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CASES

DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

In re AKEUNG, *Ex parte* DWARKA.

[No. 15 OF 1929.]

1930. JANUARY 23. BEFORE SAVARY, J.

Bankruptcy petition—What is a debt on which to found petition—Creditor purchaser of land from debtor—Debtor concealing existence of mortgage thereon—Creditor rescinding contract on discovery of such concealment—Creditor after such knowledge continuing in possession of property and deriving profits therefrom—Whether creditor can claim return of deposit in such circumstances—Mere offer by debtor to give promissory note for deposit—Whether such offer suffices to estop debtor from alleging facts constituting waiver on part of creditor—Estoppel—Representation and acting thereon necessary to constitute same.

This was a bankruptcy petition presented against A. by one D. founded on a debt alleged to be due to him by A. in the following circumstances. D. had bought of A. certain land and had paid $900 on account of the purchase price and had entered into possession thereof. D. was not aware at the time of the purchase that there was a mortgage on the said land which fact A. concealed from D. A. failed to advertise transport of the property as agreed and in the interval D. discovered that there was such a mortgage and repudiated the contract. Subsequent to such repudiation and up to the time of the filing of the petition D. continued in possession of the said land and derived profits therefrom.

During an interview between the parties that arose consequent upon D.'s discovery of the said mortgage A. offered to give D. a promissory note for the deposit but there was no evidence that at that interview A. made any such representation as would induce D. to continue in possession of the land.

Counsel for the petitioner suggested that the Court should in any event make an order directing the property to be restored to A. and accounts to be taken between D. and A., and that when the result of the taking of such accounts was known, a receiving order should be made if the sum found due, if any, was sufficient to justify such a course.

Held, (*a.*) Where a contract of sale is rescinded for want of title or default on the part of the Vendor, and there is total failure of consideration, the purchaser is entitled to recover the deposit as a debt.

(*b.*) But where the party to a contract who has been misled has himself chosen with knowledge of the facts to deal with the subject matter of the contract by exercising acts of ownership or the like in such manner as to make restitution impossible, then he is precluded from rescinding the contract.

(*c.*) Estoppel is a rule of evidence which precludes a person from denying the truth of some statements previously made by him and has no application unless some other person has been induced by such statement or representation to alter his position.

(*d.*) It is an objectionable and at least an inconvenient mode of proceeding to found petitions for adjudication of bankruptcy on disputed balances of cross demands a variety of complicated dealings and unsettled accounts.

The facts are fully set out in the judgment.

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

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

In re AKEUNG, *Ex parte* DWARKA.

SAVARY, J.: This is a bankruptcy petition presented by one Dwarka, founded on a debt of $900 alleged to be due to him by one Akeung. At the close of the evidence tendered on behalf of the petitioning creditor, counsel for the debtor submitted that there was no good petitioning creditor's debt which could be made the basis of a petition in bankruptcy. Counsel for the debtor relied on this submission and did not call any evidence. A statement of the material facts is necessary before I deal with the submission made. Dwarka, who had been a tenant of certain lands of Akeung at Springlands, Corentyne, agreed to buy lot 76, section D., from Akeung for $1,200 and this agreement was evidenced by a document in writing dated the 23rd day of February, 1929. Lot 76, section D., included the lands held by Dwarka as a tenant. This lot was erroneously described in this document and also in the formal agreement for sale referred to hereafter, as lot 75, section D., but as the lands agreed to be sold were well known to Dwarka and the parties were *ad idem* as to what was intended to be bought and sold, it was agreed that, for the purposes of this petition, the error should not be considered as material. On the said 23rd day of February, Dwarka paid $700 on account of the purchase money and sometime between that date and the 22nd of March following Dwarka was given and took possession of the lands he intended to purchase, these lands being greater in extent than the lands occupied by him as a tenant of Akeung's.

On the 22nd of March the parties met by appointment at the chambers of Mr. Mungal Singh, barrister-at-law, where Dwarka stated in the presence of Akeung that Akeung had agreed to pass transport when a Judge attended the sitting of the Supreme Court in Berbice in the month of June following. It was also agreed there that Dwarka should add a further sum of $50 to the purchase price so as to get over a difficulty created by the fact that Akeung had previously sold four lots to other persons, these four lots having to be bought back from the purchasers. Nothing turns upon this.

Akeung was unable to and did not produce to Mr. Singh his copy of the transport so that the necessary papers could not be prepared, but promised to bring it to Mr. Singh within two weeks. In spite of this position Dwarka paid on that day a further sum of $200 on account of the purchase money, and Mr. Singh considered it advisable to prepare a formal agreement wherein it is stated that the purchase price was $1,250, of which the vendor had received $900. No mention was made then of the fact that these lands were subject to a mortgage of $1,200 and the purchaser was entirely ignorant of the fact. Akeung did not bring his copy of the transport as promised to Mr. Singh, and on the 7th of May, in consequence of instructions from Dwarka, Mr. Singh sent a letter by registered post to Akeung calling upon him to refund the said sum of $900 for the reason that since the meeting at his chambers, his client had discovered the lands were mortgaged, and that he, Akeung, had taken no steps to have transport advertised although requested to do so. This letter, to my mind, would amount to an intimation by Dwarka to Akeung that he intended to repudiate the contract for the reasons stated therein.

No reply was sent, although it was admitted that this letter was

received. On the 14th of May, Mr. Singh saw both parties at Spring-lands Court and Akeung there admitted that he was not yet in a position to produce his transport and also that the lands were mortgaged to one Lashley for about $1,200. He informed Mr. Singh that he was unable to pay off the mortgage, or return the said sum of $900 paid on account of the purchase money as he had spent it in paying off some of his creditors. He thereupon offered to give Dwarka a promissory note for this amount which offer was refused. He then stated that Dwarka could do what he liked as he proposed to get one of his creditors and the mortgagee to take steps against him so that Dwarka would be unable to get anything from him.

Neither at this interview nor at any other time did Akeung tell Mr. Singh that he had ever informed Dwarka of the existence of the mortgage either before the contract of sale was entered into or after, and neither did Akeung take up the attitude that it had been agreed that transport should be passed in the month of October following, nor did he offer to do so in that month after paying off the mortgage.

It seems to me not unreasonable for Dwarka to have come to the definite conclusion at this interview that Akeung was unable to perform the contract, and Dwarka would have good ground for repudiating the contract.

Dwarka thereupon issued a specially indorsed writ against Akeung on the 17th of June claiming the return of the said sum of $900 as being money had and received by the defendant for his use. The Court refused leave to sign final judgment on this claim, and gave the defendant leave to defend the action. A statement of defence was filed on the 8th of July, 1929, but no further steps were taken in the action and it is still untried. On the 9th of October, 1929, a writ of execution was issued at the instance of Messrs. Booker Bros., McConnell & Co., Ltd., against certain property of Akeung and on the 31st of October this bankruptcy petition was presented to the Court. The case for the debtor, Akeung, as appears from the cross-examination is (1) that the existence of the mortgage was either disclosed by the vendor to the purchaser at the material time or was in fact known to the purchaser and (2) that transport was to be passed in October, by which time Akeung would have been able to redeem the mortgage.

As I accept the evidence of Mr. Mungal Singh and Dwarka, it is impossible for me to accept the views as put forward on behalf of Akeung. I am satisfied that it was agreed that transport should be passed in June and that Akeung wilfully concealed from the purchaser Dwarka the existence of this mortgage, and Dwarka has stated specifically that he understood the land was free of encumbrances.

It is unnecessary to decide the point raised by counsel for the debtor, that the purchaser would not be entitled to rescind on the ground of the concealment of the mortgage if the vendor was able and willing to transport the property free of encumbrances, as I have already stated my conclusions that the vendor himself said that he was unable to redeem the mortgage and in fact never offered to do so. It was further contended on the part of Akeung that the purchaser Dwarka had no right to repudiate or rescind the contract of sale in view of the fact that he had taken possession of the land

agreed to be sold, had used and enjoyed it and still continues to do so. These facts are admitted by Dwarka who further stated that in the month of June, 1929, he had rented portions of the lands to tenants for the purpose of planting rice from which he would presumably derive some benefit, and that he had also planted some of the lands himself in rice, which crop he had reaped in September or October last, *i.e.*, a short time before the presentation of this petition.

It is clear from this evidence that the exercise of these rights of ownership took place after Dwarka was aware of the existence of the mortgage, and after the inability of Akeung to redeem it and to carry out the contract of sale had been communicated to him. In fact, it may be stated that this took place after Dwarka purported to repudiate or rescind the very contract of sale under which he had taken possession of these lands. I am satisfied that it is clear law that where a contract of sale is rescinded for want of title or default on the part of the vendor, and there is total failure of consideration, the purchaser is entitled to recover the deposit as a debt. Bullen and Leake (8th Ed.), p. 295, and the cases of *ex parte Muir*, 2 C.D., 22 and *re Miller* (1901) 1 Q.B. 51, show that such a debt can form the basis of a petition in bankruptcy.

But can Dwarka repudiate or rescind the contract of sale under the circumstances set out above? In my opinion the submission of counsel for the debtor is sound that, under these circumstances the purchaser is not entitled to repudiate or rescind the contract and sue to recover as a debt the deposit paid on account of the purchase money, and if that is the true position, then there can be no debt on which to found this petition in bankruptcy.

In Pollock on Contracts, 9th Ed. at p. 628, the learned author states: "Where the rescission is not declared in judicial proceedings no further rule can be laid down than that there should be prompt repudiation and restitution as far as possible." And at p. 633, where he discusses the proposition that a contract cannot be rescinded after the position of the parties has been changed, he proceeds: "The case is simpler where the party misled has himself chosen to deal with the subject matter of the contract by exercising acts of ownership or the like, in such a manner as to make restitution impossible; and it is still plainer if he goes on doing this with knowledge of all the facts;" and on the same page: "So a purchaser cannot after taking possession maintain an action to recover back his deposit." These principles are, to my mind, clearly deducible from the various authorities to which I will now refer.

In *Blackburn* v. *Smith*, 2 Ex. 783, it was decided that the purchasers could not sue for the return of the deposit made on account of the purchase money as they had taken possession of the land agreed to be sold and the parties could not be placed (*in statu quo*). Baron Parke, delivering the judgment of the Court, said: "Further, we think, on the principle of the case of *Hunt* v. *Silk* (5 East, 449), inasmuch as the plaintiffs had the possession of the property, and the parties could not be placed (*in statu quo*), the count for money had and received cannot be entertained, supposing the defendant had been guilty of a breach of contract subsequent to the delivery of the abstract."

In *Vigers* v. *Pike,* 8 Cl. & F., 562, 650 and 652, it was decided that, if a lessee of mines goes on working them after he had full information of the circumstances on which he relies as entitling him to set aside the lease, he cannot obtain rescission of the lease.

See also Leake on Contracts (7th Ed.) at page 266, and Fry on Specific Performance (6th Ed.) at p. 350, para. 744.

In the well known case of *Erlanger* v. *The New Sombrero Phosphate Co.,* 3 A.C. 1218, Lord Blackburn in his speech in the House of Lords at page 1,278 makes this observation: "It is, I think, clear on principle of general practice, that as a condition to rescission there must be *restitutio in integrum.* The parties must be put *in statu quo.*"

In *Law* v. *Law,* (1905) 1 Ch. 140, Cozens-Hardy, L.J., delivering the judgment of the Court of Appeal, says: "It is now too late for William to repudiate the contract of which he has thus deliberately secured the benefits."

But counsel for the petitioning creditor sought to distinguish the case of *Blackburn* v. *Smith* on the ground that it was not a case of fraud and that the principle there enunciated did not apply where a contract was repudiated on the ground of fraud, and referred to Fry on Specific Performance (6th Ed.) at p. 350, para. 744.

The statement of the law in Fry does not support any such distinction but is in accord with the authorities, In *Holdsworth* v. *City of Glasgow Bank,* 5 A.C. 317, Lord Blackburn at p. 338 lays down the law as follows: "I do not think there is now any doubt that when a contract is, in the language of the English common lawyers, induced by fraudulent deceit of the other contracting party, or of one for whom he is responsible, or in the language of the Civil Law, when there is *dolus dans locum contractui* the contract is not void, but only voidable. And it now follows from this that though the deceived party may rescind the contract and demand restitution, he can only do so on the terms that he himself makes restitution." And the following passage from the judgment of the Court in the case of *Sheffield Nickel Co.* v. *Unwin,* 2 Q.B.D. 214 is quoted with approval in Leake on Contracts (7th Ed.) at pp. 264-265. "A contract voidable for fraud cannot be avoided when the other party cannot be restored in his *status quo.* For a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto* it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages." In view of these authorities and the opinion I have formed, it is unnecessary to decide whether the concealment was fraudulent or not, but there appears to be good ground for supporting the view that it was done with a fraudulent intention.

Counsel for the petitioning creditor also referred the Court to the case of *Rowland* v. *Divall,* 129 L.T. 757 in support of the proposition that the mere fact that the purchaser had had possession of the subject matter of the contract of sale did not deprive him of his right to recover the purchase price where there was a total failure of consideration. In that case the plaintiff purchased from the defendant a motor car which turned out to be stolen and the police claimed and took possession of the car on behalf of the true owner.

whereupon the purchaser sued the Vendor for the purchase price. It was held that the fact that he had had possession of the motor car for four months did not prevent him from recovering. But it seems to me, that the case is easily distinguished, as, firstly, the vendor was not the true owner and therefore the doctrine of '*restitutio in integrum*' could have no application, and, secondly, the purchaser was not in possession of the subject matter of the contract at the time of the action. But it is instructive to mention that the case of *Hunt* v. *Silk* was cited to the Court, and that Scrutton, L.J., in the course of his judgment, obviously accepts the law as laid down in that case and in the other authorities previously referred to. This is the language that he uses. "When once you get it as a condition and that condition is broken, the contract can be rescinded, and with the rescission of the contract, you can demand the return of the purchase money; and treating it as a condition unless the purchaser with knowledge of the facts has held on to the bargain so as to waive the condition and will himself be relying on his claim for breach of warranty in damages, there appears to be no difficulty whatever in recovering the purchase money." I am unable to extract from this case any principle that will be of assistance to the petitioning creditor.

For these reasons I have come to the conclusion that the purchaser Dwarka would be precluded from suing to recover as a debt the sum paid on account of the purchase money, and therefore such sum cannot form the basis of this petition in bankruptcy. To use the language in the judgment of the Privy Council in The *Kin Tye Loong* v. *Seth & ors.* 89 L.J.P.C 113, Dwarka cannot blow hot and cold, approbating and reprobating the same transaction.

Another argument put forward on behalf of Dwarka was that, as the contract had been mutually rescinded and Akeung had offered to give a promissory note for the said sum of $900, he was estopped from setting up part performance as a ground of objection in this matter.

Mutual rescission would involve an offer on the part of Akeung to return the sum of $900 and an offer by Dwarka to restore the property to him, Akeung, but there is no evidence to support this. An offer to give a promissory note for $900, which was refused, is not, in my opinion, a return of the deposit. The evidence rather amounts to a statement by Akeung of his inability to perform the contract. But even assuming, for the purposes of argument, that there had been mutual rescission I can see no operative estoppel in the conduct or representations of Akeung. Estoppel is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself, and it is not conclusive unless the other person has been induced by it to alter his position. Where is the evidence that Dwarka altered his position as a result of any conduct or representations made at the interview at the Springlands Court previously referred to? No mention was made of the fact that Dwarka was in possession of the property. Dwarka had already given notice of his intention to rescind and after the interview definitely rescinded by filing his action for the recovery of the deposit. I have already held that in law he was not in a position to rescind as he had not restored or offered to restore the property,

Lastly, it was suggested that I should make an order directing the property to be restored to Akeung and direct accounts to be taken as between Dwarka and Akeung, and that when the result of the taking of the accounts was known, a receiving order should be made in the sum due if any was sufficient to justify such a course. I have been referred to the case of *ex parte Scott Russell, re Scott Russell*, 6 L.T. 238, as supporting the making of such an order. But in the course of his judgment Knight Bruce, L.J., states, that it is an objectionable and at least inconvenient mode of proceeding to found petitions for adjudication on disputed balances of cross-demands, a variety of complicated dealings and unsettled accounts. I am not satisfied that I have any jurisdiction to make such an order as the one suggested, and even if I had, the case of *ex parte Scott Russell* shows that it is undesirable to do so.

The position of the petitioning creditor may be said to be a hard one but that is no ground for making an order in his favour if it is not warranted by the authorities.

I am of opinion that there is no good petitioning creditor's debt and accordingly I dismiss the petition.

Solicitor for petitioner, *F. Dias.*

Solicitor for debtor, *L. Romotar.*

JAGDAI *v.* ARENTSEN.

[No. 192 OF 1930.]

1930. DECEMBER 3. BEFORE SAVARY, J.

Sale of goods—Perishable goods—Sale of Goods Ordinance, 1913, Section 49 (3)*—Meaning of term—Rights of unpaid seller with reference to same—Receipt by seller of portion of balance of purchase-money after breach by buyer—Whether such receipt necessarily constitutes waiver—Meaning of waiver—Elements necessary to constitute same.*

On 27th January, 1930, the defendant sold to the plaintiff 16 casks of cocoanut oil at $24 per cask to be delivered at Bookers' wharf within a reasonable time. $100 was paid on account on that day and it was agreed that the balance should be paid on delivery. The casks were delivered on the 10th February, and the plaintiff was informed thereof on the 11th or 12th February. On or about February 13th plaintiff asked defendant for a couple of days to pay the balance due and finally plaintiff promised to do so before February 25th. No payment was made on that day and as the plaintiff had in the interval departed from the colony the defendant sold the oil at $20 per cask. Early in March plaintiff sent defendant a bank draft for $120 from Surinam whence she had gone and the defendant cashed same on March 7th. Later in the same month defendant informed plaintiff of the resale of oil and of the logs sustained thereby, that is, $64 and of other expenses making in the aggregate a total of $126, and informed plaintiff that there was a balance of $94 left, which plaintiff could have but plaintiff refused same.

Held, (*a.*) Where goods are of a perishable nature then by virtue of the provisions of section 49 (3) of the Sale of Goods Ordinance, 1913, the seller can resell and recover damages for any loss occasioned by the buyer's breach, and that the circumstances of this case warranted the seller in exercising such right of resale.

(*b.*) Goods will be considered of a perishable nature not only when they are such as to deteriorate physically by being kept but also when they are such as to be subject to deterioration in a commercial sense so as to be likely to become unmerchantable as such, and that on the evidence the goods in this case came within that description.

(*c.*) That waiver must be an intentional act with knowledge and that as the seller in this case accepted the sum of $120 at a time when he bad already exercised his right of resale and at the earliest opportunity informed the plaintiff of his claim for loss on the resale the defendant had done nothing to induce the plaintiff to believe that he was still treating the contract as open; and further that there was no evidence showing that the plaintiff had in any way altered her position during the period between her sending the $120 and her being informed of the defendant's claim for damages arising out of her breach and therefore another element necessary to constitute waiver, that is, conduct induced by representation was absent.

P. N. Browne, K.C. (*K. S. Stoby* with him), for the plaintiff.

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

SAVARY, J.: This action arises out of a sale of 16 casks of cocoanut oil by the defendant to the plaintiff, who claims that the defendant failed to deliver the cocoanut oil whereby she suffered damage. In the alternative plaintiff claims the return of the sum of $220 paid on account of the purchase price. The defence is not merely a denial of any breach of contract on the part of defendant, but raises a positive case of actual delivery in accordance with the terms of the sale and there is a counter claim for damages for non-acceptance. In the reply plaintiff pleads that if she did commit a breach such breach was waived by defendant. It will thus be seen that the issues are of mixed fact and law.

A consideration of the case and the various points raised on the evidence leads me to the conclusion that I should, in the main, accept the defendant's story.

I am satisfied that this was a sale on the 27th January, 1930, of 16 casks of cocoanut oil at $24 a cask to be delivered at Bookers' No. 1 wharf within a reasonable time. On the day when the contract was made plaintiff paid $100 on account and the balance was to be paid on delivery. I find that defendant delivered the 16 casks of cocoanut oil at Bookers' No. 1 wharf by the 10th February and informed the plaintiff on the 11th or 12th February. The plaintiff saw the 16 casks on the wharf and asked defendant to give her a couple of days to pay the balance. This was about the 13th February. Defendant saw her several times and a few days after she finally said she would pay him before the 25th February. Defendant waited until then and as she had not paid by that date and had left the colony for Suriname defendant sold the oil to one Boodoo on the 27th February at $20 a cask.

Subsequently plaintiff sent defendant from Suriname a bank draft for $120 which defendant cashed on the 7th March. About the second week in the same month defendant met plaintiff and informed her that he had resold the oil and had lost $64 on the price and had incurred other expenses making a total of $126. She was told that there was a balance left of $94 which she could have but she said she did not want it. After this further negotiations took place between the parties but in my view they were not referable to the contract sued on, but were directed to the question of a new contract. These negotiations broke down and finally the parties met at the office of defendant's solicitor where defendant claimed that plaintiff should pay his losses for which he finally agreed to accept $64. Plaintiff, through her agent Santos, offered $25. The defendant refused this offer and plaintiff brought this action. Plaintiff herself alleges that $60 was offered on her behalf but 1 am not prepared to accept the view. There was a considerable conflict between the respective parties as to the material facts, but as stated before I prefer to accept the defendant's version. 1 may point out that it seems strange that plaintiff should have offered to pay for defendant's losses if he was in default and she was free from blame, even to avoid a lawsuit. The plaintiff's manner and demeanour in the witness-box did not commend themselves to me and without going into an analysis of the evidence I may mention that her allegation that the place of delivery was to be at the pawnbrokery of which Santos was manager is unsupported by the evidence of her own witnesses and is to my mind untrue, and her denial that she was informed by defendant that 10 casks were at the wharf is in the teeth of the evidence of her own witness Santos.

In addition the documents tendered in evidence by defendant seem to me to support his story and I refer particularly to exhibits L.A. 1, L.A. 5 and L.A. 6.

It is clear from these findings that plaintiff has not made out a case of non-delivery in fact but she contends that as defendant sold the oil without giving her any notice of his intention to re-sell as provided by sub-section 3 of section 49 of the Sale of Goods Ordinance, 1913, he has committed a breach of his contract by not

giving her a further opportunity to pay before re-selling. I have some doubt as to whether this case arises on the pleadings and, furthermore, it appears to me in conflict with her story to the Court but as both counsel discussed it I propose to deal with the submission. I have come to the conclusion that the facts of this case establish that the property in the 16 casks of oil had not passed to the buyer at the time of the re-sale. Although the goods bore the mark of the buyer it was a term of the contract that delivery should take place on payment of the balance of the price. The buyer never paid the balance and never even tendered the amount at any time. See Benjamin on Sale, 6th Edition, p. 1,083. The contention of the seller is that the goods were of a perishable nature and therefore on default of the buyer he could re-sell. The buyer as stated before never paid the balance on the 25th February or at any other time. Apart from any other rights defendant might have, if I accept his contention and come to the conclusion that the goods were of a perishable nature, then it seems to me that under the provisions of section 49 (3) of the Sale of Goods Ordinance the seller could re-sell and recover damages for any loss occasioned by the buyer's breach.

I accept the evidence of the defendant and his witnesses that if cocoanut oil properly made is put into casks with the bungs on it will go rancid in from four to seven weeks. In this case the casks were delivered with the bungs on and in my view the cocoanut oil could be said to be of a perishable nature. In Benjamin on Sale, p. 1,885, the meaning of perishable is stated as follows: "It is presumed that goods will be considered of a perishable nature, not only when they are such as to deteriorate physically by being kept, but also when they are such as to be subject to deterioration in a commercial sense, so as to be likely to become unmerchantable as such." The cases of *Maclean* v. *Dunn*, 4 Bing, 722; *Sharp* v. *Christmas*, (1892), 8 T. L. R. 687 and *Ryan* v. *Ridley*, 19 T.L.R. 45, lay down the principle that where the goods are of a perishable nature and the buyer does not carry out the terms of the contract as to payment for them, the seller can re-sell them and sue for any loss. They are also instructive from the point of view of what kind of goods have been considered perishable. But that does not dispose of the plaintiff's case as she pleads, in the alternative that if she committed a breach of the agreement such breach was waived by the defendant's conduct. In support of this plea she relies on the admitted fact that subsequent to the breach defendant received and accepted from her the sum of $120, previously referred to, which she alleges was a further payment on account of the purchase price. Waiver must be an intentional act with knowledge. *See Darnley* v. *London, Chatham and Dover Railway Company*, 36 L.J. Ch., 404 at p. 411, and although it is true that defendant knew of the breach, in my opinion he never intended his acceptance of the money to he a waiver, as at the date of the receipt of the money he had already sold the oil to Boodoo and shortly after and at the earliest opportunity, he informed the plaintiff of his loss on the re-sale and made in effect, a claim for damages arising therefrom. Although it is now admitted that defendant could not add to the difference between the contract price and the market price certain expenses

which he then claimed from plaintiff, it seems to me that in considering defendant's conduct this fact is not of material importance as his conduct then showed that he accepted the $120 so as to be able to re-imburse himself for his loss and his informing plaintiff that the balance of $94 was due to her supports this view. It seems to me that far from defendant intending to waive the breach he early made a claim for loss arising from the breach. From this it appears to me that there are no acts or conduct on the part of defendant that could lead the plaintiff to believe that defendant still treated the contract as in existence. In *Hartley* v. *Hymans* (1920) 3 K.B., 475, McCardie, J., at p. 492 quotes with approval a passage from the judgment of Bowen, L.J., in *Bentsen* v. *Taylor Son & Co.* (1893) 2 Q.B. 274, where he puts the test as follows: "Did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent..." Furthermore it cannot be said that the plaintiff altered her position in any way after sending the money to defendant up to the time, shortly after, when he informed her of his claim for damages, arising out of the breach. (See per McCardie, J., at p. 495 of *Hartley* v. *Hymans,* ante).

Applying the test to the facts of this case it seems to me that plaintiff fails on the point of waiver also. There remains for consideration the counter-claim for damages for non-acceptance by plaintiff. The measure of damages is determined by section 49, sub-section 3, and section 51 of the Sale of Goods Ordinance and in the circumstances of this case it is the difference between the contract price and the market or current price at the time of the non-acceptance on the 25th February.

Of the witnesses called by both parties as to the market price none gave evidence as to the actual price in Georgetown. McLean stated the market price in Berbice was $22 per cask at the material time, Mohamed Abbas spoke of the price as being $30 a cask in Suriname, defendant referred to sales on his estate on the East Coast at the rate of $20.40 a cask and Bacchus gave evidence of the price at Nabaclis being at the rate of $22 a cask.

The actual sale to Boodoo in Georgetown was at the rate of $20 a cask and I accept that as the market price.

The defendant therefore is entitled to damages amounting to $64 being the difference between the contract price and the market price on 16 casks of cocoanut oil. During the trial plaintiff amended her statement of claim by claiming in the alternative for the return of the sum of $220 previously mentioned and it was not disputed that she was entitled to the return of it less any sum awarded to defendant by way of damages.

There will be judgment for the plaintiff for $220 on the alternative claim and for defendant for $64 on his counter-claim and I allow defendant to set off this amount against the amount recovered by plaintiff from him. Each party will bear his own costs.

Solicitor for the plaintiff, *F. Dias.*

Solicitor for the defendant, *L. Ramotar.*

MARTINS *v.* UNITED DIAMOND FIELDS OF B.G. LTD.

[No. 131 OF 1930.]

1930. DECEMBER 5. BEFORE GILCHRIST, J.

Muster and servant—Claim for wages—Oral Evidence to show contract not executed on date appearing thereon—Admissibility thereof—Memorandum of agreement—Connected documents—Statute of frauds—Guarantee or undertaking to pay another's debt—Necessity for such agreement to be in writing—Agreement not stating consideration—Necessity for such statement—What is consideration.

The plaintiff who had previously been in the employment of the defendant company as the manager of their business at Potaro was dismissed in November, 1926, and re-employed on the 14th February, 1928, under a written agreement providing for salary at the rate of $150 per month. Plaintiff relinquished his employment on the 8th October, 1928, when salary to the extent of $503.87, the sum claimed, had accrued to hint. The defendant company in their defence pleaded *inter alia,* that in consideration of his re-employment the plaintiff had undertaken in a written agreement to collect certain sums of money that had become due and payable to the company during the plaintiff's previous term of employment, and had empowered the defendant company to deduct from his salary any deficiency of such debts that there might be on the 28th February, 1929. This last agreement executed by plaintiff bore the same date as the agreement already referred to relied on by the plaintiff. In his reply the plaintiff pleaded *inter alia,* that the written agreement dated 14th February, 1928, under which he was employed did not entitle the defendant company to apply any salary due to him against any outstanding credits and further that the agreement relied on by the defendant company did not comply with the provisions of section 17 of the Civil Law of British Guiana Ordinance, 1916 (Statute of Frauds and was not enforceable.

At the Searing the plaintiff adduced oral evidence for the purpose of showing that the written agreement relied upon by the defendant company was not signed on the date it bore to which evidence counsel for the defence objected. For the defence it was urged that even if the second agreement was executed on the 15th and not on the 14th of February the two documents were practically contemporaneous and must be read together as evidencing all the terms upon which the plaintiff had been re-employed.

Held, (*a*.) That parol evidence is admissible to prove that a deed or other written instrument was not executed on the day of which it bears date.

(*b*.) That if placing two documents side by side it appears that they are connected with each other without the aid of parol evidence both may be read together when ascertaining what is the contract and whether there is a sufficient memorandum within the meaning of the Statute of Frauds, but that neither of the two agreements in this case indicated any connexion with the other and they must therefore be treated as separate and independent.

(*c*.) That so reading them the second agreement was not enforceable because it did not contain any consideration for the plaintiff's promise to answer for the debts of the debtors of the defendant company.

(*d*.) That the promise of re-employment contained in the second agreement did not constitute consideration.

(*e*.) That even if such promise of re-employment constituted consideration the defendant company had failed to prove re-employment under the said second agreement.

(*f*.) That if the consideration in the said second agreement was executed it was bad because the parties were already bound by the previous agreement of re-employment and there was no fresh consideration for the new agreement.

(*g*.) That if the consideration was executory it was equally bad because the subsequent re-employment was under a previously concluded and independent agreement.

The facts are fully set out in the judgment.

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

P. N. Browne, K.C. (*K. S. Stoby* with him), for the defendant company.

GILCHRIST, J.: In this action the plaintiff claims the sum of $503.87 for work done and services rendered for the defendants at their request as manager of the business of the defendants carried on at Potaro, No. 2 Mining District in this Colony, at an agreed salary of $150 per month.

2. It is not disputed that when the plaintiff resigned his appointment in November, 1928, the sum claimed was payable to him as salary by the defendants.

3. The defendant Company, hereinafter referred to as the defendants or the Company, by their defence say:—

(*a*.) that they are not indebted to the plaintiff in the amount sued for or in any sum whatsoever for salary or at all as alleged in the plaintiff's statement of claim;

(*b*.) that the plaintiff was employed by them as manager of their business at Potaro, Essequibo, at a salary of $200 per month in or about the month of November, 1926, and continued as such until the month of November, 1927, when be was dismissed, because, contrary to specific instructions, he had given extensive credits to several persons and at the date of his dismissal the amount then due by such persons was $1,922.51, and generally, he had mismanaged the business of the Company in that district;

(*c*.) that subsequently at the verbal request of the plaintiff they agreed to re-employ him and did re-employ him at a salary of $150 per month, and in consideration of such re-employment, the plaintiff on the 14th day of February, 1928, entered into and executed the following agreement:—

> KNOW ALL MEN BY THESE PRESENTS that I the undersigned Joseph Francis Martins, residing at lot 95, Hadfield Street, Georgetown, do hereby agree and undertake to collect 75% of all sums of money due, owing and payable to the United Diamond Fields of British Guiana, Limited, amounting to $1,922.51 as per schedule attached and incurred during my former management of their business at Potaro No 2 Mining District, from November, 1926, to 15th November, 1927, and I do hereby further agree and undertake that any deficiency that may be found to be due on the 28th February, 1929, be deducted from the total amount of salary due to me by the said Company on said date in consideration of my re-employment with the said Company from date hereof.
>
> Dated the 14th day of February, 1928.
>
> (Sgd.) J. F. MARTINS.

(*d*.) that the plaintiff forthwith entered into the defendants' employ on the terms mentioned in the aforesaid agreement and continued in their employment until the 8th day of October, 1928, when he tendered his resignation on the grounds of ill-health;

(*e*.) on the 8th day of October, 1928, when the plaintiff tendered his resignation there was then and still is outstanding the sum of

$1,388.77 due by those persons to whom the plaintiff had given credit and which he had undertaken as per the aforesaid agreement should be deducted from any salary due by them to him the plaintiff. .

(*f.*) the defendants admit the length of service rendered by the plaintiff and the payments made to him on account of salary as set out in the particulars of his Statement of Claim but say that at the date of the plaintiff's resignation the sum of $1,388.77 was still outstanding and uncollected from the aforesaid persons and has not been paid to them.

(*g.*) the defendants by virtue of the aforesaid agreement set out in paragraph (c.) hereof are entitled to apply and have applied the sum claimed by the plaintiff as balance due to him for salary in and towards the amount of $1,388.77 outstanding at the date of his resignation and not collected by the plaintiff from the aforesaid persons;

(*h.*) alternatively the defendants claim that they are entitled to deduct, alternatively to set off any amount that the plaintiff would be entitled to claim from them for salary against the amount which the plaintiff agreed should be deducted from the total amount of salary that might be due to the plaintiff by them.

4. The plaintiff by his reply, *inter alia:*—

(*a.*) denies that he was dismissed by the defendants as alleged in paragraph 2 of the defence or at all, or that he ever mismanaged the business of the defendants;

(*b.*) states that the credits referred to by the defendants in paragraph 2 of the defence were given in the course of the defendants' business by the several managers hereinafter named and authorised by the then General Manager, Victorine Antonio Pires;

(*c.*) states that he was re-employed by the defendants under a written agreement dated 14th day of February, 1928, and entered into between the defendant and the plaintiff at the city of Georgetown, which agreement does not entitle the defendants to apply any salary due to the plaintiff against any credits which were outstanding when the plaintiff resigned his appointment with the defendants in the month of November, 1927. The plaintiff denies that he was re-employed by the defendants under the alleged verbal agreement set out in paragraph 3 of the defence. The said alleged verbal agreement is contrary to the provisions of Section 17 of the Civil Law of British Guiana Ordinance, 1916, and is not enforceable in law, the said section not having been complied with.

(*d*) that if he was re-employed by the defendants under the alleged verbal agreement set out in paragraph 3 of the defence which is denied, and gave the written undertaking pleaded therein, the promises, if any, referred to in the said undertaking were made without any consideration.

5. No evidence has been led by the defendants to substantiate or even support para. 2 of the defence that the plaintiff was dismissed in November, 1927, for the reasons therein stated, a foundation of the defence as going to show the situation of the parties at the time the undertaking pleaded in para. 3 was given. On the contrary the evidence of the plaintiff and Mr. Pires which I accept is

that in December, 1927, or January, 1928, shortly after the arrival in the Colony of Mr. Cohen, a director of the Company, the plaintiff saw Mr. Cohen and Mr. Pires as to the determination of his employment and the matter was subsequently investigated and Mr. Cohen informed him. the plaintiff, that he was satisfied with his work and he would be re-instated but as business was at a low ebb the Company would give him a salary at $150 per month and when things improved he would be given a further $50 a month (the salary earned by him at the time his employment was terminated in November, 1927, was $200 a month).

6. I see no necessity to deal in detail with the allegation in the said paragraph that plaintiff gave credit to several persons to the sum of $1,922.51. The evidence of the plaintiff supported by the witnesses Pires, James and Clarke and which I accept, clearly establishes that the manager of each particular shop, over whom was the plaintiff as district manager, was given power by the Company to exercise his discretion as to giving credit. Further credit to certain persons was authorised by Mr. Jacobs, a director of the Company. Further the evidence also establishes that the plaintiff was authorised by the directors of the Company to give credit to deserving customers The evidence also establishes that included in the sum of $1,922.51 was an amount owed by one G. O. Brown to one Vieira whose business was taken over by the company, including the amount owned by the said G. O. Brown.

7. It appears to me that the plaintiff's services were terminated in November, 1927, in consequence of the outspoken letter of the plaintiff to the Company, exhibit J.F.M. 1. No attempt had been made by the defendants to contest the statements in the said letter, I would further point out that in the letter to the plaintiff terminating his employment no reason is given for so doing. I might also point out that the letter to Mr. Smith (exhibit J.F.M. 3) to whom plaintiff was directed to hand over negatives mismanagement of the Company's business by the plaintiff.

In para. 3 of the defence it is alleged that it was at the verbal request of the plaintiff that he was re-employed. Does the evidence support such an allegation? In my opinion it does not. As stated in para. 7 above the letter of the Company to the plaintiff (J.F.M. 2) terminating his employment gives no reason for so doing In my opinion it is only reasonable that a person who feels he has given good and faithful service (the letter J.F.M. 1 indicates this) and has not been guilty of neglect of duty but who has his services terminated without any reason being given, should ascertain the reason for such conduct and place himself in a position to secure employment elsewhere. It is not unusual for a person seeking employment to be asked who was his previous employer and the reason for his having left. What would be the position of one who seeks employment and answers that his services were terminated by his previous employer but he did not know why? Clearly this would be embarrassing and would reduce, if not entirely crush, his chances of employment. In my opinion the plaintiff acted as a reasonable and sensible man in approaching Mr. Cohen, the chief director of the Company, on his arrival in the Colony, and Mr. Pires, also a director, as to the termination of his service. The result

of the reasonable and sensible conduct of the plaintiff was, as plaintiff states, that Mr. Cohen made an investigation and subsequently informed him that he was satisfied with his work and that he would be re-instated. In this respect the plaintiff is supported by Mr. Pires. I accept their testimony. No direct evidence was given that plaintiff requested re-employment. I am unable to construe plaintiff's conduct as amounting to a request for re-employment, though it did result in re-employment by the Company. A more reasonable construction appears to me to be that it was a desire to place himself in a position readily to obtain employment.

9. At the hearing the agreement referred to in para. 4 of the plaintiff's reply was admitted in evidence and marked J.F.M. 5. It bears date 14th February, 1928. The undertaking referred to and set out in para. 3 of the defence was also admitted and marked J.F.M. 7. That also bears date the 14th February, 1928.

10. Evidence was sought to be led by the plaintiff to prove that the undertaking J.F.M. 7 was not given and/or executed on the day of the date it bears. Counsel for the defendant company objected to any evidence being given to prove that the said undertaking was not executed on the date it bears. I admitted the evidence in this respect subject to my ruling as to its admissibility, liberty being granted to defendants' counsel to produce authority in support of his submission. The only references to which my attention has been drawn by counsel is Phipson on Evidence, 6th edition, p. 681, and Taylor on Evidence, 11th edition, Vol. 1, p 169. In my opinion it is settled law that parol evidence is admissible to prove that a deed or other written instrument was not executed on the day of which it bears date. See Chitty on Contracts, 18th edition, p. 132 and cases referred to (note (d) at p. 133, also Phipson on Evidence, p. 585, and cases there cited. The objection is overruled and the evidence admitted.

11. I have dealt above with the evidence in certain respects. I will now deal with the evidence in respect of the agreement J.F.M. 5, and the undertaking J.F.M. 7, and the submission of counsel for the defendants that the documents J.F.M. 5 and J.F.M. 7 are contemporaneous documents and connected one with the other. In support of his contention counsel cited *Stokes* v. *Whicher* (1920) 123 L.T.R.23 and the cases there cited.

12. In *Stokes* v. *Whicker,* Russell, J. (as he then was) refers to the case of *Long* v. *Millar* (1879) 41 1, T.R. 306; 4 C.P. Div., 613 and to the judgments of the Lord Justices and goes on to say *Long* v. *Millar* comes to this that if one can spell out of the document a reference in it to some other document, you are at liberty to give evidence as to what that other document is, and if that other document contains all the terms in writing then you get a sufficient memorandum within the statute by reading the two together."

In *Sheets and another* v. *Thimbleby & Son* (1897) 76 L.T.R. 709 at p. 711) Lopes, L.J., lays it down that if placing two documents side by side it appears they are so connected with each other without the aid of parol evidence both may be connected together when ascertaining what is the contract and whether, there is a sufficient memorandum within the meaning of the Statute of Frauds.

14. Now there is nothing in either document which indicates a connection one with the other. On the contrary clause 3 (b) of J.F.M. 5 when taken and considered along with the document J.F.M. 7 indicates, if it does not establish, a dissociation of the two documents and their independence each of the other, I would further point out that there is nothing in the pleadings of the defendants alleging or even suggesting a connection of the two documents. The cases cited do not assist the case for the defendants and this becomes more pronounced when the facts and circumstances of this case are taken into consideration.

15. The evidence of the plaintiff is that subsequent to Mr. Cohen stating he would re-instate him at a salary of $150 a month, to which he agreed, he entered into and signed the agreement J.F.M. 5 which was also signed by the Company and witnessed by Mr. Vanier and Miss Cheong, This was on the morning of the 14th February, 1928. On the afternoon of the same day he was at the Company's office, Mr. Jacobs, an attorney of the Company, brought him the document (undertaking) J.F.M. 7—which was then all in type and not amended in writing and asked him to sign it. Mr. Pires and Mr. Vanier were present. He refused to do so and said that the amount of $1,922.51 referred to was in respect of credits. That he had received instructions from Mr. Pires, then managing director of the Company, to authorise the managers of the shops to credit deserving customers and that he was not in a position to collect any of the accounts making up the said sum. Mr. Pires then said something to Mr. Jacobs. He left the document with Mr. Jacobs and left the office. Next morning, 15th, he went to the office for travelling allowances to go to the Potaro. Mr. Jacobs then presented to him the document J.F.M. 7 as amended in ink as it is at present. He again refused to sign it and repeated what he had said on the afternoon before. Mr. Jacobs then said "Oh man, sign the document. I will not hold you responsible. It is only a matter of formality." Plaintiff said if that is so he will sign it, and he did so, initialing the alterations. He remarked it was dated 14th February, Mr. Jacobs said it was typed the day before and there was no need to alter the date. He cancelled the stamp dating it the 14th and also signed and dated the schedules (J.F.M. 8 to J.F.M. 11) referred to in J.F.M., 7. He admits that he read the document J. F.M. 7 on the 14th and also on the 15th and that he fully understood from its terms that he held him responsible for collecting 75 per cent, of the sum of $1,922.51 and that any deficiency in the collection thereof would be deducted from his salary. He admits that he had power to stop a manager of a shop from giving credit. He denies that Mr. Cohen told him on his re-employment that he would have to collect 75 per cent, of the debts due the Company's shops in the Potaro during his previous employment and that if he did not do so within a year it would be deducted from his salary. He says he was never told this by anyone.

16. The evidence of Mr. Pires is that in 1926 he was appointed managing director of the Company. He supports the testimony of the plaintiff as to giving credit. In August, 1927, he left for England. He returned in December, 1927, with Mr. Cohen. In December, 1927 or early in January, 1928, the plaintiff made certain representations

to them. An investigation followed and Mr. Cohen instructed Mr. Jacobs, the then Manager of the Company, to re-employ the plaintiff and start him with a salary of $150 a month and if business improved to increase it to $200 a month.

17. On 14th February, 1928, he was at the Company's head office in Georgetown speaking to Mr. Jacobs when the plaintiff came to the office. About the same time Mr. Vanier, Solicitor, came. Mr. Vanier had some documents in his hands. He handed them to Mr. Jacobs who read them and handed them to the plaintiff and said he wished him to sign them. Plaintiff read the documents and then told Mr. Jacobs that he could not sign them and that he did not think it was fair he should be made responsible for the credits given by managers of the shops. Mr. Jacobs said there was nothing in it or words to that effect, that he, plaintiff, was in charge of the business and he did not see why he should not be responsible. He (Pires) asked to see the documents. He read one, a guarantee about collecting debts—a document like J.F.M. 7, all in type and without alterations. He then said to Mr. Jacobs that he did not think it fair that plaintiff should be asked to sign the document. Mr. Jacobs asked why. He said that the managers of shops were permitted by the Company to use their discretion in giving credits. There were some lists attached to the document, like J.F.M. 8 to J.F.M. 11. He noticed on one of the lists the name G. O. Brown (see J.F.M. 10) and told Mr. Jacobs that Brown was a debtor to Vieira and his was one of the accounts handed over to the Company and he did not think it right. Jacobs then said "Well I made James give a similar guarantee." He said that was also wrong. Plaintiff refused to sign the documents. Jacobs then instructed Mr. Vanier, Solicitor, to alter the document. Plaintiff left the office and so did Vanier. Jacobs then asked him why he objected as it was to the Company's advantage to get these guarantees as it would make them (managers) take an interest in collecting the accounts, but admitted that it was not fair to put in an account owed in Vieira's time, before the Company took over. Jacobs then said it was only a formality to make them energetic. He did not see J.F.M. 7 signed.

18. In cross-examination he (Mr. Pires) said "The alterations to J.F.M. 7 were discussed in my presence and I think plaintiff was also present. Jacobs insisted that this document (J.F.M. 7) should be signed by plaintiff. I think plaintiff was told by Jacobs that if he did not sign the document (J.F.M. 7) he would not be re-employed by the Company. I digress for a moment to observe that evidence founded on "I think" is of no value. Assuming it has some value, that value is entirely dissipated in the face of the direct evidence of the plaintiff, that the alterations were not discussed in his presence, that he did not hear Mr. Pires suggest to Mr. Jacobs any of the alterations, that Mr. Jacobs never told him if he did not agree to sign the document he would not be re-employed by the Company and that no member of the Company ever said that to him.

To proceed: No evidence has been led by the defence questioning the testimony of plaintiff and Mr. Pires which I accept. It is clearly established in my opinion that J.F.M. 5 was an executed agreement between the plaintiff and the Company before any request or question arose as to the plaintiff giving or signing J.F.M. 7

and that J.F.M. 5 was signed on the 14th February and J.F.M. 7 on the 15th February, as well as the schedules therein referred to—J.F.M. 8 to J.F.M. 11. I might here refer to the evidence of James and to the documents C.A.J. 1 to C.A.J. 3 produced through him, and to the documents J F.M. 5 and J.F.M. 7. It will be seen on referring to these exhibits that C.A.J, 1-3 and J.F.M. 5 are all witnessed by A. Vanier, Solicitor, and M. Cheong, and that there are no witnesses to the document J.F.M. 7 (undertaking). Here is support, if such be needed, for the truthfulness of the testimony of the plaintiff and Mr. Pires.

20. The evidence and the documents themselves establish, in my opinion, that the agreement J.F.M. 5 and the undertaking J.F.M. 7 were never signed at the same time and are not contemporaneous or connected documents and I so hold. It was open to the defendants to call Mr. Vanier, who, it is clear from the evidence, acted as the Company's solicitor in respect of the documents J.F.M. 5 and J.F.M. 7 to rebut, if he could, the evidence of the plaintiff and Mr. Pires. Evidently, for reasons best known to the defendants, he was not called.

21. At this point it appears to me fitting to deal with para. 3 of the defence in certain respects. The plaintiff in paragraphs 4 and 5 of his reply treats the agreement of employment of the plaintiff, therein referred to, as being a verbal agreement. At the hearing counsellor the defendants submitted that the words "verbal request" are only introductory and do not refer to the agreement of employment of the plaintiff at $150 a month and that it was open to the plaintiff to ask for or apply for particulars as to whether the agreement alleged was verbal or in writing. While I agree with counsel for the defendants that the construction advanced by him could be put on the said paragraph in question it appears to me, having regard to the evidence as to the execution of the document set out in the said paragraph exhibit (J.M.F. 7), and the execution of the agreement set up in paragraph 4 of plaintiff's reply (exhibit J.F.M. 5) that the defendants had a special reason for so pleading. The evidence points to the reason being that the defendants were fully aware that the terms of the two documents (J.F.M. 5) and J.F.M 7) were never agreed to simultaneously nor were they contemporaneous documents though they bear the same date, and hoped at the trial of the action to get over any question that might arise as to the force and validity of the document J.F.M. 7.

I have stated above (paras. 19 and 20) that the documents J.F.M. 5 and J.F.M. 7 are independent of each other. For the defendants to succeed the Court will have to find that the document J.F.M. 7 complies with the requirements of section 17 of the Civil Law of British Guiana Ordinance, No. 15 of 1916, and that the plaintiff has received consideration for the promise therein stated. Section 17 of that Ordinance is adapted from the Statute of Frauds, 1677 (29 Car. II., c. 3, s.4. I would here point out that section 3 of the Mercantile Law Amendment Act, 1856 (19 and 20 Vict, c. 97) which provides that "no special promise to be made by any person after the passing of that Act, to answer for the debt, default or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him there-

unto lawfully authorised, shall be deemed invalid to support an action, suit or other proceeding, to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document," is not part of the law of this colony.

23. In *Wain* v. *Warlters* (1804. 5 East. 10) it was held that to charge a person to answer for the debt of another, the note or memorandum in writing signed by the party to be charged must contain the *consideration* for the *promise* as well as the *promise* itself, and that parol evidence for the consideration was inadmissible. This case was confirmed by *Saunders* v. *Wakefield* (1821), 4 B. & Ald. 595 and acted on in numerous cases since.

24. Counsel for the plaintiff submits that the promise of the plaintiff, if any, referred to in the undertaking (J.F.M.7) was made without any consideration; that the said document discloses no consideration for plaintiff's promise to pay any unpaid balance of the debts referred to; that a promise to re-employ is no consideration, that the consideration could only be the terms on which the person is employed, among other things, the salary or remuneration to be paid by the employer to the employee; and that it is not competent for the defendants to give parol evidence of the salary payable.

25. In *Laythoarp* v. *Bryant* (1836), 3 Scott, 238 at page 250, Tindall, C.J., said: "What is the meaning of the term 'consideration?' It is defined to be any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience' sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either expressed or implied of the defendant." In applying this definition to the present case the word "defendant" must be substituted for "plaintiff" and the word "plaintiff" for "defendant" wherever they occur.

26. It has been held that the consideration must be of some value, that it is sufficient if it be of slight value only.

27. Now looking at the document J.F.M. 7 itself, if the consideration is a promise of re-employment it is no consideration—*Lees* v. *Whitcomb* (1928), 2 Bing, 34. Assuming, however, that a promise of re-employment is consideration the defendants have failed to prove any re-employment under the said document.

28. If taking this document as a whole and the conclusion is that the consideration is employment coupled with the payment of salary, the consideration is entire and unseverable. No mention is made in the document of the amount of salary. Therefore to prove the amount of salary parol evidence is necessary. This, the authorities show, cannot be admitted In the circumstances the consideration being entire and unseverable, and in part cannot be proved except by parol evidence the whole consideration is void and the promise of the plaintiff being without consideration is unenforceable.

To consider the document J.F.M. 7 from another point of view and taking it as a whole and assuming that the reference to salary is of some value, the question arises as to whether the consideration referred to is executed or executory.

30. If it is taken as an executed consideration it is bad in that at the time the promise was made by the plaintiff there was a concluded and distinct agreement between the plaintiff and defendant as to employment and salary as disclosed by the document J.F.M. 5 and no fresh consideration has been proved for the giving thereof, nor has any detriment or inconvenience been suffered by the defendants for the promise of the plaintiff.

31. If it is taken as an executory consideration, that is, something to be done after plaintiff's promise—in this case the employment of the plaintiff by the defendants—so as to attach the consideration to the promise of the plaintiff, then the defendants have signally failed to show that. It is true the evidence establishes that subsequent to the plaintiff signing and giving to the defendants the document J.F.M. 7 he was employed by the defendants, but the plaintiff has clearly established that such employment was under the independent and concluded agreement J.F.M. 5 between the defendants and himself previous to the asking for and the giving of the undertaking J.F.M. 7.

32. Considered from every angle the defence fails. Having come to this conclusion it is unnecessary to deal with the further points raised by counsel for the plaintiff.

33. There will be judgment for the plaintiff for $503.87 with costs.

Solicitor for the plaintiff, *J. Gonsalves.*

Solicitor for the defendant Company, *F. Dias.*

GONSALVES *v.* LANDRY.

On Appeal from the Supreme Court of British Guiana.

GONSALVES, Appellant.
v.
LANDRY, Respondent.

1930. July 1.

Before Sir Philip MacDonell, Kt., C.J., President, Mr. Justice J. Stanley Rae, C.J., and Sir Anthony DeFreitas, Kt., C.J.

Sale of land—Vendor having title for only a portion thereof—Vendor having possessory rights over remainder—Purchaser in possession of such remainder disturbed by Vendor—Rights of purchaser—Declaration and injunction—Form of order where it appears that persons other than Vendor also have rights in and to said remainder—One case presented before trial judge—Different case before Court of Appeal—Exercise of discretion—Appellant disallowed costs.

L. sold to G. a parcel of land situate at Kitty. Throughout the negotiations for sale the land was referred to as a corner lot thereby indicating that it comprised the entire lot, situate at the corner in question. L. held transport for only a portion of the said parcel of land but had been in possession for about 33 years of the remaining portion. After transport had been passed G. took possession of the entire lot, and L. disturbed G.'s possession of the portion not covered by the transport.

G. brought an action against L. claiming *inter alia,* damages for breach of contract. The case presented to the learned trial judge centred around the claim for damages, which was dismissed on the authority of *Jolliffe* v. *Baker,* 11 Q.B.D., 255 (*Vide* 1929, L.R.B.G. 30).

Held, (*a*.) That on the case presented to the learned trial judge his judgment was correct but on the facts found by him the appellant was entitled to the declaration set out in the following judgment.

(*b*.) That in view of the fact that the aspect of the case presented on appeal was not put before the learned trial judge the Court of Appeal was in no way differing from the judge's decision and in the circumstances no costs of appeal would be allowed.

G. J. de Freitas, K.C. (*S. J. Van Sertima* with him), for the appellant.

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

The judgment of the Court was delivered by the President of the Court, Sir P. J. MacDonell, as follows:—

This is an appeal from a decision by the learned trial Judge dismissing an action brought by the appellant as plaintiff against respondent and also against one Rampersaud as defendant wherein the appellant claimed "a declaration that the plaintiff purchased from the defendants all that lot 44 in the Kitty and Alexanderville Village District as laid down and defined on a plan of that portion of Kitty known as Prince Edward's Town made by H. Rainsford, Sworn Land Surveyor, dated 30th April, 1842, and deposited in the Office of the Registrar on the 26th July, 1817, with all the buildings and erections thereon and that the plaintiff is entitled as against the defendant Festus Abraham Landry to possession of that parcel of land which comprises the western one-quarter of lot 44 aforesaid commencing from the western boundary thereof by the whole depth

of the said lot." The appellant does not appeal from the decision of the learned trial Judge dismissing his action as against Rampersaud.

The facts are these. On the 12th March, 1915, the respondent Landry acquired by Letters of Decree the eastern three-quarters of this lot 44, and he says, (and it is not contradicted) that his ancestors squatted on the remaining western-quarter of lot 44 some 50 years ago and that they and he have been in undisturbed possession ever since, and that he in particular has been in such possession ever since his father died 33 years ago. He qualifies this, however, by admitting the existence of a nephew who may very possibly have rights jointly with himself to this western quarter of lot 44; he would not then be the sole owner of this western quarter of it, but he claims a right in and to it, and his claim is not disputed—is indeed the basis of the plaintiff's action. The respondent Landry then was owner of the eastern three-quarter of lot 44 by a documentary title, the Letters of Decree of the 12th of March, 1915, and he had rights in and to the western quarter, possibly not a several right but one jointly with some other person or persons, but a right not evidenced by any document but resting on possession merely.

On the 1st of June, 1918, respondent Landry transported to Rampersaud the eastern three-quarters of lot 44 by transport No. 628. This document refers in terms to the Letters of Decree of the 12th of March, 1915, and was clearly a transport of the eastern three-quarters only of this lot. On the 2nd of November, 1927, Rampersaud obtained judgment in the Supreme Court of the colony against the respondent Landry for the sum of $764.72 with interest and costs. And on payment of the amount found to be due under the judgment, Rampersaud was to reconvey to respondent Landry the eastern three-quarters lot 44 transported to him in June, 1918. If, however, respondent Landry did not pay Rampersaud the amount due under the judgment within two months, then Rampersaud was to be at liberty to sell the eastern three-quarters of lot 44 by public auction and apply the proceeds in satisfaction of his judgment debt, interest and costs.

The respondent Landry seems to have realised at once that he would be unable to pay this amount and so obtained a re-transport of what he had transported to Rampersaud in June, 1918, so he suggested to Mr. Jackson, his counsel in the action by Rampersaud against him, that Mr. Jackson should find a purchaser. Mr. Jackson, also the witness Fraser, who for this purpose became an agent of the respondent Landry, did find a purchaser in the person of the appellant who after first offering $900 subsequently advanced his price to $1,075 an offer accepted by Rampersaud contingently on respondent Landry agreeing thereto in writing. The respondent Landry did so agree, and after some little delay and an amendment of the advertisement of transport, Rampersaud on the 13th of February, 1928, executed transport to the appellant for the consideration of $1,075. Transport of what? Clearly of the eastern three-quarters of lot 44 which was all that Rampersaud ever owned and all therefore that he could convey. As Rampersaud is no longer in the case it is unnecessary to set out at length the documents in relation to this sale and purchase signed by himself or his agent. It is sufficient to say that every document sent in the course of

carrying through this transport by Rampersaud or his agent to appellant or his that stated anything uncertain as to what Rampersaud was purporting to convey, contained also the means of removing that uncertainty—usually a reference to Transport No. 628—and proper perusal of those documents would have shown the appellant and his advisers that Rampersaud was transporting the eastern three-quarters of lot 44 and not anything else or anything more. The learned trial Judge dismissed the appellant's action as against Rampersaud, and we apprehend that the appellant was well advised not to appeal against that decision.

The evidence as affecting the respondent Landry can now be considered separately. The findings of fact of the learned trial Judge so far as affecting the respondent Landry are as follows: "I am satisfied that the agent (*scilicet*, or respondent Landry) did offer the whole of lot 44 to the plaintiff and described it as a corner lot and that he was authorised by Landry to do so and that plaintiff thought he was buying the whole of the lot including the western quarter." For these findings there was ample evidence and the respondent Landry's denial of these facts was clearly dishonest. In dismissing the action against Landry, the learned trial Judge deprived him of his costs and no exception has been or could be taken to this order. To return The evidence of the witnesses Jackson and Fraser is explicit that respondent Landry laid stress on lot 44 being a corner lot; that is, he was offering the appellant the western quarter. True, the appellant and his advisers were so careless in examining the documents sent them and in grasping the facts, that they seem to have been uncertain what Rampersaud and the respondent Landry were respectively selling to the appellant but whatever they were respectively selling, the evidence is conclusive that the respondent Landry was selling the western one-quarter. The witness Fraser makes it clear that there was consideration for this sale to the appellant by the respondent Landry of the western one-quarter. "Plaintiff," he says, "first offered $900. Landry did not accept and said, as it was a corner lot, he should get more. Eventually the plaintiff offered $1,075," which was the price at which Rampersaud accepted. As this advance of $175 on the original price offered by appellant was money in diminution of the amount which respondent Landry owed Rampersaud under the judgment of the 2nd of November, 1927, it was benefit to him as well as detriment to the appellant. There was then a parol agreement for valuable consideration by respondent Landry to sell to the appellant the western quarter of lot 44. On the evidence there was a subsequent payment of $50 by appellant to respondent Landry and also permission to occupy a house on lot 44 at a nominal rent, but these things seem to have been promised after respondent Landry had agreed to sell the western quarter, and must therefore be held to be matters *ex gratia.*

The subsequent facts are that the appellant took possession in April, 1928, of the whole of lot 44, that respondent Landry at once protested that he had never sold him the western quarter and that when appellant put up a fence to enclose the lot respondent Landry broke down the part of it enclosing the western quarter and evicted the appellant therefrom.

On these facts and the findings of the learned trial Judge, learned counsel for the respondent Landry did not contest that the appellant was entitled to relief as on a parol agreement to sell followed by acts of part performance and to some form of declaration protecting the interest in the western quarter of lot 44, which appellant had been found to have purchased from respondent Landry. The exact form of that declaration will be given later.

The learned counsel for the appellant do not ask for costs of this appeal but the learned counsel for the respondent goes further and contends that his client ought to have the costs of same. He bases his argument on this, that the appellant in his notice of appeal asks for a "declaration that plaintiff purchased from the defendant Landry the whole lot 44, Prince Edward's Town, and is entitled to the possession of the westernmost one-quarter thereof," whereas the facts no less than the argument advanced for the appellant, show that the appellant did not purchase from respondent Landry the whole of lot 44 but his interest in the western quarter only, and bases his argument on this also that the appellant's counsel in the course of arguing the appeal admitted that the injunction he now asked for would have to differ materially from that asked for in his notice of appeal. To these contentions it seems to us sufficient to say that in his notice of appeal, appellant does ask, as against the respondent Landry, for possession of the western-quarter, which it is admitted that he is, as against the respondent Landry, entitled to, and that the words claiming a declaration that he purchased from respondent "the whole lot 44" can be rejected as surplusage. True, the appellant can only have possession of the western quarter of lot 44 as against the respondent Landry and not *simpliciter*, because of the fact, largely overlooked on both sides, that, according to the evidence, there are or may be another person or persons entitled to this western quarter besides the respondent. Appellant gets part of, or if you will, a modification of, what he asks for in his notice of appeal and, if so, we cannot see that respondent can complain of surprise. As to the point about the form the injunction must take: alteration of this from that asked for in the notice of appeal is again necessitated by the fact that there may be other persons having interests in the western quarter besides the respondent. We can test the contention for respondent by asking, in the words of the old pleading, whether the difference between what appellant asked for in his notice of appeal and what he is now content to take, amounts to a departure or to a new assignment. We are satisfied that it does not and that the justice of the case will best be met by giving no costs of this appeal.

As to the form the declaration must take. As there are or may be persons interested in this western quarter of lot 44 besides respondent Landry, the declaration must make it clear that all we can give the appellant is right to the western quarter as against respondent Landry, such right to be limited to whatever appellant may have purchased from the respondent, but not extending further, and the injunction to be granted must be limited to effect the same purpose but nothing more. We think its form should be as follows:—Declare that the appellant bought from the respondent his right, title and interest in and to the western quarter of the lot

44 in question and that the appellant is entitled to hold against the respondent possession of the said quarter lot; order and direct that the respondent and his agents and servants and every of them be restrained by injunction and an injunction is hereby granted restraining them and every of them from interfering with appellant's possession of the said western quarter of lot 44 derived from appellant's purchase of the said right, title and interest of the respondent therein; no order as to costs of this appeal; order as to costs below to stand.

It should be clearly understood that in giving this relief to the appellant we are in no sense reversing or even differing from the judgment of the learned trial Judge. The case for the appellant as presented to him was one of compensation for misdescription after conveyance duly passed, and he rejected that case on the authority of *Clayton* v. *Leach*, 41 Ch.D. 103, and *Joliffe* v. *Baker*, 11 Q.B.D. 255; this decision is accepted by both sides. The case on which we now grant relief to the appellant was never really before him. It may be implicit in the case and in his findings of fact, but we apprehend that it was never really put to him or that he was afforded the opportunity of considering it. The case before us was a different one; consequently our decision cannot, *ex hypothesi*, involve disagreement with the decision of the learned trial Judge on the case as actually before him.

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

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

PRACTICE NOTE.

PRACTICE NOTE.

Grounds of Appeal—Bias of trial judge alleged—No Evidence on the record in support of such allegation—Impropriety of stating such ground without evidence in support thereof commented on—Duty of counsel to apply to trial judge for written statement where he proposes to rely on anything occurring in course of a trial but not appearing on the notes of evidence—Application to judge in private after judgment delivered to withdraw or minimise comments contained in judgment—Irregularity thereof.

In the case of *Wong* (Appellant) versus *Ewing* (Respondent), which was heard before the West Indian Court of Appeal sitting in British Guiana on the 2nd of July, 1930, (the Court consisting of Sir Philip Macdonell, C.J., President, Sir Robert Furness, C.J., and Sir Anthony de Freitas, C.J.) the first two grounds of appeal were as follows:—That an order for a new trial should be directed because

(1.) While evidence was being tendered by the defendant at the trial, i.e., during the course of the examination of the witness McDavid on the 10th January, 1930, and thus before the defendant's case had been concluded the learned trial judge intimated at the hearing that he was then prepared to hold it was a term of the agreement entered into between the defendant and the plaintiff that the plaintiff was to share in the profits realised from the sale of the business belonging to the defendant's estate.

(2.) The said declaration by the learned trial judge in the circumstances was an intimation by the jury whose functions he was then exercising of a verdict adverse to the defendant before the defendant's case had been fully presented to the jury and amounted both in law and in fact to a preconceived prejudice and bias on the part of the jury amounting to an irregularity of the trial of the said action.

Counsel for the appellant admitted at the hearing of the appeal that there was nothing on the record to support these grounds of appeal whereupon the following observations were made.

The President: Let me say, and I believe it is the view of my brother judges, that if anything occurs in the course of a trial which does not appear on the notes of the evidence, it is the duty of counsel who wishes attention to be called to it to wait upon the judge and get from the judge something in writing to the effect that that particular incident took place. If you get that, it becomes something written. Failing that, we cannot pay attention to it. Sir Anthony De Freitas, C.J., said: "No Court of Appeal would permit disrespectful language to any Court in the course of an appeal unless that disrespectful language was clearly based upon material in the record. There is no such material in the record and these grounds ought to be struck out as having been improperly put before the Court. In my view, it would be wise to issue a warning that in certain circumstances, the author of disrespectful language might be guilty of contempt of Court. There is nothing in the record at all to support these grounds of appeal, I go further and say that during a trial it is open to any judge to say "So much as you have now presented makes it appear so and so unless there is material in the record itself, it is a gross impropriety to put any such grounds of appeal as these before the Court of Appeal. In my opinion they should be struck out."

After the appeal had by consent been dismissed the Court made the following observations:—

The President: We wish to make one or two more observations on a matter which came up yesterday afternoon for the purpose of warning those who may be hereafter concerned, and it is this. We

desire to refer to the first two paragraphs of the appeal. Upon them we refused to hear counsel for the appellant. They contained unfair and baseless allegations of prejudice and bias on the part of the learned trial judge, Mr. Justice Gilchrist. There is not a scintilla of material in the case upon which such improper allegations could be based. We say these things advisedly, for the future guidance of practitioners in like cases. Further, we desire to say that we agree entirely with Mr. Justice Gilchrist's comments upon what on the face of it—we do not know what explanation may be behind and we are not concerned to discover any explanation—was a most improper letter relating to thieving employees, and we are glad that the learned trial judge, Mr. Justice Gilchrist, firmly rejected counsel's irregular application made to him in private to withdraw those comments from publication or to minimise them. Those comments in our opinion were thoroughly justified.

ON APPEAL FROM THE SUPREME COURT OF DOMINICA.

RAWLE, Appellant,

v.

ESPRIT, *et al,* Respondents.

ROYAL BANK OF CANADA, Appellants,

v.

ESPRIT, *et al,* Respondents.

1930. SEPTEMBER 22.

BEFORE J. S. RAE, C.J., SIR ROBERT H. FURNESS, KT., C.J., AND SIR ANTHONY DEFREITAS, KT., C.J.

Leeward Islands Supreme Court Act, Cap. 22, *Section 50* (*c*) *& 51—Power of Judge to order action to be transferred for trial from Dominica to another circuit—Conditions precedent to exercise of discretionary power—Affidavit in support of application for such transfer—Averment of deponent's mere belief without statement of grounds therefor—Worthlessness of such affidavit.*

It is the duty of a judge to determine whether a basis of fact exists for a belief expressed in an affidavit and an order made on an affidavit containing an expression of belief unsupported by any evidence of facts warranting same will be set aside**.**

Sir ANTHONY DEFREITAS, Chief Justice of British Guiana, delivered the judgment of the Court on the 22nd of September, 1930, as follows:—

To the Judge from whose decisions these two appeals have been brought, the plaintiffs made application in each of the two cases

that the case be transferred from the island of Dominica for trial in the island of Antigua or the island of St. Christopher. Both applications were heard together and on the 9th of January, 1930, the Judge delivered one judgment in which he made an order in each case that the case be transferred to Antigua for trial**.** The defendants in each case obtained from the Judge leave to appeal to this Court. With the concurrence of counsel for all parties the two appeals have been heard together.

(1)

ESPRIT *v.* RAWLE.

This is an action in which the claim indorsed on the writ is "for damages for conversion of certain machinery and fixtures, the property of the plaintiffs." It appears from the plaintiffs' statement of claim, delivered on the 10th of September, 1929, that it was in May, 1926, that the alleged tortious conversion occurred which is the basis of the action of trover in the indorsement on the writ. The statement of claim asks for judgment against the defendant for one thousand pounds damages, being £500 for his negligence in the performance of his duty as the plaintiffs' solicitor in respect to the sale of certain machinery, and a further £500 "for the conversion of the said machinery." From which it will be observed that conversion of fixtures as a ground of claim is abandoned and that an entirely new claim is set up for damages for negligence as a solicitor. The statement of claim is signed by Dr. Herd, as the plaintiffs' solicitor. Dr. Herd has introduced into the statement of claim a new cause of action not mentioned in the indorsement on the writ, a cause of action very different from conversion. No indication of such a claim for damages for negligence is to be found in the writ. This new claim is based on an allegation that the defendant "acted either fraudulently or with gross negligence "in allowing the first plaintiff, Cecilia Esprit, to consent to the sale of the same machinery which, it is also alleged, the defendant has tortiously converted. While the pleader is willing to wound with an aspersion of fraud in a general allegation in a pleading, he is apparently timorous of striking with a definite claim in tort for damages for fraudulent misrepresentation.

There is in this case an affidavit filed on the 6th of January in support of the application for transfer. It is of no value; and the Judge has said that he did not read it. The Judge founded his order for the transfer of the case to Antigua entirely on an affidavit of the 2nd of January, 1930, by Dr. Herd containing uncorroborated allegations of some suspicion of bias in favour of the defendant on the part of the special jurors of Dominica and an expression of his belief—without any basis of fact—"that a fair and impartial trial of the issues in this action cannot be had with a special jury in Dominica." If the plaintiffs are allowed at the trial to give evidence in proof of their allegations in the statement of claim, then the issues will involve consideration by a jury of facts and circumstances in relation to land (an "estate") in Dominica, machinery and plant of the estate, a house in Dominica and the sale of that house for debt at a price below its true value. These were regarded by the Judge as less fit

for consideration by a Jury in Dominica than by a jury in Antigua, about 100 miles from Dominica, across the sea. Also, the Judge did not regard as important that all the parties and all the witnesses are resident in Dominica; that passenger steamers ply between Dominica and Antigua not every day but at long intervals of time; that a view by the jury of the land, the machinery and the house may be necessary or desirable and that the expense of a trial in Antigua would be excessive. In his written judgment giving his decision to order the transfer of the case to Antigua, he discussed "suspicion" and a "belief" sworn to by Dr. Herd. He said: "As to whether a basis of fact exists for such a belief as is sworn to in the affidavit of Dr. Herd, I cannot venture or even pretend to say. This involves the study rather of human psychology than of Law and is no part of a Judge's duty to determine." The meaning which those words appear to convey cannot be accepted as correctly representing the duty of the Judge. Dr. Herd's "belief" in his affidavit is: "I have every reason to and I verily believe that a fair, and impartial trial of the issues in this action cannot be had with a special jury in Dominica." The Judge says that he "cannot venture or even pretend to say"—and that it is not his duty to determine—whether a basis of fact exist for such a "belief"; so that it is clear that he made the order without a basis of fact to support it: he made it on the sole ground of some suspicion of bias alleged by the plaintiffs' solicitor and uncorroborated. The order is therefore ill-founded. The Judge has not, in fact, applied his mind to the question that was before him. By section 50 (c) of the Leeward Islands Supreme Court Act, Cap. 22, it is provided that an action shall be brought either in the Circuit in which the cause of action arose or in the Circuit in which the defendant resides. The defendant in this case lives in Dominica and the cause of action arose in Dominica, so he has the right on both grounds to have this action against him tried in this Circuit. Section 51 of the same statute gives discretionary power to a Judge to order any action to be transferred for trial from Dominica to another Circuit, subject to the condition precedent that the Judge shall first satisfy himself (a) that there is reason to believe that a fair and impartial trial cannot be had in Dominica, or (b) that the convenience of witnesses or the ends of justice would be promoted by such a transfer. In this case it is clear that the Judge did neither. He has avowedly found no reason to believe that a fair and impartial trial cannot be had in Dominica, and he expressly says it is not his duty to determine if there is a basis of fact for such a belief, though the law makes it his duty to find that there is reason for such a belief before he can order a transfer. A transfer to Antigua will obviously not promote the convenience of witnesses, all of whom live and work in Dominica. There is nothing whatever to show that the ends of justice could be promoted by depriving the defendant of his right to a trial in Dominica. The Judge's decision to order the transfer was not in accordance with the law. The appeal must be allowed and the order set aside, and the plaintiffs must be ordered to pay to the defendant his costs of this appeal and of the application in the Court below.

Even without considering the weight of the affidavits filed in opposition to the application for transfer, which dispel Dr. Herd's alleged suspicion, it is clear that the order of the 9th of January, 1930, transferring this case to Antigua is ill-founded and that it cannot be allowed to stand.

There must also be an order that all proceedings in the action be stayed until the plaintiffs have paid the costs as ordered by this Court, because the plaintiffs' application for a transfer of the case was a vexatious and oppressive proceeding for the purpose of harassing the defendant.

(2)

ESPRIT *v.* ROYAL BANK OF CANADA.

In *Logan* v. *Bank of Scotland* (1906: 1 K.B. 141) the Court of Appeal restored the order of a Master staying all proceedings in an action brought in London in respect of a cause of action arising in Scotland. Sir Gorell Barnes (Collins, M.R. and Romer, L J., agreeing) refused to allow the action to be tried in London; and he said "The action is purely a Scottish action, and all the transactions which give rise to the alleged cause of action took place exclusively in Scotland. . . It is clear from the affidavits that all the circumstances upon which the plaintiff relies in the statement of claim took place in Scotland and that all the evidence with reference thereto will have to be obtained from Scotland. . . . It seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious," and he went on to refer to the difficulty of procuring the attendance of busy men as witnesses and of having to deal with books, documents and papers to be brought from Scotland and to the vexation caused by a plaintiff suing in a country other than in that where everybody is and where all the witnesses and material for the trial are. Similarly, if the plaintiffs had the right to commence this action in Antigua against the Royal Bank, and had done so, the Judge there or this Court would order a stay so as to enable the action to be brought and tried in Dominica, as the more appropriate place of trial for the convenience of witnesses, And similarly, if the order under appeal in this case is allowed to stand, witnesses, bank books and papers and Court papers will have to be obtained from Dominica for the trial in Antigua, for all the transactions upon which the plaintiffs base their alleged cause of action took place in Dominica.

The Solicitor for the Royal Bank is Mr. Rawle, who is personally the defendant in the other case; and in this case the order for transfer is founded entirely on an affidavit by Dr. Herd substantially the same as his affidavit upon which the order in the other case is founded. In his judgment already referred to the Judge delivered one summing up on the two applications for transfer, saying substantially the same thing in relation to each case. It is clear that the appeal by the Royal Bank must also be allowed and the order for transfer set aside, with costs to the Bank of this appeal and of the application in the Court below, and that all proceedings in the action must be stayed until these costs are paid.

A. E. BELLODA *v.* R. E. A. NICHOLLS.

ON APPEAL FROM THE SUPREME COURT OF DOMINICA.

ALBAN EDWARD BELLODA, Appellant,
v.
RALPH EDGAR ALFORD NICHOLLS, Respondent

1930. SEPTEMBER 22,

BEFORE J. S. RAE, C.J., SIR ROBERT H. FURNESS, KT., C.J., AND SIR ANTHONY DEFREITAS, KT., C.J.

Action for accounts—Allegation that defendant failed to render full or true accounts—Duty of agent to render accounts—Summons taken out by defendant for order on plaintiff to give particulars—Affidavit in support thereof containing references to correspondence—Correspondence not made exhibits to affidavit—Inadmissibility of such correspondence—Whether plaintiff in accounting suit can be compelled to give particulars of his claim—Practice—Judge's refusal to supply appellant with copy of his notes of argument—Comment thereon.

The plaintiff by his writ in this action claimed from the defendant to have an account taken of all dealings with the Soufriere estate by the defendant as the attorney and agent of the plaintiff and paragraph 7 of his Statement of Claim was as follows:—

7. The defendant, although requested to do so, has not rendered full or true accounts to the plaintiff of the moneys received and paid by him in the course of his said attorneyship nor paid over the plaintiff his share of the profits of the said estate.

And the plaintiff claims:—

(1) An account of the working of the said Soufriere Estate by the defendant from the 5th day of September, 1919, to the 31st day of March, 1929, and of all moneys received and paid by the defendant as agent of the plaintiff.

(2) Payment of the amount due.

Before delivering the defence the defendant's solicitor took out a summons for an order to the plaintiff to deliver particulars and he filed an affidavit sworn by the defendant in support of the summons. The affidavit contained references to correspondence alleged to have passed between the parties but such correspondence was not made an exhibit to the affidavit. The learned judge read and acted upon such private documents not put in evidence before him.

The defendant in the said affidavit also deposed that the plaintiff in paragraph 7 of his statement of claim had alleged that the accounts rendered were not full or true accounts and that he required particulars of the alleged omissions or errors in the said account. The trial judge granted the order for particulars.

The appellant's solicitor applied through the Registrar to the judge for a copy of the notes of arguments but the judge declined to allow same to be furnished on the ground that notes of argument were not granted for purposes of appeal.

Held, (*a*.) That it is the duty of every agent being an accounting party to keep and preserve and be constantly ready with correct accounts of all dealings and transactions in the course of the agency, to produce whenever reasonably called upon by the principal or by any other person duly authorised by the principal in that behalf all accounts and documents in his hands concerning the principal's affairs; and to pay over or account for, to the principal upon his request all moneys received on behalf of the principal.

(*b*.) That as the correspondence referred to in the affidavit was not made an exhibit thereto such correspondence was not legally in evidence.

(*c*.) That the interpretation of the well known phrase "has not rendered true or full accounts" as meaning that accounts were rendered but were not true or correct was a distortion of paragraph 7 of the statement of claim.

(*d*.) That the learned judge's view that notes of argument are not granted for purposes of appeal was erroneous, that Appeal Judges should be given all the matter that is relevant and material to guide their judgment and to enable them to inquire fully into the litigation so as to reach a proper decision, otherwise orders may be made in the absence of knowledge of what ought to be known and there may be a consequent miscarriage of justice.

The Chief Justice of British Guiana, Sir ANTHONY DE FREITAS, delivered the judgment of the Court on the 22nd of September, 1930, as follows:—

The writ in this action bears the following indorsement: "The plaintiff's claim is to have an account taken of all dealings with the Soufriere Estate in the Presidency of Dominica by the defendant as the attorney and agent of the plaintiff, co-registered proprietor as trustee of the said Soufriere Estate, from the 5th day of September, 1919, to the 31st day of March, 1929."

It is the duty of every agent, being an accounting party to keep and preserve, and be constantly ready with, correct accounts (*i.e.*, full or true accounts) of all dealings and transactions in the course of the agency; to produce whenever reasonably called upon by the principal, or by any other person duly authorised by the principal in that behalf, all accounts and documents in his hand concerning the principal's affairs; and to pay over, or account for, to the principal upon his request all moneys received on behalf of the principal.

The plaintiff in this case delivered a statement of claim, in which he states in the seventh and last paragraph:—

"7. The defendant, although requested to do so, has not rendered full or true accounts to the plaintiff of the moneys received and paid by him in the course of his said attorneyship nor paid over to the plaintiff his share of the profits of the said estate. And the plaintiff claims:

(1) An account of the working of the said Soufriere Estate by the defendant from the 5th day of September, 1919, to the 31st day of March, 1929, and of all moneys received and paid by the defendant as agent of the plaintiff.

(2) Payment of the amount due."

That is the usual form of a claim for an account from an agent, as it is given in the books on pleading.

Before delivering the defence the defendant's solicitor took out a summons for an order to the plaintiff to deliver particulars, and he filed an affidavit sworn by defendant in support of the summons. On that summons the Judge in the Court below made an order on the 24th of July, 1930, requiring the plaintiff to deliver particulars of his statement of claim; and that order is the subject of this appeal. The order is signed by the Judge, and among the recitals in it he says he referred to "the correspondence and accounts referred to in the said affidavit" of the defendant. Neither correspondence nor accounts are exhibits to the affidavit. There are references in the affidavit to the existence of correspondence and accounts, but no letter or account is identified. The affidavit does not refer to any exhibit, and there is no exhibit. Rule 23 of Order 38 requires accounts and documents referred to in an affidavit to be referred to as exhibits to the affidavit. No correspondence or accounts are before this Court. It would appear that some of the

materials upon which the Judge founded this order were not proper materials for such use; that the unidentified correspondence and accounts were not legally admissible in evidence; that the Judge should not have read and acted upon such private documents not put in evidence before him; and that the order is therefore ill-founded.

In the order of the 24th of July, 1930, against which this appeal is brought, the following is set out:—

"It is hereby ordered that the plaintiff do within ten days from the date of this order deliver to the defendant's solicitor the following particulars in writing of the said plaintiff's statement of claim, viz.:

(1.) Particulars of the moneys alleged to have been received by the defendant in the course of his attorneyship and not included in the accounts rendered by the defendant.

(2.) Particulars of the alleged wrongful entries in the defendant's account of moneys paid by the defendant in the course of his attorneyship.

And that in default the said plaintiff be precluded from giving evidence in support thereof on the trial of this action, and that the costs of this application be paid by the plaintiff to the defendant."

This order follows exactly the terms of the summons, which asked for particulars of receipts which, it is said, the plaintiff alleged to be "not included" in an unidentified account and of "wrongful entries" which, it said, the plaintiff alleged to be in an unidentified account. Both the summons and the order are based on the last two paragraphs of the defendant's affidavit, which says: "14. The plaintiff in paragraph 7 of his statement of claim, to which I crave leave to refer, has alleged that the accounts rendered by me *are not full or true accounts.* 15. I require particular of the alleged omissions and errors in my said accounts in order to prepare my defence." Though based on the affidavit, the summons and order do not follow it precisely, for the deponent's request for particulars of alleged "errors" in unidentified accounts is expanded and intensified in the summons by "alleged wrongful entries": not "wrong" entries (to correspond with "errors") but "wrongful" entries, so that persons in Dominica would necessarily understand that the plaintiff has "alleged" against the defendant's good character that the defendant tried to cheat him by making false entries that are injurious to him. It is manifest that the design to create that false impression was successful in relation to one person, the Judge, seeing that he has definitely recorded his understanding of "wrongful" in that sense, for in his written judgment delivered when making the order he uses "untrue statement" and "untruths" as synonymous with "wrongful entries" in the summons and with "errors" in the defendant's affidavit. Hereafter in this judgment there will be discussion of the distortion and misrepresentation of paragraph 7 of the statement of claim.

The judgment delivered by the Judge below and signed by him is as follows:—

"July 24th, 1930.

This is an application in an action asking for an account of the Soufriere Estate workings brought against Mr. Ralph Nicholls (for ten years the attorney of the owners Messrs. Belloda and Bellot).

2. As yet no defence has been put in; but a statement of claim has been delivered to him. *In that statement of claim it is alleged that in the statements of accounts supplied by Mr. Nicholls* and passed as correct (up to 1919 by Mr. Belloda and from that date to 1929 by Mr. Bellot, the joint owners of the Soufriere Estate) *there are certain untrue statements* and certain omissions made.

3. *On reading this* the defendant asks that he be afforded indications of what *untruths* and omissions are hereby referred to in order that he may answer these allegations when drawing up his defence and know what he has to meet.

4. I think he is entitled to these and I grant his application. They should be supplied within ten days and the cost of this application (in accordance with precedent) shall fall upon the plaintiff."

In his written judgment the Judge says that "the costs of this application (in accordance with precedent) shall fall on the plaintiff." Such a reference to "precedent" cannot assist a Court of Appeal. If the Judge had cited the precedent he had in mind it would have enabled this Court to consider whether it is applicable to the circumstances of this case. The 1930 *Annual Practice* has this note under rule 7A of Order 19: "The party in default may be ordered to pay the costs of the application (*Kingston* v. *Corker* (1892) 29 L. R. Ir. 365), but they are usually made costs in the cause." That Irish case is probably not the precedent hinted at, for it is not applicable to this case. In that case the plaintiff's statement of claim alleged merely a negligent breach of trust and in contravention of O. 19, r. 16, he asserted in his reply to the defence that the breach of trust was fraudulent. On an application by the defendant the plaintiff was ordered to give particulars of fraud and he was, of course, ordered to pay the costs of the application. In the case before us it would appear that the Judge was wrong in ordering the plaintiff to pay the costs.

In this case there are misrepresentations in the defendant's affidavit and in the summons taken out by his solicitor, which would appear not to have arisen from ingenuousness resulting from lack of knowledge. The order appealed from cannot be allowed to stand, and it must be discharged, for the commonsense reason that its supposed foundation does not in fact exist. It is based on a perversion of the facts. The defendant says in his affidavit that the plaintiff in paragraph seven of his statement of claim "has alleged that the accounts rendered by me *are not true or full accounts*," and he goes on to say "I require particulars of the alleged omissions or errors in my said accounts." This is a gross distortion of paragraph seven. It is improbable that this distortion was created by the defendant. It is probable that he did not apply his mind to it, and that he thoughtlessly signed it and swore to it, regarding it as Dr. Herd's statement of "law" which must be adopted by him. He has been ill served. And it may be that his solicitor, in the summons acted under the constraint of the same counsel's advice. While Dr. Herd as senior counsel for the defendant—respondent, urged upon this Court the fairness and correctness of his interpretation of paragraph seven, which is an obvious misinterpretation, Mr. Lockhart, his solicitor, as junior counsel before us expressly abandoned that interpretation and confined his interesting and well-presented argu-

ment to a point of law—which did not prove acceptable to us. It is obvious on reading paragraph seven that it does not in any way "allege" that the defendant rendered any account with omissions or errors. On the contrary, all that the paragraph very plainly says is that, though the defendant has been requested to render to the plaintiff full or true accounts of his agency, the defendant has not done so. It does not say that he rendered any account. Paragraph six of the statement of claim says that during the defendant's management of the estate "the defendant failed and neglected to render any accounts to the plaintiff. . . .although frequently requested by the plaintiff so to do." Notwithstanding this clear statement that the defendant failed to render accounts and the clear statement in paragraph seven to the same effect, the draftsman of the defendant's affidavit so twisted the language of paragraph seven as to put in the mouth of the plaintiff an allegation that the defendant did render accounts to him and a further allegation that in the accounts so rendered there were omissions or errors. This is an astounding distortion. The Judge's order repeats, and is based entirely on, this distortion of facts in requiring particulars of receipts alleged to be "not included in the account rendered by the defendant" and "particulars of the alleged wrongful entries in the defendant's accounts." This distortion is intensified in the written judgment, which shows that the whole foundation of the order is nothing but a false assumption that the plaintiff had attacked the character of the defendant. In his judgment the Judge says: "In that statement of claim it is alleged that in the statement of accounts . . . .there are certain *untrue statements* and certain omissions made. On reading this the defendant asks that he be afforded some indications of what *untruths* and omissions are hereby referred to." There is no statement of account before this Court and none is to be found in the papers in the suit. This is a positive and precise declaration by the Judge, but it is clearly erroneous; it is an acceptance and an amplification of the distortion in the defendant's affidavit. It ought to be plain to every one that the plaintiff made no such allegations whatever and that no such allegations were in paragraph seven for the defendant's "reading." Moreover, every lawyer knows or ought to know that the usual form of an employer's statement of claim for an account from his agent contains the phrase "full or true accounts," as set out in Bullen & Leake's well-known book on pleading. At page 82 of Bullen & Leake (8th edition: 1924) there is a form of claim by an employer for an account by which the plaintiff is advised to plead that "the defendant has not, though requested by the plaintiff so to do, rendered *full or true accounts* to the plaintiff." As any other lawyer would, the plaintiff's solicitor, Mr. Rawle, has followed that generally-accepted and authoritative form. If by any possibility the expression "full or true accounts" in that form could reasonably be taken to mean that the plaintiff "alleged" that the defendant rendered him accounts with untrue statements and omissions, Bullen & Leake would not be the book of high authority that it is in all English Courts. Learned lawyers on the Bench in England have down to the present day referred with respect to the famous third edition of Bullen &

Leake of 1868; and in that edition the phrase was "true or just" account. "Full or true account" has been a trite phrase to legal practitioners and Judges for many years; and it has never been given the meaning that Dr. Herd assigns to it. In the case before us there has been either ignorance of Bullen & Leake's form or it has been designedly ignored with an indirect motive.

It is clear that the order appealed from is ill-founded and that it should be discharged.

The order is bad, not only on grounds of commonsense as has been shown, but also on grounds of law as laid down in English decisions of the Court of Appeal. It is well established that where the plaintiff's claim, as in this case, is for an account, he will not be compelled to give particulars of his agent's receipts and payments. Such particulars will form part of the account, when the account is being taken. The judgment the plaintiff asks for is a judgment for an account to be taken and for payment of the amount found to be due. This form of action, an equitable claim for an agent to account, is to meet cases where the plaintiff does not know what sum is due to him. Where he does know, the form of action is a common law action for debt, claiming the definite sum he alleges to be due to him. Where he claims a definite sum he may be ordered to give particulars. Where there is a claim for an account, as in this case, to require particulars is to require the plaintiff to do what is beyond his power, for he has no means of knowing definitely what are his agent's numerous transactions: in this case, during an agency throughout ten years. To require particulars in this case is to require the plaintiff to account to the defendant, which is a denial of justice, for it compels him to claim a definite sum which he is unable to ascertain—with the result that he is deprived of his right to seek redress by any form of action. In *Augustinus* v. *Nerinckx* (1881: 29 W. R. 225 C.A.) B. advanced money to C. for a particular purpose during a series of years, and afterwards B.'s executrix obtained a judgment for the amount advanced. In an administration suit certain funds to which C. was entitled were carried to a separate account to satisfy the judgment. The executrix of A. then commenced an action claiming that the greater part of the moneys apparently advanced by B. had in fact been advanced by A. Before delivering a statement of defence the defendant obtained from Baron Pollock an order for particulars of the plaintiff's claim. It was held by the Court of Appeal reversing Baron Pollock) that as the plaintiff's claim, if successful, would only lead to an order for an account, the defendant was not entitled to particulars. Jessel, M. R., said: "I think that the attention of the learned Judge could not have been sufficiently directed to the nature of the action. It is not an action for a definite sum of money, but it sets up a claim to partnership or, in the alternative, to a charge upon a certain fund in Court; and in the first instance an order for an account will be made—that is, if the plaintiff is successful. *In order to enable the defendant to put in her defence, it does not appear to be at all necessary that she should know the particulars of the items.* There is no analogy between this and a common law action for money lent. In the case before us the Judge's notes show that his attention was very

clearly directed by Mr. Rawle, counsel for the plaintiff, to the nature of the action as an action for an account and not for a definite sum of money; and Mr. Rawle cited the case of *Augustinus* v. *Nerinckx.* The plaintiff in *Carr* v. *Anderson* (1901. 18 T.L. R. 206 C.A.) was convicted of felony and the defendant Sir Robert Anderson, the Assistant Commissioner of Police, was appointed administrator of the property of the plaintiff. After his release from prison he brought this action for an account. In his statement of claim he asked for an order for an account of the property received by the administrator while he was in prison, alleging that the administrator had received rents and valuable articles (including shares, securities and jewellery) which the plaintiff was unable to specify. The plaintiff expressly alleged that the administrator had "persuaded and induced the Secretary of the Netherlands legation (and others) to lay claim thereto (the plaintiff's property) and to give notice to the said defendant not to part with the same to the plaintiff." This was a definite allegation of misconduct on the part of the defendant; not a distorted inference of an allegation of "omissions or errors" in an account, drawn from a request for a "full or true" account. Buckley, J., made an order that Carr, the plaintiff, should deliver particulars of the property referred to. The ground of the order was stated to be that "the real point for trial would be whether the property claimed by the plaintiff belonged to him or was stolen goods." An appeal by the plaintiff was successful. Vaughan-Williams, L.J., said that *a sufficient answer to the demand for particulars was that the action was brought for an account*; and the object of the particulars was that the plaintiff should first account to the defendant.

In the case now before us the defendant's affidavit in support of the summons for particulars was filed and served on the 22nd of July, while the summons was fixed for hearing at eleven a.m., on the 23rd of July. At the hearing on the 23rd the plaintiff's counsel Mr. Rawle, applied for an adjournment on the ground of the late service of the affidavit, the necessity for communicating with his client and the time required for preparing two counter-affidavits. The Judge rejected the application, being misled by Dr. Herd's opposition. The Judge's notes show that Dr. Herd said *inter alia:* "The two affidavits would contain certain matters *probably irrelevant* to the action. I can't give consent to any adjournment at this stage; I have to go away tomorrow." It is to be hoped that this absurd prognostication of probabilities was not taken into consideration by the Judge, though he noted it verbatim. Dr. Herd lives in Antigua. His departure from Dominica would have left to the defendant in Mr. Lockhart, his solicitor and junior counsel, a competent and candid advocate and lawyer to represent him. This refusal of an adjournment was unreasonable in the circumstances and prejudicial to the plaintiff in the preparation of counter-affidavits and of his answer to the application for particulars. It is sufficient ground for discharging the order then made and now the subject of this appeal. Though a Judge has a very wide discretion to grant or refuse an adjournment, an appeal lies against such a refusal: see, amongst other cases, *Maxwell* v. *Keun* (1928) 1 K.B. 241.

Through a letter of the 5th of August, 1930, from the Registrar to the plaintiff's solicitor the Judge said that at the hearing of the application for particulars he took notes of only arguments and he refused to allow a copy of those notes to be supplied to the appellant. At the special request of the President of this Court the Judge has, however, now allowed copies of the notes to be supplied to us. There is mention in the notes of the application for adjournment already referred to. The Judge refused to allow the appellant's solicitor to have a copy of his notes on the ground that notes of arguments "are not granted for purposes of appeal." This is not a correct view. It is well known to be of great importance that Appeal Judges should be given all the matter that is relevant and material to guide their judgment and to enable them to inquire fully into the litigation so as to reach a proper decision, otherwise orders may be made in the absence of knowledge of what ought to be known, and there may be a consequent miscarriage of justice. It is a wrong notion that Appeal Judges should be protected against seeing the arguments addressed to the Judge from whose decision an appeal is brought. A cursory glance at the English law reports will disclose that Courts of Appeal do consider the arguments in the Court below. In *Piper v. Irish* (1928: L. R. B. G. 79) it will be seen that Chief Justice Stronge's notes of arguments and of a rejected application for an adjournment were sent to this Court sitting in Antigua. The case of Baudains in the Privy Council has no application here. Those who have had experience of proceedings in a Court of Appeal, or have read about them in the books, know that the taking of a point that in the Court below was not taken or was taken after the case on both sides was closed is an important subject for consideration by the Court of Appeal. It is a mistake to think that only "notes of evidence" must be sent up.

The order appealed from is entirely wrong.

The appeal must be allowed and the order of the 24th of July, 1930, must be set aside, and the defendant—respondent must pay to the plaintiff—appellant his costs of the application for particulars and of this appeal.

SAMUEL DEANE *v.* FLORENCE BROWN

ON APPEAL FROM THE SUPREME COURT OF ST. VINCENT.

SAMUEL DEANE, Appellant,

v.

FLORENCE BROWN, Respondent.

1930. MARCH 8.

BEFORE SIR PHILIP J. MACDONELL, KT., C.J., PRESIDENT, SIR ROBERT FURNESS, KT., C.J., AND SIR ANTHONY DEFREITAS, KT., C.J.

Gratuitous bailment—Revocable at will—Rights of bailor against bailee refusing to deliver up subject—Matter of bailment.

A gratuitous bailment is revocable at the will of the bailor and if the bailee detains the goods bailed or refuses to deliver up same, the bailor can recover the goods because *ex hypothesis* he has never parted with the right to possession.

The facts of the case are fully set out in the judgment.

The judgment of the Court was delivered by Sir PHILIP MACDONELL, President:—

This action was detinue for certain furniture and household effects. The facts are given in the judgment appealed from and, slightly shortened from that judgment, were as follows. Plaintiff had furniture in a house in Middle Street, but on his second marriage he went to live at his second wife's house elsewhere, leaving in his house at Middle Street the furniture there in the custody of his sisters, Ethel and Marian Deane who had lived with him while he was a widower. About 1924, plaintiff's sister, Florence Brown, the defendant, returned to the Colony after an absence of 25 years, and by the permission of plaintiff, the defendant went to live at the Middle Street house with the other sister Ethel Deane, then custodian of plaintiff's furniture in that house; Marian, the remaining sister, had died. The house needing repair, Ethel Deane with plaintiff's consent moved the furniture to the house of a Mrs. Bacchus where for a time Ethel Deane and defendant lived together. They disagreed, so plaintiff got another house for Ethel Deane to live in and authorised her to remove to that house the furniture from Mrs. Bacchus' house. On 2nd January, 1929, plaintiff went with other persons to Mrs. Bacchus' house to get the furniture for Ethel Deane's new house, and after dispute with the defendant did take some of it away; what he then took does not concern the present action. But the plaintiff made demand for the rest of the furniture in the face of which demand the defendant removed it on 19th January, 1929, to a room of her own elsewhere where it now is. It is this furniture removed by defendant on 19th January, 1929, that is the subject of the present action.

The learned trial Judge has given a finding on the facts which implies that he found, and is consistent only with his having found, that the furniture removed by defendant on 19th January, 1929, was the plaintiff's property, He speaks of it as having been left by plaintiff when he remarried in the hands of Ethel Deane and

Marian Deane "as custodians," and he speaks of the plaintiff's "consent" to Ethel Deane moving it to Mrs. Bacchus' house, when she left the house in Middle Street. It seemed to be accepted in argument that the learned trial Judge had so found. On the appeal, it was suggested to us for the respondent, defendant below, that this finding of ownership in plaintiff as a fact was wrong, but we did not understand that this argument was seriously pressed. Certainly nothing in the evidence was pointed out to us as showing that such a finding was unreasonable having regard to the evidence before the learned trial Judge, still less that evidence was wanting upon which he could so find. That being so, we are absolved from any detailed consideration of evidence which as it reads in the notes of the learned trial Judge, is certainly conflicting and not devoid of difficulty. We accept, then, without further discussion the finding on fact that the furniture removed by defendant on 19th January, 1929, was the property of the plaintiff.

After the finding on fact the learned trial Judge goes on to say:—"Ethel Deane left Mrs. Bacchus' house before the demand was made by plaintiff or the removal of the furniture by defendant from Mrs. Bacchus' house. After Ethel Deane left Mrs. Bacchus' house, defendant was in possession of the furniture and the plaintiff can only succeed in his action if he proves that he was entitled to immediate possession of the furniture at the time of his demand or at the time when defendant moved the furniture from Mrs. Bacchus' house. The plaintiff has failed to prove that ha was entitled to immediate possession of the furniture at either of these times. Judgment for the defendant with costs and counsel's fees."

We cannot agree with this statement of the legal position of plaintiff with regard to this furniture. His permission to Ethel Deane to use and enjoy the furniture first at Middle Street and afterwards at Mrs. Bacchus' house, was on the evidence a gratuitous bailment to her of that furniture, revocable at any time at the will of the plaintiff. Then during the whole of the time that Ethel Deane was "custodian" or bailee of that furniture, whether at Middle Street or at Mrs. Bacchus', the plaintiff had the right of immediate possession. He could at any time have demanded delivery of it from Ethel Deane, and if she had detained that furniture from him, this would have been detinue; if she had refused to deliver it to him, this would have been evidence of a conversion. The next fact was that Ethel Deane moved from Mrs. Bacchus' to the new house plaintiff had provided for her, leaving the furniture behind her. Obviously this will make no difference to the plaintiff's existent right to immediate possession. For the moment the custodian is altered, and the furniture is now in custody not of Ethel Deane any longer but of defendant. The contractual relation between the parties, plaintiff and defendant, is the same on the evidence as it was before between the parties plaintiff and Ethel Deane, one of gratuitous bailment, revocable, that is, at will. If plaintiff had a right to immediate possession as against Ethel Deane, which on the evidence he clearly had, then he certainly has that right as against defendant, and his action for detinue—or if you will, for trover, for that equally would lie on the evidence—should have succeeded.

Nicolls v. *Bastard.* 5 L.J. Ex 7, per Parke, B: "The rule is that either the bailor or bailee may sue and whichever first obtains damages, it is a full satisfaction." *Mears* v. *L.S.W.R.* 31 L.J., C.P. 120, Williams J.: "In the case of a gratuitous bailment, either the bailor or bailee may bring an action of trover; but where the property has been hired, the owner cannot sue in trover for it, because he has parted with the right to possession." Here, there was no hiring, the bailment was gratuitous and revocable, consequently the bailor, *i.e.*, the plaintiff, had never parted with the right to possession.

For the above reasons we are of opinion that this appeal must succeed and be allowed with costs, here and below. Counsel for both parties have consented to remove from the statement of claim the articles therein numbered (11) Hair-mattress, (18) Condiment set, (19) Bread Board and Knife, (20) 7 Dinner Mats and (22) Earthenware, Glassware, etc., at an agreed total value of £6 18s. 6d; these must be deducted from the items set out and value given in the statement of claim. Judgment in this action must be entered then for plaintiff for the delivery of the items set out in the Statement of Claim other than items (11), (18), (19), (20) and (22) or for their value £43 0s. l0d. and costs; counsel's fee allowed.

ON APPEAL FROM THE SUPREME COURT OF GRENADA.

BURKE, Appellant,

v.

BERNARD, Respondent.

1930. MARCH 26.

BEFORE SIR P. J. MACDONELL, KT., C.J., PRESIDENT, SIR ROBERT H. FURNESS, KT., C.J., AND SIR ANTHONY DEFREITAS, KT., C.J.

Fixture—Maxim "Quicquid plantatur solo solo cedit"—Relaxation of Maxim in cases of tenants or life—Tenants—Limit of relaxation—Conveyance absolute or mortgage comprises fixtures.

(*a*.) The general rule of law is "Quicquid plantatur solo solo cedit," but this rule has been modified on the ground of public benefit in favour of tenants and tenants for life.

(*b*.) Such relaxation of the ancient rule is not an alteration in the rule which determines what is and what is not a fixture but it is a relaxation of the rule as to the right to remove those things which are fixtures. A fixture is a fixture still notwithstanding any relaxation of the rule.

(*c*.) The exceptional rule which gives a tenant the right to remove his fixtures in certain circumstances has no application to a case where an owner has made a fixture by affixing his chattel to his own land, or where the land with the fixture remaining on it comes to such a person as a vendee, mortgagee, devisee or heir.

(*d*.) By a conveyance whether to a purchaser or to a mortgagee fixtures annexed to the freehold will pass unless there be some words in the deed to exclude them.

(e.) When the lower masonry storey of a house is built into the land and thus becomes a fixture and the wooden upper storey is an essential and integral part of the house attached to the wooden pillars in the ground such upper storey is also a fixture.

The facts are fully set out in the judgment.

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

1, One Thomas Bernard owned a piece of land at Mt. Sinai with a house on it, which he built there in or about the year 1906. On the application of a judgment creditor the Court nude an order on August 28, 1922, for the sale of all Bernard's right, title and interest in this and three other pieces of land. In February, 1923, the Court appointed a Receiver of the property ordered to be sold and he took possession. In the valuator's report of the value of the Mt. Sinai land, on which the Court based the reserve price fixed for the sale, no mention is made of a house on the land. The Registrar's advertisement of December 11, 1922, describes the lands offered for sale, without mentioning a house. Thomas Bernard and his family were living in the house on the Mt. Sinai land when the Receiver took possession. A Receiver's possession is the possession of the Court. The effect of his appointment is to remove the parties to the suit from possession and to make them mere custodians for the Court. Lionel Burke, the defendant-appellant, was the purchaser of the land at Mt. Sinai at auction sale on September 26, 1924, and he thereupon took possession from the Receiver. In October, 1924, Bernard and his family left the house and Burke and his wife entered into occupation of it. Thomas Bernard died on July 3, 1925, without having made any demand on Burke for the house. Probate of his will, dated April 7, 1925, was obtained on July 12, 1926, one year after his death. No mention is made in the will of the house on the land sold to Burke six months before the execution of the will but specific bequests are made of such chattels as a sewing-machine, a looking-glass, a cow and furniture. The plaintiff-respondent, Samuel Bernard, a brother of Thomas, is the sole executor named in the will. In his estate duty account for the purpose of obtaining probate (verified by his affidavit of June 28, 1926), the plaintiff as executor mentioned a "chattel house at Mt. Sinai." It is noticeable that he said at the trial, in his evidence: "I prepared an estate duty affidavit of my brother's estate showing what property he had. I did *not* include this house in the affidavit."

2. On the date on which he obtained probate, July 12, 1926, twenty-one months after Thomas Bernard had left the house, the executor delivered to Mrs. Lionel Burke, her husband then being in Venezuela, a letter requesting her to "quit and deliver up possession of the dwelling-house presently occupied by you, situated on your lands, but which is the property of the late Thomas Bernard." Mrs. Burke had then recently spent £40 in completing extensive repairs of the house. Sween, the carpenter who had built the house in 1906, in his evidence for the plaintiff, said that the house was dilapidated in 1924. The testator made no demand for the house between the time of his leaving it in October, 1924,

and his death in July, 1925; he did not mention the house in his will though he made bequests of such minor chattels as a looking-glass. But soon after the dilapidated house had been repaired and made more valuable, the executor put forward the unusual claim to be entitled to enter into possession of a dwelling-house built on another person's land, to which land he made no claim to be entitled. Mrs. Burke did not reply to this demand for delivery up of possession. Two years after the demand, on July 7, 1928, the executor filed the writ in this action endorsed with a claim for £50 damages "for conversion of a chattel house situate on a lot of land at Mt. Sinai . . . . which chattel house is a part of the estate of Thomas Bernard, deceased, which defendant has wrongfully converted to his own use." On this claim in the Court below the learned trial Judge gave judgment for the plaintiff-executor for £40 damages and costs; and from that judgment this appeal has been brought.

3. How is the house constructed? From the evidence of two carpenters who built the house in 1906, and the evidence of the plaintiff and of a Land Surveyor, it appears that it was built as a two-storey house, with the upper storey of wood resting on masonry pillars and wooden pillars; and forming part of it was a gallery. The sleepers of the ground floor rested on masonry ledges on the ground. The sleepers of the upper floor rested on masonry lodges on the top of four square masonry pillars, one at each corner, and on the top of masonry steps in the middle, outside. There were also five wooden pillars let into the ground and nailed to and supporting the sleepers and runners of the upper floor. On the ground floor, the spaces between the masonry pillars were occupied by boards, windows and doors. The sides of the buildings were shingled on the exterior. The windows were glass windows with properly hung sashes. The roof was covered with wallaba shingles-Blackman, one of the carpenters who constructed the building, in giving evidence for the plaintiff at the trial in April, 1929, said: "I passed there on Monday morning and 1 saw nothing different from what it was before. Up to last year when I went downstairs there was nothing different from what it was when it was built," and "I was not in Grenada when Burke bought. . . .When I returned to Grenada Mrs. Burke was in the house. Bernard was already dead when I returned. When I returned I saw galvanise had been put on the gallery, and windows in the gallery had been made into sash windows." So that Bernard may have substituted in the gallery galvanized iron roofing for other roofing and sash windows for other windows, when Blackman was out of Grenada and before Burke bought the land. There is no direct evidence on the point. It is clear that Bernard erected on his own land a dwelling-house that was not of a low grade and the building of it in 1906 must have cost a substantial sum, for Sween, the carpenter, in describing in his evidence the condition of the house in 1924 said "I saw the place was dilapidated. I valued the woodwork at £60. I valued it at £60 as if the woodwork had to be removed. If the woodwork had to remain there I valued it at £104 or £105," The Land Surveyor said in his evidence that he saw nothing to prevent the wooden upper storey from being lifted

from the masonry pillars and that it would be possible to detach the wooden pillars from the house by taking out the nails or by "cutting the building from the posts." We are without assistance from any comment by the trial Judge on the construction of the house or on the possibility of removing the house or any part of it, but seeing that the Surveyor was appointed by the Court at the trial "to examine the structure and report on the nature and details of its construction," we infer from his evidence that the upper storey of wood can be lifted from the masonry and wooden pillars without much difficulty and without material damage to itself or to the rest of the house.

4. In his written reasons for his decision the learned trial Judge states only two findings. In the first he says: "I do not believe that Thomas Bernard agreed to leave the house as alleged by the defendant." If we had been the trial Judges we might have inclined to acceptance of that alleged agreement as correct, but as the solution of that question of fact was not essential for the decision of the issue in the Court below and is not essential for the decision of this appeal, we say no more. This is the second finding, "In my opinion the house in question is a chattel and did not become the property of the defendant when he purchased the land." He does not give the grounds for that opinion, nor does he say anything that can help us to ascertain if he included the masonry of the ground floor storey in "the house" that he declared to be a chattel. The plaintiff in his letter to Mrs. Burke demanded that she should quit and deliver up possession to him of a dwelling-house: he did not claim the right to take away a part of the house only; and in his evidence at the trial he said "I am claiming walls and all." The claim in the writ is for damages "for conversion of a chattel house, part of the estate of Thomas Bernard," not for conversion of a chattel part of a house. The learned trial Judge's broad opinion that 'the house' is a chattel leaves it to be inferred that in his opinion the plaintiff was justified in demanding that the defendant do quit and deliver to him possession of the dwelling-house and of the part of the defendant's land in which the house is built and that the failure to yield to the demand for such possession of a fixture and a chattel combined, without specific mention of the chattel is sufficient evidence of a tortious conversion to sustain the action of trover, and that the house, with "walls and all," is a "part of the estate of Thomas Bernard." He narrates, but he does not discuss, the evidence as to the component parts of the complete house. It may be that there was not a sufficiently specific demand for a chattel to be evidence of a conversion to support trover. But out of respect for the learned trial Judge, and for the purpose of determining the present litigation, we assume that he meant and dealt with the wooden upper storey only as being "the house" which he declared to be a chattel, for it appears that at the trial (as in argument before us) the plaintiff's case was confined to that upper structure of wood as being a chattel, while the ground-floor storey with masonry was regarded as a permanent fixture.

5. The house was not mentioned in the valuation, by way of exclusion or at all, nor was it mentioned in the Registrar's adver-

tisement of the sale, although the debtor, Thomas Bernard, had stated that it existed when he gave evidence at the hearing of the summons for an order for the sale of the land. That may be taken, not unreasonably, to afford an inference that the Judge when he made the order for sale had reached the conclusion that the house was not a chattel but was a fixture so attached to the soil that it went with the land. Such an inference has greater force when regard is had to section 323 (1) of Chapter 172 (at page 1,586 of volume 2), which provides that there is no jurisdiction to order a debtor's interest in land to be sold unless the Judge is satisfied by affidavit or oral evidence on oath that the debtor has no personal property in the colony against which the judgment can be enforced. In Thomas Bernard's evidence on oath, on the summons for sale, he mentioned the house at Mt. Sinai but not any other property belonging to him except the land at Mt. Sinai and three other pieces of land. After hearing that evidence the Judge ordered the sale of the four pieces of land. It should be presumed that he did his duty in accordance with the law and had satisfied himself that the debtor had no personal property that could be taken in execution of the judgment. There is a presumption, therefore, that the Judge had decided that the house was not a chattel when the order for sale of land was made, and a presumption that the house was—sold with the land. A copy of the order for sale was not sent up with the appeal papers to this court; but we have now seen the order and we find that it says, *inter alia:* "It has been made to appear to the satisfaction of the Court by the admission of the defendant that there is no property of the said defendant within the Colony other than his lands against which the said judgment can be enforced." We shall not further discuss this point. This appeal will be decided on more fundamental grounds.

6. The general rule of law expressed in the maxim "Quicquid plantatur solo, solo cedit" is that whatever is affixed to the freehold of land, even slightly, is a fixture which becomes part of the freehold or inheritance and is the property of the owner of the soil. Under this rule if the tenant or the occupier of a house or land annexed anything to the freehold, neither he nor his representatives could afterwards sever it and take it away. This old rule has long been modified in favour of a tenant, on the ground of public benefit, so as to enable him to disannex and remove during his term any chattels which he has affixed to the house or land of another person, of which he is tenant, for the purpose of trade or ornament, provided that they can be removed without material damage to the freehold. The principle of this relaxation of the rule applies also to the case of a tenant for life and a remainderman and allows the life-tenant or his personal representatives to remove a chattel affixed by the tenant to improve the estate for his own enjoyment. This relaxation of the ancient rule in certain circumstances is not an alteration in the rule which determines what is or what is not a fixture, but it is a relaxation of the rule as to the right to remove those things which are fixtures. A fixture is a fixture still notwithstanding any relaxation of the rule (see per Joyce, J., *in re Chesterfield's Settled Estates* (1911) 1 Ch. 237, 242.

7. Before us, Mr. Bruyning, counsel for the plaintiff-respondent, stressed the slight attachment of the wooden upper storey to the soil, and the facility with which it can be removed, as grounds for affirming the decision that it was the chattel property of Thomas Bernard before the sale of the land to Burke and it is now the chattel property of Bernard's estate. Counsel also referred to a custom of the colony which, he said, supports the judgment appealed from, but as he did not state what the custom is and as he did not formulate any definite or intelligible proposition, the point was not discussed.

8. The question whether the house in the case now before us is a fixture or a chattel—even if regarded as relating only to the wooden upper storey as a separate entity—is not solved on grounds of slight and temporary attachment and easy removal as in the decision in *Hellawell* v. *Eastwood* (1851) 6 Ex 295, which declared certain fixed machines to be chattels, for that decision has not been accepted as conclusive and binding in other cases, though the principles of law stated in it have not been disapproved. In that case the plaintiff held premises as tenant of the defendants and distress for rent had been put in by the defendants under which a seizure was made of cotton-spinning machines called "mules" fixed by screws to the wooden floor. Parke, B., delivering the judgment of the Court held that these machines were not fixtures but chattels and therefore distrainable for rent. The rule is that fixtures are not distrainable but that chattels are. This case has been cited or discussed in many cases but not followed. In the House of Lords case of *Reynolds* v. *Ashby* (1904) A.C. 466 Lord Lindley (at page 473) said: "It has been much commented on in later cases and is of questionable authority." *Crossley* v. *Lee* (1908) 1 K.B. 86, Walton, J., said that the effect of the decision of the Court of Appeal in *Hobson* v. *Gorringe* (1897) 1 Ch. 182, "Is that it must now be taken that the law was not correctly applied in *Hellawell* v. *Eastwood*"—applied, that is, to the particular facts in that case. Slight attachment by screws or nails, similar to the attachment in Hellawell's case, and in the case now before us, did not prevent fixed chattels in later cases from being held to have become fixtures passing with the land. In *Wilde v. Waters* (1855) 24 L.J. C.P. 193, it was held that a crane nailed at top and bottom to the ceiling and floor to keep it in its place, but not let into the wall, and a bench nailed to the wall, were fixtures and not goods and chattels for which trover would lie after the expiration of the tenant's term. In *Hobson* v. *Gorringe* it was held by Lord Justice A. L. Smith, delivering the judgment of the Court, that an engine affixed to the freehold by bolts and screws, to prevent it rocking, was sufficiently annexed to the land to become a fixture and consequently, that it passed to the mortgagee as part of the freehold; and the Lord Justice referred to an engine screwed down to planks upon the ground being held to be a fixture in *Climie* v. *Wood* (1868) L.R. 3 Ex. 257: and to *Wiltshear* v. *Cotterel* (1853) 1 E. & B. 674 where it was held that a threshing machine was a fixture passing to the purchaser of the land though it was *attached only by bolts and screws to wooden posts let into the ground*: and to *Walmsley* v. *Milne* (1859) 29 L.J. C.P.

27, where an engine and other chattels screwed to the building to which they were attached were held to be fixtures that passed to the mortgagee and not chattels passing to the assignee of the mortgagor: and to *Longbottom* v. *Berry* (1869) L.R. 5 Q.B. 123, where machinery annexed to the floor and ceiling of a building by means of screws were held to be fixtures passing to the mortgagees, and that it made no difference that the object of the annexation was merely to steady the machines when in use and that they could be removed without any injury to them or to the freehold, or that the machines were in the nature of trade fixtures, which would, as between landlord and tenant, belong to the tenant; and the Lord Justice also said: "In *Holland* v. *Hodgson* (1872) L.R. 7 C.P. 328, the Exchequer Chamber affirmed *Mather* v. *Fraser* and *Longbottom* v. *Berry*, and held that looms attached by means of nails driven through holes in the feet of the looms into the floors, which attachment was necessary to keep the looms steady when at work, and which nails could be drawn easily and without any serious damage to the flooring, formed part of the realty." In our view the wooden upper storey of the house in the case now before us is not a chattel, but is a fixture attached by nails.

9. The plaintiff's claim to the house was presented to us as relating only to the wooden upper storey of the house, which, it was urged, was removable by the executor notwithstanding that it was attached to the soil. To justify this claim it was sought to apply the exceptional rule which gives a tenant the right to remove his fixtures in certain circumstances. But it has long been settled by many decisions that this exception has no application to a case where an owner has made a fixture by affixing his chattel to his own land and where the land, with the fixture remaining on it, comes to such a person as a vendee, mortgagee, devisee or heir. In the House of Lords case of *Bain* v. *Brand* (1876) 1 App. Cas. 762, the Lord Chancellor (Lord Cairns) said: "What extent of removal the executor of one who is not a tenant, but is a complete owner of the inheritance may have as against the heir, whether in point of fact he has any right of removal at all, or any right to take more than that which properly considered was never fixed to the inheritance in a definite way, I need not stop to consider because the case of *Fisher* v. *Dixon* has clearly decided by the authority of your Lordships that fixtures of the kind now before your Lordships (machinery) cannot be removed by the executor of one who is complete owner of the inheritance." In *Longbottom* v. *Berry* (1869) L.R. 5 Q.B. 123, Hannen, J., in delivering the judgment of the Court, held that machines affixed by means of screws, by the owner in fee in possession of land and premises, had passed as fixtures to his mortgagees and not as chattels to his assignees under a bill of sale; and he said that "the entire inapplicability of the peculiar law of fixtures between landlord and tenant to such a case was long since very clearly pointed out by Lord Cottenham in the well known case of *Fisher* v. *Dixon* (1845) 12 Cl. & F. 312 H.L." At an auction sale in pursuance of an order of the Court the defendant-appellant bought the land with the dwelling-house of two-storeys intact upon it. The land was advertised for sale with particulars that made no mention of the house, nor was it mentioned in the Court's order for

the sale. The lower masonry storey of the house is built into the land and is clearly a fixture: the wooden upper storey is an essential and integral part of the house and by its attachment to the wooden pillars in the ground it is also a fixture. A conveyance of freehold property, whether absolutely or by way of mortgage, and whether taking effect at law or in equity only (Ex. p. Barclay (1856) 5 De G. M. & G. 103; *Meux* v. *Jacobs* (1875) L.R. 7 H.L. 481), will comprise fixtures, unless an intention to withhold the fixtures is expressly declared or can be gathered from the context. *Hare* v. *Horton* (1834) 5 B. & Ad. 715). No such intention can be gathered from the omission of any mention of the house from the order for sale and the Registrar's advertisement of the sale. In *Colegrave* v. *Dias Santos* (1823) 2 B. & C. 76, where fixtures in a freehold house were held to pass with the. house on a sale of the house action, Bayley, J., said: "It is assumed that the fixtures were not intended to pass by the conveyance of the house. But there is nothing to prove that; and, on the contrary, I think that as nothing was said about them at the time of the sale, the plaintiff has no right to make this claim." In *Hitchman* v. *Walton* (1838) 4 M & W 409 Ex. Parke, B., said: "There is no doubt that by a conveyance, whether to a purchaser or to a mortgagee, fixtures annexed to the freehold will pass, unless there be some words in the deed to exclude them. *Colegrave* v. *Dias Santos* is an authority to that effect in the case of a purchaser, and *Longstaff* v. *Meagoe* (1835) 2 A & E 167 in the case of a mortgagee."

10. In *Pole-Carew* v. *Western Counties, &c., Manure* Co. (1920) 2 Ch. 97 C.A., the defendant company carried on a business as manufacturers on premises held by them as lessees. They erected at their own expense certain fixtures including plant consisting of "chambers" for making sulphuric acid. It was held (affirming Sargant, J.) that, the plant must be regarded as integral portions of one complete building permanently annexed to the freehold and not as chattels or tenant's fixtures. The chambers were leaden vessels supported by and enclosed in a substantial wooden framework, the lowest part of which consisted of a series of beams resting mainly on but not fixed to stone walls and pillars, except in the case of one chamber which rested entirely on unfixed iron columns. Lord Sterndale, M.R., said: "The outside walls had doors and windows and the space inside was used as a storehouse. The beams (of the chambers) rested on these walls at the ends, and were supported by brick piers and also by iron columns which stood on prepared foundations, but were not in any way fastened to the foundations. Where the beams were supported by columns they were fastened by either nails or screws to caps on the top of the columns. The joists were not mortised into the beams, but were cut so as to fit over them and remain firmly in the position in which they were placed. On the joists a floor was laid which made a roof for the space underneath, and above that on sill-pieces fastened to the floor there was a wooden superstructure. . . . It was contended that the superstructure of the chambers, that is, the beams and everything above them, were chattels not attached to the substructure, and could be removed as chattels by taking the beams from the walls, piers and columns, bringing

with them the detachable caps of the columns. The first point, therefore, for decision is whether these chambers were chattels . . . . If these chambers had been removed the result would have been to unroof the sub-structure which was used as a store-house. . . . The chambers seem to me to bear no analogy to self-contained structures such as small windmills: *Rex* v. *Otley* (1830) 1 B & Ad. 161; *Rex* v. *Londonthorpe* (1795) 6 T. R. 377; barns: *Elmes* v. *Maw* (1802:) 3 East, 38; or grannaries; *Wiltshire* v. *Cottrell* (1853) 1 E. & B. 674; which can be lifted up and taken away without disturbing in any way the supports on which they rest. I wish to adopt the language of Sargant, J., on this point. "If you look at the size and permanence and the general character of the structure and the absence of any definite line of demarcation or division, the absence of any unity in the upper structure, as distinguished from the lower structure, I think one is driven to the conclusion that the whole structure forms one single unit and is of the nature of a building that it is not a chattel, that it is a fixture, and that the lower portion of this unit being embedded in the land by ordinary foundations, it cannot be considered a tenant's fixture, and must be considered from the beginning as being something permanently annexed to the freehold of the nature of a building." Warrington, L.J., said: "The defendants seek to separate the several structures into their component parts. They admit that the walls and the brick piers are attached to the inheritance. . . . But they contend that so much of each structure as merely rests by its own weight on that which supports it, whether the latter be the soil of itself or something attached to the soil, constitutes a chattel. In my opinion the several structures cannot be thus separated: I think the entire series of structures must, for the purposes of this case, be regarded as one composite building, and if that composite building or any one of the minor buildings composing it (treating the building in each case as a single whole) is attached to the inheritance then the whole of such building is so attached. . . The wooden barn on staddles in *Wansbrough* v. *Maton* (1836) 4 Ad. & E. 884, the granary in *Rex* v. *Londonthorpe* and in *Rex* v. *Otley* were all separate and independent buildings, and not part of a whole which was itself a building. A closer analogy is that of the horizontal slab of marble supported on stone supports fixed in the ground which though itself unfixed was treated as having lost its character, of a chattel part of a garden seat not attached to the soil by the supports: *D'Eynecourt* v. *Gregory* (1866) L.R. 3 Eq. 382. . . . The defendants therefore, in my opinion fail in their effort to establish that the structure in question or some parts of them are chattels. But they say if they are not chattels they are at all events tenants' fixtures which they had a right to remove. But I think they constitute a composite building not merely resting by its own weight on the soil or by a foundation but with its walls built into and thus forming part of the soil like the walls of any ordinary. I can find no authority for holding that such a building can ever be regarded as a tenants' fixture, that is, something which is removable by the tenant. . . I think we ought to hold that the several structures in question are not and never were trade fixtures removable by the tenants. This English case shows that there is no foundation for any claim

that, after Burke had taken possession as purchaser, there was any right in Thomas Bernard or the executor to remove, as a chattel, the upper storey or any other essential part of the house in question before us.

11. It is clear that the whole house in question was a fixture attached to the land sold to the defendant-appellant. As such a fixture it passed to the purchaser on the sale; and thereafter there was no right in Thomas Bernard or the executor to remove it or any part of it.

12. We desire to thank Mr. Henry for assisting us with his clear and brief exposition of the appellant's case.

13. The appeal must be allowed with costs. The judgment in the Court below must be set aside and judgment there entered for the defendant with costs.

PRACTICE NOTE.

West Indian Court of Appeal Rules, r. 12—Rule 6 (2)—Pronouncing judgment not equivalent to entering judgment—Necessity for drawing up and entering judgment—Note of oral decision not equivalent to judgment appealed from.

Section 255 of Cap. 172 (West Indian Court of Appeal Act) provides that the judge at or after the trial may direct judgment to be "entered" for any party.

No. 6 (2) of the West Indian Court of Appeal rules provides *inter alia* that unless the time has been enlarged, no appeal shall be brought after the expiration of six weeks from the time at which the judgment is entered.

No. 11 of the said rules provides that the party appealing from a judgment or order shall produce to the Registrar the judgment or order or an office copy thereof.

Held, That it was clear from the said enactments that it was imperative before an appeal could be entertained that there should be a formal order duly entered or recorded and that pronouncing judgment was not equivalent to entering judgment.

The President of the West Indian Court of Appeal at a sitting of the Court in Grenada on the 26th March, 1930, made observations to the following effect for the guidance of practitioners:—

With the papers in each of the appeals before us there is a copy of a brief note in the Judge's notebook of his oral decision at the close of the trial. This note cannot be correctly regarded as the judgment appealed from. A judgment should have been drawn up and entered.

It is usual for a copy of the judgment as formerly drawn up and entered to be sent to a Court of Appeal; and this is required to be done by No. 12 of the Rules of this Court; and see Rule 6 (2). Section 255 of Cap. 172 provides that the Judge at or after the trial may direct judgment to be "entered" for any party. "Pronouncing judgment is not entering judgment; something has to be done which will be a record." (*Holtby* v. *Hodgson* (1889) 24 C.B.D. 103 C.A., per Lord Esher at p. 107).

In section 261 of Cap. 172 it is said that the Court may order a

formal judgment to be drawn up on the application of either party. Section 270 of Cap. 172 says that every final judgment or order shall be recorded in a book to be kept by the Registrar for the purpose and to be called the Decree Book. There is nothing to show that the judgment in any of the cases now before this Court was drawn up or was duly entered or recorded.

No. 6 (2) of the Rules of this Court follows the English Order 58, rule 15, in providing *inter alia* that, unless the time has been enlarged, no appeal shall be brought after the expiration of six weeks from the time at which the judgment is entered. Therefore, regard is to be had to the entry of judgment. This has not been done in any of the present cases, so that there is no operative judgment or order before us. In *Thames River Conservators* v. *Kent* (1915) 59 Sol. Jo. 612 C.A., it was held that the time for appealing runs from the date when the judgment or order becomes operative by being entered and sealed.

No. 11 of the Rules of this Court, following Rule 8 and the English Order 58, provides that the party appealing from a judgment or order shall produce to the Registrar the judgment or order, or an office copy, and shall leave with him a copy of the notice of appeal to be filed, and the Registrar shall thereupon set down the appeal by entering it in the proper list of appeals. This Rule has been ignored by the appellants in the cases before us, though section 261 of Cap. 172 provides that on the application of either party a formal judgment may be ordered to be drawn up. Even where judgments or orders are not usually drawn up, they must be drawn up if required for the purposes of an appeal in order to enable the appellant to comply with this rule. No appeal may be set down by the Registrar unless at the time the notice of appeal is brought to him there is also brought with it the judgment or order appealed from or an office copy: *Lawson* v. *Financial News* (1918) 87 L.J. Ch. 64 C.A.; 1 Ch. 1. In this Financial News case Swinfen-Eady, L.J., said: "The Rule provides that 'the party appealing . . . shall produce . . .'; and such officer shall 'thereupon' set down the appeal. The order or an office copy of it must therefore be produced on setting down the appeal and the officer is not entitled to set down any appeal unless that is done and the rule has been complied with," And Warrington, L.J., said: "It is an essential part of setting down an appeal to produce the order or an office copy of it.

At page 1,235 of the Annual Practice for 1930, after reference to *Lawson* v. *Financial News* there is the following note: "Consequently, where the practice prevails in ordinary cases of not drawing up orders where applications have been refused and no orders made, an order showing the refusal must nevertheless be drawn up where required for the purpose of appeal; so decided by the Court of Appeal in the unreported cases of *Koenig* v. *Temple Press*, July 16, 1903, and *Shirely* v. *Kino*, July 28, 1903, overruling on this point *Smith* v. *Grindley* (1876) 3 CD. 80."

Similar observations were made by the President on the 10th March, 1930, in St. Vincent, when reference was made to the following statutory enactments of that colony: sections 237, 243 and 249 of the Code of Civil Procedure and section 31 of the Supreme Court (Summary Jurisdiction) Ordinance.

PAYNE AND HEBRON & DRAYTON.

ON APPEAL FROM THE COURT OF CHANCERY OF BARBADOS.

CHARLES PAYNE, Appellant,

AND

EDITH HEBRON, ALEXANDER C. DRAYTON AND VIOLET L. DRAYTON, Respondents.

FEBRUARY 13. 1931.

BEFORE C. F. BELCHER, KT., C.J., PRESIDENT, J. S. RAE, C.J., AND SIR ANTHONY DEFREITAS, KT., C.J.

Barbados Statute 13 of 1891 section 32—Judgment Debtor—Meaning thereof—Definition—Section 2—Any person entitled to pay off and have satisfaction entered in respect of the judgment debt or any part thereof—Whether such a person includes a mere life tenant—Significance of certain words in section as indicative of intention of Legislature—Canons of Statutory interpretation—Words not to be treated as mere surplusage.

Section 32 of the Barbados Statute 13 of 1891, is as follows:—"Where a mortgagor or judgment debtor is entitled to redeem the mortgage or pay off and have satisfaction entered in respect of the judgment debt, he shall by virtue of this Act, have power to require the mortgagee or judgment creditor, instead of reconveying or entering satisfaction, and on the terms on which he would be bound to reconvey or enter satisfaction, to assign the mortgage debt and convey the mortgaged property or to assign the judgment debt and the benefit of the judgment and the writ of execution (if any) thereon and of all other securities (if any) to any third person, as such mortgagor or judgment debtor directs, and the mortgagee or judgment creditor shall by virtue of this Act be bound (as the case may be) to assign and to convey as aforesaid or to assign as aforesaid accordingly."

And section 2 thereof defines "judgment debtor" as follows:—"Judgment debtor includes any person from time to time deriving title under the original debtor or entitled to pay off and have satisfaction entered in respect of the judgment debt or any part thereof."

The appellant, plaintiff in the Court below, sought from that Court a declaration that he was entitled to have two judgment debts assigned to his nominee. He was the life tenant under the will of his late wife and the judgments were obtained after her death against her executor.

The learned trial judge held that the appellant did not come within the terms of the definition of "judgment debtor" as being neither the original judgment debtor nor deriving title under the original judgment debtor inasmuch as he took from the testatrix who was not the judgment debtor and not from the executor who was, but the learned trial judge did not consider whether the appellant fell within the remaining class of persons who are deemed judgment debtors because they are entitled to pay off the judgment debt. In fact, that point was not argued before him. And the learned trial judge further held that the appellant was not entitled as a mortgagor.

Held, (1.) That the learned trial judge's decision that the appellant was not a mortgagor was correct, so also was his decision that the appellant was not a judgment debtor in the restricted sense of being either the original judgment debtor or a person deriving title under the original judgment debtor, but

(2.) The appellant as a life tenant by himself and without the necessity of acting jointly with the remainderman, came within that portion of the definition of judgment debtor which included any person entitled to pay off and have satisfaction entered in respect of the judgment or any part thereof inasmuch as

(*a.*) the use of the word "entitled" in section 2 indicated that the person envisaged as a potential discharger of the judgment would in contradistinction to a mere stranger obtain some benefit for himself by paying off the debt.

(*b*.) the words "or any part thereof" indicated that the right to pay off need not be co-extensive with the whole interest in what will be taken in execution, and

(*c*.) the words "and on the terras which he would be bound to enter satisfaction" were entirely appropriate where others than the immediate payor are interested in the payment but had no significance at all if the right to pay off the judgment were deemed to be confined to the sole owner or the aggregate owners acting together of the land liable to be sold.

The judgment of the Court was delivered by the President on the 13th February, 1931, as follows:

The appellant, plaintiff in the Court below, sought from that Court a declaration that he was entitled to have two judgment debts assigned to his nominee. He is the life tenant under the will of his late wife, and the judgments were obtained after her death against her executor. The plaintiff based his claim upon the Barbados Statute No. 13 of 1891, section 32, which is as follows: "Where a mortgagor or "judgment debtor is entitled to redeem the mortgage, or pay off and have satisfac- "tion entered in respect of the judgment debt, he shall by virtue of this Act, have "power to require the mortgagee or judgment creditor instead of reconveying or "entering satisfaction, and on the terms on which he would be bound to reconvey "or enter satisfaction, to assign the mortgage debt and convey the mortgaged prop- "erty or to assign the judgment debt and the benefit of the judgment and the writ of "execution (if any) thereon and of all other securities (if any) to any third person, "as such mortgagor or judgment debtor directs, and the mortgagee or judgment "creditor shall by virtue of this Act be bound (as the case may be) to assign and "convey as aforesaid or to assign as aforesaid accordingly." He argued before the Court below that he was either a mortgagor or a judgment debtor within the meaning of that section. There is no definition of "mortgagor" to be found in law 13 of 1891 except by implication in the definition of "mortgage" in section 2, whereby "mortgage" includes "any charge on land for securing money;" but there is, in that section, a definition of judgment debtor as follows: "Judgment debtor includes any "person from time to time deriving title under the original debtor or entitled to pay "off and have satisfaction entered in respect of the judgment debt or any part "thereof." The learned judge held that appellant did not fall within the terms of that definition, as being neither the original judgment debtor (which clearly in the strict sense of those words he could not be, for the judgment was obtained against the executor) nor deriving title under the original judgment debtor inasmuch as he took from the testatrix who was not the judgment debtor and not from the executor who was. The learned judge did not enter into a consideration of whether or not the plaintiff fell within the remaining class of persons who are deemed judgment debtors because they are entitled to pay off the judgment debt; and indeed it was not argued before him. He then dealt with the argument that plaintiff was entitled to what he sought as a mortgagor, and decided against him; on the ground, as we understand it, that whoever concerned in this case might be said to be a mortgagor it was not the testatrix, seeing that the judgments were not obtained against her, and that the plaintiff claiming through her alone, could be in no better position in respect of them than she

was. The learned judge then referred to the case of *Fletcher* v. *Bird* (Fisher on Mortgages, 6th Edit., page 1,025) as one which might at first sight appear to support the premise which he regarded as a necessary base for the plaintiff's argument, namely, that there could exist a mortgage not originating in any contract between the person through whom title is derived by the person seeking to redeem and the mortgagee; but he went on to show, and we agree with him, that all which that case establishes is that a person who has acquired title by possession adverse to the mortgagor can redeem the mortgage. He then made certain observations on the case of *Tarn* v. *Turner* (39 Ch. D. 456 with which we fully agree, and he concluded his judgment by saying that the plaintiff's wife was not a judgment debtor and therefore not as such, a mortgagor; and that, even assuming she was a mortgagor, she had no contract giving her that equity of redemption on which alone a right to redeem can rest, and therefore that plaintiff, taking as he did solely through his testatrix and consequently obtaining no more interest than she had, must fail; and he dismissed the bill with costs.

Plaintiff's notice of appeal claims reversal of the judgment on the ground that plaintiff was a mortgagor, but before us the matter was argued, as it was below, on both sides, on the question of his being, alternatively, a "judgment debtor." No objection was raised by the respondent to that point being argued on appeal; and there is no such question of his being taken by surprise as ought to debar us from considering it.

We will take the latter contention that plaintiff is a judgment debtor, first, as being logically the primary basis of appellant's case. Appellant, to succeed in this aspect, must shew that he falls under one or other of the classes of persons who by the definition section (No. 2) of law 13 of 1891, may be a judgment debtor. That he is not the judgment debtor in the narrow sense of the defendant to the original writ against whom judgment is entered, and that he does not derive title under such an one, is manifest, so that if he is to bring himself within the definition at all it must be as one falling within the remaining category of persons referred to, namely, those who are "entitled to pay off and have satisfaction entered in respect of the judgment debt or any part thereof." Those words are not lightly to be deemed mere surplusage or repetition; the legislature must be taken by this Court to have had in view some other class than the nominal defendant who alone can be said to be under any direct obligation to pay the debt merged in the judgment, and his successors in interest. The word "entitled" indicates that the person envisaged as a potential discharger of the judgment is obtaining some benefit for himself in paying off a consideration which at once excludes the mere stranger whose money the sheriff (and the judgment creditor too if nothing further were in question) would no doubt be quite prepared to take. It must then be someone whom payment will relieve from a burden, and of no one can that be said more exactly than of the beneficial owner, be he legal owner or not, of the land which will be taken and sold if the judgment debt is not paid. Having reached the position that the beneficial owner of the land which is liable to satisfy the judgment is entitled to pay it off, the next question for us is whether where the

land is settled the life tenant has the right in himself or whether we must regard the whole of the estates, for life and in remainder, as one entity in respect of which all the owners must join before there can be any payment off. We think the legislature ought to be taken as intending the life tenant to have the right to pay off; we say nothing of the remainderman because his position does not arise in this case. In favour of this view is the occurrence in section 2 of the words "or any part thereof" indicating that the right to pay off need not be coextensive with the whole interest in what will be taken in execution. Next, such an interpretation places the life tenant of lands subject to execution under judgment in the same position, with regard to payment off, as is the life tenant of mortgaged lands with regard to redemption, whose right was established as early as 1754 (*Aynsley* v. *Reed*) and has never been questioned since. That the legislature intended such a correspondence appears from the language of section 22 itself, which giving as it does parallel rights to mortgagor and judgment debtor an the basis of an assumption of certain anterior rights in each of them, proceeds to use language (to wit the words "and on the terms on which he would be bound to enter satisfaction") which is entirely appropriate where others than the immediate payor are interested in the payment but has no significance at all if the right to pay off the judgment is to be deemed to be confined to the sole owner, or the aggregate owners acting together, of the land liable to be sold. In such a case the satisfaction is necessarily absolute and subject to no terms. When, however, a mortgagee reconveys the legal estate to a life tenant it is not a reconveyance absolute, but on the terms that the life tenant shall hold the property subject to trusts corresponding to those of the original settlement; this was so explained by Chitty, J., in *Alderson* v. *Elgey* (26 Ch. D. p. 572), and it is to be supposed that the legislature, using as it did in section 32 exactly the same language as to both reconveyance and entry of satisfaction, subject only to modifications entailed by the differing natures of a mortgage and a judgment debt, intended the tenant for life of lands liable to be taken under the latter to stand upon no different footing from the tenant for life of mortgaged lands, in this particular matter of payment off or redemption, or to be more precise, it regarded him as possessed of the like anterior rights and proceeded to give him a similar extension of them to that which it was according to the mortgagor. And the final reason which leads us to this interpretation is that any other would work a most grievous hardship. If the life tenant may not as of right pay off at all, or only in conjunction with the remainderman, the creditor whose only legitimate interest is to get his debt paid and who incurs no liability whatsoever to the judgment debtor by assigning the judgment debt for value, is given an entirely unreasonable and unwarranted faculty of interfering with what in no way concerns him; he may demand a premium of the life tenant, or there may, as was said by Page Wood, V.C. in *Wicks* v. *Scrivens* (70 E. R. 726) of the facts in that case, exist too close a connection between creditor and trustee (here executor) so that the life tenant is through the medium of the creditor liable to be injured for the advantage of someone else, presumably the remainderman, whom the trustee wishes to benefit.

We hold therefore that the appellant in this case is a judgment debtor, and as such entitled on paying the creditor to avail himself of section 32 and to require the creditor to assign to his nominee.

On the alternative ground, of mortgage, we had placed before us by Mr. Reece a very able argument based on section 233 of No. 6 of 1911 and directed to show that the appellant could not be regarded as a mortgagor within the meaning of section 32 of Act No. 13 of 1891. Having regard to our decision on the other ground, which disposes of the appeal, it is unnecessary for us to express any opinion on the validity of Mr. Reece's submission in that respect

Our decision is as follows: Appeal allowed, judgment appealed from reversed. Declare that appellant is entitled on payment of the amounts due on the judgments to have the judgment debts referred to in the Bill of Complaint assigned to such third person as he may direct. Order that on payment on or before the 31st March, 1931, by appellant to judgment creditors of the amounts due them respectively with interest to date of payment, the judgment creditors respectively do at the costs and charges of the appellant assign to such third person as appellant may direct the judgment debts and the benefit of the judgments and writs of execution; plaintiff in such case to keep down the interest on the judgments during the continuance of his own life interest. Order that on failure by the appellant to pay the amounts within such time as aforesaid he shall thereafter stand debarred from all right to pay off. Appellant to have his costs of the action and of this appeal.

MARY DICK, *et al v.* HENRY ORMONDE DURHAM.

[No. 152 OF 1929.]

1930. JUNE 14. BEFORE GILCHRIST, J.

District Lands Partition Ordinance (*16 of 1926*), *Section 17—Decision of Settlement Officer—Publication of awards—No appeal to Local Government Board—Action to set aside award brought eleven months after publication of list of award—Finality of award.*

The claimants to a parcel of land subject to the District Lands Partition Ordinance, 1926, did not appeal from the decision or award of the Settlement Officer but filed an action claiming relief in respect thereof eleven months after the publication of the list of awards.

Section 17 of the District Lands Partition Ordinance, 1926, gives a claimant who is dissatisfied with any decision of a Settlement Officer a right of appeal to the Local Government Board and also provides for application to the Supreme Court in any manner and for any remedy now provided by law subject to a proviso that "if such application is not made within two mouths after the decision of the Officer or in case of appeal to the Board within two months after the determination of such appeal, the decision of the Officer or of the Board as the case may be shall be final."

Held, that the purpose and object of the said section was that there should be an early determination and finality in respect of the rights to land subject to the provisions of the said Ordinance, and that the claimants' action was therefore barred by lapse of time.

E. F. Fredericks, for the plaintiffs.

S. J. Van Sertima, for the defendant.

GILCHRIST, J.: I cannot agree with the submission of counsel for the plaintiffs that the plaintiffs were included in the expression "and others" in the appeal by Changur and Gopaul and others—Exhibit H.O.D. 6. The said document clearly establishes the contrary.

2. The evidence clearly establishes—

(*a*.) That pursuant to two petitions presented to the Governor-in-Council (exhibits H.O.D.2 and H.O.D.3) under the District Lands Partition and Re-allotment Ordinance, 1926, the Governor-in-Council by Order in Council dated the 27th May, 1927, and published in the *Gazette* of the 18th June, 1927, ordered that the lands specified in the said petition should be subject to the provisions of the said Ordinance and appointed the defendant Henry Ormonde Durham, Sworn Land Surveyor, as officer to partition and/or re-allot the said lands, the said lands being the undivided lands of the eastern half of Fyrish in the Fyrish Country District, Corentyne Coast, Berbice. Part thereof being the subject of this action.

(*b*.) That the defendant in pursuance of his said appointment complied with the provisions of the said Ordinance and made awards of the said undivided lands which were approved by the Local Government Board and published in the *Gazette* of 16th June. 1928.

(*c*.) That the plaintiffs did not appeal against any of the awards contained in the list of awards published in the *Gazette* of the 16th June, 1928.

(*d*.) That this action was instituted on the 14th May, 1929, nearly eleven months after the publication of the said list of awards.

3. In my opinion it is clear that the purpose and object of the Ordinance (16 of 1926) is that there should be an early determination and finality in respect of land subject to the provisions of the Ordinance.

4. Section 17 of the Ordinance gives to a claimant who is dissatisfied with any decision of the Officer appointed under the provisions of the said Ordinance in respect of lands subject to the provisions of the Ordinance a right of appeal to the Local Government Board. The section also provides that any such claimant may apply to the Supreme Court in any manner and for any remedy now provided by law. The section goes on to say: "but if such applica-"tion is not made within two months after the decision of the Officer or in case "of appeal to the Board within two months after the determination of such ap-"peal, the decision of the Officer or of the Board as the case may be, shall be "final."

5. It is clear that section 17 imposes an obligation on a dissatisfied party to move within a specified time. This the plaintiff did not do.

6. The result is that the decision of the defendant became final before the institution of this action.

7. I uphold the point of law raised by paragraph 7 of the defence and give judgment for the defendant with costs. I certify for one counsel only.

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

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

ABDOOL ROHOMAN KHAN v. BOODHAN MARAJ, *et al.*

ABDOOL ROHOMAN KHAN *v.* BOODHAN MARAJ, *et al.*

[No. 380 OF 1929.]

1930. JULY 26. BEFORE SAVARY, J.

Trespass—Alleged owner out of possession for more than 12 years—Civil Law of British Guiana Ordinance, 1916, Section 4, Subsection 2—Deeds Registry Ordinance, 1919, Amendment Ordinance, 1925—Failure of person in possession to oppose either transport or mortgage—Whether rights lost by non-opposition where no actual notice of intended sale or mortgage.

This was an action brought by the plaintiff against the first-named defendant and others for trespass upon a certain parcel of land.

It was admitted at the hearing *inter alia,* (a) that the plaintiff and his predecessors in title had been in possession of the said parcel of land for a period exceeding 50 years; (b) that the plaintiff himself had been in possession thereof from the date of his purchase of same, to wit, the 19th April, 1916, and had exercised full rights of ownership thereon; and (c) that on the 19th and 21st day of September, 1929, the defendants broke and entered the said parcel of land. The first-named defendant claimed that the said parcel of land formed part of Plantation Wisselvalligheid transport whereof was passed to the said defendant on the 15th April, 1916, and the plaintiff admitted that he had not opposed the mortgage by the defendant of the said plantation but did not admit that the said mortgage included the parcel of land in dispute.

The following contentions were advanced on behalf of the first-named defendant:—

(1.) That despite the provisions of subsection 2 of section 4 of the Civil Law of British Guiana Ordinance, 1916, which are as follows:—

"No person shall make an entry or distress, or bring an action or suit to recover any immovable property but within twelve years next after the time at which the right to make, bring, or recover the same has accrued to him or to some person through whom he claims," the said defendant's right of entry on the land was not barred in September, 1929, because of the provisions of subsection 2 of section 3 of Ordinance 26 of 1925 which was substituted for section 20 of the Deeds Registry Ordinance, 1919, and which reads as follows:—"A transport, letters of decree, or declaration of title issued under the provisions of subsection (1) of section four of the Civil Law of British Guiana Ordinance, 1916, passed or issued before the first day of January, one thousand nine hundred and twenty and in force thereat, shall after the expiration of two years from the said date if still in force vest in the transferee or grantee thereof the full and absolute title to the immovable property or to the rights and interests therein described, subject to the provisions contained in sub-section (1) (a), (b), (c) and (d) of this section."

(2.) That even if sub-section (2) of section 4 of the Civil Law of British Guiana Ordinance, 1916, applied in the present case it would operate only from the 1st January, 1922, the date when the said defendant acquired a full and absolute title.

(3.) That the said provisions of the Civil Law of British Guiana Ordinance, 1916, did not apply to the defendant because his transport was passed before the said Ordinance.

(4.) That the advertising of transport or mortgage is equivalent to notice to a person in possession of land for the statutory period in the absence of actual notice.

(5.) That a person in possession of land for the statutory period loses his rights if he does not oppose an intended sale or mortgage of the said land of which he has not had actual notice.

Held, (1) That the provisions of sub-section (2) of section 4 of the Civil Law of British Guiana Ordinance, 1916, give a negative right to a person in possession of land for 12 years or more and prevent even the rightful owner from disturbing such possession after such a period of years has elapsed since the time when the right to make an entry first accrued to the rightful owner.

(2) That the Deeds Registry Ordinance, 1919, dealt with *title* to property by deed, while the provisions of the said section of the Civil Law of British

Guiana Ordinance dealt with *possessory* rights merely; and that the expression "full and absolute title" means a title free from defects of any nature, in other words, indefeasible, save in cases of fraud and has not the effect of overriding the limitation sections of the Civil Law of British Guiana Ordinance, 1916.

(3.) That the passing of the Deeds Registry Ordinance, 1919, did not affect the possessory rights of persons acquired under the provisions of the Civil Law of British Guiana Ordinance, 1916.

(4.) That generally speaking, limitation sections are retrospective in effect.

(5.) That the advertisement of an intended transport or mortgage is not equivalent to actual notice as regards a person in possession for the statutory period, and

(6.) That a person in possession of land for that period does not lose his rights if he does not oppose an intended sale on mortgage of which he has not had actual notice.

In re Petition by *Van Kinschoot*, 1892, and *Ferreira* v. *Ho-a-Hing*, 1896, L.R.B.G. 78 followed.

The facts are fully set out in the judgment.

E. G. Woolford, K.C. (*S. J. Van Sertima* with him) for the plaintiff.

J. A. Luckhoo, K.C. (*C. V. Wight* with him) for the defendants.

SAVARY, J.: This case raises some interesting and important points about the law of real or immovable property of the Colony. The plaintiff is the owner by transport passed on the 19th of April, 1916, of Plantation Waterloo situate on the Island of Leguan, in the county of Essequebo, and the defendant Lutchmy, who died since action brought and is represented herein by her executor Boodhan Maraj, was until her death, the owner by transport passed on the 15th of April, 1916, of Plantation Wisselvalligheid. The other defendants were her agents and servants.

The plaintiff's case is that Lutchmy, her servants and agents on the 19th and 21st days of September, 1929, respectively, wrongfully entered upon and committed acts of trespass on a parcel of land containing about one hundred and ten Rhynland acres contiguous to Plantation Waterloo and for a long period of years occupied by successive owners of Plantation Waterloo as part thereof and which parcel of land is the property in dispute. The plaintiff also alleges that Lutchmy, her servants or agents wrongfully induced his farmers on the said parcel of land to break their contracts with him. For these wrongs the plaintiff claims damages and an injunction.

The defence is that the parcel of land in dispute is the property of Lutchmy and the plaintiff has not acquired any prescriptive rights under the provisions of section 4 (2) of the Civil Law of British Guiana Ordinance, 1916, and secondly, loss of rights by non-opposition to Lutchmy's transport.

At the trial the following facts were admitted by the defendants:—

(1.) that plaintiff and his predecessors in title have been in sole continuous and undisturbed possession of the said parcel of land for a period exceeding fifty years;

(2.) that the plaintiff purchased from Guyadeen and others Plantation Waterloo on the 19th of April, 1916, and was on the said date given possession thereof and of the said parcel of land forming part of Plantation Waterloo;

(3.) that the plaintiff has been in undisturbed possession of the said parcel of land from the said 19th of April, 1916, and has rented part of the said parcel of land to rice farmers and has exercised full rights of ownership thereon;

(4.) that on the 19th day of September, 1929, Lutchmy, her servants and agents broke and entered the said parcel of land which is one of the acts of trespass complained of in this action;

(5.) that, on the 21st of September, 1929, Lutchmy, her servants and agents broke and entered the said parcel of land and committed further acts of trespass;

(6) that, some farmers of the plaintiff delivered their paddy to the rice mill of the said Lutchmy;

(7.) that Plantation Marionville had a sugar factory and that cane formerly grown on the said parcel of land was taken to the said factory to be ground;

(8.) that Hugh Sproston was one of the predecessors in title of the said Lutchmy in the ownership of Plantation Wisselvalligheid and Success *cum annexis.*

The plaintiff on his part admitted that Lutchmy had passed a mortgage of property as described in a transport from John Pedro Santos and another to Gobin Maraj, dated the 23rd of May, 1910, and another transport from Jaigobin, as one of the heirs of Gobin Maraj to the said Lutchmy, dated the 15th of April, 1916. Both transports, marked S.S.M.I. 10 and S.S.M.I. 12 respectively, dealt with Plantations Success and Wisselvalligheid. In effect the plaintiff admitted that these two plantations were mortgaged by the said Lutchmy, but not that the mortgage included the parcel of land in dispute. It was also agreed by the parties at the trial that

(*a*.) all plans, diagrams, charts, Acts of Deposit, transports or letters of decree relating to Plantations Waterloo, Wisselvalligheid and Success *cum annexis* be admitted in evidence on mere production, if authenticated, or if they purported to come from the proper custody; (*b*.) the identity of the various parties alleged to be the owners of the material plantations for the purposes of this case be admitted. Mr. Insanally, a Sworn Land Surveyor, gave evidence on behalf of the plaintiff and through him various documents and plans were put in evidence. The evidence of Mr. James Smith taken *de bene esse* on behalf of the plaintiff was admitted. No evidence was led for the defence.

It would appear that the parcel of land in dispute is described on a plan by Bowhill of Leguan Island, dated the 5th of December, 1913, marked S.S.M.I. 1 as "Part of Plantation Wisselvalligheid now attached to Plantation Waterloo," and on a plan by T. G. Wight, dated December, 1915, marked S.S.M.I. 7 as "Portion of Plantation Wisselvalligheid—claimed by the proprietors of Waterloo—and since become also known as Waterloo."

It is also instructive to point out that this latter plan was deposited in the Deeds Registry by virtue of an Act of Deposit on the 22nd of December, 1876, by Edward Stubbs as attorney of Hugh Sproston, and shows on the face of it, that it was a survey of Planta-

tion Wisselvalligheid, among others, made at the request of Hugh Sproston, one of the predecessors in title of Lutchmy.

It is contended for plaintiff that he is entitled to succeed on the issue of trespass on the ground that he and his predecessors in title have been in undisturbed possession of the parcel of land in dispute for a period of fifty years and over, and that, when Lutchmy and the defendants entered on the said parcel of land on the 19th and 21st days of September, 1929, respectively their right to do so had been barred by virtue of the provisions of sub-section 2 of section 4 of the Civil Law of British Guiana Ordinance, 1916, and was therefore wrongful. This Ordinance came into force on the 1st day of January, 1917, and the above sub-section which is substantially a reproduction of section 1 of the Real Property Limitation Act of 1874 (substituted for section 2 of the Act of 1833), fixes twelve years as the period within which an entry must be made after the right to do so has accrued.

From the admissions made by the defence it was assumed for purposes of this argument, and to my mind rightly, that, as a matter of fact in September, 1929, more than twelve years had elapsed since the plaintiff's right to make an entry had accrued. This position was not contested by counsel for the defendant in so far as it was a matter of fact, but he advanced legal arguments, with which I will deal later, in support of his contention that, as a matter of law, the twelve years began to run, if at all, only after the 1st of January, 1922.

The effect of section 2 of the Act of 1833 was considered in the cases of *Newlands* v. *Holmes* (1842) 11 A & E, 44, and 3 Q.B. 679, *Galley* v. *Doe d Taylerson* (1840) 9 L.J.Q.B. 288 and *Doe d. Baker* v. *Combes* (1850) 19 L.J.C.P. 306, and it seems to me correct to express it as follows: that unless an entry be made within the statutory period, from then, i.e., from the time when the statutory period has elapsed, the right is taken away.

In *Newlands* v. *Holmes* in 11 A. & E., Lord Denman, C.J,, says at p. 51:— "Now by the operation of that statute the right of entry of the defendant is wholly taken away; for, by the pleadings, the entry appears not to have taken place within twenty years of the right first accruing. . . He has, therefore, lost his title, and is a mere wrongdoer. This judgment was affirmed in the Exchequer Chamber where at p. 686 of the report in 3 Q.B., Tindal, C.J., delivering judgment says ". . . the plaintiff may possibly have had no title; but his possession at the time of the action commenced is admitted. It is therefore the case of a party (with or without title) in possession resisting a party whose entry is barred." And in *Culley* v. *Doe d. Taylerson* at p. 292, Lord Denman, C.J., in discussing this question states its effects as follows: . . . "and if one party has been in actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the ejectment is barred by this section." Therefore it would appear that unless I agree with the legal contentions advanced on behalf of the defendants, the entry of Lutchmy and the defendants in September, 1929, was wrongful. Now, what is the answer of the defence? The first submission is that Lutchmy's right was not in law barred in September,

1929, because of the provisions of section 3 of Ordinance 26 of 1925, which was substituted for section 20 of the Deeds Registry Ordinance, 1919, whereby a transferee of immovable property acquired a full and absolute title and that consequently a person in possession, even for thirty years, who did not oppose the passing of a transport of the same property, lost all his rights including that of possession, and the transferee had a right to dispossess or eject him.

In my view the question of non-opposition as a part of this argument does not really arise if I correctly understand this contention. Perhaps it may be put in this way, that a transferee who since 1920 or 1922, as the case may be, acquired a full and absolute title under the Deeds Registry Ordinance, 1919 and 1925, had rights paramount to those of a person in possession even for thirty years, and could eject or dispossess him.

The Deeds Registry Ordinance, 1919, deals with the registration of title deeds to lands, but section 20 (1) enacted that a transport passed after the commencement of the Ordinance, *i.e.*, after the 1st of January, 1920, shall vest in the transferee the full and absolute title to the immovable property. Subsection 3 of the same section provided that transports passed before the commencement of the Ordinance shall, after the expiration of two years from such commencement, if still in force, also vest the full and absolute title in the property.

Section 3 of the Deeds Registry Ordinance, 1919, Amendment Ordinance, 1925, repealed and substantially re-enacted section 20 aforesaid with certain modifications which are not material to the present case. As Lutchmy's transport was passed in 1916, then on the 1st of January, 1922, she acquired a full and absolute title, and her counsel contends that there is implied therein the right to make an entry on the property in dispute or to eject plaintiff therefrom in spite of the long undisturbed possession of himself and his predecessors in title. This argument necessarily proceeds on the assumption that Lutchmy's transport gave her the legal title to the property in dispute. I am not so deciding as it is not necessary for the purposes of my judgment, but even on that assumption it appears to me that the contention is unsound.

The Deeds Registry Ordinance was passed three years after the Civil Law Ordinance, which introduced for first time, as I was informed by counsel, statutory provisions dealing with limitations of rights and suits affecting real property, based to some extent on the English Statutes.

By section 4 (1) of the Civil Law Ordinance the Supreme Court can issue a declaration of title based on thirty years sole and undisturbed possession, and section 4 (2) gives a negative right, as it is termed, to a person in possession for twelve years or more as was pointed out earlier in my judgment; in other words, it prevents a person from disturbing the possession after twelve years have elapsed from the time when the right to make an entry first accrued to that person. The nature of this right or title is very clearly expressed in a recent case in the Divisional Court, *Taylor* v. *Twimberrow* (1930), 2 K.B. 16, where Scrutton, L.J., at p. 23, quotes with approval a passage in Darby and Bosanquet's Statutes of Limitations, 2nd Ed., p. 493, which is as follows: "It has been

said that the effect of the Statute is to execute a conveyance to the person in possession, and not only to extinguish the right of the former owner, but to transfer the legal fee simple. But the truer view is that the operation of the statute in giving a title is merely negative: it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him." And although, in this Colony, there is no corresponding provision to section 34 of the Real Property Limitation Act, 1883, whereby the right of the person out of possession is extinguished at the end of the statutory period, it seems to me that the words above apply equally to the position here save as to extinguishment.

These clear rights are given by the Civil Law Ordinance, 1916, and in the Deeds Registry Ordinance of 1919 no reference is made to the above sections and no express provision is made limiting or restricting the rights so given. Surely if it was intended to give by the use of the words "full and absolute title" the far-reaching consequences suggested, one would expect provision in the latter Ordinance to that effect. I say far-reaching consequences because it seems to me that if this argument were sound, the limitation provisions of the Civil Law Ordinance would be rendered largely nugatory by the later Ordinance, as it is difficult to conceive under what circumstances a person in possession could invoke the aid of the limitation sections since the conflict is almost invariably between a person in possession and the legal owner by transport. The Deeds Registry Ordinance does not deal with the question of title or rights by possession and, to my mind, does not override such title or right.

The whole argument appears to be based on a confusion of the legal incidents of title to property by deed and title or rights by possession respectively. A person may have a perfect title to a property and yet may not be able to take possession on account of his right to do so being barred. In my opinion the expression "full and absolute title" means a title free from defects of any nature, in other words, indefeasible, save in cases of fraud and has not the effect of overriding the limitation sections previously referred to. If I may say so, it appears to me that the Deeds Registry Ordinance gave statutory force to what it seems was the established rule of law as administered by the Courts before the passing of the Ordinance and under Roman-Dutch Law.

A perusal of the judgment of Sir David Chalmers, C.J., *in re* Petition of Elizabeth Van Kinschoot which is to be found among the minutes of the Supreme Court January-February, 1882, which is discussed later on, shows at p.18 that the title given by transport was regarded as indefeasible in character under the Roman-Dutch system of law.

The next argument on behalf of the defence is based on another effect of the previously mentioned sections of the Deeds Registry Ordinances. The point advanced is that, if the statute ran at all in the present case, which is disputed, then it only began to run from the 1st of January, 1922, at which date Lutchmy acquired a full and absolute title.

It seems to me that the reasons set out in my consideration of the last point apply with equal force to this contention.

In addition it would follow that a person who had acquired or began to acquire rights under the limitation sections of the Civil Law Ordinance would be deprived of them by the later Deeds Registry Ordinances, and that, merely inferentially, as I can find no clear words in the Ordinance to lead to the conclusion that those pre-existing rights were swept away. For my own part, I am not prepared to give effect to this novel construction of the above quoted sections of the Deeds Registry Ordinances, and it may be mentioned that Mr. Justice Dalton in his work on the Civil Law of British Guiana, published in 1921, does not call attention to any such effect when discussing section 4 of the Civil Law Ordinance.

Next, it was submitted that the limitation section did not apply to plaintiff as his transport was passed before the Civil Law Ordinance, 1916, The basis of this argument is that section 2 (3) of the Ordinance preserved rights acquired before the date of the Ordinance and as Lutchmy or her predecessors had acquired a right of entry before the passing of the Ordinance, that right was preserved.

This argument proceeds on the assumption that plaintiff and his predecessors in title, who were admitted to have been in possession for over fifty years, had acquired no right or title to the land in dispute. But is this assumption correct, when it is borne in mind that under the Roman-Dutch Law sole and undisturbed possession for thirty three and one-third years gave a title to the property, see Dalton on the Civil Law, p. 30. But taking the view most favourable to the defence, and acting on that assumption, it seems to me that the point has no substance as even if the period of limitation began to run only from the coming into force of the Ordinance, *i.e.*, the 1st of January, 1917, then more than twelve years had elapsed when the entry was made by Lutchmy and her servants and agents in September, 1929.

I can find no words in the Ordinance to suggest that, at any rate, from the date of the coming into force of the Ordinance, the plaintiff was to be excluded from the benefit of the provisions of sub-section 2 of section 4, nor do I appreciate how, in the present case, the date of his transport has any material bearing on this point as the subsection deals with possessory rights and not rights derived under deeds of title.

Having previously decided that, in my opinion, the limitation period did not begin to run only from the 1st of January, 1922, the date when Lutchmy acquired a full and complete title under the provisions of the Deeds Registry Ordinance, I must hold that defendants fail on this point also. Nor do I see that the case of *Pugh* v. *Heath*, 7 A.C. 238, cited on this point, lays down any principle that indicates that my conclusion is not sound. A perusal of that case and especially of the report of the decision of the Court of Appeal in 6 Q.B.D. 345, where Lord Selborne, L. C. delivered the judgment, shows that it is an authority for the proposition that, according to English law, the effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to the land, for the first time, in the person who was previously a mere incumbrancer, and that when that owner takes proceedings to

recover possession of the land, for the purposes of the Statutory Limitations, his right to do so is deemed to have accrued from the date of the foreclosure, and not from the date of the mortgage.

I am unable to appreciate the application of this principle to the question under discussion.

It appears unnecessary to deal with the question as to whether the limitation sections are retrospective, but I may point out that the cases of *Bachelor* v. *Middleton*, 6, *Hare 75, The Udan* (1899), p. 236, and *Welby* v. *Parker* (1916), 2 Ch. 1, seem to support the view that, generally speaking, they are.

This brings me to the last submission made by counsel for the defence which raises an important question in the law of this colony as to the effect of advertising a transport, and non-opposition by a person in possession for the statutory period. The only case that the Court was referred to is *Fauset* v. *Baveghens*, L.J., 5th of March, 1912, a decision of Berkeley, J. The report does not state whether any authorities were cited and none are mentioned in the judgment. Although one of the points for decision was whether a person in possession of a parcel of land without legal title lost his rights if he failed to oppose a transport of the same property, a point similar to the one in the case before me, it seems that the *ratio decidendi* of the decision of Berkeley, J, was that the person in possession had had actual notice of the intended transport, and was therefore estopped from setting up a title by prescription. If my view of this judgment is correct, then, as in the present case there is no admission or evidence of actual notice, this authority would not he of much assistance. In fact it may be said that the views of the learned Judge in that case are obiter as he in fact found that the defendant had no title by prescription. As there was no actual notice to the plaintiff in the present case, the real questions for consideration on this aspect of the case are

(1.) whether or how far the fact of advertising a transport is equivalent to notice to a person in possession for the statutory period in the absence of evidence of actual notice;

(2.) whether if that is so, the person who has been in possession for a period sufficient to bar the right of entry of any other person is estopped from setting up his right or title to possession if he does not enter opposition, or, in other words, loses not only his right to possession but possession in fact.

It is fortunate that I have been able to discover that the matter has been previously considered in the Courts of this Colony. As far back as 1882, on the hearing of the petition of Van Kinschoot previously referred to, Chalmers, C.J., made some observations, which although in the nature of *obiter dicta*, were subsequently quoted with approval in the case next referred to. I have been able to see the original judgment in the records of the Supreme Court Registry, wherein the learned Chief Justice adopts certain passages from Van Leeuwen, Matthaeus and Burge. The passage in Burge's Commentaries on Colonial and Foreign Law, Volume II., p. 581, is as follows:—

"There are some cases in which the right is preserved notwithstanding there has been no opposition in the sale interposed. Thus

it need not be interposed where the right of the third person is manifest, in *oculos omnium incurrit*; or if the right be established by the general law and known to attach to the property. Neither can the omission to make his opposition prejudice the person who is in actual possession of the property on his own behalf."

The next case is *Ferreira* v. *Ho-a-Hing* (1896) L.R.B.G. 78, an action to declare a levy and subsequent sale bad and illegal. At the hearing a preliminary objection was taken by the defendant that, as plaintiff who was claiming a share of the property had not entered opposition to the execution sale, the action could not lie. In a considered judgment, Sheriff, J., quoted with approval certain parts of the learned Chief Justice's judgment referred to above and proceeded: "The deduction to be drawn from these remarks appears to be this, that where notice of execution sale is brought home to a claimant, then his *silentium* is to be regarded as *contumax.* Indeed he says so. I do not agree that the plaintiff in this case can stand by with impunity and subsequently sue for damages. He could have stopped the sale in its inception, but by standing by he is to be regarded as waiving or abandoning any right that was in him, I am prepared to go further if necessary and to hold that he is estopped by his own conduct from successfully asserting any claim to such property." But in my opinion the basis of this decision was actual knowledge of the intended sale on the part of plaintiff and this appears from the following observation by the trial Judge at the beginning of his judgment: "It is material to note that the plaintiff admits knowledge of the intended sale . . ." Lucie Smith, Acting C.J., came to the same conclusion in *Dos Santos* v. *Johnson,* L.J., 17th of May, 1901, where, after stating that knowledge of the sale by the Marshal was brought home to the defendant only after the sale, he proceeded: "It is contended that as the defendant did not oppose the execution sale which was duly advertised he has lost all his rights. As a rule this may be so, but there are certain persons who are not deprived of their rights by not opposing. Those persons are stated in Mattheaeus de Auctionibus, liber 1, Cap.XI., paragraph 63, *et seq.*" He then quotes one of the passages adopted by Chalmers, C.J., and the learned Acting Chief Justice continues: "The defendant is clearly such a person as is described in that paragraph; he had just and lawful possession."

The cases of the *South African Association* v. *Van Staden* (1892) 9 S.C. (Juta, 95, and *Fauset* v. *Baveghens,* L.J., 5th of March, 1912, are not inconsistent with these decisions, and to my mind, can be distinguished on the ground that in each case actual notice of the intended sale was brought home to the party affected.

McKaley & anor. v. *Goopiah & anor.,* G.J., 30th of March, 1911, was a decision of the Full Court based on their finding that the appellants did not have title to the land by right of prescription, but in the course of the judgment certain observations were made from which it might be inferred though not correctly in my opinion, that the Full Court laid down the broad proposition that remaining passive and not opposing were fatal to one's rights, but as the South African case previously referred to, is the only authority cited in the judgment, it seems to me reasonable to draw the conclusion that there was actual notice to the interested parties in that case of

the intended sale. If it is suggested that the proposition laid down by the Full Court is wider than that laid down in the authorities first cited by me, *i.e.*, that the loss of rights in the case of a person in possession does not depend on actual notice, then, as the point was not necessary for the decision of that case and the remarks are really *obiter dicta*, I prefer to follow the authorities first referred to and to hold (1) that the advertisement of the transport is not equivalent to actual notice, in case of a person in possession for the statutory period, and (2) that a person in possession of land for that period does not lose his rights if he does not oppose an intended sale or mortgage of the same land of which he has not had actual notice. That person's rights may be negative in character, but in my opinion they are effective and can be asserted in a Court.

I have now dealt with all the submissions on behalf of the defence. Several other points were argued by plaintiff's counsel, but in view of the reasons given for my decision, it is unnecessary to deal with them as they were really raised in anticipation of any submissions for the defence and the occasion for dealing with them does not arise in the present case. For the foregoing reasons the plaintiff succeeds in his claim for trespass and the usual injunction is granted against the defendants. By agreement of the parties the question of damages and also the question of calling evidence in support of the issues raised in paragraphs 8 and 9 of the Statement of Claim as to inducing the plaintiff's servants to break their contracts were left over until after my decision on the point of trespass.

I will deal with the question of costs at the conclusion of the matter.

Solicitor for the plaintiff, *C. Gomes.*

Solicitor for the defendant, *A. G. King.*

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1930

AND IN

THE WEST INDIAN COURT OF APPEAL

SITTING IN

BRITISH GUIANA, DOMINICA, GRENADA, ST. VINCENT AND BARBADOS.

[1930-1931.]

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1931.

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1930.

SIR ANTHONY DEFREITAS	…… Chief Justice.
WILLIAM JAMES GILCHRIST	…… Puisne Judge.
JOHN LEWIS HENRY WILLIAM SAVARY	…… 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 1930 L.R.B.G.

TABLE OF CASES REPORTED.

WEST INDIAN COURT OF APPEAL.

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[1930-1931.]

JUDGES OF THE COURT:

Sir PHILIP J. MACDONELL, KT., President (*quondam* Chief Justice of Trinidad)

C. F. BELCHER (now Sir C. F. BELCHER, KT.), President, (Chief Justice of Trinidad),

J. STANLEY RAE (Chief Justice of Grenada).

SIR ROBERT H. FURNESS, KT., (Chief Justice of Barbados).

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