INDEX.

CASES

DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

WALDRON *v.* STOREY AND ANR.

[No. 338 OF 1926.]

1927. NOVEMBER 29, 30; DECEMBER 21, 22, 30;
1928. JANUARY 23.

BEFORE DOUGLASS, J.

Specific performance—Principles on which granted—Power of Attorney—Extent of Authority—Private instructions limiting power by principal to attorney—Whether innocent purchaser affected thereby—When specific performance will be refused—Where it involves breach of trust—Whether devisee under a will can in life-time of testator claim sale of land devised to be breach of trust.

(*a*) The relief by way of specific performance provided for by section 3 (4) (*d*) of the Civil Law of British Guiana Ordinance, 1916, is to be granted on the same principles as those on which it is granted in England in the case of contracts relating to land, that is to say, that generally it is granted where damages do not afford a complete remedy, and where the remedy is mutual.

(*b*) The apparent authority of an agent is the real authority so far as third persons are concerned, and where an agent abuses it, it does not affect a person dealing bona fide with him. A fortiori is this the case where an agent's apparent authority is sought to be limited by private instructions given him by his principal.

(*c*) Although it is true that the Court may refuse the remedy of specific performance where to grant it would involve the commission of a breach of trust, still equity will not intervene in favour of a principal against a third party where the agent has acted under the powers entrusted to him, and there is no fraud on the agent's part but only a mere mistake or error of judgment.

(*d*) A devisee under the will of a person still alive does not possess such an interest in the land devised as to be able successfully to invoke the aid of the Court in his favour where litigation has arisen concerning or affecting the land devised, because such devisee's interest can arise only on the death of the testator.

The relevant facts are set out in the judgment.

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

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

DOUGLASS, J.: The only reason for joining Clara Gaddum, the second-named defendant in this suit, was because she had on the 7th August, 1926 entered an opposition to the grant of transport to the plaintiff, but the opposition was never served and was finally withdrawn on the 23rd February, 1927, after the service

on her of notice of the writ of summons herein. Consequently para. (b) of the plaintiff's claim is rendered unnecessary, and on the case coming on for hearing on the 29th November, 1927, Mr. Stafford, for the plaintiff, also withdrew his claim for damages para. (c), and there then remained para. (a) claim by the plaintiff for specific performance of an agreement for transport of the "W½ lot 249, Bourda District, Georgetown," and para. (d) claim for rents of the said property from the 1st August, 1926. Mr. Moses died on the 17th September, 1927, before his case could be heard, and Mr. Storey, who had been sued as his attorney, was by Order of Court dated the 2nd October substituted in his capacity as executor under the last will of Mr. Moses.

The defences set out in paras. 1, 3, and 5 of the defence were not pressed and there was ample proof that Mr. Moses had been represented by Mr. Storey as his attorney since 1915, and that at the date of the agreement for sale—21st June, 1926—the power of attorney in favour of Mr. E. P. Bruyning given on the 22nd August, 1924, had not been revoked, and was in existence until the 23rd August, 1926. The defence relied on then was,

1. (a) The Power of Attorney given to Mr. Bruyning did not entitle him to sell the property taking into account the particular circumstances of the case.
   (b) If Mr. Bruyning had power to sell that power was expressly withdrawn before the sale of the Bourda property.
2. The power of attorney given to Mr. Bruyning created a fiduciary relationship between his principal and himself, and the Court would not decree specific performance, an equitable remedy, in a case involving a breach of trust.

The relief by specific performance is by Section 3 (4) (d) of the Civil Law of British Guiana Ordinance, 1916, to be granted in a case of immovable property on the same principles on which it is granted in England in the case of contracts relating to land that is, it is ordered at the discretion of the Court in cases where damages do not afford a complete remedy, and on the principle that the remedy must be mutual. The Court will enforce it at the suit of a vendor in every case where a similar remedy is open to the purchaser.

First then as to the extent of the authority of Bruyning, the agent, to dispose of the immovable property of Moses, his principal. There were apparently two such properties in Georgetown, one in Kingston and the other—the subject of this action—in Bourda, The power of Attorney under which Bruyning derived his authority appointed him to be attorney in this colony of "him the appearer during his absence from the colony," and "on "all and every occasion to carry on and manage all the affairs and busi- "nesses of him the appearer to purchase and sell or mortgage real and per- "sonal property and to receive and pass

"as the case may require transport or transfer or conveyance thereof," and it ends with a general clause that the attorney might do (perform) transact, etc., whatever might be requisite and whatever further the appearer might direct by letter or written instructions as fully and effectually as he the appearer could himself do and perform; and then follows the usual clause by the appearer to ratify and confirm. There is no question but that Moses was out of the colony when the agreement for sale of the Bourda property took place, nor—apart from any other circumstances—is there any doubt that Bruyning could sell any of the Georgetown property under the power. It is however alleged by the defendant that not only was there no necessity for sale of the Bourda property, but other funds were available to meet any claims against Moses, and further Bruyning had been directed not to sell the property. Neither of these reasons of course would at law affect an innocent purchaser, and on the evidence one could only conclude that the plaintiff purchased in good faith and without any notice of anything nullifying Bruyning's powers of sale.

Moses and the plaintiff never met until after the sale had been negotiated, and Bruyning had been acting as his attorney since August, 1924. When an authority is general as in this case it will be construed liberally and according to the usual course of dealing in such matters. As Blackwood Wright in his work on Principal and Agent says, "The apparent au- "thority is the real authority so far as third persons are concerned, and "where an agent abuses it, it does not affect a person dealing *bona fide* with "him." And this principle is even stronger where an agent had been privately instructed not to do a certain thing (*Watteau* v. *Fenwick, Davy v. Walter*).

On these grounds then the plaintiff is within his rights in claiming specific performance of the sale made to him, but there is the further objection taken, that the Court will not generally exercise its power to compel specific performance when to do, so would necessitate a breach of trust, or of a prior contract, with a third person, and that an attorney is in the position of a quasi-trustee; the case chiefly relied on was that of *Mortlock* v. *Buller* 10 Ves. 292) which extended the doctrine to all cases of trust and confidence, and decided that when a contract involved a gross breach of duty by an agent to his principal the Court would not enforce the consequences of that act. And *White* v. *Cudden* (1842. H. C. and F. 766) was also referred to, a case where trustees for sale misrepresented the value of the property, and the Court refused to enforce specific performance against them with compensation, as being prejudicial to the cestui qui trust (and see *Walters* v. *Morgan,* 1861. 3 de Gex. F. & J. 722). The evidence in this case shows no such misrepresentation of the value of the property in question, or of any advantage taken by the purchaser,

sufficient to form a ground for refusing specific performance; a purchaser is entitled to make a good bargain and I find no such unfairness as to call for the Court's interference. Inadequacy amounting only to hardship without conclusive evidence of fraud affecting the transaction is no ground for relieving a vendor.

There were some 30 or more documents offered as exhibits, and objection taken to many of them as not being admissible or having no bearing on the case, and it is convenient to say here that amongst others I exclude from consideration as offending the rules of admissible or relevant evidence, (1) all the copies of cables sent or received (2) Ex. "O," an alleged certificate of opposition to a transport by Mr. Bruyning, and (3) Ex. "R," ah agreement between Bruyning as the attorney of Moses and one Mendes. Letters between principal and agent are I think admissible to enable the Court to collect from the circumstances stated whether the general authority to sell given to Bruyning was circumscribed or withdrawn by his principal, but it would be very dangerous to hold that third persons were affected by such communications. (See *Whitehead* v. *Tuckett,* 13 R.R. 509).

To apply the doctrine that breaches of trust will be relieved against in equity to the breach by an agent of his duty to his principal it is generally necessary that some third party should be prejudicially affected, in the case of trusts it would be the beneficiary, and it is I understand suggested in the present case that Miss Rhoda Knights, a niece of Mr. Moses and a witness in the case, would suffer loss were the plaintiff to obtain a decree of specific performance. It seems that Moses on May 6th, 1925, made a will prepared by Mr. Bruyning on his instructions, by which he bequeathed *inter alia* to his niece Rhoda Knights his property at South Road, Bourda—the property now in question,—that on the 1st September, 1925, he made another will revoking the first but with the same provision in it, and that by a further will made on 31st August, 1926, revoking previous will he again made a similar bequest. It may be remarked that this last will, probate of which was obtained on the 6th October, 1927, was made after a knowledge of the sale to the plaintiff of the said property and after an endeavour on the part of Moses to induce him to cancel it, so that it can have no effect on the legal aspect of the case except in so far as it indicates the wish of Moses at that date. Miss Knight appears to have been aware of the legacy and was informed by Bruyning that the property had been left her by the first will, but as a will speaks from the death of the testator, which took place on 19th September, 1927, and he was at liberty at any time either to part with the property or alter his will she has no legal or equitable claim against anyone, and she would not have been entitled to oppose transport of the said property during the lifetime of the testator, though it may be stated that that was not the ground of her opposition

It may well be, and the evidence is to that effect, that Moses did not wish to part with any of his properties in B.G., but the evidence also shows that he was being pressed by at least one creditor, that he had mortgaged his Kingston property as well as his property in Suriname, and had a large amount of money tied up in the dispute with the Colonial Bank, and his attorney, who was also his solicitor and so in a position to have an intimate knowledge of his difficulties, in an endeavour to relieve his financial position and to save the sale of the Kingston property—the more valuable of the two—sold the Bourda property, and whether it was a wise or unwise exercise of his discretion it certainly relieved the situation. So far then no one but Moses had any right to complain, but—it is alleged by the defence—Bruyning had been expressly forbidden to sell that property. The evidence on this point is very contradictory; it appears that Moses arrived off Georgetown in the Biskra, on the 6th July, 1926, and that he sent for various persons including Bruyning, who visited him two or three times, and that there were present also Miss Gaddum, (the ex-defendant and his Suriname attorney), Mr. and Miss Knights and numerous other relations and friends. Bruyning denies that he was forbidden to sell any of the properties and says that Moses appeared to be very distressed over an impending forced sale of the Kitty property belonging to a Mrs. Da Silva who also came on board, and there is no doubt that the conversation and instructions were chiefly concerned with that property, and with Mr. Wight's claim against Moses. Mr. Marshall is a most reliable witness to what occurred on board but after an interval of nearly a year and a half he naturally cannot recall some of the incidents given by other witnesses, He states, "He "(Moses) told me he didn't want his properties sold at all in B.G. Bruyning "referred to the fact that Mr. Wight was pressing for money and threatened "to levy. He did say more than once he didn't want his properties sold. He "asked my advice in Bruyning presence if you have an attorney and he is "selling your property without your knowledge or consent what are you to "do," and on cross-examination "my impression was that he had bought the "properties and didn't care to part with them, he showed special affection "for the Kingston property." Mrs. Knight's evidence of the same incident on board is, "Moses told Bruyning that he was not to sell his property or "anybody else's property." Mr. T. A. Storey the defendant stated "Moses "told Bruyning not to sell Da Silva's property, and that none of his proper-"ties were to be sold; I presume it was to Mr. Bruyning he spoke. I don't "actually remember all that was said, it is too far off." Miss Gaddum states, "Bruyning said he had to sell the place (*i.e.,* Da Silva's), and Moses told "him to raise money on it. Moses told him not to sell any of his properties. "Bruyning got vexed when he got ashore and said he would sell." Mrs. Da

Silva says "Moses again instructed Bruyning not to sell my property or any "of his properties but to give me opportunity of getting my place mort- "gaged." Rhoda Knights says, "Moses said mark you are not to sell Mrs. "Da Silva's property, nor any other of mine."

The effect on my mind of the whole of the evidence of what occurred on the "Biskra" is that the discussion was chiefly with regard to Mrs. Da Silva's property and also to the Kingston property, that the Bourda property was never referred to specifically, and that all the witnesses are of opinion that Moses stated he did not wish any of his properties sold. It is very indefinite, the conversation took place in the presence of a great many visitors coming and going; I do not doubt but that the witnesses are stating their recollection of what occurred, but it remains only an inference that Bruyning was directed not to sell the Bourda property and much of the conversation must have taken place in his absence. It is to be noted too that the letter written by Moses to Bruyning on the 20th July and received the 27th July does not refer to any of the subjects stated to have been discussed, and is a perfectly friendly letter. Even if there were a general direction not to sell it would be difficult to find that it created a trust effective against the sale to a *bona fide* purchaser without notice, especially in view of the rule that when the authority is revoked by act of a party to a power of attorney such revocation only affects a third party from the time the revocation is known to him and not before. That Moses himself did not look upon the revocation of power of sale as effective is indicated by the fact that on the 30th August both Moses and his then lawyer endeavoured to effect a compromise in offering to return the $1,080 paid by the plaintiff as part of the purchase money together with $100 (or $500 the plaintiff says) in addition, if the plaintiff would release his right of purchase, In these circumstances I must hold that Moses was bound by the general authority given to Bruyning, if the latter abused the confidence reposed in him it is Moses (the principal) and not the plaintiff (the innocent purchaser) who must suffer for it.

I have consulted all the cases referred to by counsel for both parties relative to the equities but can find none in which equity intervened in favour of a principal against a third party where the agent had acted under the powers entrusted to him, there must be something more than a mere mistake or error of judgment on the agent's part, and I cannot see my way to consider this as a case between two innocent parties where both have been defrauded. For a period of two years Bruyning had been conducting Moses' business in Georgetown when the latter was absent, and had the plaintiff been the one to refuse to complete the purchase there is no doubt that Moses could have sought the assistance of the Courts in enforcing it.

I cannot express the conclusion I have come to better than by quoting from the judgment of Farwell, J., in *Hexter* v. *Pearce* (1900 1 CD. 346), "The whole doctrine of specific performance rests on the ground that a man "is entitled in equity to have in specie the specific article for which he has "contracted and is not bound to take damages instead. The right to sue on a "contract is the same in law and in equity, but the remedies differ, and the "Court of equity will grant the equitable remedy in all cases, so far as I "have been able to discover, unless there has been some conduct on the "part of the plaintiff disentitling him to relief in equity, or in some rare in-"stances where there would be a great hardship imposed on an innocent "grantor or lessor by reason of some mistake which he has made, although "the other party has not contributed to it . . . . . I am not aware that the "Court has ever taken into consideration the comparative convenience or "inconvenience of plaintiffs and defendants apart from the consideration I "have just mentioned."

In my opinion the plaintiff is entitled to the relief he asks for and there will be judgment for specific performance; this naturally carries with it his claim to the rents of the property he has purchased from the 1st August, 1926, to date. I accordingly direct the necessary accounts to be taken by the Accountant of the Court in order to ascertain what rents have been received by the deceased Mr. Moses or by Mr. Storey either as the attorney or as executor of the deceased estate since the 1st August, 1926, the account with the necessary vouchers and affidavit of verification to be lodged by the defendant within 28 days.

I further order the defendant to pass transport of the property within 10 days and in the event of his failing to do so it is ordered that the Registrar of the Court carry this order into effect.

The plaintiff should have the costs of this action against the first defendant, and also against the second defendant up to the date of her withdrawal from opposition.

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

Solicitor for the defendants, *C. Gomes.*

GOMES *v.* CURRY AND ANR.

GOMES *v.* CURRY AND ANR.

[No. 172 OF 1927.]

1928. FEBRUARY 4. BEFORE DOUGLASS, J.

Opposition suit—Reasons set out in notice of opposition—Advisability of repeating and referring to same in Statement of Claim—General ground of opposition stated in Notice of opposition—Particulars thereof set out in Statement of Claim—Whether such mode of pleading contravenes rules governing opposition suits—Whether opposition suit is the proper procedure when opposer is owner by transport of portion of property sought to be mortgaged by another—Defendant's transport by error referring to portion of land embraced by plaintiff's transport—What is the proper remedy.

(*a*) It is advisable to follow the old practice of embodying in the Statement of Claim the reasons of opposition set out in the Notice of Opposition.

(*b*) Where a ground of opposition is stated generally in the Notice of Opposition, the opposer may in his Statement of Claim set out particulars thereof, provided that in so doing he does not in effect aver an independent and distinct ground of opposition. *Barrie* v. *Duff* (31.3.08) followed.

(*c*) Where the opposer's transport embraces the land or a portion thereof which the defendant is seeking to mortgage or transport the proper remedy is not by way of opposition because as the plaintiff has already acquired dominion over the property no steps that the defendant can take through a misdescription of his the defendant's property can prejudice the opposer's right in any way.

E. M. Duke, for the plaintiff.

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

DOUGLASS, J.: The plaintiff is asking for an injunction to restrain the defendants from passing a first mortgage on the E½ of S½ of lot 188, South Cumingsburg District, Georgetown, and for a declaration that the opposition entered on the 1st day of May, 1926, is just, legal and well founded

The statement of claim ought to include the ground of opposition and generally repeats and relies on the reasons of opposition previously described. In the present case it, in effect does so but does not refer to them as being the reasons for opposition, and it is only ascertained on a production of a certified copy of the opposition in the course of hearing. No objection was taken on this score, and as the statement of claim refers to the opposition entered on the 1st May, 1926, it appears sufficient, but it would be more convenient if counsel would follow the old practice of embodying the reasons for opposition as such in the statement of claim. The first objection taken by the defendant is to paragraph 4 of the statement of claim as contravening rule 9 (1) of rules of Supreme Court (Deeds Registry), 1921, but I do not agree that the contents of that paragraph is a fresh reason of opposition. It is, perhaps, evidence to be adduced in support of plaintiff's claim, or, put in another way, the ultimate result that the plaintiff alleges the evidence will show, and is unnecessary, though perhaps informative. Nearly 20 years ago, it was held in the local case of *Barrie* v. *Duff*

(31.3.08) that if a mere general statement be made as a ground of opposition, the particulars could subsequently be added.

But in paragraphs 6 and 7 of the Defence, a more serious objection is taken to the whole proceedings, that it is not competent for the plaintiff to oppose the passing of the mortgage as the defendants are owners by transport of the property sought to be mortgaged, and that the plaintiff has mistaken his remedy.

The first question appears to be how far her transport secures to the plaintiff all that she claims she is entitled to.

The plaintiff has traced her title to the property very effectually from a Transport dated the 4th March, 1814, in which the said property is described as the S.W. part of Lot 188 . . . Cumingsburg . . . . containing 35 feet in width and 130 feet in depth, and in all the transports since that date the same description is adhered to except there is in the transport dated the 19th May, 1900, under the title "Fourthly"—the addition of the words "also known in the Town Books as W½ of S½ lot No. 188, and a certificate was laid over, given at the same date by the Town Clerk of Georgetown, that the property referred to as W½ of S½ on the Town Books is the same as that described as S.W. part, etc., in the transport immediately preceding." The certificate also contained a statement that the provisions of the Georgetown Town Council Ordinance, 1898, with respect to subdivision of lots was not contravened, though that was not necessary as the lot was so sub-divided before the earliest Ordinance passed on 18th *March,* 1828. entitled "The Consolidated Act for the better regulation of Georgetown." On the 15th June, 1923, the plaintiff had the adjoining lot 189 and part of 188 surveyed by Mr. Seymour, taking measurements from the paling running along the western boundary on Waterloo Street, a copy certified by the Commissioner of Lands and Mines was put in evidence. This shows the total depth of lot 188 to be 243 feet from west to east, and the portion transported to the plaintiff being 130, it obviously leaves to the owner of the east portion 113 feet; the width of 35 feet north to south is not disputed; but the defendants say that their portion being the E½ of the S½, *i.e.*, ¼ of the whole lot, the plaintiff cannot claim more than ¼ of it and they do not admit the correctness of the measurements; the defendants base their claim on transport dated 19th September, 1908.

Under the Deeds Registry Ordinance, 1919, Amendment Ordinance, 1925, section 3 (2) a transport passed before the 1st January, 1920, shall after the expiration of two years from that date vest a full and absolute title in the transferee to the immovable property therein described, so that the defendants' title did not become completed until the 1st January, 1922. On the other hand the plaintiff and another obtained by transport an undivided half of the portion of land

she claims on the 9th August, 1920, and consequently the full and absolute title to the undivided half vested forthwith under section 3 (1): the other undivided half had similarly been transported to one M. A. Rodrigues on the 17th June, 1920, and ultimately in 1922 became; vested in the plaintiff. The plaintiff and others then acquired their full and absolute title before the defendants obtained theirs, and a misdescription in the defendants' transport of the property transported cannot affect the absolute ownership under a prior transport, but the plaintiff has a still stronger position for the evidence shows that she is and has been for some time in possession of the strip of land, the defendants say should not have been included in their title, and the rule still holds "*in æguali jure melior est conditio passidentis.*"

That being so, how can a misdescription of the property in the defendants' transport affect the plaintiff? It is obvious that if her property is described in the Town Books as W½ of S½ lot No. 188, whereas it should properly be South-west part of lot No. 188, the same reasoning applies to the other portion of the South ½ of lot No. 188, and by the amount the ¼ lot is increased in the one case by the same proportion must the other ¼ lot be reduced.

The persons to whom "opposition" is available are collected in Burge on "Foreign and Colonial Laws" (1838 Ed.), Vol. 2, p. 580, speaking generally, it is all those who have an interest in the property published for sale who can offer their opposition to it, *e.g.*, "if the property . . . . belongs to "another . . . . . if a person has any rent, usufruct or servitude over it. The "creditor having an hypothec also interposes an opposition," and again the "omission to make his opposition cannot prejudice the person who is in "actual possession of the property on his own behalf." The right was summed up shortly in the *Administrator General* v. *Willems* (1892) by Chalmers, C.J., thus, "This question" (*i.e.*, what was a valid cause of oppo- "sition) must be decided upon authority and principle. . . In all the older "authorities the faculty to oppose is founded in a right to or in the property, "or a nexus upon it." Matthaeus enumerates three classes of persons who can oppose a sale, the 1st opposes absolutely with the object of stopping the proceedings, the 2nd with the object of having their own property separated from that of the debtor, the 3rd with the object of preserving their rights. Mr. Duke in his "Treatise of the Law of Immovable property" sums up the decisions on the right to oppose very fairly, he states it is confined (1) to persons having dominion in the *res* itself or some legal or equitable right therein and (2) by virtue of such a claim as might properly be brought before the Court by means of a specially indorsed writ.

But surely the plaintiff has not only dominion over the property included in his transport, but also every legal and

equitable right imaginable, and if that is so no steps that the defendants have taken can prejudice his right in any way; in my opinion he has adopted the wrong procedure to prevent the defendants purporting to charge a greater portion of S½ of lot No. 188 than they legally can; according to her own showing the plaintiff has no interest in the property which the defendants are entitled to mortgage, and if any one is injured by their mortgaging property under a misdescription it is the intended mortgagee and not the plaintiff.

In these circumstances I must refuse the injunction asked for, though not without considerable hesitation, and declare the opposition not to be well founded. This does not of course preclude the plaintiff taking any other proceedings that she may deem advisable. As it is the first case of its kind, and the evidence discloses a misdescription of the property in the defendants' transport, I do not think costs should be allowed.

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

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

ALTAFFHUSAIN *v.* ISHMAEL AND ANR.

[No. 118 OF 1926.]

1928. FEBRUARY 25. BEFORE DOUGLASS, J.

Bankrupt—Composition made with creditors—Promissory note given to one creditor for full amount of debt subsequent to date of composition—Attempt of one creditor to gain advantage over other creditors—Invalidity of note given in such circumstances—Creditor party to composition Deed—Deed not annulled—Whether creditor can bring action to recover original debt.

(*a*)Where creditors are dealing on a common basis, *i.e.* acting together in consideration of receiving some proportionate shares of a fund to he distributed amongst them—any person who was bargaining behind the rest for a private advantage cannot maintain and enforce such a transaction, because it would be a fraud upon the other creditors.

(*b*)In the case of a composition, the right to sue for the original debt does not revive on default in payment of the composition.

(*c*)Such debt can revive only if and when the Court thinks fit to re-adjudicate the debtor a bankrupt,

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

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

DOUGLASS, J.: The plaintiff seeks to recover $1,800 on a promissory note given on the 18th August, 1924, by his married daughter and her husband, the defendants deny having received any consideration for it although they admit signing the note, and say it was given to insure the plaintiff against his liability on a bond for $2,050 given by him to secure a composition made

with the creditors of Alice Ishmael which had been accepted by a majority in number and three-fourths in value of all the creditors who had proved on the 13th August, 1924, under section 16 of the Insolvency Ordinance No. 29 of 1900, and approved by the Court on the 30th August, and the defendants further say that the plaintiff had realised the property of Alice Ishmael to satisfy creditors, and had incurred no personal liability as yet. The plaintiff on the other hand states that the promissory note for $1,800 has nothing to do with the composition proceedings but was given to replace a promissory note for $719 surrendered in August, 1924, and includes a further loan of $480 to the defendants, and a sum of $601, the value of a stall, stock, and utensils, owned by the defendants, but credited to himself on his daughter applying for Receiving Order and retransferred to the defendants on the creditors agreeing to a compromise. With respect to the separate loans which formed a portion of the first note for $719, the evidence is most unsatisfactory, and had it not been that Alice Ishmael included a sum of $700 due her father as one of the creditors I should have doubted their genuineness, as I do doubt that any sum of $480 was lent after the compromise. The transfer and re-transfer of stall, stock and utensils, if it ever occurred, was obviously intended to defraud the creditors, and inasmuch as it was an illegal transaction the consideration for the promissory note for $1,800 also fails to that extent. The whole of the transactions between father and daughter are so tainted with fraud that it is difficult to say if any part of the sum covered by the promissory note is good, but even if the $700 is allowed as good the plaintiff as one of the creditors is bound by the compromise and cannot be allowed to include that amount in a promissory note and so gain an advantage over the other creditors, and all the more so as the plaintiff is surety for carrying out the terms of the compromise. Upon the facts given in evidence, such fraud is disclosed with a view to depriving the creditors of part of the assets of the defendant Alice Ishmael, or to induce them to accept a lower rate of compromise that every part, of the transaction is clearly bad, and the promissory note whether given as the defendants say as a guarantee or not is wholly void.

Most of the cases submitted by Mr. Luckhoo in support of the plaintiff's case are not applicable—and those before the Bankruptcy Act of 1896 are of doubtful authority—but I will refer to two which are to the point.

1. In *McDermott* v. *Boyd* (1894. 3 Ch. Div. 365) where a bankruptcy was annulled on the petition of the bankrupt with the consent of creditors, but an agreement to pay one creditor a further sum of £600 was not disclosed to the Court, it was held that there was no duty to disclose the agreement to the Court inasmuch as the function of the Court was merely to ascertain

whether the proper parties consented; but Lord Herschell, in delivering judgment, expressly stated, "as regards the other creditors, if this were a "case in which all the creditors were dealing on a common basis, that is to "say, if they were acting together and were consenting to an annulment in "consideration of receiving some proportionate shares or some named "shares out of a fund that was to be distributed amongst them—then I agree "that any person who was bargaining behind the rest for a private advan- "tage could not maintain the transaction for a moment . . . ." "But," he con- "tinues, in the present case nothing of the kind appears." And Davey, L.J., says in relation to the case "It was utterly unlike a composition the princi- "ple of which is that all the creditors share alike . . . . . Of course it would "be an obvious fraud on the other creditors who agree to accept a composi- "tion payable *pro rata* to all, if one creditor was enabled by a secret bargain "to obtain a better advantage for himself, and that would be all the more so, "as in modern cases, a specified majority of creditors, have power to bind "the minority."

2. In *Wild* v. *Tucker* (1914 3 K.B.D. 36) it was held that a contract by an undischarged bankrupt in consideration of a small loan, to pay in full a debt of a large amount due from him at the commencement of and provable in his bankruptcy is not void as being contrary to public policy or the policy of the Bankruptcy Acts, but is a valid and enforceable contract. Atkin, J., stated "a promise for good consideration to pay a debt from which the "debtor is already discharged in bankruptcy is an enforceable promise: see "*Jakeman* v. *Cook* (4 ex D, 26)." I have already stated that in my opinion in the present case there was no fresh consideration for the promissory note so far as it exceeded the $719 presumably provable in bankruptcy, but apart from that this is not a case of a bankrupt's discharge which by Section 28 (2) of our Ordinance releases the insolvent from all other debts provable in insolvency, other than certain exceptions mentioned in sub-section (1) thereof; but an order was made on the 6th July, 1927, annulling the Adjudication Order of the 5th July, 1924, alter the promissory note had been given and even after this action was started; the question of the policy of the Insolvency Act does not arise, and I agree with the learned author of Williams Bankruptcy Practice (13th Edit.) when he says: "It would seem "that in any case where there is a composition without a bankruptcy or af- "ter a bankruptcy with an annulment thereof, a promise like that in *Jake-* "*man* v. *Cook* would be deemed a fraud on the other creditors, if made be- "fore a payment of the composition, because it might result in sweeping "away the assets available for the payment of the composition" (*Ex parte* "*Barrow* 18 C.D. 464).

Mr. Luckhoo suggests that as the plaintiff is a creditor, he is entitled to at least 35 per cent of the amount of the promissory

note and to have judgment for that amount, I cannot agree, in the first place there is no evidence that he proved for $700 in the Insolvency proceedings although he was put down as a creditor for that amount on his daughter's statement of her liabilities, and next, if default has been made in payments under the composition, Rule 172 of the Insolvency Rules, 1901, says that no action to enforce such payment shall lie, but the remedy of any person aggrieved shall be by application to the Court.

This brings me to an insuperable objection to the claim by the plaintiff, quite apart from his failure to satisfy the Court as to the bona fides of his claim and that there was good consideration for it, and that is, that under section 8 of the Ordinance on the making of a Receiving Order no Creditor to whom the debtor is indebted in respect of any debt provable in insolvency shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, except with the leave of the Court. At the time this action was started the Receiving Order had not been rescinded and the leave of the Court has never been applied for or granted. Referring again to Williams' Bankruptcy Practice it is stated, it seems clear that in case of a composition under section 21 the right to sue for the original debt does not revive on default in payment of the composition for the acceptance of a composition under this section and the approval of the Court will operate only as a conditional discharge; that is to say the debts will revive if the Court thinks fit subsequently to re-adjudicate the debtor an insolvent on any of the grounds mentioned in subsection (3). "Until such re-adjudication the acceptance by the "creditors of the composition would seem pleadable in bar to any action to "recover a provable debt." *Slater* v. *Jones* (1873. 8 Ex. 186).

With regard to the second defendant, the evidence is clear that he never borrowed any money from the plaintiff, indeed it is never alleged by the latter, and signed the note only for the accommodation of the first defendant and that no consideration passed; that he knew of and assisted in the intended fraud on creditors is also certain.

I give judgment for the defendants, but for obvious reasons allow no costs.

Solicitor for Plaintiff, *L. Ramotar.*

Solicitor for Defendants, *V. Dias.*

GINDER, LTD., AND HOUSTON.

GINDER, LTD., APPELLANT,
AND
HOUSTON, RESPONDENT.

[No. 155 OF 1927.]

1928. MARCH 2.

BEFORE SIR ANTHONY DE FREITAS, KT., C.J., AND DOUGLASS, J.

Mining Regulations, 1924—Location of claim by person not having prospecting licence—Effect thereof—subsequent location of same claim by holder of licence—Whether previous location valid—Meaning of term "located" in Regulation 6 (1) of Mining Regulations 1924—Whether regulation 88 (1) limits the remedy to "jumping" or merely prescribes the circumstances in which "jumping" may be resorted to.

(*a*) The term "located" in regulation 6 (1) of the Mining Regulations 1924, means located in accordance with the laws and regulations governing the locating of claims. Consequently an attempted location by a person who does not possess a prospecting licence, a pre-requisite to the right to locate, is null and void and the land purported to be located is *instanter* open to location by a person doing so in accordance with the regulations.

(*b*) Regulation 88 (1) reads thus "a claim for which a licence has not been issued may be jumped under the following circumstances only" and among the circumstances set out is the following (a) "if the person locating it had no prospecting licence in force at the time."

Held:—That the word "only" in the said regulation does not limit the person desiring the claim to adopt the process of jumping if another remedy is available, but is intended to limit the cases available for jumping to those set out therein.

Appeal from the order of Gilchrist, J., allowing the appeal of the respondent herein from the Warden's order dated 12th July, 1927, and ordering the appellants to vacate a certain claim.

G. J. DeFreitas, K.C., and H.C. Humphrys, for the appellant.

E. M. Duke, for the respondent.

DE FREITAS, C.J.: In my view it is clear that "located" in No. 6 (1) of "The Mining Regulations, 1924," means located in accordance with the laws and regulations governing the locating of claims. A claim is not validly located unless the locating of it has been in accordance with those laws and regulations. It is clear that, at a time when there was no existing valid location, the respondent, Houston, validly located the claim on the 3rd of October, 1925.

I am, therefore, of opinion that Mr. Justice Gilchrist's decision is correct and that this appeal should be dismissed with costs.

DOUGLASS, J.: This is an appeal to the Full Court from the decision of the Judge allowing the appeal of the respondent herein against the order of the Warden dated 12th July, 1927, and ordering the appellants herein to vacate the claim known as "Pennsylvania" or "In Time."

The facts are not in dispute; one Pierre, a director of the appellant company, purported to locate the said claim on the 30th September, 1925; he had held a prospecting licence but it had expired before that date . . . . . On the 3rd October, 1925, the respondent, who held a valid prospecting licence, through his agent de Groote, located the same claim and after the necessary preliminaries obtained a claim licence and paid the rents for the claim for 1925, 1926 and 1927. On the 1st March, 1927, the appellants located the same claim, and on 9th March lodged a complaint against the respondents under Regulation 170 of the Mining Regulations, 1924. The Warden gave his decision on the 12th April that both the locations were null and void and declared the claim open to location at the expiration of six weeks from that date. From this decision the respondents appealed to the Supreme Court. The principal ground of the present appeal is that the learned Judge was wrong in point of law in holding that it was competent for the respondent to locate the said claim on the 3rd October, 1925, and it was submitted that the only "remedy" was by way of jump under regulation 88 (1). Regulation 88 (1) reads: "A claim for which a licence has not been issued may be jumped under the following circumstances only: (a) if the person locating it had no prospecting licence in force at the time." It is common ground that Pierre had no prospecting licence in force at the time he purposed to locate the claim, and therefore, so say the appellants, the respondents could not obtain the claim by locating it, as the only "remedy" was by jumping. I have already held in *John* v. *Cozier* (L.R.B.G. 10th September, 1926) that the word "only" in this regulation does not limit the person desiring the claim to adopt the process of jumping if another remedy is available, but is intended to limit the cases available for jumping to those set out in the paragraphs under the regulations, and I have seen no reason to alter my opinion.

Was the respondent entitled to locate? for if he had located the claim in question in accordance with the Regulations, the appellants' attempt to locate it at a later date could not have been effective. There can be no doubt that Pierre's location was null and void for the last paragraph of Regulation 6 (1) runs: "Any location not made in compliance with this regulation shall "be null and void." Under the superseded Regulations of 1905 this paragraph reads: "Any location not made in compliance with this regulation "shall be disallowed by the Commissioner," a very different thing, for until so disallowed, no person could take advantage of the breach of the regulation. This distinction is still retained as will be seen by reference to regulation 5 (b), "A prospecting licence issued to any person shall, unless the lo- "cation is null and void, or he is informed by the Commissioner that his "location is disallowed, be deemed to entitle him

"to work the ground located thereunder." I do not see any necessity for interpolating the word "lawfully" between the words "previously" and "located" in Regulation 6 (1), for it is clear that without a prospecting licence no question of location within the obvious meaning of the regulation arises. The inception of this regulation shows it, "a person on obtaining a prospecting licence may . . . . "prospect for and locate claims"; the person attempting to do what he may call "locating without a prospecting licence is a mere "trespasser." The proviso to Regulation 4 (b) which was referred to by learned counsel for the appellants as supporting his view that there may be a location apart from a prospecting licence (if it has any definite meaning) was perhaps introduced to point out that a so-called location made previous to a licence which is subsequently obtained is no location. It is evident from the words in the same rule. "A prospecting licence issued to any "person shall . . . . . entitle him to work the ground located thereunder," that a location can only be made by a person authorized under the regulations. (And see Regulation 25 (7) (c), and *Harrison* v. *Gainfort.* Review cases B.G. 1898 p. 27).

The respondent then was entitled to locate in the circumstances existing, and this Court will uphold the decision of the learned Judge.

The appeal is dismissed with costs.

Solicitor for the appellant, *G. R. Reid*

MOSES *v.* STOREY.

MOSES *v.* STOREY, *et al.*

[No. 439 of 1927.]

1928. FEBRUARY 23, 24; MARCH 5. BEFORE DOUGLASS, J.

Will—Probate—Suit for setting aside will—Allegations in Statement of Claim of insanity of testator—Defence in denial of such allegations—Application for particulars of matters alleged in Defence—Principle upon which particulars granted—Peculiar rules in Probate practice relating to particulars.

The defendants in an action brought to set aside a will on the ground *inter alia* that the testator was insane and suffering from delusions when he signed same pleaded that the testator's disposition of his property was not due to any insanity or delusion but that the testator was influenced thereto by quarrels which had taken place between himself and his wife. The plaintiff applied for particulars *inter alia* of the dates of the said quarrels.

Held:—(*a*) That the object of requiring particulars was to narrow the issues and to prevent surprise.

(*b*) That the "quarrels" referred to were only a link in a chain of minor incidents going to prove a material fact and were not *per se* a material allegation upon which the success of either party to the suit depended.

(*c*) That the English practice in probate actions up to 1901 had been usually adopted and followed in this colony and that according to that practice particulars in the usual sense of the term, were not ordered.

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

P. N. Browne, K.C., and C. R. Browne, for the respondents.

DOUGLASS, J.: This application was made on behalf of the plaintiff under Order XVII, rr. 7 and 8 answering to Order XIX., rr. 6 and 7 of the English Practice.

The particulars desired resolved themselves into the following:

(1) The dates of each of the "quarrels" referred to in lines 16, 22 and 27 of Substance of Case, par. (c) of the Defences filed: and

(2) The date of each of the two occasions on which the deceased, J. H. M. Moses called on the plaintiff to account, referred to in Substance of Case par. (c) lines 40 and 41, and in par. (m) of the particulars of defence in answer to a letter by plaintiff's solicitor dated 28th January, 1928.

It appears that not being satisfied with the particulars supplied the plaintiff's Solicitor wrote again on the 4th February asking for better particulars, when a reply dated the 7th February was received from the defendant's solicitor stating that the particulars supplied "are the best, as far as it is practi- "cable that my clients can furnish," and enclosing the following further particulars: "(d) The quarrels referred to in lines 22 and 27 of the Substance of "the Case occurred at the residence of the deceased in Paramaribo during the "period referred to under (d) of the defendant's particulars delivered on the "3rd February, 1928," (*i.e.*, during the illness of the deceased from the month of September, 1925, to the month of July, 1926). "(m) These particulars were delivered on the 3rd February, 1928," (*i.e.*, on two occasions between the months of October and November, 1925, inclusive, and on or

about the 8th February, 1926, all at Paramaribo, verbally. The refusal to give any further money was made at the last mentioned date and place).

The cases referred to by counsel for all parties go to show that it depends on the facts in each case what particulars may be required, and that the pleadings should state those facts which will put the opposite party on his guard and tell him what he has to meet when the case comes on for trial; particulars are only necessary so far as they ensure clearness and prevent surprise at the trial.

I am of opinion that with this standard in view Mr. Stafford has made out no case for demanding the particulars he seeks to obtain, his client, the plaintiff, is not charged with any offence, nor is there any material allegation made by the defendant which he should be unable to meet; the case of *Hartop* v. *Hartop* is not applicable, there a particular act had to be proved, here further particulars of the "quarrels" appear to be immaterial to the success of either the plaintiff's or defendant's case (*vide Cave* v. *Torre*). The "quarrels" referred to are merely incidents set out in a general paragraph of the Substance of Case submitted by the defendant contesting the insanity of the deceased, which paragraph includes a number of small circumstances the collective effect of which is said to have led to the plaintiff and her husband separating, and no one could know the substance of these "quarrels" and when they took place better than the plaintiff.

It may be noted that the plaintiff in her answer to particulars required of the said paragraph 7 "Substance of Case" replies exactly in the same form and with similar vagueness with respect to the same period which she is now expecting the defendants to elaborate, for commencing at line 14 of the particulars filed 23rd January, 1928, one reads, "the delusions aforesaid "first manifested themselves early in the month of November, 1925, at his "residence at Paramaribo, Suriname. The plaintiff can give no further par-"ticulars as to this date. The said delusions were exhibited continuously by "the said J. H. M Moses at his residence from November, 1925, to the 4th "July, 1926, when he abandoned the plaintiff at Paramaribo, etc., etc,"

The "quarrels" may or may not form a part of the chain supporting the defendant's contention that the deceased was not of unsound mind and that there was no undue influence on their part, it is impossible to say until the evidence as a whole is adduced; at the present time I can see no reason why evidence in support of the allegations objected to should be excluded.

Next with respect to the objection at law raised by Mr. P. N. Browne, K.C., and Mr. C. R. Browne to the plaintiff being entitled in a probate action to any such particulars as they ask for. It has been the practice of this Court, in the absence of any local probate rule, to follow as nearly as may be consistent with local conditions the practice obtaining in England, and it

can hardly be contended by Mr. Stafford that the English Probate Practice does not apply as he has himself adopted it when he inserts in the Statement of Claim the "Substance of Case," in compliance with the note to Order XIX, r. 25 (a) (the English Practice) that that rule would apparently apply to a statement of claim in an action for revocation, such statement being of the nature of a defence.

The cases cited by learned counsel for the defence show clearly that up to 1901, when Rule 25 (a) was interpolated, the practice was to require no further particulars in probate actions than were embodied in the pleadings, and in *Patrick* v. *Hevercroft* (1920) 123 L.T. 201, McCardy, J., referred with approval to Mr. Mortimer's "lucid and masterly work on probate, page 263" where he says, "if the plaintiff considers that the substance of "the case delivered by the defendant is incomplete, or not sufficiently de- "tailed, he may apply to the Registrar on notice under the summons for "directions for further substance of the case but he can obtain no more than "a statement in general terms of the case which is relied on by his oppo- "nent. He is not entitled to *particulars* in the usual sense of the term."

The headnote to *In re* Estate of Earl of Shrewsbury and Talbot deceased (1922. 126 L. T. 415) reads: "The rights of opposite parties to ob- "tain information as to the substance of the case under the various heads of "defence set up in a probate action is governed by Order XIX, Rule 25 "(a)"; and Sir Henry Duke, P. in his judgment quoting the judgment of Lord Cozens Hardy, MR., delivered *in re* Hailstone, deceased (1909, p. 120) says, "when we find distinct rules in the probate court dealing with a "particular subject matter they . . . . remain in force notwithstanding there "may be a different rule dealing with the subject matter in the Rules of the "Supreme Court."

Neither on the facts nor on the practice in probate cases can Mr. Stafford succeed in his application.

My attention was called to the fact that the letter dated 4th February written by the plaintiff's solicitor demanding the said particulars only gave three days for the defendants to comply with it, obviously too short a period to have obtained the particulars (had they been necessary) of incidents which occurred in Paramaribo.

I think the plaintiff should pay the costs of their application in any event.

Solicitor for the applicant, *Albert Ogle.*

Solicitors for the respondents, *A. V. Crane* and *Dias & Dias.*

MILNER *v.* PEREIRA AND ANR.

MILNER *v.* PEREIRA AND ANR.

[BERBICE.]

1928. MARCH 6. BEFORE DOUGLASS, J.

Landlord and tenant—Yearly tenancy—Notice to quit—Length of notice required—When notice must expire.

To determine a tenancy from year to year a half-year's notice expiring with the last day of some year of the tenancy is necessary.

The facts appear in the judgment.

J. A. Abbensetts for the plaintiff.

L. Ramotar for the defendants.

DOUGLASS, J.: The plaintiff is claiming from the defendants $200 for the use and occupation of business premises in New Amsterdam or in the alternative $200 for rent of the same, for the 4 months ending 30th April, 1927.

It was difficult to get from the plaintiff for how long a period he intended to let the premises from the first, but there is sufficient evidence to support the defendants' contention that it was a yearly tenancy, determinable on six months' notice. This is indicated by the terms of the notice to quit dated 10th May, 1926—which however is bad and had no legal effect—, and by the first receipt dated 12th September, 1925, for rent which was paid monthly. The first year would end on the 30th September, 1926, and on that date the plaintiff addressed another "Notice to Quit" within three months from date, with a memorandum at the foot thereof, "if you "don't remove from time specified you shall have to pay $50 per month." The defendants again disregarded the notice and continued to pay rent up to the 31st December, and offered rent at the same rate $20 per month after that date, but it was refused and they remained in possession. This notice again is bad for several reasons, and the plaintiff failed to prove that three months' notice to quit was agreed on, indeed his first notice contradicts that assertion. To determine a tenancy from year to year a half-year's notice expiring with the last day of some year of the tenancy is necessary.

The defendants admit owing rent for the months of January, February, March and April, 1927, and say they tendered it, but to escape costs they should have lodged the money in Court.

I give judgment for the plaintiff for $80 and costs.

CONWAY *v.* MARTIN.

[No. 71 OF 1926.]

1928. MARCH 21. BEFORE GILCHRIST, J.

Landlord and tenant—Local Government (*Landlord's Liability for repairs*) *Ordinance, 1921, section 2—Inmate damaged by landlord's failure to repair—Right of inmate to recover—Notice of non-repair—Whether it is the tenant who should give such notice—Whether Landlord's knowledge of lack of repair without express notice sufficient—Right of Landlord to enter premises for the purpose of effecting repairs.*

(a) By virtue of section 2 of Ordinance 5 of 1921 an inmate of a house is entitled to recover damages from the landlord for any loss sustained by the inmate in consequence of the landlord's breach of the condition to keep the premises in all respects reasonably fit for human habitation.

(b) It is a condition precedent to such a claim that the landlord should, prior to the injury sustained, have had notice of the lack of repair.

(c) Such notice (semble) need not be express nor be given by the tenant personally. The Landlord is equally liable if it be proved that after actual knowledge by him of the want of repair he fails within a reasonable time thereafter to effect the necessary repairs.

(d) The obligation imposed upon the landlord by the Ordinance carries with it an implied right of entry by the landlord in and upon the demised premises and a right to remain thereon for a reasonable time for the purpose of effecting such repairs.

The facts fully appear in the judgment.

A. V. Crane for the plaintiff.

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

GILCHRIST, J.: 1. This is an action by an inmate of a room situate at lot 11, North Street, Lacytown, Georgetown, owned by the defendant, and let by him to one Preston Cumberbatch, claiming damages for injuries sustained resulting from the collapse of a stairway whilst using the said stairway.

2. The claim is laid under section 2 of Ordinance 5 of 1921. The section was adopted in part from section 14 of the Housing and Town Planning Act, 1909 (9 Edw. VII. c. 44), but it is wider in so far as it extends its benefits to "inmates of such house or room" whereas the section in the English Act applies to tenants only.

3. On the hearing of the action counsel for the defendant admitted the letting of the premises in question by the defendant to Preston Cumberbatch. I am satisfied that the letting of the room included the stairway in question.

4. It is not disputed that at the time of the accident the plaintiff was living with Preston Cumberbatch as his wife at the premises in question.

5. On the close of the case for the plaintiff Mr. Luckhoo, counsel for the defendant, claimed that the defendant was entitled to judgment. He submitted,—

(a) that assuming the evidence for the plaintiff is correct it

establishes that the tenancy of the place in question is between Preston Cumberbatch and the defendant.

(b) Under Ordinance 5 of 1921 notice of want of repair is necessary. Such notice can only be given by the person who entered into the contract of tenancy with the landlord there existing no contractual relationship between an inmate and the landlord.

(c) An inmate's right of action depends on the tenant giving notice to the landlord of want of repair. An inmate has no power to permit entry of the landlord. The only person who could permit entry is the tenant with whom contract of tenancy is made. If the landlord entered without the permission of the tenant he is likely to be treated as a trespasser. The inmate must speak to the landlord through the tenant.

6. Mr. Crane, solicitor for the plaintiff, contended—

(a) that section 2 of Ordinance 5 of 1921 places every person inhabiting a house or room in the same position as the tenant therefore any inmate including tenant who is within the benefit of the section can take steps to protect the right conferred by the section; those steps being to give notice of want of repair and that a notice by an inmate is an invitation to the landlord to enter and therefore the landlord would have a right of entry to effect the necessary repairs. The landlord could not in such circumstances be considered or held to be a trespasser.

(b) that the Ordinance 5 of 1921, gives an inmate the right to permit the landlord to enter for the purpose of effecting repairs.

(c) Even if no notice of repairs was given but the landlord had knowledge of want of repair the landlord is liable.

(d) Alternately that the plaintiff was virtually in the position of housekeeper and agent of Cumberbatch therefore when she gave notice of want of repair she did so as agent of Cumberbatch. That the evidence establishes that the defendant treated and recognised plaintiff as Cumberbatch's agent in that he gave out drinking water to her and promised her to repair the stairway.

7. Counsel for the defendant in reply to Mr. Crane's contentions submitted that the only person who could give a right of entry is the tenant as no right of entry is given the landlord under Ordinance 5 of 1921. He further submitted that actual knowledge of the landlord of want of repair is not sufficient; it must be coupled with a right of entry.

8. I decided to hear the whole case and then rule on the submissions.

9. On the question of notice of want of repair and/or knowledge of want of repair, the evidence for the plaintiff is that plaintiff on the 10th August, 1925, drew the attention of one Lopes, the rent-collector of the defendant, to the condition of the back stairway—that it was shaking—that a week later she saw the defendant who frequently visits the yard and inspects the

place and the buildings in the yard, and told him that this stairway was shaking very badly and that he must lock after it, that the defendant held the stairway and shook it and said it was all right and when he got a chance he would look after it; that the room has two stairways, one to the front, the other at the back; that the back stairway is of four treaders; that on the 10th September, 1925, she was coming down the back stairway; that, when at the bottom—one foot on a treader and one on the ground—the string boards came away from sill at top; that one Mrs. Gomes said something to her in consequence she went to the upper storey of the building and called the defendant who came to her; they then went to the back stairway in question and she pointed out to him the condition of the string boards; that the defendant then pushed the string boards back into the sill; he then shook it and said she was only making a fuss, that the stairs were quite all right; that as soon as he got a chance he would get a piece of board and brace it.

10.The evidence for the defendant on this question of notice of want of repair and/or knowledge of want of repair is that in 1925 he visited the yard. Sometimes twice a week, sometimes three times a week to inspect the yard, buildings and pailings; that on Thursday, the 10th September, 1925, the plaintiff told him the back stairway was bad. This was at 5.30 p.m. when he visited the place. It was then somewhat dark, that he was speaking to one Brown, another tenant, when the plaintiff called to him. She was then between the kitchen and the back stairway. He went to her and she told him the stairway was bad. He then asked her why she did not tell him so when he was there on the Tuesday of that week. She then said it was only that morning she had noticed that the stairway was bad. He held the stairway (which is only 20 inches in height) and found that the western string board was shaking. It was a little bad. He told her not to use it that night but to use the front stairway, that it was too late to do anything that evening; that he would get a carpenter in the morning to look after it, and she said all right. At the time Preston Cumberbatch, the tenant, was in the kitchen, that there were only a few feet between the kitchen and the stairway. In cross-examination he said that he could not then say to what extent repairs were required that he told her not use the stairway as he did not think it was safe, that he thought it was unsafe because it was shaking; that the string boards are not morticed and tennoned to the sill but nailed to the sill.

11.In *King* v. *Vieira* decided by me on the 15th June, 1933, I held that the obligation imposed on the landlord by Ordinance 5 of 1921 to keep the premises in repair during the tenancy does not dispense with notice to the landlord of want of repair; that a landlord is entitled to notice of want of repair before he can be

held liable in damages resulting from non-repair. (See also *Treadway v. Machin* (91. L.T.R. 311); *Manchester Bonded Warehouse* v. *Can* (5 C.P.D. iv. 512); *Murphy and others* v. *Hurley* (1922, H.L. 127. L.T.R. 49). The necessity for such notice is well stated in *Morgan* v. *Liverpool Corporation* (43. T.L.R. 146).

12. Now it is clear not only from the evidence for the plaintiff but from that for the defendant that the defendant received notice from the plaintiff of want of repair of the stairway in question and also that the defendant from his personal examination of the said stairway had actual knowledge of want of repair. The evidence for the plaintiff, however, is in conflict as to the time of such notice and knowledge.

13. I will later refer to the question as to whether in the circumstances stated as to knowledge, liability is attached to the defendant.

14. I accept the evidence led for the defence as to the time of notice and knowledge of want of repair.

15. Having regard to the relationship existing between the plaintiff (inmate) and Preston Cumberbatch (the tenant) the implication in my opinion is irresistible that the plaintiff in giving the defendant notice of want of repair did so as the agent of the tenant—Preston Cumberbatch. This view is strengthened by the testimony of the defendant that when the plaintiff spoke to him on the afternoon of the 10th Cumberbatch was in the kitchen a few feet from where they were and also by the promise made to the plaintiff by the defendant that he would get a carpenter to look after the stairway.

16. Assuming that the notice by the plaintiff of want of repair was not a valid notice and cannot be relied upon by the plaintiff as express notice of non-repair, it is clear from the evidence of the defendant in examination-in-chief that at 5.30 p.m. on the 10th September, 1925, he inspected the stairway. He therefore at that time had knowledge of want of repair. Counsel for the defendant submits this is not sufficient, that such knowledge must be coupled with an entry for the purpose of effecting repairs, and that the only person who could permit or give a right of entry is the tenant.

17.Now Ordinance 5 of 1921 gives no express right of entry by the landlord or his agent for the purpose of effecting repairs. The Ordinance, however, provides by section 2 that "in any contract for the letting of any house or room for human habitation, ... there shall be implied therein the following conditions—

(a) "that the house or room is at the commencement of the tenancy in repair and in all respects reasonably fit for human habitation.

(b) that the house shall during the tenancy be kept in repair and in all respect reasonably fit for human habitation, and in

the event of a breach of either or both of such conditions any inmate of such house or room who suffers any loss by injury to health or in any other way whatever . . . . . shall be entitled to recover damages from the landlord of such house or room." The section also provides that any agreement to the contrary shall be void.

18. The Ordinance clearly imposes on the landlord an obligation in respect of premises let for human habitation.

19. It is clear from the provisions of the Ordinance that the landlord has an interest in being allowed to perform the obligation imposed upon him by statute as part of the contract of tenancy. This obligation in my opinion carries with it an implied right of entry by the landlord in and upon the demised premises and a right to remain thereon for a reasonable time to do that which the law has imposed upon him to do and which he has a right to do as part of the contract of tenancy.

20. The implied covenant for quiet enjoyment must be read as subject to the right of entry implied in the obligation imposed, by the Ordinance to repair and keep in repair. I adopt the words of Fry, J., in *Saner* v. *Bilton* (1878) 7 Ch. 815 at p. 824.

21. The defendant therefore had knowledge of want of repair coupled with a right of entry to effect such repairs. He is in such a case liable for damages resulting from non-repair if he had a reasonable time allowed him to effect such repairs and failed to do so.

22. In *Griffin* v. *Pillet* (95 L.J. K.B. 67) it was held that the lessor's obligation to repair comes into effect so soon as he had sufficient notice. Now (sufficient notice must mean) that the landlord shall be allowed a reasonable time to examine the premises and ascertain the extent of repairs and to do the repairs, or such temporary repairs as will render such defective part of the demised premises reasonably safe for use until permanent repairs can be effected.

23. It is necessary therefore to determine whether the defendant had sufficient notice or in the alternative reasonable time after actual knowledge of want of repair acquired by his inspection of the said stairway, to effect the necessary repairs or such temporary repairs so as to render the stairway safe for use until permanent repairs could be effected.

24. I have found as a fact that notice was given at 5.30 p.m. on the 10th September, 1925, and actual knowledge of nonrepair required by the defendant at the same time. At 8 p.m. of the said day the accident occurred to the plaintiff.

25. The defendant admits that he has some carpenter's tools; that he can do trifling repairs himself and has done so to his properties, that he did not get a carpenter to do anything to the stairway after the accident, that on the 11th of September at 6.30 a.m. he went to the premises and to the stairway. He then returned home and got a hammer and nail and returned and

nailed the string-board back to the sill and made it firm; that it has remained firm up to the present, that is, up to 2nd of March, 1928, the date he gave evidence, though nothing further has been done to it, that he took half an hour to put the stairway in order.

26. I am satisfied that what defendant did on the morning of the 11th September, he could easily have ascertained on the afternoon of the 10th September, as being all that was necessary to render the said stairway safe and could then and there have effected such repairs.

27. In the circumstances I hold—

(a) that the defendant had sufficient notice of want of repair.

(b) that he had allowed him a reasonable time after actual knowledge of want of repair acquired by inspection of the stairway to effect the necessary repairs to render the stairway safe; such knowledge and failure to effect repairs prevents the defendant from setting up in answer to the plaintiff's claim the fact that express notice of want of repair was not given to him. See *Griffin* v. *Pillet* (95 L.J. K.B. 67).

28. As to how the accident occurred. The evidence of the plaintiff is that whilst going up the stairs with a bucket of water the stairway collapsed to the ground. The evidence for the defendant is that it did not collapse as stated by the plaintiff but that the western string board came away from the sill and tilted over eastward 45 degrees. I accept the evidence for the defendant on this point but this does not excuse him from liability. The conclusion I come to is that plaintiff fell to the ground in consequence of the stairway silting due to the western string board coming away from the sill.

29. I do not accept the evidence of the defence that the plaintiff agreed not to use the stairway. I accept the statements of the plaintiff that she did not believe the stairway would have fallen, that had she believed it would have fallen she would not have used it. It is impossible for me to believe that plaintiff who at the time was seven months with child would have run the risk of using the stairway if she for a moment thought it would collapse. The plaintiff in examination-in-chief stated that the stairway was only a little bad.

30. In my opinion plaintiff is entitled to succeed.

It is now necessary to determine the measure of damages The claim of the plaintiff in respect of special damages ($73.50) was not contested. No questions were put to plaintiff in cross-examination questioning her evidence in respect of such claim. I find for her on this head in the sum of $73.50.

With respect to general damages. Seeing that no argument has been submitted by the defendant in opposition to plaintiff's claim for general damages and since it appears from *Chaves* v. *Burnett* (1926 L.R.B.G. p. 27.) that such general damages are recoverable I will award the plaintiff general damages which I assess at $30.

31. The case of *Chaves* v. *Burnett* was an appeal to the Full Court from the decision of a Magistrate's Court. The present action is in respect of a claim not exceeding $250. Now by sections 3 and 9 of the Appeals Regulation Ordinance, No. 33 of 1922, an appeal in this matter would lie to the Full Court, not the West Indian Court of Appeal. For these reasons I feel that sitting alone I am bound by the ruling in *Chaves* v. *Burnett*. Had this action been in respect of a claim exceeding in value the sum of $250, I take the view that a judge sitting alone would not be bound by the said ruling, I therefore reserve my own opinion for some future occasion should the point in question again arise.

32. Therefore there will be judgment for the plaintiff for $103.50 with costs.

THE KING *v.* NORMAN GRIFFITH

[No. 76 OF 1928.]

1928. MARCH 29. BEFORE GILCHRIST, J.

Custody of natural child—Writ of Habeas Corpus issued at instance of mother—Mother's prima facie right—Principles governing question of custody—Welfare of infant of paramount consideration—Infants Ordinance, 1916.

By virtue of the provisions of section 21 of the Infants Ordinance 1916, the Court in deciding such questions as the custody of natural children is guided by the same principles as prevail in the Chancery division in England.

Prima facie, the natural mother of children has the right to their custody but the welfare of such children is of paramount consideration in deciding the question of their custody.

The facts of the case fully appear in the judgment.

D. Jackson, for the applicant.

S. J. Van Sertima, for the respondent.

GILCHRIST, J.: 1. On the 7th March, 1928, Ethel Veronica Gomes of 'I.I.' Bent Street, Wortmanville, Georgetown, spinster, obtained a writ of Habeas Corpus *ad subjiciendum* commanding Norman Griffith of Charles and Evans Streets, Georgetown, to produce the bodies of their children Lucille and Violet before a judge in chambers.

2. The writ was obtained on an affidavit by Ethel Veronica Gomes, hereinafter referred to as the applicant.

3. On the 8th March, 1928, the said Norman Griffith, hereinafter referred to as the respondent, appeared before me in chambers and produced the said children Lucille and Violet. His counsel, Mr. Van Sertima, stated that the respondent received the writ at 3.50 p.m. on the 7th March, 1928, and applied for an

adjournment to enable him to prepare a return to the writ in conformity with the rules governing these matters. The application was granted. Further consideration of the matter was adjourned to the 12th March on which day the matter was adjourned to the 16th March into Court for evidence.

4. On the 10th March the respondent filed a return to the writ duly sworn to. In the return he states he had at the time of receiving the writ and still has in his custody the bodies of the infants Lucille and Violet; that he is the natural father of the said infants and has contributed to their maintenance from their respective births; that for a period of ten years he lived and cohabited with their natural mother the applicant up to and including the month of January, 1926, when he was compelled to leave her. He gives his reasons for leaving the applicant; how the children came into his possession and the causes for detaining them.

5. On the 16th and 17th March evidence was led by the respondent against granting the applicant the custody of the said children. Evidence was also led by the applicant in support of her application for custody.

6. The infant Lucille was born on the 1st November, 1919, and the infant Violet on the 6th December, 1921. Their ages respectively are roughly 8½ years and 6½ years.

7. The applicant is of the Roman Catholic Faith, The respondent is a member of the Congregational Church. Destillia Marshall with whom the respondent is now living as man and wife is of the Roman Catholic Faith.

8. I have seen and spoken to the Infants Lucille and Violet. They both strongly desire to remain in the custody of their father. I do not, however, propose to attach any weight to what they desire or to let it in any way influence my judgment. Their tender years do not permit of any right of election being given to them. On the question of a child being given a right of election, see *R.* v. *Clarke* (7 E. & B. 186). From this case it appears that a male infant acquires a right of election at the age of 14 years. In *R.* v. *Howes* (3 E. & E. 332) the Queen's Bench decided that a girl under 16 has not the right of electing where she will live. This ruling was followed in *Mallison* v. *Mallison* (L.R. 1 P. & D. 221).

9. On the question of religion; No evidence was placed before me as to these children having any definite religious views, Having regard to their years it is snot likely that they have formed any deep-rooted ideas on religious matters that a possible change in this respect would result in serious shock to them.

10. It is unnecessary to deal with the right of the mother to the custody of her illegitimate child under the common law. The discussion of such a question must be mainly academic for it is provided by section 14 of the Infants Ordinance No. 19 of 1916

that the mother of an illegitimate infant shall be the guardian of the said infant and shall be entitled to its custody but may be deprived by the Court of such guardianship or custody as in section 16 of the same ordinance.

11. The terms of section 16 clearly indicate that the real question must always be what is best for the welfare of the infant (See *Rex* v. *Walker*. 28 L.T.R. 342) and *R.* v. *Ullee,* 54 L.T.R, 286.)

12. In any event the provisions of section 21 of the said ordinance are wide enough to embrace all powers of the said Chancery Division however involved.

13. While it is true that the infants Ordinance, 1916, contains no provision in terms of section 1 of the Guardianship of Infants Act, 1925 (15 and 16 Geo. 5, chap. 45) which provides that the Court in deciding any such question as I have here, "shall regard the welfare of the infant as the first and paramount consideration," Lord Hand worth, M.R. in *re Thain,* 1926. Ch. at p. 689 said "that is not new law, and the welfare referred to there must be taken in its large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child would be happier in one place than in another but of her general well being. The section merely enacts the rule which had up to that time being acted upon in the Chancery Division." (See also in *re A. and B.*) (*Infants*) 1897, 1 Ch. 786.

14. I accept the evidence of the respondent and the witnesses called on his behalf in opposition to the claim by the applicant for the custody of the infants Lucille and Violet. This evidence clearly satisfied me that the mode of life of the applicant, her association with one Mabel Cox, a woman of ill repute, and her general treatment of the said infants are factors detrimental to the social, moral and physical well-being of the said infants.

With respect to the respondent it is admitted that he is a married man who is not living with his wife but with one Distillia Marshal], a widow, since he left the applicant. The separation of the respondent and his wife, it is clear, took place about 12 years ago. She is at present in the United States. On whom rests the blame for such separation it is not possible for me to determine, no evidence having been led on this head.

15. While therefore it may be said that the respondent is not entirely free from reproach I am not prepared to hold that he is unfit to have the custody, care and well-being of the infants entrusted to him

16. To sum up. Considering the mode of life of the respondent—the father, the mode of life of the applicant—the mother, her general treatment of the said children, their ages and being not unmindful of the *prima facie* right of the mother I am clearly satisfied that it is in the best interest and well-being of

the children that they should remain in the custody and care of their father, the respondent, and I so declare.

17. Mr. Van Sertima, counsel for the respondent, does not oppose reasonable access of the mother to the children. I therefore order that all reasonable access be allowed the mother, the applicant. That will be until further order.

18. In conclusion I have to remind the parties that the powers of the Court embrace one to alter, vary or discharge the order I now make.

19. There will be no order as to the costs of these proceedings.

Solicitor for the applicant, *M. Fitzpatrick.*

ABDOOL KADEER *v.* MOORE.

Ex parte ADAMS, *et al.*

[No. 402 OF 1926.]

1928. APRIL 2. BEFORE DOUGLASS, J.

Executor—Right to sell property of deceased—Restrictions thereon—Sale generally to be by public auction—Deceased Persons Estates Ordinance, 1917, section 38—Orange River Colony Ordinance 18 of 1905—Union Act (*South Africa*) *1918, section 52—Whether sale by Executor without complying with provisions of Ordinance void or voidable—Principles governing discretion of Court to confirm or invalidate such sale—Sale by private treaty—No interested party aggrieved thereby.*

(*a*) An executor should sell immovable property by public auction, but if other conditions are favourable and no advantage has been taken of parties. interested in the estate the Court will exercise its powers confirming a sale made by private contract.

(*b*) This rule is considerably relaxed in the case of movable property.

(*c*)A creditor of a deceased's estate is not an interested party within the meaning of section 38 of the Deceased Persons Estates Ordinance, 1917, although he is interested in the moneys derived from such sale.

(*d*)There is a tendency in South Africa, which should be far stronger here since the Civil Law of British Guiana Ordinance 1916 to give a freer hand to executors in accordance with principles of English Law.

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

C. R. Browne, for the defendants.

DOUGLASS, J.: The defendant D. L. Moore is sole executor under the will of Frederick A. Moore who died on the 23rd August, 1925. The will bears date 18th August, 1925, and was admitted to probate on the 22nd November, 1926, on a decree of the Court made the 11th November, 1926. Specific legacies were made *inter alia* as follows: "To Nunie Coates, a "child of Kassim Coates, a small cottage marked 'C,' situate at lot 50, Zee-"landia Village, Wakenaam," and "To Agnes Padmore one large cottage "marked 'B' situate at lot 50, Zeelandia."

"Nunie." Coates is the same person as Caroline Coates, one of the claimants, and the same cottage had already been bequeathed to her by Caroline B. Jeffers under her will dated 6th December, 1924, and proved 2nd February, 1925, by her brother, the said F. A. Moore, consequently F. A. Moore's bequest in respect of the cottage marked 'C' may be disregarded: it was one of the three cottages levied on by the Marshal on the 12th May, 1927. After hearing the evidence it was admitted that the claimant Caroline Coates had sufficiently proved her title to the cottage in question.

At the time of the death of F. A. Moore, Agnes Padmore was living in the cottage with the claimant A. Peters and on the 7th December, l926, the latter surrendered it to Caroline Coates and purchased the very cottage that had been bequeathed to Padmore which was also another of the cottages levied on the 12th May, 1927.

The third cottage levied on was on lot 52, Zeelandia, and had been purchased by Thomas M. Adams, on the 8th December, 1826.

Mr. J. A. Luckhoo, K.C., for the plaintiff contends with respect to the claim made by Adams and Peters that they are not genuine but are collusively made between the judgment debtor D. L. Moore and the claimants to avoid payment of a debt of $200 and costs due on a judgment dated 8th January, 1927, and that in any event the sales are null and void as the said D. L. Moore sold as executor and did not comply with section 38 of Ordinance No. 10 of 1917, the Deceased Persons Estates Ordinance, 1917, herein referred to as the Ordinance. This section reads as follows:—

" If no provision be made in the will of the deceased to the contrary or "if the terms of appointment of any administrator be not opposed thereto, "every executor and administrator shall have full power to sell all the prop- "erty, goods and effects of the deceased person and to transport any im- "movable property for the purpose of the realization and distribution of the "estate, provided however

"(1) that every such sale shall be by public auction unless the Regis- "trar at the request of any interested party after due enquiry shall "be of opinion that it will be to the advantage of persons inter- "ested in an estate to sell out of hand instead of by public auction "any property, goods and effects belonging to such estate and "shall grant the necessary authority to the executor or adminis- "trator so to act; and

"(2) Provided further if, at the request of any interested party it is ex- "pedient to sub-divide or to make a division of any movable or "immovable property belonging to the estate without proceeding "to sale the

"Registrar may, after due enquiry and on being satisfied that the "proposed division is fair and equitable grant the necessary au- "thority to the executor or administrator so to act."

"There was no provision made by the will of the deceased as to sale of his property and the evidence shows that the alleged sales were made by private contract."

The main provisions of the Ordinance were based on the Orange River Colony Ordinance 18 of 1905 and on the Union Act (South Africa) of 1913 and consequently the South African practice with regard to the supervision of the deceased's estate by the Court should be consulted in interpreting sections of the Ordinance reproduced from the South African Act. Section 38 referred to above is the local application of section 32 of the Union Act (S.A.) of 1913 which reads: "If the Master after due enquiry be of opinion "that it will be of advantage to persons interested in an estate to sell out of "hand instead of by public auction, any property belonging to that estate, "and if no provision be made in the will of the deceased to the contrary, the "Master may grant the necessary authority to the executor so to act."

In English law executors are not subject to the official supervision that prevails in Roman-Dutch Law, and the general rule both of equity and law is that an executor may dispose of the assets of his testator, and, as Mr. S. E. Williams remarks in 5th Ed. of Walker on Executors, "it would be mon- "strous if it were otherwise for then no one would deal with an executor. "He must sell in order to effect the will, but who would buy if liable to be "called to an account?"

All the cases I have been able to find touching the executor's power of sale under South African law, with one exception are with reference to immovable property but are useful in showing the Court's tendency to relax the strict rule that leave must first be obtained if a private sale is desired,

In *Prior* v. *Fynns Exors.* (1859, Searles Rep., Vol, 3) it was held that a private sale of immovable property in an estate made by an executor dative without the sanction of the heirs or the authority of the Court would be set aside *if* it can be shown to have prejudiced the estate. And in *Ex parte* Lloyds Exors. (1916, S.A. 43) a sale of land by an executor by private treaty where two of the heirs were absent and their consent could not be obtained was confirmed by the Court,

The case of *Ex parte* Eckard (1902, T.S. 169) is most useful in its review of the duties of executors. Innes, C.J., in giving judgment, says, "The "plain duty of an executor as defined by the Privy Council in the case of "*Hiddingh* v. *Denyssen* (5 S.C. 308.) is to liquidate the estate, reduce it into "possession, clear it of its debts and other immediate outgoings, and so "leave it free

"for enjoyment by its heirs . . . . . Mattheus lays it down as a principle that "executors must sell by auction (this is with reference to immovable prop- "erty). Now if that rule were meant to be absolutely observed the Court "would not be warranted in allowing any departure from its terms but we "do not think it can be so construed . . . . . The Court may within right "limits give general directions to be obeyed by all executors in perform- "ance of their duties. And he goes on to say, Without laying down that the "private sale of land by an executor is *ipso facto* void, we propose to estab- "lish the following rules for the future guidance and observance of all ex- "ecutors whether testamentary or dative:—

1. "Sales of immovable property by executors whether to pay debts or "not should as a general rule be by public auction."

2. "If it is to the advantage of the estate such sales may be made out of "hand; but the following conditions should be observed." (Here follow conditions as to consent by heirs).

In *Groenwald* v. *Mabuya* (1920. S.A. 36) the defendant, an executrix, sold by private treaty to the plaintiff a piece of land and gave him possession. The authority of neither the Court nor the master was obtained for the sale, nor was the consent of the major heirs obtained. The plaintiff sued for transfer having been in use and occupation for two years. After reference to certain cases showing an executor may sell immovable property by private contract if there is not sufficient money to pay the debts without obtaining consent of the heirs provided the sale is *bona fide*, the price reasonable, and there be no detriment to the estate. Hutton, J., in giving judgment for the defendant, says, "The law in regard to the duty of an executor to sell by "public auction has been somewhat modified by section 52 of Act 24 of "1913 (the Act referred to above) in the present sale every requirement of "the law has been disregarded; the sale was therefore clearly illegal."

The only case I can find with reference to movable property is *Perbhoo* v. *Perbhoo's Exors.* (1925. S.R. 92). Unfortunately the report is unobtainable but the paragraph in the Digest of South African Case Law (1925) page 4, reads as follows:—

"That as an executor has a right to sell goods out of hand, and can only "be held liable on allegation and proof of negligence or *culpa* in connection "with such sale, and that as negligence or *culpa* had not been alleged, the "exception should be allowed.

From the above authorities I gather that—

(1) an executor should sell immovable property by public auction, but if other conditions are favourable and no advantage has been taken of parties interested in the estate the Court will exercise its powers confirming a sale made by private contract.

(2) the rule is considerably relaxed in the case of movable property,

(3) a creditor of a deceased's estate is not an interested "party" within the meaning of the section although he is interested in the moneys derived from such sale.

(4) there is a tendency in South Africa which should be far stronger here since the Civil Law Ordinance of 1916 to give a freer hand to executors, more in accordance with the English principles.

It seems to me that the words used in section 38 "every executor . . . "shall have full power to sell" are only intended to be limited when parties interested under the will or in the intestacy have just cause or complaint, and that a sale to which any of those parties take any objection does not render the sale void but voidable only at the discretion of the Court, and the Court will in proper cases confirm such sales more especially in trivial cases of sale of immovable property where the purchasers are innocent parties and the purchase *bona fide* on their part.

I have no doubt at all on the evidence that the purchases by the claimants Adams and Peters were perfectly genuine, and the Court has power to confirm the sales in spite of section 38 (1); to refuse to do so would be to subject executors to stricter official supervision than under modern Roman Dutch law which I am convinced was never intended to be done: but apart from that I have doubts whether any party who is not interested under the will or intestacy can take advantage of the said section, for the duty of selling the assets of an estate is imposed on an executor in order that he may liquidate the estate and pay debts (Nathan on the Common Law of S.A., 1906, vol. 3, page 1969).

Unfortunately no regulations have been made for the better carrying into effect the provisions of the Ordinance or as general directions to be obeyed by executors in the performance of their duties, so that the Court is at a certain disadvantage from which the South African Courts apparently do not suffer.

I am of opinion that the claimants Adams and Peters have proved their title to the cottages and their appurtenances and I hold the levy of the 12th May, 1927, to be bad.

I accordingly give judgment for each of the claimants, the defendants, with costs in each case.

In the circumstances I award no damages.

Solicitor for the plaintiff, *L. Ramotar*.

Solicitor for the defendant, *J. Gonsalves*.

E. A. SEWDIN *v.* FERREIRA.

E. A. SEWDIN (FOR HERSELF AND OTHERS) *v.* FERREIRA.

[BERBICE.]

1928. MAY 9, 15. BEFORE GILCHRIST, J.

Partition of land—District Lands Partition Ordinance, 1914,—Appointment of Settlement Officer—Award by officer of certain land to defendant's predecessor—No appeal from award—No proceedings taken to set aside award—Mortgage by defendant's predecessor of said land to defendant—No opposition by plaintiff to Mortgage—Deeds Registry Ordinance, 1919, section 20—Ordinance 26 of 1925, section 3—No Allegation of fraud against Settlement Officer or defendant's predecessor or defendant—Estoppel.

Section 8 of the District Lands Partition Ordinance 1914, reads as follows: "The Settlement Officer shall have power to enquire into and to determine any claim made by any person to be a proprietor or mortgagee of the said land (including the claim of any person to be a purchaser or transferee of the share of any proprietor though such share may not have been transported or legally conveyed to him), or into any dispute between any claimant as to the boundaries of any lots or as to any undivided areas, and the decision of the Settlement Officer shall be conclusive as to any title or legal interest. Provided that any claimant who is dissatisfied with such decision, may within one month appeal to the Board against such decision, and the Board shall have power to hear and determine the said claim. Provided also that any claimant or other person may apply to the Magistrate's Court in any manner and for any remedy now provided by law but if such application is not made within three months after the decision of the Settlement Officer or in case of appeal to the Board within three months after the determination of such appeal, the decision of the Settlement Officer or of the Board as the case may be shall be final and conclusive as to the title or interest in the land and no appeal shall lie from the same to any Court of law."

Held, That having regard to the provisions of the said section and of section 20 of the Deeds Registry Ordinance 1919. as amended by section 3 of Ordinance 26 of 1925, a person who not does appeal from the decision of the Settlement Officer or who does not apply to the Court to set aside such decision within the prescribed time, is, in the absence of fraud estopped thereafter from questioning the validity of such officer's award.

The facts of the case fully appear in the judgment.

E. M Duke, for the plaintiff.

E. F. Fredericks, for the defendant.

GILCHRIST, J.: In this action the plaintiff for herself and on behalf of Eleanor Sewdin, Caroline Haripaul and Samuel Lloyd Sewdin claims (a) an order of the Court restraining the sale at execution at the instance of the defendant of Plantation Bohemia in the county of Berbice, (b) a declaration that the opposition entered by the plaintiff on the 9th July, 1927, to the aforesaid sale at execution is just, legal and well founded, on the ground that it is not competent for the defendant to cause the said plantation to be sold at execution without reserving the interest of plaintiff, and those on whose behalf she brings this action, derived by virtue of their right to their legitimate portion in the estate of their deceased mother Margaret Sewdin consequent on her marriage to Martin Sewdin in community of property.

2, The pleadings are somewhat lengthy but having arrived at a definite opinion in respect of certain points there is no necessity to deal with them at length.

3. It is not disputed that on or about the 10th February, 1920, the Governor-in-Council granted the prayer of a petition for an order that Plantation Bohemia should be the subject of the District Lands Partition Ordinance No. 13 of 1914, and made an order accordingly, and appointed John Augustus Abbensetts as Settlement Officer, that by notice dated the 12th May, 1920, and published in the *Gazette* of the 15th May, 1920, the Settlement Officer gave notice that on the 29th May, 1920, he would hold the meeting required to be held by section 6 of the said Ordinance, that is, a meeting of all persons claiming to be proprietors or mortgagees of the land, the subject of the partition order, that on the 20th June, 1921, the said John Augustus Abbensetts, acting under section 8 of the Ordinance, awarded Martin Sewdin Plantation Bohemia, save and except the piece of land claimed by the Canadian Mission Council of British Guiana, that the award of the Settlement Officer was approved by the Local Government Board under the said section and published in the *Gazette* of the 30th July, 1921, that on the 29th April, 1922, the said John Augustus Abbensetts in his capacity aforesaid transported to Martin Sewdin the land which he awarded to him on the 20th June, 1922, that on the 29th April, 1922, the said Martin Sewdin (execution debtor) passed a first mortgage in favour of the defendant (execution creditor) of the said lands awarded and transported to him, that the land taken in execution to enforce the judgment of foreclosure of the said mortgage in favour of the defendant is the said land the subject of the bond and deed of mortgage by the said Martin Sewdin in favour of the defendant.

4. At the hearing counsel for the plaintiff abandoned the submission in the pleadings that the Governor-in-Council had no power to direct the partitioning of Plantation Bohemia, and that such order and the appointment of John Augustus Abbensetts as Settlement Officer was *ultra vires* the power of the Governor-in-Council. He further repeatedly and forcibly stated that he did not allege fraud in the Settlement Officer, Martin Sewdin or the defendant,

5. It is not alleged nor is there any evidence that any proceedings were taken under the provisions of section 8 of the District Lands Partition Ordinance, 1914, to set aside the award of the Settlement Officer of the said lands to Martin Sewdin. Now the said section provides that where there is no appeal from the decision of the Settlement Officer or other proceedings to set aside the decision of the Settlement Officer the decision of the Settlement Officer shall be final and conclusive as to the title or interest in the land so awarded and no appeal shall lie from the same to any Court of law.

6. Having regard to the provisions of the said section 8 and to section 20 of the Deeds Registry Ordinance No 17 of 1919, as amended by section 3 of Ordinance No. 26 of 1925, and bearing

in mind that no fraud is alleged, I am of opinion that Martin Sewdin (execution debtor) is vested with the full and absolute title to the property taken in execution at the instance of the defendant (execution creditor).

7. During the hearing the bond and deed of mortgage passed by Martin Sewdin in favour of the defendant in respect of the said property was produced in evidence.

8. I have referred to the judgment of the Court in respect of the foreclosure of the said bond and deed of mortgage in respect of the said property. It is dated the 18th June, 1927. It states *inter alia* that the willing and voluntary condemnation decreed and passed on the 29th April, 1922, in respect of Plantation Bohemia save and except the building on the said lot the property of the Canadian Mission Council of British Guiana be strengthened and confirmed according to its legal tenor and effect and consequently that the defendant in the present action be admitted to proceed to execution against the property thereby mortgaged.

9. No steps have been taken to set aside or amend the said bond and deed of mortgage and/or judgment of the Court admitting the defendant in these proceedings to levy execution against the said property.

10. In my opinion the plaintiff is estopped from questioning the said bond and deed of mortgage or to impugn the right of the defendant to proceed to execution against the said property.

11. Having come to a definite conclusion on the points of law raised by the defendant in par. 1 (c) and (d) of her defence it is unnecessary to deal with any other matters raised by the pleadings or by counsel for the plaintiff at the hearing.

12. I uphold the points of law raised by the defendant in paragraph 1 (c) and (d) of her defence and declare the opposition not well founded.

13. Judgment for the defendant with costs.

Solicitor for the plaintiffs, *W. Dinally.*

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

JEFFREY *v.* MENDES.

[No. 113 OF 1926.]

1928. MAY 19. BEFORE SIR ANTHONY DEFREITAS, KT., C.J.

Landlord and Tenant—Local Government (*Landlords liability for Repairs*) *Ordinance, 1921—Inmate—Bodily injury sustained through non-repair—No previous notice given to landlord—No pecuniary loss suffered—Whether inmate can recover—Force of precedents—Doctrine of stare decisis—Only principle binding—Limitation of doctrine—Where decision clearly wrong or devoid of any ratio decidendi.*

The plaintiff who was a married woman residing with her husband brought a claim against the defendant the husband's landlord for damage alleged to have been suffered by her as a result of failure on the part of the landlord to keep the premises let in all respects reasonably fit for human habitation.

The plaintiff's claim was based on section 2 of Ordinance 5 of 1921, which is as follows:—"In any contract for the letting of any house or room for human habitation, whether furnished or unfurnished there shall be implied therein the following conditions:—

(*a*) That the house or room is at the commencement of the tenancy in repair and in all respects reasonably fit for human habitation.

(*b*) That the house shall during the tenancy be kept in repair and in all respects reasonably fit for human habitation.

And in the event of a breach of either or both of such conditions any inmate of such house or room who suffers any loss by injury to health or in any other way whatever in consequence of such breach, shall be entitled to recover damages from the landlord of such house or room."

The plaintiff proved personal injuries but no pecuniary loss. The plaintiff also failed to prove that notice of the want of repair had been given to the landlord.

Held, (1) Such notice was a condition precedent to the plaintiff's cause of action. *Morgan* v. *Liverpool Corporation,* 1927, 2 K. B. 131, followed.

(2) That the plaintiff could not succeed without proving that she had suffered some pecuniary loss or incurred some pecuniary liability.

It is necessary to consider closely any decision from which there can be no appeal.

Although a Judge of one division of the Supreme Court will usually follow a decision of another division of the same Court in accordance with the doctrine of *stare decisis,* yet there are the following limits to this doctrine:—(*a*) Such precedent is only binding for the rule of law or principle therein enunciated, (*b*) Where a decision is clearly erroneous it need not be followed, and (*c*) It has no binding authority whatever where it is devoid of any *ratio decidendi*.

Chaves v. *Burnett,* 1926, L.R.B.G. 27 disapproved.

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

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

The Chief Justice (SIR ANTHONY DE FREITAS) delivered judgment on the 19th May, 1928, as follows:—

The plaintiff is the wife of Charles Jeffrey, whose occupation is that of a salesman in a retail spirit shop. From November, 1922, to September, 1925, he was the tenant of a house, of which the defendant was the landlord, at a rent of eight dollars a month; and in that house he and his wife and child lived. On the 30th of March, 1925, the plaintiff fell on the floor of the kitchen of the house. Her case is that when she was walking on the floor a defective board broke under her, and the broken board fell to the ground six feet below the floor, leaving a clear opening or hole in the floor twenty inches long and five inches wide, through

which her right leg went precipitately, up to her thigh; and that she was confined to bed for three weeks, ill from nervous shock resulting from the fall. She filed this action on the 25th of March, 1926, claiming fifteen hundred dollars damages from the defendant in respect to an alleged breach by him of his contractual duty to keep the kitchen floor in repair. She claims damages as an "inmate" of her husband's house; and she bases her claim on the new section 219 of Ordinance 13 of 1907 (substituted for the former section 219 by section 2 of Ordinance 5 of 1921) which provides as follows:—

"In any contract for the letting of any house or room for human habitation, whether furnished or unfurnished there shall be implied therein the following conditions:

(a) That the house or room is at the commencement of the tenancy in repair and in all respects reasonably fit for human habitation.

(b) That the house shall during the tenancy be kept in repair and in all respects reasonably fit for human habitation.

And in the event of a breach of either or both of such conditions any inmate of such house or room *who suffers any loss by injury to health or in any other way whatever* in consequence of such breach, shall be entitled to recover damages from the landlord of such house or room."

In section 77 of Ordinance 8 of 1878 (before it was repealed by 13 of 1907) and in the original section 219 of 13 of 1907, the words were: "who suffers any loss by injury to health or otherwise."

English Acts of Parliament have imposed on landlords of working-class houses, in relation to the tenant, a similar condition to keep their houses in repair, but no Act gives to "inmates" the right that is given to them by our enactment to recover damages for a breach of that condition. In England and in this colony such a stranger to the contract of tenancy may have a right of action, on some ground other that contract, to recover damages for injuries in certain special circumstances. But no such question arises in this case, which is confined to the right of an "inmate" under section 219.

2. It is common ground between counsel for the parties in this case that it is settled law (see *Morgan* v. *Liverpool Corporation* (1927) 2 K.B. 131 C.A.) that a landlord is not liable unless, prior to an accident, he has had notice of a defective condition that should be repaired. The plaintiff has failed to establish her allegation that such a notice was given to the defendant. Her husband nearly succeeded in persuading a woman to commit perjury in her evidence by swearing that she heard the defendant admit that he had received notice. The witness ultimately told the truth, which was that, though she had no recollection of it, the plaintiff's husband suggested to her that such an admis-

sion was made in her presence. I accept the defendant's denial that he ever made any such admission. I find that no notice was given to the defendant. Therefore he is not liable; and the plaintiff cannot succeed.

3. It is agreed that there is no evidence that the plaintiff has suffered any pecuniary loss or incurred any pecuniary liability in consequence of her fall on the floor. For the defence it is submitted that "loss" in the new section 219 means pecuniary loss and that, consequently, an inmate can recover damages for pecuniary loss only, and that, as it is common ground that the plaintiff has suffered no pecuniary loss, judgment should be for the defendant. I agree. On behalf of the plaintiff it is contended that the enactment has already been authoritatively interpreted by the decision of two judges in the local case of *Chaves* v. *Burnett* (30th April, 1926), on appeal from a magistrate's court, and that the interpretation there laid down is that an "inmate" is given a right by section 219 to recover damages generally and not only in respect to pecuniary loss. It is further submitted that this Court is bound by the decision in that case. This Court is the Supreme Court exercising its general civil jurisdiction, and from its decision an appeal lies direct to the West Indian Court of Appeal. The Court giving the decision in *Chaves* v. *Burnett* was the Supreme Court exercising its special jurisdiction to hear appeals from magistrates, and such a decision is final and conclusive between the parties to the appeal so that there can be no further appeal whatever. It is necessary, therefore, to consider closely any such decision from which there can be no appeal.

4. A judge of one division of the Supreme Court will usually follow a decision of another division of the same Court in accordance with the doctrine of *stare decisis,* which means that a court will abide by the rules and principles upon which previous decisions are founded. Although it is no doubt correct to say, as stated by Brett, M.R., that there is no common law or statutory rule to oblige a court of law to bow to its own decision, and that it does so on the ground of judicial comity, yet it is of great importance that it should be known with certainty what the law is—so far as possible—and a loyal adherence to the doctrine of *stare decisis* helps to achieve such a certainty. But this doctrine should not be so overstated as to provoke a display of wit such as was exercised by Dean Swift when he made Gulliver say in his report on English law that if once English judges go wrong they make it a rule never to come right. An inferior court may decline to follow a decision of even a court of appeal if the decision is clearly wrong. Lower courts repeatedly refused to follow the decision of Lord Chelmsford as Lord Chancellor in *Hensman* v. *Fryer* (L.R. 3 Ch. 420) in which he reversed, on appeal, the decision of Vice-Chancellor Kindersley (L.R. 2 Eq. 627). In *Farquharson* v. *Floyer* (L.R. 3 Ch. D. 109)

Vice-Chancellor Hall rejected that decision of Lord Chelmsford; and so did Vice-Chancellor Malins in *Dugdale* v. *Dugdale* (L.R. 14 Eq. 234), who there said: "the point was decided in *Hensman* v. *Fryer* under a misapprehension as to the effect of the decision in *Tombs* v. *Roche,* and I must refuse to follow it. The Court is not bound to follow a decision even of a Court of Appeal if clearly erroneous. There were in my recollection no less than three decisions of Lord Westbury which Vice-Chancellor Stuart declined to follow. One of the cases in which be did so was *Drummond* v. *Drummond* (L.R. 2 Eq. 335), which afterwards went to the Court of Appeal (L.R. 2 Ch. 32) and was affirmed."

5. Jessel, M.R., has said: "The only use of authorities or decided cases is the establishment of some principle which the judge can follow in deciding the case before him." The same Master of the Rolls said in another case: "The only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided." A decision is authority only for the principle or rule on which it is based; and that is to be found by seeking the *ratio decidendi.* All observations going beyond the *ratio decidendi,* whatever respect they may command by reason of the eminence of the judge by whom they are uttered, are to be followed only "in so far as they may be considered agreeable to sound reason and to prior authorities" (per Lord Campbell, L.C.). "The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law." (Salmond's Jurisprudence, 2nd ed., s, 67).

6. In *Chaves* v. *Burnett* the plaintiff, Malvina Burnett, was the wife of the tenant, so that there was no privity of contract between her and the landlord, who was the defendant, Chaves. Owing to the steps of the house being out of repair a "treader" came off when she stood upon it, and she fell on her back. She sustained personal injuries from the fall. There were contusions on her shoulder and on her head, and there was a bruise on her knee. She claimed damages as an "inmate" of her husband's house, under the new section 219 of 13 of 1907. The magistrate awarded her twenty-five dollars and costs. Chaves appealed. It was clear that there was injury to Mrs. Burnett's health. Counsel for the appellant submitted to the two judges forming the appeal court that Mrs. Burnett could recover damages only "for loss and not for personal injury, which is not loss": and as no loss had been proved he asked for judgment. He cited *Haigh* v. *Royal Mail S P. Co.* (1883) 49 L.T. 802 C.A. In Haigh's case the Master of the Rolls said: "I cannot understand any loss or damage to a passenger, as such, exclusive "of loss or damage to his property," and "Personal injury cannot be included under the word loss." Chaves's appeal was dismissed.

7. The junior of the two judges in Chaves's case said in his written judgment: "The plaintiff in her claim states that she incurred expenses in "obtaining treatment and has been otherwise greatly damnified and claims "the sum of $100 damages for the wrongful acts of the defendant. No par- "ticulars are given and she apparently claims general damages, and I agree "with the learned counsel for the appellant that she has not proved or en- "deavoured to prove any Joss in a pecuniary sense, and the case of Haigh "referred to by him is also to the point, in which Brett, M.R., lays it down "that 'personal injury cannot be included under the word loss,' and 1 am "of opinion that had the words 'suffer any loss by injury to health' stood "alone, the plaintiff should have been non-suited." Mrs. Burnett (the plaintiff-respondent) being clearly under the part of section 219 relating to "injury to health" by reason of the personal injuries she sustained— "not having suffered in any other way whatever," and the learned judge having agreed that "loss" is referable to pecuniary loss and not to personal injury, one would have expected that he would carry his opinion (that the plaintiff should have been non-suited) to its logical conclusion and would allow the appeal and reverse the decision in favour of Mrs. Burnett. But he does not. Having previously referred to *Groves* v. *Western Mansions, Ltd.* (1916) 33 T.L.R. 76 and to Mr. Justice Lush's discussion there of the cause of action that the wife of a tenant might have in respect to injuries sustained by her in consequence of a "concealed trap," the junior judge says: "Apart from "statute this makes clear what the rights of the plaintiff would be." It became clear to him that, apart from statute, *i e.*, section 219, the rules as to a "concealed trap" governed the rights of Mrs. Burnett. After hearing the President of the Court deliver his judgment dismissing the appeal, the junior judge concluded his judgment by saying: "I am the more inclined to "concur as *the equities of the case* are all on the side of the respondent, the "landlord had notice of the defect and either made no effort to remedy it, or "at the best made a patched up job which partially remedied the defects of "the steps and turned them into a *concealed trap.* For these reasons I agree "that the appeal fails." The learned judge having in his mind that "loss" means "pecuniary loss," and that it was clear that Mrs. Burnett suffered by injury to health and not in any other way, it seems to me that it is not unreasonable to say that his dismissal of the appeal was really founded on the doctrine and fact of a "concealed trap" in respect to which general damages are recoverable, even though there is no pecuniary loss. That is the *ratio decidendi* of his decision. That being so, his decision can have no application in the case now before me, and it need not be further considered.

8. The President of the Court gives no reason for his decision. He does not state any rule or principle upon which he bases his

decision. No *ratio decidendi* can be found in it. The decision is therefore of no authority except as between the parties to the case it decided. Since it states no rule or principle that can be followed, it does not bind me. Further, it does not bind me because it is clearly erroneous. Its interpretation of section 219 is not in accord with the cardinal rules for the construction of statutes, and it was therefore a wrong interpretation. The golden rule for the construction of statutes is that all the words used by the Legislature must be given their primary meaning in the context.

The material part of the President's judgment is as follows:— "Counsel for the appellant submits that the respondent not being the tenant can only recover as an inmate for loss and not for personal injury which is not loss (*Haigh* v. *R.M.S.P. Co.*).

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

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

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

The President yields to the doubt, and in his provision (1) he makes it clear that it is only when loss results from it that suffering from "injury to health" can be a ground for damages; but any other suffering is such a ground under his provision (2), though there is no loss.

9. The enactment plainly says that an inmate may recover damages who "suffers any loss by injury to health or in any other way whatever." If we follow the rule of giving to every word its primary meaning in the context, it is obvious that "loss" is the governing word and that the enactment refers to loss caused by injury to health or loss caused in any other way. Perhaps the Legislature might have covered the same ground by saying "suffers loss in any way whatever." But it may be that it was thought that in the usual circumstances of such tenancies injury to health would probably result from accidents due to non-repair so, to avoid doubt as to the damages recoverable, injury to health was emphasized by express mention, to meet cases like those of working men or women who, by injury to health, lose for a time their ability to earn wages and who incur consequential medical and nursing expenses, and so suffer pecuniary loss, "In any other way" was added to make the provision comprehensive and

complete, and to cover other occasions and when an inmate suffers pecuniary loss, *e.g.*, by his gramophone or other chattels being destroyed by the falling of a defective ceiling or floor or the like.

10. The President's interpretation is that the enactment means: "suffers (1) any loss by injury to health or (2) in any other way whatever"; and he goes on to say that "both these provisions are governed by the word 'suffers' and not by the words 'any loss' as submitted by counsel." The judgment does not state any rule or principle of construction upon which this version is based; it does not condescend to particulars; it does not refer to any matter in the case before the Court as requiring or justifying this version. A general interpretation is pronounced *ex mero motu*, which confines "loss" to suffering by injury to health and excludes it from suffering in any other way. This broad interpretation declares that damages are not recoverable for suffering by injury to health if there is no pecuniary loss but that they are recoverable for every possible other suffering. Merely to suffer at all (without any loss) is to acquire a right to damages. The canons of construction forbid the exclusion of any significant word in an enactment. No reason for the exclusion of "loss" is stated. No concrete illustration is given of any kind of suffering to which the broad provision (2) would apply. Nor is it shown by what kind of suffering Mrs. Burnett acquired the right to damages when she suffered no pecuniary loss. The President's decision is wrong. The enactment plainly provides that an inmate may recover damages for pecuniary loss only and nothing more. The tenant's right to recover damages is not mentioned in section 219, because by the measure of damages under the common law he can recover general damages as well as for the special damage resulting from pecuniary loss,

11. The President's decision is erroneous from another point of view. It appears to be inapplicable even to the case it decides. It is clear that Mrs. Burnett suffered injury to health which was the only suffering she experienced. It is equally clear that she suffered no loss. In the President's opinion the absence of loss disentitles her to any damages, even though she suffered pain and inconvenience from injury to health. The President nevertheless says "the respondent *therefore* is entitled to damages under provision (2)." This is a provision as to an inmate who "suffers in any other way" than by injury to health. Mrs. Burnett suffered only by injury to health and not in any other way. The judgment, nevertheless, places her under provision (2), as having suffered in some other way than by injury to health; and it awards her damages for "suffering," of the existence of which there is no evidence and in respect to which she makes no claim or allegation. Her only qualification for provision (2) lies in the negative element of no loss.

It will be observed that in the judgment in *Chaves* v.

Burnett consideration was given to the "equities of the case," which were declared to be all on the side of Mrs. Burnett. It would appear that those "equities" formed the sole impelling cause for a decision in her favour. It is clear that there were no equities within the meaning of English Jurisprudence. That was merely the use of a colloquial word indicating sympathy and abstract justice. Whatever his feeling of sympathy or his sense of abstract justice may be, a judge is strictly confined to giving effect to the statute before him, and it is not within his power to construe an enactment according to his own present notion of what it ought to be, so as to give relief from an apparent hardship. There is an ancient and wise saying that "hard cases make bad law." Bad law is made by decisions that attempt to soften hard cases. Where the meaning of an enactment is plain it is the rule that it is not within the province of a judge to consider its wisdom or its policy. His duty is not to make the law reasonable or congruous with his notion of colloquial "equities," but to expound it as it stands, according to its real meaning. The function of a judge is *jus dicere* and *not jus dare*—to declare what the words of the enactment say that it means and not to make law or give law. His function is not to legislate, but to interpret the Legislature's meaning by what the Legislature has said.

13. The defendant Mendes is entitled to judgment, because he received no notice of any condition of disrepair. The plaintiff also fails, because she has not proved that she has suffered any pecuniary loss, and it is only in respect to pecuniary loss that an inmate can recover damages.

14. The significance and importance of the words "in all respects reasonably fit for human habitation" in section 219, in relation to the basis of a landlord's liability, should be closely considered in the operation of that section in a suitable case. Such a question of fact does not essentially arise here, for this case is disposed of on other grounds. If it did arise my answer would be that I find that the house was kept in repair and in all respects reasonably fit for human habitation.

15. The plaintiff has failed to prove that a board broke in the floor of the kitchen. She and her husband were untruthful witnesses. It may be a reasonable conclusion that she fell in a sitting posture, but I do not believe that a hole in the floor resulted from such a fall; and I do not believe that a board fell out of the floor. That board was not produced at the trial though it was proved that the plaintiff's husband soon after the accident claimed to have it in his possession. The plaintiff's nervous shock was more simulated than real. I infer from the evidence of Dr. Wharton, who refused to continue to attend her after the first eleven days of her supposed illness, that she was feigning to be ill; and this inference was supported by her husband in his untruthful effort to establish his wife's stages of unconsciousness

and nervousness. This is a purely speculative action and an endeavour to extort $1,500 (and costs) from the defendant landlord. The evidence conclusively establishes that she suffered no physical injury whatever—notwithstanding that her leg, up to the thigh, is alleged to have gone precipitately through a hole only five inches wide. She appears to be both *petite* and *brunette*, but that does not explain the absence of any abrasion or mark in the circumstances.

16. The plaintiff and her husband falsely swore that while he was maintaining himself and his wife and child out of his wages as a salesman in a retail spirit shop, he paid three hundred and sixteen dollars (included in her claim for $1,500 damages) for the following things falsely said to have been consumed by the plaintiff when she was supposed to be suffering from nervous shock:—

360	pints of milk (in 90 days),
45	dozen Schweppe's soda water,
45½	lbs. of barley,
39	chickens of 3 to 4 lbs. each,
6	bottles of Hall's Wine,
26	bottles of Bovril,
26	bottles of Virol,
10	bottles of Brandy,
12	bottles of Whisky,
13	dozen eggs,
39	bottles of Bay Bum,
16	bottles of Eau de Cologne,
13	tins of Ovaltine, and
720	lbs. of ice.

Dr. Nichols said that the plaintiff was in bed for three weeks. In support of her preposterous recital of the vast quantity of things that she ate and drank, she swore that she was "fed on milk and soda water for three weeks." In the particulars in her claim no time is mentioned within which the 45 dozen bottles of Schweppe's soda water were consumed, but it is there stated that 360 pints of milk were consumed in 90 days. She abandoned the 90 days when she was a witness, and she then falsely swore that "all the milk and soda was used in three weeks"—that her average consumption was more than 17 pints of milk daily and more than 25 bottles of soda water daily! The plaintiff is a small woman and she is not robust. She committed other perjurous exaggerations. It is astonishing that any person could be found to assist her by filing in the highest court of the colony so preposterous a claim for expenditure incurred.

It is a satisfactory result that the plaintiff has failed to get from the defendant fifteen hundred dollars damages, and costs, in her gamble on the chance of a case based on false evidence. The landlord has escaped the misfortune of having to pay to the plaintiff damages and costs amounting to more than the aggre-

gate income for twenty years from the house in question. He nevertheless suffers the misfortune of having to pay his own heavy costs of defending himself, for it is not likely that he will recover any part of the costs from the plaintiff, who appears to be without any means. The successful defendant must suffer the burden of his own costs, because the general right to sue in the Supreme Court has enabled the plaintiff to put that burden upon him by an abuse of that right. In other English colonies there is statutory provision for empowering a Judge of the Supreme Court, where he is satisfied that the plaintiff in certain actions filed in that Court is without the means of paying the defendant's costs should the plaintiff fail to obtain judgment, to order the case to be transferred to a District Magistrate's Court for trial there, unless the plaintiff within a time limited in the order gives security for the defendant's costs; but no such transfer order is made if the Judge is of opinion that the action can be more fitly tried in the Supreme Court. I understand that nine of the fourteen elected members of our own local parliament are legal practitioners. I hope that the nine will use their influence to get an ordinance passed to make provision for similar transfer or security in cases like this.

Judgment must be entered for the defendant, with costs.

IRWIN *v.* IRWIN.

IRWIN *v.* IRWIN.

[No. 373 OF 1927.]

1928. MAY 22. BEFORE EGG, ACTING J.

Husband and wife—Petition for dissolution of marriage—Desertion by husband— Adultery by petitioner after filing of petition—Exercise of Court's discretion—Matrimonial Causes Ordinance 1916, section 13.

The Court exercised its discretion in favour of the petitioner, a wife who had been deserted by her husband for about three years and who subsequent to the filing of her petition committed adultery with a man, where it was proved that the petitioner had hereby become *enceinte* and that the man and the petitioner were both willing to marry each other.

S. J. Van Sertima, for the petitioner.

The respondent did not appear.

EGG, Acting J.: In this petition Agnes Leonic Irwin, whose maiden name was D'Ornellas, prays for a dissolution of her marriage with Ignatius Cecil Irwin on the ground of his malicious desertion.

To the petition the respondent does not appear.

I am satisfied on the evidence adduced that respondent has maliciously deserted the petitioner since May, 1925, and that she is entitled to the prayer of her petition, but since the tiling of her petition certain acts have taken place which counsel of petitioner has quite rightly brought to the notice of the Court and is now asking the Court to exercise its discretion under section 13 of Ordinance 34 of 1916 (Divorce and Matrimonial Causes) in granting the prayer of her petition in view of those circumstances.

It appears that in December, 1927, after the filing of this petition, the petitioner committed adultery and is now *enceinte* that both the petitioner and the man are willing to marry each other and have each given sworn testimony to this effect.

In exercising its discretion the Court is not bound by any rules but will consider each case entirely upon its own merits. I have carefully considered the facts herein and I am satisfied that it would be for the good of the petitioner if she was freed and allowed to marry that person instead of leaving her in misery and despair.

I would not be wrong if I followed the judgments in *Pretty* v. *Pretty,* 104 L.T., p. 79, *Hale v. Hale,* 32 T.L.R., p. 53 and *Grayson* v. *Grayson,* 43 T.L.R., p. 225, and more so if I adopted the following passage from the judgment of Bargrave Deane, J.: "In the course of the proceedings the peti-"tioner has met a gentleman who has fallen in love with her and has be-"haved most honourably towards her. I have been informed that this gen-"tleman is prepared to marry the petitioner notwithstanding the verdict that "has been given against her if the decree is

"made absolute. That means lifting her out of the slough of distress and "despair, and I think there ought not to be any doubt in the mind of any "human being as to the course which I ought to adopt. The natural anger "which I feel against the petitioner for having committed perjury must be "put aside and I must give effect to the feelings of humanity which cer- "tainly prompted the Legislature when section 31 of the Act of 1837 was "passed. I have stated that I have had some doubt as to my duty in this mat- "ter, but on the whole I think I am adopting a course which will commend "itself to any English Judge."

Decree nisi granted with costs and custody of the four children of the marriage.

GONSALVES *v.* YOUNG.

[No. 237 of 1927.]

1928, APRIL 25; MAY 1, 2, 23. BEFORE EGG, ACTING J.

Nuisance—Adjoining houses—Residential area—Smoke issuing from kitchen chimney into neighbour's bedroom—Chimney not built in conformity with municipal bye-laws—Material interference with comfort of plaintiff's household—Injunction.

The Court granted an injunction restraining the defendant from continuing the use of a kitchen chimney so as to cause a nuisance where it was proved that owing to the proximity of the said chimney to the plaintiff's bedroom smoke issued therefrom into the plaintiff's house in such volumes as materially to interfere with the ordinary comfort and convenience of his household.

Held: That a person may not excuse a nuisance created by him by alleging that he is acting reasonably. *Water* v. *Selfe*, 4 De G. and Sm. 322 followed.

G. J. Be Freitas, K.C., and *S. J. Van Sertima,* for the plaintiff,

E. M. Duke and *A. J. Parkes,* for the defendant.

EGG, Acting J.: Action by plaintiff claiming $2,000 damages and an injunction restraining defendant from the continuance or repetition of a nuisance caused by smoke from a chimney attached to a kitchen on the defendant's premises.

The plaintiff and defendant are neighbours and reside in Brickdam, a residential part of this city, and the plaintiff alleges by reason of the erection of a kitchen at the extreme western end of the gallery of the defendant's house facing Brickdam and within 22 feet of the plaintiff's house that smoke issuing and proceeding from the chimney attached to the kitchen spreads and is diffused into and permeates the plaintiff's dwelling-house in such a manner as to cause sensible and serious nuisance and intolerable discomfort and annoyance to the plaintiff, his family, visitors and servants.

The two properties in question have been erected years ago and up to June, 1927, the kitchen on the defendant's property was

placed on the ground level and opposite to the back part of the plaintiff's house. The houses so erected having been designed as to show the front part in Brickdam, the defendant however on becoming the owner decided to reconstruct the design of the house and so make what was the back part of the house the front and *vice versa* in consequence of which a new kitchen was built and attached to the extreme western end of the gallery and about ten feet to the south of the site of the old kitchen thus putting the kitchen opposite to the lower flat of the plaintiff's house and the chimney 9 inches above the level of the sill of plaintiff's bedroom window.

The plaintiff and his witnesses testify to the fact that at least four times per day the stove in kitchen is lighted and the smoke issuing from the chimney comes into his house owing to the close proximity in which the kitchen is erected and also from the fact that there is an annexe to the plaintiff's house on the northern end of the eastern side which juts out into the area between the two houses thus reducing the open space at one end and forming a narrow passage which retards and hinders the smoke from passing freely between the houses.

By-law 16 of the by-laws made by the Mayor and Town Council of Georgetown and confirmed by the Governor and Court of Policy on the 26th July, 1917, reads *inter alia:* "Every chimney shall be of sufficient "height not to endanger the neighbourhood or to annoy it with smoke." Has the defendant conformed with this regulation? I have it that apart from the erection of the kitchen being in contravention of the by-laws made by the Mayor and Town Council of Georgetown the chimney is of an insufficient height and that the smoke issuing therefrom enters and annoys the plaintiff's household.

Mr. Duke for the defendant contends that the use made of the kitchen does not and could not cause any substantial annoyance or other injury by reason of the cooking therein and that the happenings complained of by the plaintiff as such are in greater or lesser degree experienced by all residents in this city but he has not led evidence to satisfy me on that point that this amenity of life exists in this city, but on the contrary referred me to cases the facts of which therein are not applicable to the facts herein.

It is admitted that smoke would materially affect the comfort and enjoyment of living in a house and that it acts as an irritant to the eyes and respiratory organs and would certainly irritate a person suffering from Bronchial Asthma such as plaintiff suffers from.

The point for me to decide is whether the defendant with these facts existing, not temporarily, but day after day, is acting reasonably from his point of view and not causing a nuisance to his neighbour. Is what is complained of a nuisance? And if it really is a nuisance, then it seems almost to follow as a matter of

course that it is a nuisance which ought to be restrained, assuming that it is not of a trifling or a passing character, for after all, can a man reasonably create a nuisance? That seems to me to be the question from which there has never been any departure and that is, that he cannot. If he commits a nuisance, then he cannot say that he is acting reasonably. The two things are self-contradictory, and it ought to apply in this case.

In *Walter* v. *Selfe* reported in De Gex and Smale, Vol. 4, p. 322, (which was on the question of a person burning bricks on his own ground so as to be offensive to his neighbour and causing a nuisance), the Vice-Chancellor in that case said:—

"The question arises whether this is or will be an inconvenience to the "occupier of the plaintiff's house as the occupier of it, a question which "must, I think, be answered in the affirmative; though whether to the extent "of being noxious to human health, to animal health, in any sense, or to "vegetable health, I do not say nor deem it necessary to intimate an opin-"ion, for it is with a private not a public nuisance that the defendant is "charged. And both in principle and authority the important point next for "decision may properly, I conceive, be thus put: ought this inconvenience "to be considered in fact as more than fanciful, more than one of mere deli-"cacy or fastidiousness, as an inconvenience materially interfering with the "ordinary comfort physically of human existence, not merely according to "elegant or dainty modes and habits of living but according to plain and "sober and simple notions of life, as far as the human frame in an average "state of health at least is concerned, mere insalubrity, mere unwhole-"someness, may possibly, as I have said, be out of the case, but the same "may perhaps be asserted of stied hogs, melting tallow and other such in-"ventions less sweet than useful.

"That does not decide the dispute, a smell maybe sickening though not "in a medical sense. Ingredients may, I believe, be mixed with air of such a "nature as to affect the palate disagreeably and offensively, though not "unwholesomely. A man's body may be in a state of chronic discomfort, "still retaining its health, and perhaps even suffer more annoyance from "nauseous or fetid air for being in a hale condition. Nor, I repeat, do I think "it incumbent on the plaintiffs to establish, that vegetable life or vegetable "health either universally or in particular instances is noxiously affected by "the contact of vapours and floating substances proceeding from burning "bricks; for they have, I think, established that the defendants' intended "proceedings will, if prosecuted, abridge and diminish seriously and mate-"rially the ordinary comfort of existence to the occupier and inmates of the "plaintiff's house whatever their rank or station, whatever their age, what-"ever their state of health."

Finding as I do that the smoke issuing from the chimney on

defendant's premises eaters into the plaintiff's house and so annoys the household I am of opinion that it is a nuisance and must be restrained.

The plaintiff has not proved that he has suffered any damage and on the question of the loss of valuation of his premises by virtue of this nuisance existing on defendant's premises I am of opinion that the injunction granted will remove this anxiety.

I award no damages. Injunction granted. Defendant to pay plaintiff the costs of this action. Defendant, his servants and agents are restrained from the continuance or repetition of the said injury and the committal of any injury of a like kind in respect of the same property.

Solicitor for plaintiff, *F. Dias.*

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

Re BARROW AND VASCONCELLOS, LTD.

[No. 2 OF 1928.]

1928. MAY 25. BEFORE EGG, ACTING J.

Company—Petition for compulsory winding up—Allegations of fraud—Statutory affidavit—Oath as *to belief in truth of allegations of fraud—Whether sufficient.*

Where in a petition for the winding-up of a company fraud is alleged, the statutory affidavit stating a mere belief on the part of the deponent in the truth of such allegations is not sufficient. The facts of the alleged fraud must be stated in a separate affidavit.

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

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

E. M. Duke, for the respondent, Barrow.

EGG, Acting J.: Objections are taken, *in Limine,* to the hearing of the petition in the above matter on the grounds (1) that fraud or misconduct by the Managing Director, Conrad Frederick Barrow, as alleged in the petition and which requires investigation is not supported by affidavit of the petitioner and (2) that there is no allegation that there will be a substantial dividend for the shareholders after investigation and, therefore, no benefit in Court making order.

Under the Companies Winding-up Rules, 1905, Rule 26, it is stated that every petition for the winding-up of any company by the Court or subject to the supervision of the Court, shall be verified by an affidavit referring thereto. It further states by whom such affidavit shall be made and that such affidavit shall be sworn and filed within four days after the petition is presented when such affidavit shall be sufficient *prima facie* evidence of the statements in the petition. The form of affidavit is shown at the end of the rules.

Although the affidavit prescribed by the rules is in all cases necessary, it is not therefore in all cases necessarily sufficient. The affidavit as sworn to by the petitioner states: "That such of the statements in the petition as "relate to ray own acts and deeds are true and such of the said statements as "relate to the acts and deeds of any other person or persons I believe to be "true." clearly indicating that the statements relating to his own acts are. true, but that those relating to other persons he believes to be true In the petition it is stated that the Managing Director, Conrad Frederick Barrow, apart from other specific charges is acting in collusion with his wife (the mortgagee of the property) and his brother to exhaust the assets of the company and so acquire the business of the company, so that in effect, although there are various charges against the Managing Director culminating in one of acting in collusion and fraud, the affidavit referred to as evidence of the same only states that the petitioner believes such acts to be true.

In Palmer's Company Precedents (Part 2), 13th edition, at p. 108, the learned writer stated: "Assuming that a proper case has been alleged in the "petition, this affidavit (meaning statutory one) will, as a rule, be sufficient "*prima facie* evidence; but where fraud is alleged there should be evidence "by separate affidavit showing the particulars of the alleged fraud" and at p. 109 the learned writer also stated: "It must be borne in mind that the "*prima facie* evidence afforded by the statutory affidavit is very readily "displaced, especially when fraud is alleged in the petition (Gold Hill "Mines, 23 Ch, D. p. 210)."

In a winding-up petition, evidence of information and belief is not except as regards the statutory affidavit admissible—for the application is not an interlocutory one, and even in interlocutory applications is not admissible—but as was said by Jessel, M.R. *in re Gilbert* v. *Endean*, 9 ch. D., p. 266:

"I must say that in my opinion a charge of misrepresentation or con- "cealment ought not to be supported by affidavits on information and be- "lief. No doubt in the case of interlocutory applications the Court as a mat- "ter of necessity is compelled to act upon such evidence when not met by "denial from the other side. In applications of that kind the Court must act "upon such evidence, because no other evidence is obtainable at so short a "notice, and intolerable mischief would ensue if the Court were not to do "so. The object of these applications is either to keep matters as they are or "to prevent the happening of serious or irremediable mischief, and for these "purposes the Court has been in the habit of acting upon this imperfect evi- "dence. But the Court has no right to act upon it in finally adjudicating "upon the right of parties": hence, the petition as far as it relates to the misrepresentation, collusion and other charges of misconduct by the Managing Director, Conrad Frederick Barrow,

in respect of the management of the firm of Barrow and Vasconcellos, Limited, is void of proof.

In re London & Hull Soap Works, Ltd., W. N. 1907, p. 254 (petition for winding up company and in which fraud was alleged) Parker, J., held: "That where fraud was charged the statutory affidavit was not sufficient—"the facts of the alleged fraud must be stated on affidavit."

Mr. Browne for petitioner submits that there are substantial grounds alleged in petition for Court to make order and more so that it is just and equitable that the Company should be wound up.—Sub-sec. 6 of section 126 of Ordinance 17 of 1913 (Companies (Consolidation) Ordinance).

This section is identical with section 129 of the Companies Consolidation Act, 1908, 8 Edward 7. c. 69 and was fully discussed, in the recent case of *Lock & Anr.* v. *John Blackwood, Limited*, 131 L.T.R., p. 719, but I am of opinion that in the absence of the *prima facie* affidavit of proof of the acts of fraud alleged it is not just and proper that the Court should at this stage enquire into the petition and that the winding-up processes of the Court ought not to be used as a means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation.

As to the second point taken, the petitioner states in paragraph 20 of his petition that "the assets of the company are of considerable value, they "consist of amongst other things a large quantity of dry goods and mer-"chandise and if prudently realised will be sufficient not only to pay and "satisfy the company's debts and liabilities but to pay a substantial divi-"dend to the members."

Sub-section (1) of section 132 of Ordinance 17 of 1913 reads that the Court shall not refuse to make a winding-up order on the ground that the company has no assets; that being so, I am not prepared to hold otherwise.

The Court therefore grants leave to the petitioner to swear and file within ten days hereof an affidavit showing the particulars of the alleged fraud as stated in the petition, with leave also to the opposers, the company and Conrad Frederick Barrow, to swear and file affidavits in reply, if so advised, within ten days of the service on them of copies of such affidavits.

The petitioner to pay the costs of the day to the opposers at the company and Conrad Frederick Barrow which I assess of $30 each.

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

Solicitor for the Company, *G. R. Reid.*

Solicitor for the respondent Barrow, *E. de Freitas.*

JAGNANDAN, Appellant,
AND
ELDER, Respondent.

1928. JULY 7.

BEFORE SIR ANTHONY DE FREITAS, KT., C.J., GILCHRIST, J., AND EGG, ACTING. J.

Motor-car Offences—Motor-car Ordinance, 1925, section 10—Driving in a manner dangerous to the public—Whether the term "public" includes passengers in the car.

The appellant was convicted of driving his motor-car in a manner dangerous to the public having regard to all the circumstances of the case contrary to section 10 of Ordinance 23 of 925.

Counsel for the appellant contended that the conviction was wrong on the ground that "public" does not include passengers in the car driven and that there was no evidence of any other persons besides the said passengers being endangered.

Held, That there was evidence that persons were on the road at the time and place of the committing of the offence and there was therefore sufficient evidence on which the appellant might have been convicted. *Troughton* v. *Manning* 92 L.T. 855 distinguished.

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

B. F. King, Assistant to the Attorney General, for the respondent.

The judgment of the Court was delivered by Sir ANTHONY DE FREITAS, C.J.: The defendant was convicted by a Magistrate on a charge of having driven motor bus No. 2142 on a public road in a manner dangerous to the public having regard to all the circumstances of the case, contrary to section 10 of Ordinance 23 of 1925. He appealed. At the hearing in the Court below the defence was inevitable accident or that the defendant was at the most guilty of a mere error of judgment. In his reasons for his decision the Magistrate says (*inter alia*): "Having heard the evidence I am sat-"isfied that defendant was endeavouring to get to the bridge before the "driver of the rival bus (the Dreadnought) which was in front of him and in "order to do so drove his own bus in a manner which could only result in "disaster. When he saw that the other bus had reached the approaches of "the bridge before him he made a belated attempt to stop his vehicle and in "so doing sent it into the trench. It is obvious that he meant to pass the bus "in front at all costs."

After hearing much argument we intimated that we agreed with the Magistrate on the facts, whereupon it was submitted by counsel for the appellant as a matter of law that the decision in *Troughton* v. *Manning* (1905) 92 L.T. 855, governed this case, so as to require the conviction to be quashed. The headnote to *Troughton* v. *Manning* says: "The appellant having refused to

pay a toll for a motor car, the respondent the toll collector, placed himself in front of the car to prevent it proceeding. Having been warned to stand clear, the respondent, after the car was in motion, hung on to the sides of the car, was carried along, and after having asked the appellant to stop fell oft and was injured. The speed of the car was reasonable, and no danger was caused to anyone but the respondent. The justices convicted the appellant of reckless driving under section 1 (1) of the Motor Car Act, 1903. *Held*, that the conviction was wrong." Lord Alverstone, C.J., said: "This "conviction cannot be supported, but nothing that I say must be supposed "to support the view that the driver of a motor car need not regard his obli- "gations under the statute *where there is only one person in the road*, "whether he is lawfully there or not or whether he could or could not get "out of the way," and "In this case there was no evidence of any breach of "the section in view of what was intended to be included by the section, "although some question might arise between the toll-keeper and the appel- "lant in regard to the latter's conduct, but a personal grievance as between "the toll-keeper and the appellant in respect of the latter's conduct is not, "however, sufficient to constitute evidence of driving which was reckless "in itself or reckless in view of all the circumstances of the case as referred "to in section 1 (1) of the Motor Oar Act, 1903. It is rather the case of a "very unfortunate occurrence which might, for all I know, have been "caused by want of reasonable care on the part of the appellant towards the "respondent, but we should be straining the sub-section if we held that "there had been a criminal offence under it where there had been no reck- "less driving with regard to *anybody on the highway*. I should be slow to "interfere where there was any evidence before justices that could fairly be "said to be evidence of an offence, but we ought not to strain the statute "and turn into a criminal offence a personal grievance of the complainant "independent of what would be regarded as reckless or negligent driving "within the statute." The judgment of Kennedy, J., was as follows: "I do "not think that this was within the section, properly and fairly read, for my "view of the intention of the section is to prevent misconduct in the man- "agement of a motor car towards the public who were outside it on the "highway, the section was not meant for the protection of persons on the "car itself, but was for the protection of persons using the highway I do not "think that the intention was to punish any one who was reckless as regards "passengers on the car." Ridley, J., concurred, and the appeal was allowed.

Counsel for the appellant ultimately rested his case on a submission that the effect of *Troughton* v. *Manning* was that the expression "the public" within the meaning of s. 10 (1) of Ordinance 23 of 1925 (corresponding with a. 1 (1) of the Motor Car Act, 1903, 3 Edw. 7, c. 36) does not include (a) the passenger

in bus No. 2142, nor (b) the passengers in the bus Dreadnought, (for the reason that they were "passengers" and not "in the road"); but he conceded that it includes (a) a person in the road, (b) any person who is likely to be in the road, in the circumstances of a particular place, such as where there are dwelling-houses or a shop near the road and (c) a person who is riding a bicycle on the road. There is evidence in the case before us of some of the persons admitted to be included in "the public;" consequently, the submission does not affect the validity of conviction. A witness called for the defendant before the Magistrate said that he was on the public road by No, 71 bridge, when he saw the bus Dreadnought standing by the rice-mill bridge, unloading rice bags and saw bus No. 2142 come up behind the Dreadnought. The defendant said in evidence that he was driving No. 2142, and when he got near to the rice mill by No. 71 bridge he saw the Dreadnought at a standstill near the rice mill, while its conductor was on the road and a boy was throwing down bags from the top of the Dreadnought, It was said at the bar that No. 71 is a village, but there is no direct evidence of that in the case.

Since the evidence in the case establishes that fact and circumstances existed which counsel for the appellant concedes would prove that there was a "public" and would therefore exclude the application of *Troughton* v. *Manning,* it is unnecessary for us to consider that case or the submission said to be based on it. We think this appeal should be dismissed with costs.

When a case arises in which the evidence shows nothing more than that a driver was reckless as regards the passengers on the motor vehicle being driven by him, it may be that this Court will follow the opinion of Kenedy, J., in *Troughton* v. *Manning,* and hold that the driver was not guilty of driving in a manner dangerous to the public; and it may be that in an appropriate case this Court will follow *Ex parte Stone* (1909) 73 J.P. 444 in holding that proof of the fact that a motor vehicle is driven through a village at an excessive speed is evidence that will support a conviction for driving at a speed which is dangerous to the public, having regard to all the circumstances of the case.

Solicitor for the appellant, *L. Ramotar.*

Solicitor for the respondent, *Crown Solictor.*

BUDWAH *v.* GAFOOR.

BUDWAH *v.* GAFOOR.

[No. 18 OF 1928.]

1928. JULY 21. BEFORE EGG, ACTING J.

Practice—Probate—Claim to set aside alleged will—Allegations of unsoundness of mind, memory and understanding—Application for particulars thereof—Rules of Court, 1900—English Order 19 Rule 25 (*a*).

Under the present Rules of Court and in the absence of a rule corresponding to the English Order 19 Rule 25 (a) local Courts have no power to order particulars in a probate suit of the allegation that a testator was not of sound mind, memory and understanding.

The relevant facts appear in the judgment.

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

E. F. Fredericks, for the respondent.

EGG, Acting J.: Plaintiff Budwah, as executor and sole beneficiary under the last will and testament of Daleep, deceased, claims to have the granting of Probate of the pretended last will and testament dated 3rd December, 1927, of the said Daleep refused and an order declaring the paper writing executed by the said Daleep on the 26th November, 1827, to be the last will and testament of the said Daleep and alleges in his Statement of Claim (amongst other matters)

(*a*) that the said Daleep was in a very weak condition of health and of mind and at the time of drawing up of the paper writing purporting to be the last will and testament of the said Daleep was unable to and did not give instructions for the making of the said will,

(*b*) that at the time the alleged will purports to have been executed, the said Daleep was not of sound mind, memory and understanding, and

(*c*) the execution of the alleged will was obtained by the fraud and/or undue influence of the defendant Abdool Gafoor.

Defendant now asks for better particulars of the allegations made in (*a*), (*b*) and (*c*) mentioned above.

In resisting the application Mr. Fredericks, counsel of plaintiff, admits that particulars should have been given with respect to (c) but in regard to (*a*) and (*b*) submits that as there are no probate rules existing in this colony there is no obligation to do so, and that even if particulars were ordered in so far as (*a*) is concerned it is purely a matter of evidence.

I am unable to agree with him that particulars for (*a*) is a matter of evidence. I am of opinion that the defendant is entitled to particulars for (*a*) inasmuch as Order 17, Rule 7, states *inter alia:* "In all cases in which, etc . ". . . . and *in all other cases in which particulars may be necessary*

"particulars (with dates and items, if necessary) should be stated in the "pleading."

As the Statement of Claim now stands it seems to me that the defendant may well be taken by surprise if the particulars he asks for are not given so far as they are within the plaintiff's knowledge. He is entitled to know what point thereto he has to meet. Plaintiff should state the cause and nature of the very weak condition of health and of mind which rendered him unable to give instructions for making the will in order that the issue may be joined or admitted and so make it perfectly clear at the hearing what fact the Court has to decide on.

As to (*b*) Mr. de Freitas for the defendants contends that the English Order 19, Rule 25 (*a*) of which there is no corresponding rule in this colony gives the Court the power to order the particulars asked for—he admits that there are no Probate Rules in this colony. Up to 1901 no such rule existed in England and the Probate Division of the High Court of Justice refused from time to time to order particulars to be given when the capacity of a person making a will was raised and it was only in that year that Order 19, Rule 25 (*a*), was added. I agree with Douglass, J., in the case of *Rampersaud Sing* v. *Ramgolam, et al*, 1924, B.G.L.R., p. 181, wherein he stated:—"In the local case of *Pereira* v. *Pereira* (1916. B.G.L.R. p. 9), Mr. "Justice Hill held that where the question of the capacity of the testator to "make a will has not been raised on the pleadings, evidence opening such "question is not admissible and Order 17, Rule 7, appears to support this "Ruling; the two English cases *Lord Salisbury* v. *Nugent* (1883, 9 P.D. 23) "and *Hawkinson* v. *Barmingham* (1883. 9 P.D. 62) should however be "noted, where it was decided that with regard to the pleas of undue influ-"ence and of insanity the practice of the Probate Division was not governed "by Order 19, Rule 6 (which corresponds to our Order 17, Rule 7) with "respect to the obligation of parties to furnish particulars of matters "pleaded. The decisions in these two cases still hold good in this colony as "we have no rule corresponding to Rule 25 (a) of Order 19 which was "added in 1901 to meet the effect of this decision."

I am therefore of opinion that the Court has no power to order particulars to be given on this issue.

The application will therefore be granted for (*a*) and (*c*), particulars as applied for in (*a*) and (*c*) to be supplied to the defendant within ten days failing which paragraph 6 (six) and 9 (nine) of the Statement of Claim must be struck out. Defendant's solicitor applied in writing to plaintiff's solicitor for the particulars before coming to the Court to which defendant's solicitor received no written reply, but on the contrary two verbal replies, one promising to do so, and the other that he was unable to obtain evidence in support of the said allegations.

Defendant is entitled to the costs of this application which I assess at $50.

The time for tiling the defence will be extended to ten days after delivery of the particulars.

Solicitor for the applicant, *S. W. Ogle.*

Solicitor for the respondent, *F. Dias.*

MOSES *v.* STOREY, *et al.*

[No. 439 of 1927.]

1928. SEPTEMBER 4, 5, 6, 7, 10, 12, 13, 14, 17, 18, 19, 20, 21, 24; NOVEMBER 6.

BEFORE EGG, ACTING J.

Probate—Validity of will questioned—Onus of proof—Unsoundness of mind—Delusion—In what circumstances can monomania of testator invalidate his will—Undue influence.

(*a*) Where the validity of a will is challenged it lies upon the party propounding same to establish such validity.

(*b*) Where there are grounds for a testator coming to certain conclusions concerning a person's feelings or intentions towards him, such conclusions cannot in law be considered a delusion.

(*c*)It is not every type of monomania which will affect a testator's power of making a valid will and testament. For it to have such effect it must so affect the affections, the moral sense and the general power of the understanding as to take away the testamentary capacity.

(*d*)Influence in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will must be an influence exercised either by coercion or fraud.

S. L. Van B. Stafford and *D. E. Jackson,* for the plaintiff.

P. N. Browne, K.C., for the first-named defendant.

J. A. Luckhoo, K.C., for the other defendants.

EGG, J.: Claim by plaintiff Louisa Beatrice Moses: (1) to have probate of the last will and testament of John Henry Mathias Moses (referred to as the "testator") dated 31st August, 1926, which was granted on the 6th day of October, 1927, to Thomas Augustus Storey revoked and the said will declared null and void upon the grounds of undue influence and that the testator was not of sound mind, memory and understanding at the time of making and executing the said will;

(2) on failure that the Court shall pronounce in solemn form for the will of the testator dated 21st September, 1925;

(3) in the alternative for the will of the testator dated 6th May, 1925, and lastly:

(4) a declaration that the testator died intestate.

The defendants are Thomas Augustus Storey, the executor

under the will of the 31st August, 1926, and seven legatees under the said will—of which six legatees entered appearance.

Since the institution of this action and before the hearing, one of the executors, Donald Oldfield, has died.

Mr. Luckhoo as counsel for three of the defendants, contends that as insanity is alleged from September, 1925, to the date of the testator's death, no undue influence could take place, inasmuch as a person of unsound mind could not be under undue influence. I noted the objection allowing counsel for plaintiff to lead evidence, if any, of undue influence, and if at the close of the evidence, I found that insanity was proved, there would be no necessity to deal with such evidence. On the other hand, if the plea of insanity failed then I would consider the objections raised by Mr. Luckhoo.

Following the ruling laid down in the case of *Smee* v. *Smee*, 5 P.D., p. 41, whereby anyone questioning the validity of a will is entitled to put the person alleging the will to be made by a capable testator upon proof, the onus therefore being on the defendants, Mr. Browne opened.

The statement and observations necessary to be made in this case, as the reasons of the sentence the court is about to give need in no degree be proportioned to the bulk of evidence, nor the witnesses which have been introduced into the cause. The material facts lie in a narrow compass, nevertheless it is interesting to deal with the history and movements of the testator from a given date—17th September, 1925, the day on which the testator was stricken with a paralytic seizure to the day of his death—19th September, 1927—on board the "s.s. Biskra" between Trinidad and this colony, and to analyse the evidence so as to arrive at the conclusion whether or not the testator was of sound mind, memory and understanding at the time of his making and executing the will dated 31st August, 1926.

Soon after the paralytic seizure which occurred at the testator's home in Paramaribo, Dutch Guiana, the testator became an ill man, and it is common ground to both sides that the paralytic seizure might have been caused from distress and grief over a domestic misfortune to his niece Laura Beatrice Knights, now Mrs. Parker, for whom he had a very great affection, accelerated by a disease, diabetes, from which the testator suffered because it is during this illness that the testator acted strangely and behaved in a manner inconsistent with his usual demeanor as to warrant both Drs. Voet and Schuitemaker (whose evidence was taken in Paramaribo by the special examiner, Mr. E. M. Duke) coming to the conclusion that the testator's mental faculties were being weakened by the disease; Dr. Voet further testifying that he was satisfied "that Moses was not in possession of his "senses" resulting in the testator being taken to the Military Hospital, (Paramaribo) for treatment where, after a period of ten days

he was taken back to his home and treated by Dr. Barend, a specialist in lunacy attached to the Government Lunatic Asylum in Paramaribo. It was around this time that the testator's two sisters, Mrs. Keturah Knights, Louisa Leonora Moses and his niece Rhoda Louisa Knights went to Paramaribo, to assist in the caring of the testator. Shortly after their arrival the peace of the household was being continually disturbed on account of frequent bickerings between Mrs. Moses and Mrs. Knights aggravating at times to the testator and impeding his recovery which was taking place, culminating in a serious breach of marital relations between Mrs. Moses and her husband (testator) when it was discovered that certain moneys which the testator kept in his house were missing and further an order which the testator had signed for $2,000 in favour of Mrs. Knights had not been paid by a Mr. de Miranda, a Notary Public of Suriname, who at that time was requested by the testator to make disbursements on the testator's account. Mrs. Moses acting no doubt on the advice of Mr. de Miranda obtained the services of Mr. Bucaille, an advocate in Suriname, who prepared and filed in the Supreme Court of Justice in Suriname an application to place her husband (testator) under curatorship as being *non compos mentis* on a certificate of Dr. Barend dated 8th December, 1925, which application was subsequently withdrawn from the court on the production of a later certificate of Dr. Barend dated 8th February, 1926, certifying the testator as fit to manage his own affairs. It was from this time onwards that Mrs. Moses ceased to assist or help in any way the testator and whilst he, on the other hand, accused her for trying to put him in the madhouse and to obtain his money. This state of affairs existed until June, 1926, when Mrs. Moses left the testator's house, going to another house in the country where she remained until the day of the testator's departure from Suriname when she returned.

I must confess that the evidence is very conflicting, in fact, diametrically opposed in some instances of the domestic quarrels which took place between the testator's family and Mrs. Moses—some of the instances being so exaggerated as to hardly make it credible for one to believe that the interest of the sick man was ever considered; be that as it may, the testator in due time grew stronger and improved in health witnesses proving that fact both before me and in the evidence taken before the special examiner that the testator proposed going to Guadeloupe, West Indies, for thermal bath so as to regain his full strength, for which place he left Paramaribo on the 4th July, 1926, via Demerara.

It is important to note that the plaintiff Mrs. Moses alleges in her statement of claim and also in the particulars supplied that apart from specified dates mentioned therein, the testator suffered from insanity after his illness until the day of his death—and recited therein the nature of the testator's delusion. The words "morbid fancies of a like nature" were also indicated in the statement of

claim as part of the substance of case under insanity but—on particulars being asked for as to "morbid fancies" counsel for Mrs. Moses abandoned any proof of "morbid fancies" and repeated and relied on the acts of insanity as stated in the claim and particulars. During the hearing application was made to lead evidence of "morbid fancies" (delusions) other than those stated in claim and particulars which I declined to allow, as by so doing there would not have been a finality to the hearing and also from the fact that counsel himself had intimated his abandonment of that evidence; I however, granted an amendment of paragraph 7 (substance of case) by adding the words "and scribbled wildly on scraps of paper" after the words "became of unsound mind" in the fourth line thereof.

Now, has the evidence adduced established beyond reasonable doubt that the testator was insane from the date of his illness to his death and particularly in August, 1926, when the will was made and executed by the testator? I have it that the testator on his return to Demerara on the 23rd August, 1926, from Guadeloupe whither he had gone and stayed a short time, resided at the King George Hotel and was there interviewed (in some instances called persons to see him) by Messrs. Van Sertima, Percy C. Wight, Rev. D. P. Talbot, Miss Lawrence and Mr. Carlos Gomes, all of whom testified to the testator being quite able to transact and discuss business, that he was all right rational and sensible and that there was nothing in his demeanour to indicate he was not in possession of all his mental faculties, and I lay great stress on the evidence of Carlos Gomes, a solicitor practising before this court who was engaged by the testator to make the will of the 31st August, 1926, as showing how careful the testator was as to the details in the disposition of his property under the will and also of the fact that the testator had previous to Gomes' second visit prepared instructions (in his own handwriting) Ex "C" of the disposition of his property under the will which shewed as Gomes said "that the testator was pos- "sessed of a perfectly balanced mind" further, the evidence of Stanley E. Gomes, barrister-at-law, and one of the witnesses to the execution of the said will shews that the testator on reading the will before signing same discovered three clerical errors which were corrected before he executed the document all tending to show that the testator was a methodical and thorough person in the execution of his affairs, consequently sitting as a jury I have to ask myself whether during the period when the testator engaged Solicitor Gomes to make the will, gave written instructions for same, and the day the will was executed, the testator was capable of having such a knowledge and appreciation of facts and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in the disposition of his property and act upon it.

I find as a fact that the testator up to the date of Dr. Barend's first certificate dated 8th December, 1925, was of weak intellect but here I pause to express my doubt as to whether the fact that Mrs. Moses was seeking to put the testator under curatorship was a delusion under which the testator laboured. The attempt to do so was a fact established on Mrs. Moses' part which she denied to her husband as having taken place, in spite of the information given to the testator by his sisters to that effect, and it is this attempt on Mrs. Moses' part which excited the testator, bat by no stretch of imagination can it be considered a delusion rendering the testator intestable, nevertheless I find also as a fact that from and after the date of Dr. Barend's second certificate dated 8th February, 1926, the testator was able to manage his own affairs, as has been shown by the evidence wherein he conducted correspondence in general, arranged his financial affairs and generally did everything that could only have been accomplished by a sane and rational person possessing all his faculties, which state of circumstances existed from that time until he died.

At the close of the defendant's case, Mr. Stafford, counsel for plaintiff, reduced his plea of general insanity and indicated certain propositions whereby his case became one of a plea of monomania, and after evidence was taken, in his address laid great stress on the following cases:—

Waring v. *Waring,* 6 Moore's P.C. 341,

Smith v. *Tebbitt,* L.R. 1 P. & M. 398,

Dew v. *Clarke, 5* Russell 163,

Attorney General v. *Parnther,* 3 Browne's C.C. 441,

as showing that any degree of mental unsoundness, however slight and however unconnected with the testamentary disposition in question must be held fatal to the capacity of a testator.

In *Banks* v. *Goodfellow,* L.R. 5 Q.B. 549 these particular cases were fully discussed by the Court of Exchequer and at p. 559 of the judgment which was delivered by Cockburn, C.J., he said, "Neither in *Waring* v. "*Waring* nor in *Smith* v. *Tebbitt* was the doctrine thus laid down in any de- "gree necessary to the decision. Both these were cases of general, not of "partial insanity, in both the delusions were multifarious, and of the wildest "and most irrational character, abundantly indicating that the mind was "diseased throughout. In both there was an insane suspicion or dislike of "persons who should have been objects of affection, and, what is still more "important, in both it was palpable that the delusions must have influenced "the testamentary disposition impugned. In both these cases, therefore, "there existed ample grounds for setting aside the will without resorting to "the doctrine in question. Unable to concur in it, we have felt at liberty to "consider for ourselves the principle properly applicable to such a case as "the present. We do not think it necessary to consider the position assumed "in *Waring* v. *Waring,* that

"the mind is one and indivisible or to discuss the subject as matter of meta-
"physical or psychological inquiry. It is not given to man to fathom the
"mystery of human intelligence, or to ascertain the constitution of our sen-
"tient and intellectual being."

And at p. 560 of the said judgment, the learned Chief Justice said *inter alia*, "No doubt when delusions exist which have no foundation in reality,
"and spring only from a diseased and morbid condition of the mind, to that
"extent the mind must necessarily be taken to be unsound, just as the body
"if any of its parts or functions is effected by local disease, may be said to
"be unsound although all its other members may be healthy and their pow-
"ers or functions unimpaired. But the question still remains, whether such
"partial unsoundness of the mind, if it leaves the affections, the moral
"sense, and the general power of the understanding unaffected, and is
"wholly unconnected with the testamentary disposition, should have the
"effect of taking away the testamentary capacity." Thus I repeat that after February, 1926, the delusions assigned to the testator had disappeared, the attempt by Mrs. Moses to put the testator under curatorship was a fact accomplished that I am of opinion on the evidence and all the surrounding circumstances in this case that the testator was of sound mind, memory and understanding at the making and executing of the said will of the 31st August, 1926.

The objection raised by Mr. Luckhoo that as insanity was pleaded no undue influence could take place during such period seemed to me a novel point, but I am of opinion that it was competent for counsel for plaintiff to allege undue influence, for if the evidence proves that the conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind is such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence he would not have executed, and similarly if imaginary terror is created sufficiently to deprive the testator of free agency, it may possibly be described as obtained by coercion.

Influence in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will must be an influence exercised either by coercion or by fraud.

One point, however, is beyond dispute, and that is that where once it has been proved that a will has been executed within due solemnities by a person of competent understanding and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed, and looking to the evidence in this case to satisfy myself whether or not the plaintiff has proved that the testator was unduly influenced by his sisters or his niece, nowhere do I find any trace of action or conduct on their behalf to suggest an overshadowing or overriding by them or any of them of the testator's volition so that he was being driven, not led, towards the disposition of his

property, as was said by Lord Penzance in *Hall* v. *Hall*, 1 P. & M. 482. "To "make a good will a man must be a free agent. But all influences are not "unlawful, persuasion, appeals to the affections or ties of kindred to a sen- "timent of gratitude for past services or pity for future destitution, or the "like, these are all legitimate and may fairly be pressed on a testator. On "the other hand, pressure of whatever character, whether acting on the fears "or hopes, if so exercised as to overpower the volition without convincing "the judgment is a species of restraint under which no valid will may be "made. In a word, the testator may be led, but not driven and his will must "be the offspring of his own volition, and not the record of someone else." Consequently I am of opinion that the plaintiff has failed to prove undue influence.

Of the evidence taken by the special examiner, Mr. E. M. Duke, LL,B., Barrister-at-Law, the greater part of same dealt with the period soon after the testator was stricken with paralysis and on which evidence I have already expressed my finding, so much so that the question of my ruling on the evidence which was objected to at the examination and on the reading of the evidence during the hearing is of little avail, however, of the evidence objected to by counsel for defendants and which are recorded in my notes of evidence under the letters A. to M. I grant the objection to strike out the evidence in (b), (c), (d), (f), (h), (j) and (k) as being no part of the pleadings and substance of the case and I allow the evidence to be admitted in (a), (e), (g), (l) and (m).

The special examiner is deserving of praise for the skilful and thorough manner in which he executed his commission.

I accordingly find for the defendants and pronounce that the will of the testator dated 31st August, 1926, be admitted to probate in solemn form.

As to costs I am of opinion that costs ought to follow the event. I can see no reason for departing from that rule. This is not a case of the plaintiff giving notice that she merely insists on the will being proved in solemn form, or that the litigation has been caused by the state in which the testator left his testamentary papers, or that the testator by his own conduct and habits and mode of life has given reasonable ground for questioning his testamentary capacity, but it is one in which the plaintiff by her own conduct wilfully left her husband after causing him grief by her attempt to put him under curatorship. I also form the opinion that but for the gratuitous advice of Mr. E. P. Bruyning and Fitzgerald Mayers to the plaintiff, the former especially playing such an important role in these proceedings, being an ex-attorney of the testator and one on whom the testator in his lifetime had called on to account for his intromissions and dealings as such attorney—that this case would not have engaged the attention of this court.

I accordingly give judgment that the defendants recover costs against the plaintiff, save and except the costs occasioned by and incidental to the appointment of Mr. E. M. Duke as special examiner, and such examination by virtue of the order of this court dated 29th May, 1928, and also the amounts allocated to be paid to the solicitors of the defendants and the plaintiff and the costs incidental thereto by virtue of the Order of the Full Court of the Supreme Court dated 8th June, 1928, which I order to come out of the estate.*

Solicitor for the plaintiff, *A. Ogle.*

Solicitor for the first-named defendant, *A. V. Crane.*

Solicitor for the other defendants, *F. Dias.*

[*EDITOR'S NOTE.—An appeal from this decision was heard by the West Indian Court of Appeal on the 1st and 2nd days of July, 1929. There was no written judgment but the appeal was dismissed with costs.]

RIDLEY *v.* RIDLEY.

RIDLEY *v.* RIDLEY.

[No. 35 OF 1928.]

1928. DECEMBER 6. BEFORE GILCHRIST, J.

Will—Probate—Allegation of forgery of testator's signature—Handwriting—Expert evidence—Effect thereof—Costs—Principles to be observed in probate matters.

The Court is not bound by the evidence of an expert on handwriting. The expert's evidence is of assistance based as it is on study and observation, but in the ultimate event it is for the Court to make up its mind whether a particular writing is to be assigned to a particular person.

As to the question of costs in suits involving the question of the validity of a will, each case has to be decided upon its merits though there are two general principles not to be lost sight of in arriving at a decision. The first of these principles is that if the person who leaves a will or the persons who are interested in the residue have brought about the litigation then there is a case made out in which the Court ought to order that the costs be paid out of the estate and the second principle is that if the circumstances are such as to lead reasonably to an investigation by those who contest the will, the costs ought to be borne by those who have incurred them. *Spiers* v. *English* 1907. 96. L. T. R. 582 applied.

J. A. Luckhoo. K.C., and *E. F. Fredericks,* for the plaintiff.

D. E. Jackson, for the defendant.

GILCHRIST, J.: The plaintiff in this action claims a declaration of invalidity of the will of James Augustus Ridley, deceased, probate whereof was granted in common form on 11th December, 1926, on the grounds:—

(*a*.) that the said will is a forgery;

(*b*.) that the paper writing purporting to be the last will of the said James Augustus Ridley, deceased, was not duly executed.

2. The defendant counter-claims and asks that the Court decree probate of the said will dated the 2nd of November, 1926, in solemn form of law.

3. The interest of the plaintiff as one of the next of kin of the deceased is admitted.

4. At the hearing in accordance with the established procedure of the Court the propounder of the will, the defendant, was called upon to begin and led evidence in support of the said will.

5. With respect to the evidence on behalf of the plaintiff I propose to deal first with the evidence of A. M. Barcellos who has made a study of handwriting. In the course of his evidence in examination in chief, he states he has examined the signature to the said will (Exhibit H. 2) and of the witnesses thereto and the proved signatures of the deceased James Augustus Ridley in the Occurrence Book of the Market Police Station for the year 1925 (Exhibit D. 2), and the signature of the deceased on the pay sheet for the month of September, 1926, (Exhibit E. C., J. 1), and draws the conclusion that the signatures "J. A. Ridley" and

"Richard London" on the will (H. 2) are in the handwriting of one and the same person, that the impressions and characteristics are alike, movement of hand the same, angle of letters the same, that the signature "J. A. Ridley" however is a little more laboured as it is written more cautiously.

6. In answer to the Court he states he took about twenty minutes in examining the signatures of Exhibits H. 2 and D. 2, that there is a striking peculiarity in the signature "J. A. Ridley" at pages 243 and 245 of Exhibit D. 2, that in the will (H. 2) there is also this striking peculiarity, that the formation of the "R's" at pages 175, 232, 235 and 239 of D. 2 (Occurrence Book) and that of H. 2 (the Will)) bear slight similarity one to the other, that the "R" at page 239 of D. 2 and that of the Will—H. 2 bear a strong similarity one to the other.

7. In *Wakeford* v. *Lincoln* (Bishop) 90, L.J. P.C. 174 the Lord Chancellor (Lord Birkenhead) refers to the manner in which expert evidence of this kind ought to be presented to the Court, which has to make up its mind, with such assistance as can be furnished to it by those who have made a study of these matters, whether a particular writing is to be assigned to a particular person. He then states "Questions depending upon handwriting are in many cases doubtful and in the past have given, and in the future will give cause for great anxiety in Courts of Justice."

8. I have carefully examined the signatures and writing referred to by Barcellos and, to adopt the words of Lord Birkenhead in *Wakeford* v. *Lincoln* (Bishop)—upon the evidence of my own eyes I say emphatically I do not agree With the conclusion arrived at by Barcellos that the signatures "J. A. Ridley" and "Richard London" on H. 2 (the Will) are in the handwriting of one and the same person.

9. Other parts of the evidence of Barcellos which I have referred to strongly support the testimony of the defendant Forbes and Richard London, a witness to the said Will, that the signature of J. A. Ridley to the said Will is the signature of the testator James Augustus Ridley, deceased.

10. I do not intend to examine the evidence in detail. In coming to a decision the Court is guided by the rules laid down in the cases of *Fulton v. Andrews* (1875). 44 L. J., P. & M. 17); *Barker* v. *Butt* (1838. 2 Moore P.C. 317); *Brown* v. *Fisher* (1890. 63 L. T. R. 465) and other cases.

11. I prefer to accept the evidence of Richard London and the defendant Forbes taken as a whole. I also accept the evidence of Walter Harrison, clerk in the Deeds Registry, and Henry Dodson, Serjeant-Major of Police.

I hold and declare that the paper writing dated the 2nd November, 1926, whereof probate was granted in common form on the 11th December, 1926, to Clara Sophia Forbes, executrix

therein named is the true last will and testament of James Augustus Ridley, who died on the 22nd November, 1926, at the Public Hospital, Georgetown, and accordingly pronounce for the same in solemn form.

13. On the question of costs—Counsel for the plaintiff submitted that in the event of the Court pronouncing for the Will in solemn form, it will hold that the action by the plaintiff was necessitated by facts that justified her in taking proceedings, and in the circumstances order that plaintiff's costs be paid out of the estate.

14. In *Spiers* v. *English* (1907) 96 L.T.R. 582, Sir Garrell Barnes said: "Each case has to be decided upon its own merits, though there are two general principles which are not to be lost sight of in arriving at a decision. The first of these principles is that if the person who leaves a Will or the persons who are interested in the residue have brought about the litigation, then there is a case made out in which the Court ought to order that costs are to be paid out of the estate. The second principle is that if the circumstances are such as to lead reasonably to an investigation by those who contest the Will, the costs ought to be borne by those who have incurred them. These principles allow on good cause being shown why the costs should not follow the event, and unless a case does fall, generally speaking, within these principles the Court ought not to interfere with the ordinary rale as to costs."

15. In my opinion the plaintiff has hopelessly failed to show she had any reasonable grounds for instituting the proceedings. Costs must therefore follow the event.

Judgment for defendant with costs.

Solicitor for the plaintiff, *L. Ramotar.*

Solicitor for the defendant, *M. Fitzpatrick.*

WEST INDIAN COURT OF APPEAL.

REPORTS OF DECISIONS

OF

THE COURT

SITTING IN

ANTIGUA AND ST. VINCENT.

[1928.]

JUDGES OF THE COURT:

SIR PHILIP J. MACDONELL, Kt., President (Chief Justice of Trinidad).

J. STANLEY RAE (Chief Justice of Grenada).

SIR ANTHONY DEFREITAS, KT, (Chief Justice of British Guiana).

BERNARD H. A. F. BERLYN (Puisne Judge, Leeward Islands).

PIPER, Appellant,
AND
IRISH (for himself and others), Respondent.

ON APPEAL FROM THE SUPREME COURT OF MONTSERRATT.

1928. AUGUST 17.

BEFORE SIR P. J. MACDONELL, C.J., PRESIDENT, SIR ANTHONY DEFREITAS, C.J., AND B. H. A. F. BERLYN, J

Real property—Purchase in pursuance of previous oral agreement—Trusts—Express Trustee—Whether Statute of Limitations available—Montserratt Land Tax Ordinance, No. 13 of 1868—Statute of Frauds—Statute not to be made an instrument of fraud—Laches—Improvements to property by one co-owner—Proper remedy for obtaining compensation therefor.

The Appellant (defendant) had purchased certain real property at a sale held for non-payment of taxes in pursuance of an oral agreement arrived at prior thereto that he should hold such property in trust for those who were really entitled thereto under a trust deed. The Appellant ultimately disclaimed the trust and contended *inter alia*:—

(1) That he was a constructive trustee and that the claim was barred by lapse of time.

(2) That as the enactment under the provisions whereof he had purchased the property provided that all claims in respect of the land purchased should be brought within two years thereafter and as the present claim was admittedly brought after that period, it must fail.

(3) That in any event as he had expended moneys in the improvement of the property bought he was entitled to be reimbursed same in the inquiry as to *mesne profits* ordered by the trial judge.

Held, (*a*) That where a person has assumed either with or without consent to act as a trustee of money or other property and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee and will make him account for the property in his possession without regard to lapse of time.

(*b*) That although the appellant had purchased the land in fee simple and no claim had been made within the prescribed period of two years; yet Courts of Equity will not allow a Statute to be made the instrument of a fraud if the circumstances of the purchase are such that it would be inequitable to allow him to enjoy the benefits of his purchase and if his conscience is affected.

(*c*) That evidence in support of a plea of laches must show acquiescence in the acts complained of.

(*d*) That as the appellant subsequent to the said purchase had become a co-owner in his own right and had thereafter expended moneys in improving the property, his only mode of obtaining compensation was by way of partition and not otherwise.

The judgment of the Court was delivered by SIR P. J. MACDONELL:—

In this appeal the appellant, defendant below, appeals from a judgment of the learned Chief Justice of the Leeward Islands, whereby it was declared that the appellant is trustee for respondent and others of a certain piece of land in Montserrat of which appellant is tenant in fee simple by virtue of a sale to him by the Provost Marshal of 23rd July, 1914, and whereby it was ordered that appellant do convey 4/5 of the land to respondent and three other persons as tenants in common and account to them for *mesne profits.*

The facts are as follows: Daniel Richard Irish, the father of the respondent plaintiff, married firstly Elizabeth by whom he had issue, the respondent, a daughter now Mrs. Blanche Barzey Jagshaw, another son and another daughter. After the death of his wife Elizabeth, he married as his second wife Mary Francis Donoghue by whom he had issue, one son, Thomas Livingstone Irish. On July 30th, 1884, John Williams conveyed the land the subject of this action to George Barzey Wyke, (since dead) and Caesar Augustus Irish (also dead but alive till about 1920) their heirs and assigns in trust for Mary Frances Irish for her life or until re-marriage and thereafter in trust for the issue of Daniel Richard Irish by his first wife and for the issue of the same by his second wife for equal shares as tenants in common. The *Cestuis que trustent,* then, under this conveyance, will be the children, four in number, including the respondent, of the first marriage and the one child, a son, of the second marriage. At a date not stated Mary Frances Irish died, and thereafter, date also not stated, Daniel Richard Irish married as his third wife one Sarah by whom he had issue one son and three daughters, two of which daughters are living.

In 1904 Daniel Richard Irish died, but his widow Sarah continued to occupy the land conveyed in 1884, and the house thereon, by consent of the Trustee. By this time Daniel Richard Irish's children, the *cestuis que trust* under the conveyance of 1884, had got scattered. Respondent had been in America since 1901, and his sister Blanche seems to have settled in Trinidad. Later on, about 1910, Sarah the widow left Montserrat for Colon and has not since returned. One Lewis Loving then took charge of the property in question as agent, it would seem, for the *cestuis que trust,* but by the year 1914 he had quitted it and the property was at that time in charge of one Ann Ramsay, also it would seem as agent for the *cestuis que trust.* What then happened is best given in the words of the witnesses in this case, when giving their evidence in the Court below.

James Badcock Chambers, Notary Public, says "I suggested to Miss "Ramsay that if other owners were agreeable it would be a cheap way of "getting a title for the children of all three marriages to allow the place to "be sold for taxes." (The taxes were in arrears at the time, this is not disputed). "Miss Ramsay was in charge at the time, that's why I made this "suggestion, I suggested further to have it bought in at the sale and the Bill "of Sale taken in the names of all the children of the 1st, 2nd and 3rd mar-"riages, I believed at the time the other owners would be agreeable to this "course. I know place was sold. Not present at sale. Mr. Piper, (*i.e.,* the "appellant) subsequently brought me a Bill of Sale and asked me to assist "him in having it recorded notwithstanding the lapse of three months from "its execution. I noticed this Bill of Sale was

"taken in his name, and I remarked to him that I understood he was buying "it as agent for the children. He told me he had only done that to put him in "a position to make a conveyance which he would do as soon as he had got "it recorded."

Mordan Augustus Taylor, Bailiff Supreme Court, says—"The house "was in default (*i.e.*, for taxes for year 1913. Before sale I was present at a "meeting at Miss Wyke's house. Defendant (*i.e.*, appellant) was present, "Miss Ramsay and Miss Wyke. Matter of sale of house was discussed. "Miss Ramsay told me at this meeting in defendant's presence that he "would represent Miss Ramsay at the sale. Defendant did not dissent when "this was said. It was said then in Mr. Piper's (appellant's) presence that "Miss Ramsay was allowing place to be sold because she wanted to got the "children of another marriage of the original owner, Irish, who were not "included in the settlement, included in the Marshal's Bill of sale that "would be granted after the sale."

The property the subject of this action was sold and conveyed by the Provost Marshal on 23rd July, 1914, to the appellant-defendant for the sum of 8/6. This sale was under and by virtue of the Montserrat Land Tax Ordinance, No. 13 of 1868, which empowers the Provost Marshal, on selling land for arrears of land tax, to convey and ensure the property to the purchaser in fee simple free from all prior and other charges, lien, incumberance, right, claim, estate, interest and demand whatsoever "provided "always that the party entitled to any such lands or tenements so sold as "aforesaid or his representative shall be at liberty to redeem the same. . . . "within two years after the day of the date of such sale."

The appellant-defendant having by this sale and conveyance become the tenant in fee simple of the property the subject of this action, his next act seems to have been to get into communication with Blanche Barzey Jagshaw *nee* Irish, one of the *cestuis que trust* under the conveyance of 1884, and a whole sister of the respondent-plaintiff. He describes this incident as follows:—"I got into connection with Blanche Barzey. I believed "Blanche Barzey was the owner of the premises. She wrote to ask me to "overlook the premises and prevent its possible destruction (because peo-"ple were taking it away in pieces). She asked me to overlook it for her. A "deed was drawn up. It was in consideration of £21 to sell to me and I be-"lieve this was a fair price. She had a Notary Public in Trinidad represent-"ing her. . . I swear positively that I know nothing about the trust deed. . . . "I say that I bought this property for myself. . . . It was advertised for sale. I "believe 1 was doing a service to Blanche Barzey by buying it for myself "to get a better control of it for her. I believe her as the sole owner. She "was the owner, I bought it on behalf of the owner (Blanche Barzey)."

The grant from Blanche Barzey Jagshaw was put in at the hearing. It bears date 27th December, 1916, and recites that she is "seized and possessed of" the piece of land in question and that it has been sold to the appellant at Public Auction for arrears of taxes. The grant goes on to say that Blanche Barzey as grantor in consideration of £21 paid by the appellant as grantee "before the delivery of these presents" confirms to appellant as grantee the Marshal's Bill of Sale to him in respect of the said property, and also relinquishes consigns grants and delivers up any claim or demand which she had or may have to the said property for the sole use of the grantee his heirs and assigns forever, and there follows an undertaking for further assurance. In effect Blanche Barzey Jagshaw alienated for value to the appellant any rights she might have whether under the deed of settlement of 1884 or under the Ordinance to redeem after sale by the Provost Marshal.

The appellant-defendant has been in possession of the property the subject of this action either by himself or his son-in-law continuously from the sale of July 23rd, 1914, to the present date.

In 1918 the respondent plaintiff says that he became aware of Sarah his step-mother the third wife of his father Daniel Richard Irish having left Montserrat and of the sale of the property in question to the appellant defendant, but says also that he was too poor at the time to come from the United States of America to Montserrat or to take action. He returned to Montserrat after August 19th, 1926, and commenced this action in November, 1926.

It was heard before a Judge and Special Jury in April, 1927, when a verdict was taken for the plaintiff respondent but on application to this Court the verdict was set aside for irregularities in connection with the summoning and selection of the jury. It was thereafter tried before the learned Chief Justice sitting without a jury on 15th and 24th November, 1927. With regard to this second trial there are two or three matters to be mentioned.

At the opening the defendant (now appellant) in person asked for an adjournment on the ground that he was not ready to go on that plaintiff had been ordered to find security for costs and had only given that security the actual day when the case was down for hearing, and (semble) that plaintiff's doing so had taken him by surprise. The learned trial Judge refused the application and the hearing proceeded. At a later stage counsel for the defendant appeared and addressed the Court. He also by consent put in the notes of the defendant's evidence given at the abortive trial by a Special Jury in the previous April. This evidence of defendant was therefore before the Court of trial and can be considered by us.

At the trial appeal from decision in which is now brought, evidence was led for the plaintiff and the material portions thereof

as to the sale of 23rd July, 1914, have been quoted above. It will be of assistance to set out also the evidence of Elvira Wyke, niece of the deceased Daniel Richard Irish, on this matter. "Had a conversation with defendant "about the sale of the property the subject of this action . . . My conversa-"tion with defendant was after the sale, about two weeks after, as well as I "remember. I asked Piper 'Is it true you have bought that property of "'Daniel Irish in your name?' He said 'I have'. I asked him 'Why did you "'do that when you promised to buy it for the children of the 3 marriages?' Defendant said 'Stay, I have bought it in my name to secure it; as soon as "'they give me back my expenses I will hand the property over to them, I "'am now in communication with them and my family knows it.' that was "all the conversation."

At the conclusion of evidence and argument the learned trial Judge gave the following finding:—"I find that defendant attended the Provost Mar-"shal sale in pursuance of an arrangement that he should attend as Miss "Ramsay's representative and buy in the property on behalf of the children "of all three marriages of Daniel Richard Irish, and that he did attend at "such sale and buy the property on their behalf and that consequently it is a "fraud on his part to now claim the property as his own." Thereafter on counsel for plaintiff moving for judgment and after hearing counsel for defendant the learned trial Judge said "I give judgment for plaintiff declar-"ing that defendant acquired the property the subject of this action as trus-"tee for the owners being the beneficiaries in remainder under the deed of "settlement of 30th July, 1884. I order the defendant to execute a convey-"ance of 4 undivided fifth shares of such property to the said beneficiaries "in remainder under the deed of settlement of 30th July, 1884, (with the "exception of Blanche Barzey now Blanche Barzey Jagshaw) as tenants in "common. Cost of such conveyance to be borne by the plaintiff. Referred "to the Registrar in Montserrat to hold an inquiry as to *mesne profits,* I "award plaintiff the costs of this action and the costs of the inquiry as to "*mesne profits.*"

From this judgment the defendant appealed on the following grounds:—

1. That the refusal to grant the adjournment asked for by defendant at the commencement of the hearing was wrong.
2. That on the findings of fact, the learned Trial Judge was wrong in declaring defendant a trustee of the property for the following reasons: —
   (*a*.) That as Caesar Irish one of the trustees of the settlement of 1884 was alive at the time of the sale of 1914 to defendant and for 8 years after, he was guilty of laches and negligence in allowing the property to be sold and not redeeming it and in not

notifying the *cestuis que trust* of its liability to be sold and that his laches becomes that of the *cestuis que trust* and that they cannot take advantage of their own wrong after the lapse of 12 years.

(*b.*) That plaintiff was guilty of laches.

(*c.*) That defendant was under no obligation to pay the land tax and that Miss Ramsay's neglect to do so makes her the person responsible to the *cestuis que trust.*

(*d.*) That the sale by the Provost Marshal to defendant is valid and that the proper person to move for its setting aside would be the trustee.

3. That on the findings of fact the learned Trial Judge was wrong to order defendant to execute a conveyance to the *cestuis que trust* for the following reasons:—

(*a.*) That the agreement under which he found that defendant was buying for the *cestuis que trust* was not binding on the defendant as being without consideration not in writing nor under seal and that consequently defendant was free to purchase the property for himself.

(*b.*) That the agreement under which he found the defendant bought the lands in question "was illegal and a fraud on the "children on the 1st and second marriages whose agent Ann "Ramsay was admitted to be and the defendant cannot be held "liable on such agreement to do any act or thing arising out of "such agreement."

4. That the learned Trial Judge was wrong in holding defendant guilty of fraud, since the evidence of Chambers did not support the agreement alleged in the Statement of Claim and Ann Ramsay was not called as a witness, also since the agreement was illegal, defendant was free at the sale to purchase the property for himself.

5. That the learned Trial Judge should have allowed the defendant whether as part owner, trustee or purchaser under the Ordinance of 1868 the reimbursement of all just and necessary expenditure for repairs, improvement and upkeep of the property, the amount thereof to be ascertained on the inquiry into *mesne profits* ordered in the judgment appealed from.

It will be observed that the appeal is brought on grounds both of law and of fact. The appellant says that even on the learned Trial Judge's findings as to fact defendant is not a trustee of the property and plaintiff and the other *cestuis que trust* are not entitled to conveyance of the same, also that those findings of fact so far as holding the defendant guilty of fraud, are not justified by the evidence

The objection that the learned Trial Judge ought to have granted an adjournment on the 15th November, 1927, as requested by defendant was not seriously argued to us as a ground of appeal and does not therefore need discussion. Before dealing with the reasons for the appeal that were argued before us it is best and will make for conciseness, to state the position of the appellant-defendant as tenant in fee simple under sale from the Provost Marshal of the land in question. Assuming the facts as found by the learned trial Judge, then the appellant-defendant was a trustee of the property before the alleged breach of trust. As soon as the property had been conveyed to him by the Provost Marshal, he was in fiduciary relation to the *cestuis que trust;* he was a fiduciary agent of theirs, he held the property in trust to deal with it for them in conformity with the Deed of 1884, and was a trustee for them. He was therefore a trustee of the property, and was in possession of and had control over it before he committed the breach of trust alleged against him; the possession of the control over the property preceded any breach of trust. The law in such case is given by Esher, M.R. in *Soar* v. *Ashwell* (1893) 2 Q.B. at p 394. "The cases seem to me to decide that, "where a person has assumed, either with or without consent, to act as trus- "tee of money, or other property, *i.e.,* to act in a fiduciary relation with re- "gard to it, and has in consequence been in possession of or has exercised "command or control over such money or property, a Court of equity will "impose upon him all the liabilities of an express trustee, and will class him "with, and will call him an express trustee of an express trust. The principal "liability of such a trustee is that he must discharge himself by accounting "to his *cestuis que trust* for all such money or property without regard to "lapse of time."

It is a case, in the words of Lord Cave in *Taylor* v. *Duvies,* 1920, A.C. at 652, where "the trust arose before the occurrence of the transaction im- "peached, not a case where it arises only by virtue of that transaction." A person in such a position, which is the position of the appellant-defendant, cannot avail himself of the Statute of Limitations. This statement of the law, and the consequent position of the appellant-defendant, disposes of the argument addressed to us at considerable length to the effect that he was a constructive trustee only, and so enabled to plead the Statute of Limitations.

The next argument put forward was that the case was governed by the Montserrat Land Tax Ordinance, No. 13 of 1868, and that the defendant by purchasing the fee simple of the land from the Provost Marshal obtained a title which became freed of all equities after the lapse of two years within which a person interested could claim to buy back the land sold; "the fraud" it was argued "was prescribed after those two years." The case cited to us in support of this contention, *Beckford* v. *Wade* 17

Ves, 87, 11 R.R. 29, is not of assistance, and the argument is in direct conflict with the maxim that equity will not allow a Statute to be made the instrument of a fraud: See *In re Duke of Marlborough,* (1894) 2 Ch. at p. 141, and the cases there cited. The effect of the Statute is this. The purchaser from the Provost Marshal takes an unencumbered title in fee simple, but if, as here, the circumstances of his purchase are such that it would be inequitable to allow him to enjoy the benefit of his purchase and if his conscience is affected, then equity will require him to use his purchase and apply its proceeds for and on behalf of the persons who are in equity entitled thereto. The legal estate which he has acquired by his purchase will subsist, but its tenant will hold it as a trustee.

Another argument, if we apprehended it correctly, was that plaintiff's action was wrongly framed in that the personal representative of Caesar Augustus Irish, the survivor of the two trustees under the deed of 1884 had not been joined as a party or (semble) made the sole defendant. The case cited to us in support of this contention, *Robertson* v. *Armstrong,* 28 Beav. 123; 126 R.R. 313, does not do so. The facts there were that the Solicitors of certain trustees had by those trustees' directions received moneys from and had them, by order of those trustees, paid the moneys in breach of trust to Y. The bill asked for relief against the solicitors but not against the trustees also and that relief was refused. Everything the solicitors had done had been by orders of the trustees and not unnaturally the Court refused to allow them to be singled out for penalisation. We cannot see how that decision can affect a case such as the present where the facts—a stranger by his own act constituting himself a direct trustee quite independently of and, for aught that appears, without the knowledge of the original trustee—are so entirely different. Shew that Piper bought the property as agent for or at least by the directions of Caesar Augustus Irish the surviving trustee under the Deed of 1884 and the ruling in *Robertson* v. *Armstrong* might apply. But since the appellant-defendant's case is based on facts almost the contrary of the above, it cannot apply. We cannot see that this objection that the personal representative of the surviving trustee should have been made a party, has any substance.

It was further argued to us that the respondent-plaintiff had been guilty of laches and that the learned Trial Judge ought so to have held. The only evidence as to the plaintiff having been guilty of laches is that he came to know in 1918 of defendant having purchased the property from the Provost Marshal, that he was then too poor to leave the United States of America and come to Montserrat. That he did come there in August, 1926, and that he commenced this action some three months later. This is a somewhat slender array of facts on which to find laches,

and the acquiescence in defendant's claim which that term implies. There is nothing before us to show that the learned Trial Judge was wrong in refusing to find that laches had been proved against the plaintiff.

It was further argued to us that the learned Trial Judge was wrong on his finding of fact, namely, that defendant bought in consequence of an arrangement that he should attend the sale and buy on behalf of the children of the three marriages, and that his claim to be beneficial owner of the property was therefore fraudulent, and the reasons assigned for these findings of fact being wrong, the failure by plaintiff to call Ann Ramsay as a witness, and the variance between para. 7 of the Statement of Claim—allegation that Chambers was present at the agreement made between defendant and Ann Ramsay—and the evidence of Chambers, who does not state that he was so present. The failure to call Ann Ramsay does not carry the matter much further, for defendant could have called her himself, also the evidence actually before the learned Trial Judge was quite sufficient, if accepted, to prove defendant's agreement to buy for the children of the three marriages, and the variance between the Statement of Claim and Chamber's evidence was entirely cured by the verdict. That witness's evidence proved an admission by defendant of the agreement, though not that the witness was present when defendant actually made the agreement. One could not well have a clearer case of variance aided, and cured by verdict.

Lastly it was urged that in any event defendant should be allowed the value of any improvements made by him to the property. But this contention overlooks the fact that by his purchase from Blanche Barzey Jagshaw, appellant-defendant had become co-owner of the property for a one-fifth share before he made any improvements and that being so, his rights are governed by *Leigh* v. *Dickeson,* 15 Q.B.D. 60. Here the improvements made by defendant on the property were so made that the respondent-plaintiff could not help accepting the benefit of them and had no opportunity of exercising any option in the matter of acceptance or rejection, and in such case appellant-defendant can obtain compensation for these improvements on partition but not otherwise.

These were all the points raised in argument before us in support of this appeal. As we cannot see that any of them establish in any way that the judgment appealed from was wrong, we are of opinion that this appeal must be dismissed with costs.

HARDWARI LALL *v.* BEHARRY LALL.

HARDWARI LALL *v.* BEHARRY LALL.

[No. 127 OF 1927.]

1928. JANUARY 31. BEFORE GILCHRIST, J.

Bankruptcy—Deeds of Arrangement—Deed of Arrangement Ordinance 1916—Necessity for registration—Effect of failure to register deed—Onus of proof of acquiescence of creditor in deed—Creditor not conversant with the English language—Misrepresentation of debtor as to reason for requiring creditor's signature to deed—Effect and purport of deed not explained to creditor—Effect on validity of creditor's signature in such circumstances.

(*a*) The Deeds of Arrangement Ordinance 1916, requires all deeds of arrangement to be registered and non-registration renders such deeds null and void for all purposes.

(*b*) The onus of proof that a creditor has acquiesced in or submitted to a Deed of Arrangement rests on the debtor and therefore if on the evidence it is proved that the creditor was illiterate and was not told the purport and effect of the deed to which he appended his signature and moreover was induced to do so by a misrepresentation by the debtor as to its effect, such signature will not be binding upon him.

The relevant facts are set out in the judgment.

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

E. M. Duke for the defendant.

GILCHRIST, J.: In this action the plaintiff claims from the defendant the sum of $591.11 being moneys payable to the plaintiff for moneys received by the defendant for the use of the plaintiff in respect of five cases of aluminium ware and four cases of brass ware received by the defendant from the plaintiff to be sold for and on account of the plaintiff and so sold by the defendant.

2. The defence in so far as it is necessary for the determination of this matter is—

(a) that on the 25th day of March, 1927, a meeting of the defendant's creditors was held at the office of Messrs. Birch & Co., when the following of his creditors were present:—

Messrs. Pairaudeau & Co, Birch & Co., Garnett & Co., Ltd., Luigi Psaila, Ltd., Weiting and Richter, Ltd., E. M. Walcott & Co., de Caires Bros., Essequebo Land Settlement, Ltd., B. E. Benjamin, F. Kawall, C.W. Rankin, Rambharos Misir and J. R. Gouveia. At this meeting Messrs. R. B. Edghill, H. de Cambra and J. B. Dewar, Jr., representing Messrs. Weiting & Richter, Ltd., Pairaudeau & Co., and Luigi Psaila, Ltd., respectively, were appointed to assist the defendant in realising his assets, and it was agreed that all the unsecured creditors should be paid *pro rata* and that a memorandum should be drawn up to be signed or assented to by all the defendant's creditors;

(b) that the defendant drew up a memorandum in the following terms:—

15 & 16, Water Street,
Georgetown, Demerara,
26th March, 1927.

"DEAR SIR,

"A meeting of my creditors was held at the office of "Messrs. Birch & Co., yesterday afternoon, 25th instant, at 4 p.m. There "were represented Messrs. Pairaudeau & Co., Birch & Co., Garnett & Co., "Ltd., Luigi Psaila, Ltd., Wieting & Richter, Ltd., E. M. Walcott & Co., "Ltd., de Caires Bros., Essequebo Land Settlement, Ltd., B. E. Benjamin, "F. Kawall, C. W. Rankin, Rambharos Misir, and J. R Gouveia.

"It was decided that Messrs. H. de Cambra of Pairaudeau & Co., R. B. "Edghill—Wieting Richter, Ltd., and J. B. Dewar, jnr.,—Luigi Psaila, "Ltd., be appointed to assist me in realising my assets.

"That all moneys received should be deposited with the Royal Bank of "Canada for division *pro rata* between my creditors and that I would notify "the Bank that all cheques drawn against the account should be signed by "myself and either of the three representatives.

"It was also agreed that after liquidation of all my assets and payment "of same being made *pro rata* to my creditors this will be accepted in full "satisfaction and a discharge be given me accordingly. I giving the under-"taking that should any property be discovered it will be for division *pro* "*rata* between my creditors.

"If you agree to the above please fill in the amount of my indebtedness to you and sign opposite your name.

G. BEHARRY LALL."

(c) That all the creditors of the defendant, including the plaintiff herein, assented to the foregoing terms of arrangement, the plaintiff signing the same on the 5th day of April, 1927.

3. The document referred to in paragraph 2 (b) was tendered at the hearing, admitted and marked "D." It was not registered.

4. Counsel for the plaintiff submitted that this document "D" is a deed of arrangement within the provisions of Ordinance 16 of 1916 and not having been registered is wholly void.

5. The first question therefore to be determined is whether this document (Exhibit D) was a deed of arrangement for the benefit of the defendant's creditors generally within the meaning of Section 3 of the Deeds of Arrangement Ordinance No. 16 of 1916.

6. The defence alleges that all the defendant's creditors assented to the terms of arrangement set out in the document "D." No evidence was led to the contrary.

7. The Deeds of Arrangement Ordinance 1916 provides:—

Section 2 (1) In this Ordinance unless the context otherwise requires:—

"Creditors generally" include all creditors who may assent to, or take the benefit of, a deed of arrangement.

Section 3 (2) A Deed of Arrangement to which this Ordinance applies shall include any instrument of the classes hereinafter mentioned whether under seal or not.

(a) Made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally:—

(b) Made by, for, or in respect of the affairs of a debtor who was insolvent at the date of the execution of the instrument for the benefit of any three or more of his creditors, otherwise than in pursuance of the law for the time being in force relating to insolvency.

8. Sub-section 2 of section 3 defines the classes of instruments referred to in sub-section 1.

9. For the purposes of this case it is only necessary to refer to classes (d) and (e).

(d) A letter of licence authorising the debtor or any other person to manage, carry on, realise, or dispose of the business with a view to the payment of debts.

(e) Any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business or authorising the debtor or any other person to manage, carry on, realise or dispose of the debtor's business with a view to the payment of his debts.

10. This Deed "D" it is clear is for the benefit of all the defendant's creditors. In my opinion this Deed comes within the purview of the Deed of Arrangement Ordinance, 1916. The Deed was not registered. What is the result of the failure to register? It is clear that the intention of the Ordinance is to compel the registration of all arrangements, and not to allow them to be valid unless registered. The result is that this Deed "D" is void because it was not registered as required by the Ordinance. Section 4 provides that a Deed of Arrangement to which the Ordinance applies if executed in the colony shall be void unless it is registered with the Registrar of Bills of Sale within seven days after the first execution thereof by the debtor or any creditor. That means that the Deed if not so registered shall be void for all intents and purposes. (See *Hidges* v. *Preston 80* L.T.R. 847, *Re Allix. ex p. Trustee* (1914) 2 K.B. 77 in *re Lee ex* p. *Grunwaldt* (1920) 2 K.B. 200.

11. It follows, therefore, the amount claimed by the plaintiff not being in dispute, that he is entitled to payment. It however may be as well to deal with the further point raised by the plaintiff in his reply to the defence filed, viz.:—

(*a*) that the plaintiff never assented to the terms of the Deed of Arrangement "D" nor did he acquiesce therein, (b) that the plaintiff's signature to the Deed in question was obtained by the defendant representing to him that the signing thereof would

operate only as an acknowledgment of the value of the plaintiffs goods held by the defendant amounting to $591.11, that the defendant at the time he made such representation knew of its falsity and did so intending to induce the plaintiff to act thereon.

12. The onus is on the defendant to establish that the plaintiff assented to, acquiesced in or submitted to the Deed (*Re Tannenburg* 6 Mor. Rpts. 49, *Re Michael* 8 Mor. Rpts. 305). This he has signally failed to do. The plaintiff cannot read or write English. He was not summoned to attend the meeting of defendant's creditors nor did he attend. I accept his evidence taken as a whole. I am satisfied that he affixed his signature in Hindi to the Deed "D" on the representation of the defendant, that in doing so he was doing no more than acknowledge that it was the amount due him in respect of his goods entrusted to the defendant for sale on his (plaintiff's) behalf, that the defendant at the time he made such representation knew of its falsity and that he did so intending the plaintiff to act thereon. It is clear also not only from the evidence of the plaintiff but from the evidence of Rich, a witness for the defence, that the purport and effect of the said Deed was never explained to the plaintiff. It is clear also from the evidence of both parties that the plaintiff never acquiesced in or submitted to the Deed.

There will be judgment for the plaintiff for $591.11 costs to be taxed.

Solicitor for the plaintiff, *W. Dinally.*

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

DUPIGNY AND OTHERS *v.* PINARD.

DUPIGNY AND OTHERS, Appellants,

v.

PINARD, Respondent.

ON APPEAL FROM THE SUPREME COURT OF DOMINICA.

1928. AUGUST 17.

BEFORE SIR PHILIP J. MACDONNELL, KT., C.J., PRESIDENT, SIR ANTHONY DEFREITAS, KT., C.J., AND B. H. A. F. BERLYN, J.

Claim purporting to be specially indorsed—Claim for interest not due by contract or statute added—Triable issue disclosed—Judgment wrongly given as if writ specially indorsed—Judgment set aside by Court "as a matter of grace"—Criticism of phrase "matter of grace"—Successful applicants ordered by judge to pay respondent's costs—Costs—Discretion must be judicial and not capricious—Statutory interpretation—Draftsman's unskilfulness—Effect thereof.

The Appellants were defendants in an action brought by the respondent claiming by way of what purported to be a specially indorsed writ certain moneys alleged to be due by them as members of a co-partnership. The defendants entered appearance contesting the alleged partnership.

In addition to moneys alleged to be due for goods sold the plaintiff claimed certain sums as interest, but the writ did not show that such interest was payable under a contract or by statute.

The plaintiff did not follow the usual procedure that applies in the case of specially indorsed writs bat wrongly adopted an *Ex parte* procedure whereby she irregularly entered judgment by default without notice to the defendants.

The defendants thereafter applied to have the judgment set aside and the trial judge although (*Semble*) finding that there were no irregularities purported "as a matter of grace" to set aside the judgment and to give leave to defend, but ordered the defendants to pay all the costs occasioned by their application.

Held, (*a*) That even where writs are properly specially indorsed the defendant will not be shut out from an opportunity of establishing his defence before the Court if he can show that there is a triable issue applicable to the claim as a whole or unless it is clear that there is no real substantial question to be tried or unless there is no dispute as to facts and law which raise a reasonable doubt that the plaintiff is entitled to judgment.

(*b*) Where a plaintiff by his writ claims interest not arising under a statute or by contract he does not seek only to recover a debt or liquidated demand and the writ is consequently not a specially indorsed writ on which an order for judgment can be made.

(*c*) Further, it is not specially indorsed unless the indorsement itself shows that the interest claimed is payable under a statute or by contract.

(*d*)Where a statute like the Civil Procedure Act 1833, allows interest to be awarded by a jury if "they shall think fit from the time when the debts become payable by a written instrument at a time certain, or if payable otherwise, then from the time when demand of payment is made in writing" the service of a writ with a claim for interest is not a sufficient demand in writing to comply with the statute nor is a claim for interest in an ordinary statement of claim.

(*e*)As the plaintiff's claim was not specially indorsed the default judgment thereon was without jurisdiction and the appellants were entitled *Ex debitio justitiae* to have it set aside on the ground of irregularity.

(*f*)No prerogative of grace is known to English jurisprudence that enables a judge "as a matter of grace" to cancel a judgment which in his opinion has been duly entered.

(*g*)Although a Court may in its discretion deprive a successful litigant of costs yet such discretion must be judicially exercised and there must be grounds for its exercise, for a discretion exercised on no grounds cannot be judicial.

Where an object sought to be expressed in a statute has through the draftsman's unskilfulness been inaptly so expressed, it would be a serious matter to decide that the object is thereby reduced to an absurdity or a nullity. Nothing could justify such a decision except necessity or the absolute intractability of the language.

The following judgment of the Court was delivered at Antigua on the 17th of August, 1928, by the Chief Justice of British Guiana:—

A preliminary objection was taken for the respondent that the appellants had failed to apply to a judge below for leave to appeal and were, consequently, precluded from making such an application to this Court. Counsel on both sides having informed us of what knowledge they have of the facts and circumstances in that connection the Court decided that it sufficiently appeared that application for leave to appeal was made to a judge and that he refused to grant leave. Leave was thereupon granted by this Court to proceed with the appeal.

The English Rules of the Supreme Court down to the 16th of June, 1913, are in force in the Leeward Islands as provided by section 40 of the Supreme Court Act, 1913, No. 4 of 1913, and Proclamation No. 10 of 1913 in the *Gazette* of the 5th of June, 1913.

This action was commenced in Dominica by a writ of summons to five defendants, described as beneficiaries under the will of Wilson Dupigny, trading in co-partnership under the style and firm of "Estate Wilson Dupigny," and one of the five is further described as administratrix of the estate of Wilson Patrick Leonard Dupigny. Counsel on both sides state that Order 48a has no application to this writ.

The writ purports to be specially indorsed under O. 3, r. 6. Appearance for each of the defendants (other than the administratrix) was entered by their solicitor on the 26th of October, 1927; in each case with a denial of the alleged partnership. Appearance was entered by the administratrix in person on the 29th of October, 1927. No defence having been delivered, the plaintiff entered final judgment under O. 27, r. 2, on the 10th of November, 1927, as follows: "The defendants not having delivered any de-"fence, it is this day adjudged that the plaintiff recover against the said de-"fendants £1,922. 9s. 41/2d. and costs to be taxed." On the 30th of November, 1927, four of the defendants (other than the administratrix) took out a summons under O. 27, r. 15 to set aside the default judgment on the ground of irregularity; or, in the alternative, for an order that the judgment be set aside with leave to defend. No copy of the notes taken at the hearing of the summons by the judge in chambers in Dominica has been sent up to this Court; but we have before us a copy of his decision on the summons in the following terms:—"Judge's decision. December 6th, 1927.

"After listening to the alleged irregularities in regard to the

"specially indorsed writ I am of opinion that no injustice has been done to "the defendants and that they have not been inconvenienced. *As a matter of* "*grace* I yield to the petition that a defence may be put in and cancel the "judgment in default of defence. The costs occasioned hereby are to be "paid by the applicants." In the present appeal by all the defendants except the administratrix, the Court is asked to reverse the decision of the 6th of December, and to set aside the default judgment on the ground of irregularity in that the writ is not specially indorsed with a claim *only* for a debt or liquidated demand.

The writ is headed "Form No. 2, Specially Indorsed Writ Order III., Rule 6." It follows (in part) Form No. 2 in Appendix A, Part I., of the English Rules of the Supreme Court. It does not adopt the last paragraph in that form, which says: "If the defendant fails to deliver a defence within ten "days after the last day of the time limited for his appearance, he may have "judgment entered against him without notice, unless he has in the mean-"time been served a summons for judgment (O. 14, r. 1) or for directions "(O. 30, r. 1)." A note under that paragraph in the form says: "This last "paragraph applies only to a specially indorsed writ. It was added by the "Masters to the Central Office form under O. 61, r. 33." This addition was made in April, 1911. It is submitted for the appellants as their first ground of appeal that the omission of this paragraph is an irregularity which prevents the writ from being a correct specially indorsed writ within the rules. The Supreme Court Consolidation Act, 1911, No. 8 of 1911, came into operation on the 29th of March, 1911, and thereupon the Rules of Court of 1907 ceased to be in force. By section 52 of that Federal Act the practice and procedure in civil proceedings for the time being in force in England was extended to this colony. Section 53 provided that all jurisdiction under section 52 shall be subject to the Rules of Court which may be made: all previous Rules having ceased to be in force, A Rule of Court which came into force on the first of June, 1911, says: "The Rules of the Supreme "Court, 1907, shall continue to be in force as heretofore, with the exception "of Orders 39 and 58 which shall be omitted on and after the 1st of June, "1911, the same having been incorporated in the Appeal Rules (Civil Pro-"cedure) of even date herewith." The Act of 1911 was repealed by Act No. 4 of 1913, section 38 of which provides that all Rules of Court in force immediately before the commencement of the Act (such as the 1907 Rules) shall continue in force until revoked; and section 40 provides that the jurisdiction of the Court in civil proceedings shall be exercised in conformity with Rules of Court, and, so far as such Rules do not extend and do not forbid, in accordance with the practice and procedure in the Supreme Court, in England at the commencement of the Act, which practice and proce-

dure shall, subject to the Rules of Court, be deemed to be extended to and brought into operation in this Colony. So that the Rules of 1907, revived in 1911, are still in force to limit the operation of English practice. The 1907 Rules omit the whole of the English Order 30 (summons for directions) and the whole of Order 61. Consequently, when the 1907 Rules were brought into force in 1907, forms made by the Masters under O. 61, were not required to be used in the Colony. In the interval between the repeal of the 1907 Rules on the 29th of March, 1911, and their revival on the 1st of June, 1911, the Masters, added the notice in question. As, between 29th March and 1st June, 1911, there was no local rule avoiding O. 61, that notice was required to be used in the Colony (at any rate, during that period) as a part of the English practice. It is contended for the appellants that this position still continues, on the ground that the 1911 Rule gave effect to the 1907 Rules only on and from the 1st of June, 1911. The 1911 Rule does not expressly say so; but it is argued that the words "shall continue in force as heretofore" misrepresent the fact that the 1907 Rules had theretofore ceased to. exist and could not be made to continue, and consequently, that those words should be ignored and that O. 2, r. 3, should be accepted as directing the use of all the terms of Form 2 for the time being. When the 1911 Rule intends effect to be given on and from the 1st of June, 1911, it expressly says "with the exception of Orders 39 and 58 which shall be "omitted on and after the 1st of June, 1911." That date was fixed in relation to Orders 39 and 58 because it was contemplated that the English Orders previously declared by the 1907 Rules to be omitted would continue to be omitted as if those Rules had not ceased to be in force, and because the local operation of the two English Orders was desirable until the new "Appeal Rules (Civil Procedure)" came into force: so that the revived 1907 Rules may be deemed to declare the omission of the two Orders to have effect as from the 1st of June, 1911, unlike the previous omission of other Orders. It was well known that the 1907 Rules had abolished or altered many English Orders, and if the whole of the 1911 Rule was intended to operate on and from the 1st of June, 1911, one would expect the employment of language importing that the 1907 Rules shall be revived as from that date and shall be deemed to include omissions of Orders 39 and 58, which Orders had not been affected by the 1907 Rules. A meaning must be given to the words "shall continue in force as heretofore," even though they may not appear at first sight to be free from doubt. It is reasonably clear that the abrogation of all local Rules as a consequence of section 52 of the Act 8 of 1911 gave rise to the main object of the 1911 Rule, *i.e.*, to put the 1907 Rules back into the position in which they had been originally and until their operation was inadvertently put an end to by the 1911 Act and to

give them effect as if they had never ceased to be in force. It was sought to express that object by the declaration that they "shall continue to be in force as heretofore," It would be a very serious matter to decide that the object is reduced to an absurdity or a nullity by the draftsman unskilfulness. Nothing could justify such a decision except necessity or the absolute intractability of the language (See *Salmon* v. *Duncombe* (1886) 11 A.C. 627, 634, P.C., and Maxwell's Interpretation of Statutes, 5th ed., pp. 372, 373). When the 1907 Rules were restored by the 1911 Rule no forms prescribed by the English Masters by virtue of O. 61 were in force in the Colony, for the reason that their binding authority was rescinded by the abolition of the local operation of O. 61 effected by the 1907 Rules. Consequently the Masters' added notice, now in question, is not a necessary part of a specially indorsed writ in the Colony. Therefore, the ground of appeal in respect to the omission of that notice is invalid.

Attention is further called by the appellants' counsel to an irregularity caused by including in the indorsement a claim for interest which is not a claim for a debt or liquidated demand within O. 3, r. 6, or O. 27, r. 2. Appended to the indorsement are particulars of sixteen items of money claims amounting in all to £1,922. 9s. 41/2d., fifteen of which are for money lent and goods sold and delivered, and one for interest. The second item is for £1,100, the proceeds of certain Exchequer Bonds, alleged to have been lent by the plaintiff to "Estate Wilson Dupigny"; and the third item is a claim for £159. 10s. for "two years and five months interest thereon at 6 per cent, per annum to date." The appellants submit that a claim for interest cannot be specially indorsed unless it is shown on the writ (which is not shown here) that; the claim arises from an agreement to pay such interest or from a statute providing for its payment.

O. 3, r. 6, provides that in all actions where the plaintiff seeks *only* to recover *a debt or liquidated demand* in money payable by the defendant, the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim. A plaintiff can adopt the special indorsement only in accordance with this rule. If the defendant enters appearance, the plaintiff can take out a summons under O. 14, r. 1, supported by an affidavit verifying the cause of action and the amount claimed and stating that there is no defence to the action; and a judge may thereupon make an order empowering the plaintiff to enter final judgment for the amount claimed or he may give leave to defend, or he may amend the indorsement (O. 14, r. 1 (b)) by striking out of it any claim which cannot be specially indorsed, so as to bring it within O. 3, r. 6, or he may allow judgment to be entered for such part of the claim as by itself constitutes a special indorsement and send the residue of the claim to trial.

The defendant will not be shut out from an opportunity of establishing his defence before the Court if he can show that there is a triable issue applicable to the claim as a whole (*Jacobs* v. *Booth's Distillery Co.* (1891) 85 L. T. 262 H. L.), or unless it is clear that there is no real substantial question to be tried (*Codd* v. *Delap* (1905) 92 L. T. 510, H. L.), or unless there is no dispute as to facts and law which raises a reasonable doubt that the plaintiff is entitled to judgment (*Jones* v. *Stone* (1894) A. C. 122). In such cases he will be given leave to defend, even though it may appear to the judge at the time that the defence is not likely to succeed. Where the defendant has appeared, the plaintiff need not take out a summons for judgment under O. 14, r. 1. No further statement of claim is to be delivered, for under O. 20, r. 1, the specially indorsed claim is deemed to be the statement of Claim, "delivered" when the writ is "served" (*Anlaby* v. *Praetorius* (1888) 20 Q. B. D. 764, C.A.). Under O. 21, r. 6, the defendant must then deliver a defence to the statement of claim in the special indorsement, within eighteen days after service of writ. In default of a defence being delivered the plaintiff may enter final judgment under O. 27, r. 2, which provides that if a plaintiff's claim be "only for a debt or liquidated demand" he may, in default of a defence within the time allowed, enter final judgment for the amount claimed. This Rule 2 applies to all cases where the claim made in a specially indorsed writ, or in a separate statement of claim in an ordinary action, is *only* for a debt or liquidated demand.

The plaintiff in the case before us professes to endorse a claim specially under O. 3, r. 6, but she does not take out a summons under O. 14 for summary judgment, with a supporting affidavit verifying her cause of action by showing how the defendants are made liable as partners. The denials in the entries of appearance of the existence of a partnership make it clear that there is a triable issue which will prevent judgment being obtained under O. 14. The plaintiff elected to enter final judgment under O. 27, r. 2, as a matter of course, without trial and without notice or affidavit.

The appellant's principal ground is that the claim for interest in the third item of the indorsement is not and cannot be specially indorsed as a debt or liquidated demand. The law on that point has long been settled in favour of the appellants' contention. Interest may be payable on a common money bond and bills of exchange and other negotiable instruments. In the absence of some contract, expressed or implied, interest is not payable at common law on ordinary debts. The right to interest as a liquidated demand can arise only out of a contract to pay it or some statutory right. When interest is claimed as being made payable by a contract or by statute, it is claimed as a part of the debt and can therefore be specially indorsed. It is not specially indorsed

unless the indorsement itself shows that it is payable under a contract or a statute (*Sheba Gold Mining Co*., v. *Trubshawe* (1892) 1. Q.B 674; *Wilks* v. *Wood* (1892) 1 Q.B. 684, C.A.; *Paxton* v. *Baird* (1893) 1 Q.B. 139; *Gold Ores Reduction Co.* v. *Parr* (1892) 2 Q.B. 14). It is not so shown in the indorsement before us. A statutory right to interest as a liquidated demand arises in the case of bills of exchange under section 57 of the Bills of Exchange Act, 1882, corresponding with section 57 of the Leeward Islands Act No. 1 of 1887. In any other case, if interest can be recovered at all, it must (In England) be under the Statute 3 and 4 Will. 4, c. 42, s. 28 (Civil Procedure Act, 1833), by which juries are empowered "if they shall think fit" to award interest as damages on debts from the time when the debts become payable by a written instrument at a time certain, or if payable otherwise, then from the time when demand of payment is made in writing. A judge has the same discretionary power as a jury to award interest in cases within the statute. If there is a local enactment corresponding with that English section 28, it would be well to observe that the service of a writ with a claim for interest is not a sufficient demand in writing to comply with the statute (*Rhymney Ry. Co.* v. *Rhymney Iron Co.* (1890) 25 Q.B.D. 146); nor is a claim for interest in an ordinary statement of claim (*Genvrain* v. *Beck* (1925) 41 T.L.R. 629). It is not possible at present to ascertain whether the Legislature of the Leeward Islands or of Dominica has or has not enacted any provision corresponding with the English section 28. It appears that this can be learnt only by a perusal of all the local Acts since 1833. It is not essential for the decision of this appeal, however, that so great a task should be undertaken. In the present case the plaintiff is seeking to recover interest in the nature of damages, so that her indorsed claim is not "*only*" for a debt or liquidated demand," which O. 27, r. 2, requires as a condition precedent to the exercise of the jurisdiction under that rule to enter final judgment in default of a defence. The condition precedent not having been fulfilled, the default judgment is irregular and without jurisdiction under O. 27, r. 2, and the defendants are entitled under O. 27, r. 15, to have it set aside as of right. The result would be the same if a judge in chambers made an order empowering the plaintiff to enter final judgment under O. 14, r. 1; the condition precedent that the claim should be only for a debt or liquidated demand (O. 3, r. 6) not having been fulfilled, such an order would be without jurisdiction and would be set aside. In *Wilks* v. *Wood* (1892) 1 Q.B. 684 C. A., Lord Esher, M.R., said "All I can say is "that the word 'only' means 'only' and that if anything is added to the liq-"uidated demand, the writ does not come within the definition of a spe-"cially indorsed writ. The plaintiff who has a valid cause of action has "added to the claim which would have supported a

"judgment under O. 14, r. 1, a further claim which prevents the operation "of that rule and the appeal must therefore be allowed." In that case the appeal was from an order of the Divisional Court giving leave to the plaintiff to sign judgment under O. 14, r. 1. The claim was for the price of goods sold and delivered to which a claim for interest was added The Court of Appeal held that where a plaintiff claims by his writ interest not arising under a statute or by contract he does not "seek only to recover a debt or "liquidated demand" within O. 3, r. 6, and the writ is consequently not a specially indorsed writ on which an order for judgment can be made under O. 14, r. 1; and the decision appealed from was reversed.

On principles applicable to this case the Court of Appeal in England has set aside default judgments for sums in excess of what was recoverable. In *Muir* v. *Jenks* (1913) 2 K.B. 412, C. A., Lord Justice Buckley said in his judgment: "The position is this. Here is a judgment which is wrong. . "What then is to be done? There are three cases which assist me. One of "them, a decision of this Court in *Hughes* v. *Justin* (1894) 1. Q. B. 667, is "directly in point . . . It is an authority for the following proposition. If the "plaintiff in the absence of the defendant, proceeding properly under the "Rules, signs judgment for a sum in excess of that which is due to him, the "defendant is entitled to have that judgment set aside, unless the party who "holds the judgment applies as he may to reduce it to the proper amount. If "application to amend be duly made it may be right not to set the judgment "aside but to reduce it to the proper sum; but unless the party who holds the "judgment elects to have it put right, then upon the authority of *Hughes* v. "*Justin* it seems to me the defendant is entitled to say 'this is a wrong judg-"ment set it aside.;" In the case before us the default judgment is for £159. 10s, more than can be recovered on the writ and the plaintiff has not applied for an amendment at any time.

What does the decision of the 6th December say? It says that notwithstanding the "alleged irregularity" in the indorsement, the writ is specially indorsed. The judge therefore refuses to set aside the default judgment on the ground of irregularity in the indorsed claim. Nevertheless, "as a matter of grace" he cancels the judgment and gives leave to deliver a defence on condition that the defendants pay the plaintiff her costs of their successful application. The learned judge's view is erroneous, for it is clear that it is not a specially indorsed writ, because of the irregular inclusion of the claim for interest; and it is clear that the plaintiff's claim has not fulfilled the condition precedent prescribed by O. 27. r. 2, for it is not *only* for a debt or liquidated demand, since it includes a demand for unliquidated damages in the claim for interest. It is not a special endorsement containing

a statement of claim duly delivered by service of the writ that can call for a defence to be delivered, and therefore there cannot be a default judgment. O. 27, r. 2, was wrongly applied. The default judgment was entered without jurisdiction under the rule, and consequently the defendants are en titled *ex debito justitiae* to have it set aside on the ground of irregularity.

No prerogative of grace is known to English jurisprudence that enables a judge "as a matter of grace" to cancel a judgment that in his opinion has been duly entered.

It is not unreasonable of the defendants to object to paying the costs of an unsuccessful plaintiff. George Dupigny's affidavit shows a clear denial of liability in respect of the whole claim and of the existence of any partnership. The entries of appearance also contain early denials of the alleged partnership. It is clear that there is an important issue which should be tried in any event. The plaintiff initiated the litigation by a writ purporting to be specially indorsed, but not specially indorsed. She avoided the usual O. 14 procedure for a specially indorsed writ, where there would have been a contest on a summons, with affidavits on both sides. She wrongly adopted an *ex parte* procedure whereby she irregularly entered judgment by default without notice to the defendants. She was not entitled to have her costs paid by the successful defendants. Where a default judgment is irregular and is set aside the plaintiff is usually ordered to pay the costs of it and of the application to set it aside. The judge in chambers has not mentioned any ground upon which he exercised his discretion to order the successful defendants to pay the plaintiff's costs; and there does not appear to have been any material whatever before him upon which he could so exercise his discretion as to costs. In *Donald Campbell & Co.* v. *Pollak* (1927) 43 T.L.R. 787, H.L., Lord Atkinson, at page 792, asks: "Must a litigant who "has succeeded in a suit and has not been guilty of any misconduct of any "kind be, on being deprived of his costs, content with the assurance that a "judge exercised his discretion properly though he has not mentioned or "even suggested what the grounds were upon which he based the exercise "of that discretion?" In the present case not only were the defendants deprived of their costs, but they were ordered to pay the costs of their unsuccessful opponent. In the same House of Lords case the Lord Chancellor and Lord Atkinson refer with approval to the following statement in *Ritter* v. *Godfrey* (1920) 2 K.B. 47, C.A. by Lord Sterndale, M.R. "But there is "such a settled practice of the Courts that in the absence of special circum-"stances a successful litigant should receive his costs, that it is necessary to "show some ground for exercising a discretion by refusing an order which "would give them to him. The discretion must be judicially exercised, and "therefore there must

"be some grounds for its exercise, for a discretion exercised on no "grounds cannot be judicial."

This appeal must be allowed, and the respondent-plaintiff must pay to the appellant-defendants their costs in this Court and their costs in the Court below of the default judgment and the application to set it aside. The decision of the 6th of December, 1927, must be reversed and the default judgment of the 10th of November, 1927, must be set aside. In accordance with the request of counsel for the plaintiff, who holds the default judgment against all the defendants, there will also be an order that the judgment as against the administratrix be set aside.

COREA, Appellant,
AND
CABRAL, Respondent.

ON APPEAL FROM THE SUPREME COURT OF ST. VINCENT.

1928. JANUARY 6.

BEFORE SIR P. MACDONNELL. KT., C.J., (PRESIDENT), J. S. RAE, C.J., AND SIR ANTHONY DE FREITAS, KT., C.J.

Appeal—Weight of evidence—Ground of appeal—Rehearing—What appellant must prove to establish such ground of appeal.

(*a*) A Court of Appeal will not overrule the decision of a court below on a question of fact in which the judge had the advantage of seeing the witnesses and observing their demeanour, except in cases of extreme and overwhelming pressure or in a case in which the trial judge proceeded on inferences which the Court of Appeal could draw as well as he could.

(*b*) Where no question arises as to truthfulness and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position than the judges of the Appellate Court.

The judgment of the Court was delivered on the 6th of January 1928, by the Chief Justice of British Guiana as follows:—

This is an appeal from the decision of the Acting Chief Justice of St. Vincent, sitting without a jury, in a case arising out of a collision between two motor lorries. As is usual in such cases, there was a conflict of evidence. The trial judge gave judgment for the plaintiff. The three following statements appear in his "Reasons for Judgment:" "The plaintiff's case was well supported by his witnesses," and "On the evidence I am satisfied the plaintiff's account was the correct one; it is consistent and much more probable than that of the defence, which I consider untrue in most of its particulars," and "I hold the defendant guilty of negligence."

It is quite clear that there was evidence before the trial judge to sustain his solution of the conflict of testimony and his decision in favour of the plaintiff. On consideration of the notes of evidence and on hearing the argument for the appellant, our view is that the defence was entirely based on an account of the collision which is improbable and unreliable, while the plaintiff's account is both probable and reliable. The defence did not establish contributory negligence on the part of the plaintiff; and we agree that the negligence of the defendant's driver alone caused the collision. The defendant's driver was negligent not only in respect to the particular obligation of a driver to take care when he comes out of a private road into a main road, but in respect to his general obligation to take care not to endanger traffic. We are, therefore, of opinion that this appeal should be dismissed with costs.

It is remarkable that this Court is still being called upon to hear appeals against decisions of questions of facts arising out of conflicting evidence, when the conflict has been solved by a trial judge who saw, heard and questioned the witnesses when giving evidence and who had the opportunity of observing their powers of observation, memory and narration, as well as observing the indications of their honesty. It may be well to call attention to some decisions on the subject, with the hope that they will be noted for guidance in the future.

In *Colonial Securities Trust Co.* v. *Massey* (1896), 1 Q.B. 38, the Court of Appeal held that where a case tried by a judge without a jury comes before the Court of Appeal, that Court will presume that the decision of the judge on the facts was right, and will not disturb it unless the appellant satisfactorily makes out that he was wrong. Lord Fisher, M.R., said: "I have frequently stated this rule, and I think it is well expressed by Lopes, L.J., in *Savage* v. *Adam* (1895) W. N. 109. The matter is thus stated: 'Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the court below on the facts is right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then inasmuch as the appeal is in the nature of a re-hearing, the decision should be reversed: if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the court below.' With the rule so stated I entirely agree."

The case of *Khoo Sit Hoh* v. *Lim Thean Tong* (1912) A.C. 325, P.C., turned entirely on questions of fact, and there was plain perjury on one side or the other. It was tried in the Straits Settlements by a judge alone, whose finding on the facts was reversed by the colonial Supreme Court on appeal. In restoring the finding of the trial judge the Privy Council said: "Their Lordships" Board are called upon, as were also the Court of

Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position and character in a way not open to the courts who deal with later stages of the case. Moreover, in cases like the present when those courts have only his notes of evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence and yet were elucidated to the judge's satisfaction at the trial either by his own questions or by the explanation of counsel given in the presence of the parties. Of course it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony."

And see Lord Justice Scrutton's judgment in *A—G* v. *Cory Bros.* (1919) 83 J.P. 221, at p. 228.

The headnote to the collision case of *s.s. Hontestroom* v. s.s. *Sagaporack* (1927) 136 L.J. 33, in the House of Lords, says: "A Court of Appeal will not overrule the decision of a court below on a question of fact in which the judge had the advantage of seeing the witnesses and observing their demeanour, except in cases of extreme and overwhelming pressure or in a case in which the trial judge proceeded on inferences which the Court of Appeal could draw as well as he could. It ought not to take the responsibility of reversing conclusions arrived at by the judge in the court below merely oh the result of its own comparisons and criticisms of the witnesses and of its own view of the probabilities of the case." Lord Sumner in that case referred to the trial judge watching and reading the faces of the witnesses in the box and not merely perusing the notes of the evidence, and weighing their value as he goes along; and he then said: "What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to re-try the case on the short-hand note, including in such re-trial the appreciation of the relative values of the witnesses, for the appeal is made a re-hearing by rules which have the force of statue; Order 58, r. l. [See the first part of our corresponding Rule No. 4 of the West Indian Court of Appeal rules of 1920.] It is not how-

ever a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

And it should be borne in mind that in the judgment delivered by the West Indian Court of Appeal in Grenada on the 29th of September, 1927, in the case of *Meetoo* v. *Alexander*, it is said: "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 show 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."

With regard to inferences drawn by a Court of Appeal on admitted facts, Lord Halsbury said in *Montgomerie & Co.* v. *Wallace James* (1904) A.C. at p. 75: "Where no question arises as to truthfulness and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of the Appellate Court." And in *Cooper & Co.* v. *General Accident Corporation* (1923) 128 L.J. 481, H.L., Lord Dunedin said: "It has been settled again and again that judges of appeal are entitled to draw their own inferences where there is no question as to the facts themselves. The case which was cited of *Dominion Trust Co.* v. *New York Life Insurance Co.* (1919) A.C. 254, was an illustration of that."

The appeal is dismissed with costs.

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1928

AND IN

THE WEST INDIAN COURT OF APPEAL

SITTING IN

ANTIGUA AND ST. VINCENT.

[1928.]

Edited by S. J. VAN SERTIMA, B.A., B.C.L. (Oxon.),
Barrister-at-Law, British Guiana.

GEORGETOWN, DEMERARA:
"THE ARGOSY" COMPANY LIMITED, PRINTERS TO THE GOVERMENT OF
BRITISH GUIANA.

1929

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1928.

SIR ANTHONY DE FREITAS, 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 1928 L.R.B.G.

TABLE OFCASES REPORTED.

PAGE.