of the two sections already mentioned. His appeal from the taxation ultimately reached the Court of Appeal, where the taxation was confirmed in its disallowance of all costs. With reference to s. 67 of the Act of 1873 Jessel, M.R., said: "This means where relief is sought of a *kind* which can be "given by a county court," such as in a contract claim on balance of accounts. And Brett, L.J., said: "I am of opinion that the amount for which "the writ was endorsed has nothing to do with the question. The plaintiff, "apart from the counterclaim, was not entitled to recover so much as £20, "and therefore is deprived of costs by the Judicature Act 1873, s. 67." In *Solomon* v. *Mulliner,* which was an action for the return of a motor car and for damages for detention, the question considered was what is an action which "could have been commenced in a county court," and it was held, following *Chatfield* v. *Sedgwick,* that it is an action of a *class or kind* which a county court can entertain and that what had to be looked at was the *character of the relief and not the amount claimed.* If the attention of the review judge in *Archer* v. *Britton* had been directed to the House of Lords case of *Garnett* v. *Bradley* (1878: 3 App. Cas. 944), he would have seen from Lord Blackburn's observation on the same sections 5 and 67 and Order 55 in the schedule to the Judicature Act, 1875, (now O. 65, r. 1) that the sections do. not apply to an action founded on the tort of slander or libel; and that the House of Lords there held that damages for libel, however small, even a farthing, carries costs under the Order 55 (corresponding with our O. 46, r. 1, and section 47 of 10 of 1915), because the action could not have been brought in a country court. The two English cases cited do not afford authority for the interpretation in *Archer* v. *Britton* of the words "amount claimed" in the head-note of scale (c); but they may possibly afford assistance in interpreting the reference in s. 48 of 10 of 1915 to "any "action which might have been tried in a Magistrate's Court." In our view the decision in *Archer* v. *Britton* is wrong and should not be followed. The words "amount claimed" in the headnote and in the text of scale (c) mean what they say, and they mean the same thing in both places. They do not mean "amount recovered." When the amount recovered is intended it is expressly so stated, as in the first paragraph of the text. We also think that the decision of Berkeley, J., on January 3, 1917, in *Texeira* v. *Georgetown Livery Stables Co.* (1917, B.G.L.R. 18), which is based on *Archer* v. *Britton,* is wrong and should not be followed, nor should

any other decision based on *Archer* v. *Britton.* The decision of Berkeley, J., rejects the opinion expressed by Major, C.J., in the same case on May 26, 1916, as reported at page 77 of (1916) B.G.L.R., where the Chief Justice said: "This is an action of the former class, that is to say, the plaintiff "claimed $500, an amount exceeding $250. It matters not, for the purpose "of taxation, what he has recovered, for the taxation of costs by calculation "of commission on the amount recovered only follows when the claim does "*not* exceed $250. To tax the plaintiffs cost here by calculation on a com- "mission on the amount recovered would be to put it into the class men- "tioned in (*c*) when it is in fact in class (*b*), or to apply to class (*b*) a princi- "ple expressly confined to class (*c*)." We think the Chief Justice's view is correct, and we adopt it. Scale (*b*) is applicable to all proceedings in the Supreme Court except in the case of a claim for the recovery of a debt or damages for the recovery of property where it is alleged that the amount of the debt or damages or the value of the property is a sum not exceeding $250.

13. We wish to guard against being understood as deciding that all cases, without exception, come under scale (*c*) merely because they contain a claim for an amount of money or the value of property which is alleged to be not more than $250. We desire to leave open for consideration when a proper occasion arises, whether it can reasonably be argued that the substantial or main relief that is sought should be regarded as the test, and that where specific performance or an injunction, or the like, is asked for and a small sum for damages is also claimed as subsidiary relief the case does not come under (*c*), but comes under the general jurisdiction of the Court and under scale (*b*).

14. To summarise. We have decided so far, (1) that the rules and scales of costs are matters of general procedure applicable to all proceedings within the *cursus curiae,* so that whenever costs are ordered they are taxable under the existing scales; (2) that "proceeding" in Order 46, r. 1, includes any proceeding, although it may not be an "action" commenced by a writ under Order 3, r. 1; and (3) that scale (*c*) is merely an exception to the general scale of costs that is applicable to all proceedings in the Supreme Court, and that unless and until an amount or value, not exceeding $250, is claimed, it is scale (*b*) that is applicable and not scale (*c*).

15. We shall now consider the effect of Ordinance 1 of 1891 upon the costs of an election petition. It clearly appears from that Ordinance that the Legislature had costs in mind. In section 69 (2), 71 and 76 special provision is made for appeal to the Supreme Court from the decision of a Revising Barrister and for costs of such an appeal. Having provided for this minor matter, the Ordinance goes on to give a right to present an election

petition to the Supreme Court (s. 127) and it requires the person presenting such a petition to deposit with the Registrar "the sum of two hundred dollars as security for costs" (s. 127, proviso). Thereby the Legislature made a declaratory enactment of a right to costs in the parties to an election petition, subject to the trial judge's discretion under section 47 of 10 of 1915. The reasoning of Holt, C.J., in *Ashby* v. *White*, adopted by the House of Lords, in the passage beginning "if the plaintiff has a right he must of ne- "cessity have a means to vindicate and maintain it" is strong to show that as soon as the Legislature has recognised or given a right it is available *quocumque modo* unless the rest of the enactment clearly negatives this corollary. No such negative appears in Ordinance 1 of 1891; but the Legislature being aware of the general stole of costs in civil actions in the Supreme Court it enacted in section 129 that "At the trial of an election petition the procedure shall, as near as circumstances will admit, be the same, and the judge shall have the same powers, jurisdiction and authority, as if he were trying a civil action." Thereby the Legislature made an election petition the same as a civil action in the Court, in relation to the Rules or the scales of costs. The costs of an issue and of two counsel as advocates find no place under scale (*c*) and are taxable only under scale (*b*), consequently the trial judge's disallowance of the first and his allowance of thee second operate as a direction to the taxing officer to employ scale (*b*) and it must be obeyed.

16. Therefore we finally decide that at the trial of an election petition the judge has an absolute discretion to exercise the full power of awarding and apportioning costs, in any manner he may deem just, and such costs when awarded, are taxable under the general scale of costs in the Supreme Court unless the judge otherwise directs; and, since no amount or value is claimed in such a petition, such costs do not come under the exception of scale (c).

17. We have not found it necessary to consider Order 46, r. 16a.

18. We dismiss this appeal. Having considered the question of costs and the circumstances, we order the appellant to pay the respondent £30 (thirty pounds) for his costs of this appeal.

Solicitor for the appellant: *J. Gonsalves.*

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

# REPORTS OF DECISIONS

IN

# THE SUPREME COURT

OF

## BRITISH GUIANA

DURING THE YEAR

## 1927

AND IN

## THE WEST INDIAN COURT OF APPEAL

SITTING IN

ST. LUCIA, ANTIGUA, BARBADOS, GRENADA,
ST. VINCENT, AND BRITISH GUIANA.

[1927-1928.]

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# JUDGES

## OF THE

## SUPREME COURT OF BRITISH GUIANA

### DURING 1927.

| | |
|---|---|
| SIR ANTHONY DEFREITAS, KT. | ...Chief Justice. |
| WALTER JOHN DOUGLASS, M.A., LL.M. | ...Puisne Judge. |
| WILLIAM JAMES GILCHRIST | …Puisne Judge. |
| RICHARD TYRER EGG | …Acting 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, are included in the British Guiana Law Reports.

## METHOD OF CITATION.

The Reports will be cited as 1927 L.R.B.G.

# TABLE OF CASES REPORTED.