INDEX.

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CASES

DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

GENERAL JURISDICTION.

TEITKENS AND OTHERS v. THE COMMISSIONERS OF VLISSENGEN.

1895. *January* 31. ATKINSON, C.J. (Ag.), SHERIFF, J. and KIRKE, J. (Ag.).

Petition—The Vlissengen Ordinance, 1876—Powers of Commissioners in respect of sale of land, retention of price, and issue of bonds—The Vlissengen Ordinance, 1880—Fund at the Commissioners' disposal—Improvements—Special rate—Function and duty of Governor and Court of Policy.

Plantation Vlissengen was granted on June 10th, 1772, to Thomas Chapman and Joseph Bourda. On December 4th, 1773, Chapman transported his half of the plantation to Bourda who died on April 23rd, 1798, possessed of the whole plantation. By his will he left the property to certain persons named therein. Portions of the plantation became absorbed into the City of Georgetown whilst other portions were partially built upon and occupied by persons who leased or who claim through those who have leased from the persons claiming to be the heirs of Joseph Bourda. In some cases portions were taken possession of by persons haying no right or title thereto whatever. Hence disputes arose amongst the various persons claiming as heirs which rendered it impossible to lay out the property on any proper plan, or to obtain proper drainage or sewerage. It was thereupon decided by resolution of the Combined Court on June 15th, 1874, that the Colony should acquire the absolute ownership of Pln. Vlissengen and the districts of Georgetown named Lacytown, Columbia, and Newtown at a valuation to be decided on, not exceeding such sum as might be recoverable by the sale of the property. Payment was then to be made to the parties legally entitled thereto by means of Colonial bonds. The value of the whole property was fixed at $249,600, the issue of bonds was authorised, and by Ordinance 8 of 1876 the property was vested in a Board of Commissioners to be named the Commissioners of Vlissengen. Various powers and duties were assigned to the Commissioners by the Ordinance.

Petitioners now claimed as the persons or representatives of the persons entitled wholly or in part to moneys to be paid by the Commissioners to them for land that was vested in the Commissioners by the Ordinance (s. 35).

All other necessary facts or allegations set out in the petition

and in the reply thereto are sufficiently referred to in the judgment of the Court.

P. Dargan, for the petitioners.

A. Kingdon, Q.C., Acting A. G., for the respondents.

The judgment of the Court—ATKINSON, C.J. (Ag.), SHERIFF, J., and KIRKE, J. (Ag.), was as follows:—

The petitioners, claiming to be or to represent the heirs of Joseph Bourda, ask the Court to order the Commissioners of Vlissengen to pay to them the sum of $49,600.

The Commissioners in their report deny on various grounds that the petitioners are entitled to the order prayed for, one being that they have not got the money. By Ordinance 8 of 1876 (*a*) certain lands therein described, belonging to the estate of Joseph Bourda, were vested in the Vlissengen Commissioners.

By the ordinance certain very large sums were to be paid absolutely to the heirs of Bourda, and those sums have been paid.

As to this sum of $49,600 the ordinance enacts (s. 22) that "The Commissioners shall retain in their hands from the price of the lands comprised within the Columbia and Lacytown ward and the Bourda district a sum of forty-nine thousand and six hundred dollars until they shall have realised from the sale of lands hereby vested in them, either in cash or in valuable securities, an amount sufficient to pay the whole of the said purchase money with the interest thereon, after providing for all the expenses incurred by them."

The petitioners' counsel argued that the promissory notes mentioned in s. 49, given to the Commissioners by the purchasers for the instalments of the purchase money, were the "valuable securities" meant in s. 22, or were within the meaning of those words, as no other securities were referred to in the ordinance. A promissory note is not a "valuable security" in the legal sense of the words; and the promissory notes in question were not given as securities in addition to the lien, but to render more easy the collection of the instalments as they fell due.

By s. 23 it is enacted that the Commissioners, subject to the provisions of the ordinance, shall issue bonds—"Thirdly, for the payment of the sum of forty-nine thousand six hundred dollars." Then by s. 28 it is enacted that "The Commissioners shall not issue bonds for the payment of any portion of the sum

(*a*) Ordinance 2 of 1876, in 1905 Edition of Laws. Ed.

of forty-nine thousand six hundred dollars until they have received from the sale of the lands hereby vested in them securities for the payment of an amount sufficient to pay such bonds with all the interest thereon, after providing for the payment in full of all the expenses, and of all the bonds with all the interest thereon for which the Colonial revenues are pledged."

It is evident, therefore, that the petitioners are only conditionally entitled to this sum of $49,600; and that until the requirements of ss. 22 and 28 are fulfilled they are not entitled to payment of any part of it. The ordinance, indeed, contemplates that they may never receive part, if any, of this $49,600, because the concluding paragraph of s. 22 enacts that "In the event of the Commissioners not realising a sufficient sum to pay the whole of the said purchase money with the interest and expenses, they shall not be bound to pay such portion of the said sum of $49,600 as they shall not have realised sufficient to pay."

It was for the petitioners to show that all the required conditions have been fulfilled. They have failed to do so. The contrary appears. They called the secretary of the Commissioners, and he stated that the Commissioners had not realised the amounts specified in s. 22. Consequently they are bound to retain the $49,600 until they do. He also stated as to s. 28 that the Commissioners have not received the securities specified therein. The figures before us show that both these statements are well founded. It follows that they have no power to issue the bonds mentioned under the head "thirdly" in section 23.

The petitioners have applied to the Court under Ordinance 14 of 1880 (*a*). Sect. 1 thereof says that the Vlissengen moneys "shall be held by the said Commissioners of Vlissengen at the order of and shall be deemed to be a fund under the administration of the Supreme Court……" By s. 2, the Court may order payment of the whole or any part of the "moneys constituting the said fund in the hands of the Commissioners" to the parties entitled.

On the evidence it is plain that the $49,600 claimed are not in the hands of the Commissioners. The petitioners' counsel had to admit that that was so, but contended that they ought to be. If said he, the Commissioners had not expended large sums in improvements, which expenditure he characterized as a breach of trust, they would have had money enough to pay this $49,600. The secretary stated that the values of the properties as appraised and as stated in the schedules were very much over-estimated, and if the improvements had not been made the Commissioners would not have got the prices they did. If that be so, it would

(*a*) Ordinance 5 of 1880, in 1905 Edition of Laws. Ed.

appear that the heirs have received payment for their properties at their improved value and not at their actual value when the lands vested in the Commissioners, and have been receiving interest all along at the higher valuation upon such sums as remain unpaid. Be this as it may, we have no doubt that, but for the improvements, the affairs of the Commissioners would be in a much worse state than they are now.

It is a gross misstatement, moreover, to call the expenditure of these improvement moneys a breach of trust. The ordinance of 1876 expressly enacted (s. 60 *et seq.*) that as soon as practicable after the passing of the ordinance, the Mayor and Town Council were to prepare plans showing the mode in which they considered it desirable that the lands vested in the Commissioners should be laid out. Then they were to mark out the boundaries of the lots, streets, drains, etc., and, thereafter (s. 66) were to "proceed to make such of the streets, or roads, and to dig such of the drains or trenches as may be directed by the Governor and Court of Policy." By s. 66, the cost of making such streets or roads and of digging such drains or trenches shall be repaid to the Mayor and Town Council of Georgetown by the Commissioners."

It thus appears that the Commissioners had no voice in the matter. The Mayor and Town Council by the direction of the Governor and Court of Policy did the work, and the Commissioners were compelled to pay the money. We understand that they protested more than once against the extravagant expenditure that was taking place, but without avail.

Sect. 88 says that "the cost of making or widening the streets and of laying out and digging the drains and trenches within the Columbia and Lacytown ward, so as to conform to the plan as approved by the Governor and Court of Policy, may be defrayed in the first instance by the Commissioners from any funds at their disposal, and shall thereafter be recovered by a special rate to be levied on all the property within the said ward, and which rate the Commissioners are hereby authorised and required to levy in the manner herein provided." S. 89 enacts precisely similar provisions with regard to the Bourda district.

Now, if this had been all, the Commissioners would, no doubt, have done what the law not only authorises but requires them to do—levied the special rates. But this is not all. A proviso to s. 106 runs thus: "Provided always that no rate shall be levied by the Commissioners until the same shall have been sanctioned by the Governor and Court of Policy."

As to the Bourda district the Governor and Court of Policy did sanction the levying of the special rate, in terms of s. 89. But for reasons which do not appear, except that it is said that cer-

tain inhabitants of the Columbia and Lacytown ward petitioned against the levying of the rate, no special rate was sanctioned in the case of the Columbia and Lacytown ward. The result is that the Commissioners have outstanding sums expended amounting to $164,718.92 which they are not allowed to recover. They have no funds wherewith to meet certain bonds which fell due in January last, and unless they are empowered to levy the special rate, will have no funds to meet the other outstanding bonds as they fall due. As at June, 30th 1894, the remaining bonds amounted to $184,200.

It is difficult to see on what grounds the Governor and Court of Policy, having already sanctioned a special rate on the properties in Bourda, have refused or neglected to sanction a special rate on those in Columbia and Lacytown which are equally liable. In both cases the purchasers knew or must be taken to have known, when they purchased, the provisions of the law as to the levying of these special rates for the improvements. The refusal to allow these special rates to be levied amounts to a distinct breach of faith as regards the holders of the debentures now outstanding amounting to $40,000. For the repayment of the bonds issued by the Commissioners the colonial revenues are pledged; but the debentures were issued on the security of the moneys payable to the Commissioners. By s. 33 the Commissioners may pledge and assign over by debenture to the persons by whom such moneys are advanced the respective moneys upon the credit of which such sums may be advanced. The form of the debenture is given in schedule 5 of the ordinance, and by it the Commissioners "do grant and assign" to the lender "all (here describe the moneys or rate to be pledged) to hold to the said" lender until principal and interest are paid. For any moneys so advanced on the security of the rates (which must be the special rates to be levied under ss. 88 and 89, as they are the only rates mentioned in the ordinance) the Governor and Court of Policy cannot but be absolutely bound to authorise the levying of the necessary rates. And can there be any doubt that, under the circumstances above narrated, they are, at any rate, morally bound to authorize the levying of the special rate on the Columbia and Lacytown ward for the recovery of this improvement money?

It is easy to understand that it was thought desirable, before a rate was levied, that it should be sanctioned by the Governor and Court of Policy, whose function it would be to take care that the power to levy was not exercised harshly or unduly by the Commissioners. For example, the Court could see that no more was levied from time to time than was required to meet

the necessary expenses, and to pay the bonds and debentures as they fell due. It can never have been contemplated that the Court, having directed the expenditure to be made by the Commissioners, would refuse altogether to allow them to recoup themselves in the manner provided by law. One consequence of the Court's action, or rather inaction, is that a much larger amount of interest will almost certainly become payable on bonds and debentures, which, in all probability, will have to be paid out of the general revenues of the colony.

The petitioners' counsel was right, therefore, so far as these improvement moneys are concerned, in saying that the moneys ought to be in the hands of the Commissioners, but not for the reason urged by him that they ought not to have expended the money at all. The argument of the petitioners' counsel that the only money the Commissioners could spend on improvements was the "surplus" mentioned in s. 33 is fallacious on the face of it. That surplus could only arise in case the Commissioners realised a larger sum than was sufficient to pay the expenses and the sums specified in the ordinance with interest. That can be ascertained only at the end of the Commission. Until then no surplus can exist. Such "surplus," therefore, could not be moneys, "at the disposal" of the Commissioners, in terms of s. 66, to pay the cost of improvements made at the beginning of the Commission.

In attempting to show that the Commissioners had received enough to enable them to pay this $49,600 to the heirs, their counsel sought to include a sum of $13,209.39, back rents recovered by the Commissioners over and above the $18,000, which they had agreed to pay and did pay the heirs for the rents in arrear when the lands vested in them. He was in error as to this. By the very terms of ss. 22 and 28, the amount to be realised or received before the $49,600 can be paid, or bonds for the payment thereof issued, is to be realised or reserved *from the sale of the lands* vested in the Commissioners. It is obvious that the $13,209.39 was not so realised. It was profit made by the Commissioners upon their bargain with respect to the back rents. And this raises a very much larger question. Moneys amounting to $107,530.92 have been received by the Commissioners for the use and occupation of the lands vested in them from the time of such vesting up to the 30th of June, 1894, and moneys amounting to $91,600.13 have been received by way of interest on the promissory notes given by purchasers of the lands in pursuance of s. 49. These sums amounting together to $199,131.05,—or roundly speaking $200,000—were included by the petitioners' counsel in the amounts received by the Commissioners, which, when added

together, were to show that they had received enough to enable them to pay the $49,600. But there is a very grave question as to whether he was entitled to do this. It is very doubtful whether either sum can be deemed to be moneys realised "from the sale of the lands" within the meaning of ss. 22 and 28. The moneys received by the Commissioners for use and occupation were in the nature of rents—payment of which had been deferred, but which were collected when the purchase money of the land or lots was paid. This purchase money would seem to be the only money that can be said to be money realised from the sale of the lands. If the purchase money had been or could have been paid at once there would have been no money either payable or receivable for use and occupation. A similar argument applies to the moneys received by way of interest on the promissory notes. The principal represented by the notes was, no doubt, part of the purchase money but not so the interest. If the principal had been or could have been paid at once, there would have been no interest.

It is unnecessary for us, however, to decide these questions, because even if these amounts are included, the figures before us show, as we have already stated, that the Commissioners have not received the moneys or securities by ss. 22 and 28 to be received, before they can either issue bonds for the payment of the £49,600, or pay that amount.

The petition is dismissed with costs.

[Note.—Reference should be had to the ordinance of 1876 as originally passed to find the sections referred to in the judgment. Ed.]

APPELLATE JURISDICTION.

GAJADHAR AND OTHERS v. GREEN.

1895. *November* 5. SHERIFF, J.

Appeal—Magistrates' Decisions (*Appeals*) *Ordinance, 1893—Giving security to prosecute appeal—Magistrate before whom recognizance is entered into.*

Appeal from the decision of Mr. W. F. BRIDGES, Stipendiary Magistrate for the West Coast, Demerara, Judicial District, who convicted the appellants for the larceny of a goat and sentenced them each to four months' imprisonment with hard labour.

Appellants in default of appearance.

A. Kingdon, Q.C., S.G., for the respondent.

SHERIFF, J.—The Solicitor General for the respondent. No appearance for the appellants. This is also an appeal case, but it is defective and cannot be entertained. Section 16 of Ordinance 13 of 1893 requires the appellant to enter into a recognizance with at least one sufficient surety to the satisfaction of the magistrate. Now there can be no doubt that the magistrate referred to is the magistrate who tried the case. In the present instance the appellants have gone before another magistrate and entered into a recognizance. Why this last gentleman should have felt himself authorized to take such recognizance I am at a loss to understand.

Appeal disallowed. Decision of court below affirmed, with costs.

APPELLATE JURISDICTION.

COYLE v. DA SILVA.

1895, *November* 5. SHERIFF, J.

Appeal—Sale of Food and Drugs Ordinance 1892—Certificate of analyst, sufficiency of—Admissibility in evidence—Responsibility of seller.

Appeal from the decision of Mr. C. L. PAYNE, acting Assistant Police Magistrate of Georgetown, who dismissed a charge brought by the appellant Coyle against the respondent Da Silva, for the sale of half a pound of lard, not of the nature, substance, and quality demanded.

The further necessary facts appear from the judgment.

C. S. Davson, acting S.G., for the appellant.

D. M. Hutson, for the respondent.

SHERIFF, J.—This is an appeal from the decision of the then acting Assistant Police Magistrate of Georgetown.

The reasons of appeal are as follows:—

That the decision is erroneous in point of law inasmuch as:—

(a) The facts proved at the hearing were sufficient to and did substantiate the complaint, and the magistrate was bound to convict on proof of the said facts.

(b) The ruling of the magistrate, that the certificate of the government analyst was inadmissible as containing extraneous matter, was erroneous, because the said certificate was admissible in law, and the extraneous matter, if any, contained therein did not invalidate it.

I have come across a case, *Rook v. Hopley* (26 W. R. 663), which appears to a great extent to govern this case. I shall set out the judgment of KELLY, C. B.; it reads as follows:—

"I am of opinion that the appellant is entitled to our judgment. I arrive at that conclusion with great regret, because on the facts it is really a very hard case, but with that we have nothing to do. The question is simple enough; the respondent purchased and paid for the article in question as lard, and he then sold it as lard; the question then is whether, on the facts, the case comes within the provisions of the statute, the article not being

that which he sold it for. We find that the article when subjected to analysis turns out to be largely adulterated with water; the question then is whether in the eye of the law, and on the facts, adulterated lard is the article demanded. With regard to whether the invoice amounts to a warranty, I do not propose to give any decision, but what I do say is that it is not a warranty within the meaning of this act. Now the article demanded and paid for was lard; lard in one sense was given; it had been purchased as such by the respondent; but was it lard in the sense in which it was demanded? On the whole case, looking at the certificate of the analyst, the findings of the magistrate, and the words of the preamble of the act, I am of opinion that this case comes within it. It was the intention of this act to prevent adulterated articles being sold, and this article is found in express terms to be adulterated. Under these circumstances I think the appellant is entitled to our judgment, notwithstanding that all the respondent did was *bona fide* and with an honest intention."

I entirely agree in this decision, more especially with the opening and concluding sentences, and the remarks so made by the judge are applicable to the present case. I have considered the observations made by the magistrate, but I feel compelled to remark that they do not appear to me to be such as were in the contemplation of the legislature. All that he says is "Case dismissed on law and facts. See Merchandise Marks Ordinance, 21 of 1891, and the Evidence Ordinance, and cases *Pearl v. Barston, Bakewell v. Davis; Otter v. Edgley.*" He might have stated where the cases are reported and how they and the ordinances he cites are applicable.

He further ruled that the certificate of the analyst was not admissible, extraneous matter being in it. It appears to me, however, that *Bakewell v. Davis*, 1894 1 Q. B. 296, is an authority the other way. But apart from this the government analyst was called and examined as a witness. I have carefully considered the arguments advanced on behalf of the respondent but I am unable to see my way to sustaining any of them. What is adulterated compound lard and what is not appears to be left entire-or nearly so to the special information of analysts. I recall the adjudication, and direct the magistrate to impose a penalty with costs.

IN RE LOW-A-YAN;
EX PARTE THE ADMINISTRATOR GENERAL.

1895. *November* 7. SHERIFF J.

Insolvency—Application to expunge proof—Insolvency Ordinance, 1884, Schedule II, s. 24—Delay in making application.

Application by the Administrator General under the provisions of the Insolvency Ordinance, 1884, schedule II, s. 24 (*a*) for an order expunging the claim of Benjamin Conrad, trading as H. Conrad & Co., in the sum of $6,147.62 against the estate of Low-a-Yan, deceased, as having been improperly admitted.

The application further set out that the claim in question had been admitted to rank as concurrent against the firm of Low-a-Yan & Co.

P. Dargan, for the applicant.

D. M. Hutson, for H. Conrad & Co.

SHERIFF J. I deem it unnecessary to go over the ground travelled over in this application. The question lies in a very small compass. A creditor files a claim against an estate. The Administrator General improperly admits it. After a graceful repose of nearly eighteen months he awakes, and, discovering his mistake, he applies to have the proof expunged.

For the creditor it is said that he has acted on the admission of his claim, and that he will be prejudiced if, after such a lapse of time, his proof be expunged. That may be, but the argument is beside the question. If the claim originally was bad, no act of the Administrator General could make it good. And see Baldwin's *Law of Bankruptcy,* p. 147: "Though lapse of time is no bar to an application to expunge, a creditor will be entitled to retain any dividend previously received, at all events where there has been delay in making the application." I believe this to be the law.

I order the claim or proof to be expunged as asked for by the Administrator General in his application for directions.

(*a*) Cf. Insolvency Ordinance, 1900. Schedule II., ss 25, 26.—Ed.

GENERAL JURISDICTION.

GOMES v. THE CENTRAL BOARD OF HEALTH AND OTHERS.

1895. *November* 14. SIR EDWARD O'MALLEY, C.J., ATKINSON AND SHERIFF, JJ.

Opposition action.—Application for enlargement of time—Rules of Court 1893. O. XXXIX. r. 4—Ultra vires—Supreme Court Ordinance, 1893, s. 58 (2),*—Hours for transacting business in the Registry—Production in evidence of original documents by Registrar.*

Application in an opposition action for an order on the Registrar to receive and file plaintiff's claim in the action, or, in the alternative, for an enlargement of time for filing the said claim.

The motion came on for hearing before SHERIFF, J., sitting apart.

D. M. Hutson for plaintiff.

A. Kingdon, Q.C., S.G., for the defendants.

1894. *October* 18.

SHERIFF, J. The plaintiff in effect moves the court in the alternative either that the Registrar of Court do receive and file the claim of the plaintiff herein, or that the court do enlarge the time for filing the said claim.

So far as it is necessary to refer to the facts, it appears that plaintiff's solicitor, on the last day allowed him by law for so doing, went to the Registrar's office to file his claim, but it was after the hour of four o'clock, and the Registrar refused to receive and file the same.

It appears that the office hours of the department are regulated by the Government and according to the "*Official Gazette,*" July-December, 1861, p. 1248, the office hours are from ten to four. It further appears that the legal profession have been allowed considerable latitude in transacting business after office hours. 1 express no opinion as to the validity or otherwise of any step so taken, but I have no difficulty in ruling that the *right* to tile documents is limited to the office hours and no further. It is only necessary to remark that counsel for plaintiff in reply abandoned the first portion of his motion, seeking only to obtain an enlargement of time.

For the defendants I was pressed with the decision *in re Oliver and Scott*, 43 Ch. D. 310, but this case was not decided under a like rule as Order XXXIX, r. 4. (*a*), because in the latter we have the words 'or by any other statute,' which have no place in the English rule. It was then argued that the rule was *ultra vires*, as the provisions of a legislative enactment could not be repealed save by the legislature or by its express authority. This objection to my mind falls to the ground when the provisions of s. 58 (2) of the Supreme Court Ordinance, 1893 (*b*) are considered. Apart from this however, my attention was drawn by counsel for plaintiff to s. 74 of the Manner of Proceeding Ordinance, 1855, and likewise to Order XXIII, r. 1, and it was urged that the section of the ordinance though repealed was in effect re-enacted by the rule. By s. 217 of the ordinance the legislature expressly made time an essential ingredient by prohibiting any additional delay once the time for entering an opposition had elapsed. But the subsequent procedure was covered formerly by s. 74, and now by O. XXIII, r. 1. I am satisfied that plaintiff's solicitor blundered. He thought (no doubt wrongly) that the Registrar would accept the claim, and it is quite true that he ran time very close and as it turns out too closely. But I cannot see why his client is to be debarred from a hearing on the merits merely because his solicitor was about half an hour late owing to an error of judgment. I shall make an order extending the time for filing the claim herein to 10:30. a.m. October 22nd, 1894, and the plaintiff only obtains the assistance of the court upon the terms that he pays the costs of this motion.

1895. November 14. The opposition action came on for hearing before the Full Court (Sir EDWARD O'MALLEY, C.J., ATKINSON and SHERIFF, JJ.)

In the course of the action a list of documents relied on was put in by plaintiff.

The court thereupon expressed the opinion that when parties require original documents deposited with the Registrar to be produced, the Registrar should be duly summoned, and that ordinarily it would be advisable for authentic copies of documents to be laid over, and further that whenever transports refer to a plan or diagram a copy of such plan or diagram should be attached to the grosse transport.

After hearing the evidence adduced and having examined the documents and papers put in, the Court declared the opposition entered by plaintiff to be just, legal, and well founded.

(*a*) Cf. Rules of Court, 1900. Order XLV, r. 4.—Ed.
(*b*) Cf. Supreme Court Ordinance, 1915, s. 50 (2).—Ed.

GENERAL JURISDICTION.

YHAP v. FONSECA.

1895. *November* 15. SIR EDWARD O'MALLEY, C.J., ATKINSON AND SHERIFF, JJ.

Negligence—Action by widow for compensation for death of her husband—Chemist and druggist—Employers liability—Attendant in charge of branch shop prescribing and dispensing medicine—'Counter practice' and 'doctor's shop.'—Scope of servant's employment.

Held that an action will lie by the widow and children of a person whose death has been caused by the tortious act of another against that other for compensation;

Held further, that where a servant doing the act complained of was acting in the course of his employment as such, the master would be liable.

Held further (*per* ATKINSON and SHERIFF, JJ., O'MALLEY, C. J., dissenting) that on the facts disclosed in this case F., who was employed by defendant to take charge of a branch chemist's shop and who was not a qualified chemist, was not acting within the scope of his employment in himself prescribing and dispensing medicine from such shop.

Held (*per* O'MALLEY, C.J.) that, on the facts disclosed, if the materials whence the medicine was dispensed had been supplied from the shop, F. was acting within the scope of his employment in so prescribing and dispensing medicine.

Claim for the sum of $10,000 damages caused to plaintiff and her six minor children by the loss of her husband Edwin Augustus Yhap. Defendant, a dispensing chemist, carried on business in three places in Georgetown, and at one of these shops he employed a servant named Ferrier. In August, 1894, plaintiff's husband sent to the shop in which Ferrier was employed for a medicine or drug which was supplied by Ferrier. After taking that medicine he died, it being admitted that death was due to an overdose of opium, a large quantity of which drug the medicine contained, due to the negligence or ignorance of Ferrier. Defendant denied that the drug was supplied by Ferrier in discharge of his duties as his (defendant's) servant, and joined issue on the averment that he received benefit from Ferrier's acts.

A Kingdon, Q.C., S.G., for plaintiff.

D. M. Hutson, for defendant.

Defendant excepted to plaintiff's claim on the ground that the pleadings disclosed no cause of action. Argument on the exceptions was heard and the Court delivered the following judgment thereon.—

1895. *May* 1. *Curia,* (*per* O'MALLEY, C.J.)

It was objected by defendant that plaintiff's pleadings disclose no cause of action against defendant.

Two points were raised:—(1) That under the law of this colony where *Lord Campbell's Act* (9 and 10 Vic. c. 93) does not rule, no action will lie by the widow and children of a person whose death has been caused by the tortious act of another against that other for compensation.

As to this, on the authority of passages cited in argument, *Voet* book 9, tit. 2, sec. 11. "*Non dubium,*" and *Van Leeuwen vol.* 2, p.282. cap. 34. sec. 14., we hold that such an action does lie.

(2) That the doctrine of the civil responsibility of a principal for the acts of his agent, as it rules in Dutch law, will not render a master liable in such an action for the acts of his servant.

As to this, on the authority of *Voet* (9.4.10) and *Van Leeuwen* vol.2, p. 322, cap. 39, sec. 1., we hold that where the servant doing the act complained of was acting in the course of his employment as such the master would be so liable.

Thereupon the plaintiff asked leave to amend his statement of claim so as to make it appear thereon that the servant who did the act complained of in the action did so in the course of his employment as servant of the defendant. The amendment was allowed in words as appears on pleadings as amended.

The plaintiff must pay the costs of the argument and amendment.

Thereafter the action came on for hearing, and on November 15th judgment was delivered as follows.—

O'MALLEY, C.J.:—

The question of the defendant's liability turns upon whether the act of Ferrier, which led to the death of plaintiff's husband, was an act done by him in his employment as manager of a "doctor's shop." This is a question of fact. What is the business of a "doctor's shop"? There is no legal definition of such business. We cannot define it by our own view of what we think it would be the right and proper and prudent and respectable business for doctors' shops to transact. We must take the evidence as to what is the business which is in fact generally incidental to the carrying on of a doctor's shop.

On this point I am satisfied that dispensing prescriptions, and even prescribing and administering remedies, is generally in-

eluded in practice as incidental to such business. I rely for this on the evidence of the two doctors, and I do not attach much weight to the defendant's expression of opinion to the contrary. I think it clearly appeared also that prescribing and dispensing remedies was a part of the business which had actually been carried on in the Lombard street shop. Under those circumstances, if Ferrier had administered medicine made up out of materials in the shop, I should have said that it was an act done in the course of his employment. But the evidence leads me to the conclusion that the opium did not come from the shop but was obtained elsewhere, and I do not think that to make up materials, so obtained, into medicine and to administer the same was part of a doctor's shop business. The dispensing and counter practice are in furtherance of the sale of the drugs in the shop, which sale is the main purpose of the shop, and the dispensing of drugs obtained elsewhere would not be in furtherance of that purpose. I think, therefore, that in this case Ferrier was not acting in the course of his employment, and that defendant is not liable.

ATKINSON, J.—The plaintiff claims damages from the defendant alleging that her husband died from the effects of a dose of medicine of a poisonous character, negligently and unskilfully administered by the defendant's servant.

The dose was made up, according to the evidence, with powdered opium instead of compound powder of opium, the result being that the dose was ten times the strength it ought to have been, and the patient died.

The liability of defendant for the act of his servant depends upon the answer to the question, was the act of the defendant's servant done in the course of his employment. In order to determine that we must first ascertain what his employment was. That depends upon the evidence.

Defendant has a chemist and druggist shop in Camp street, and at the time of this occurrence he had two other chemist and druggist shops, one in the Stabroek Market and the other in Lombard street. This latter was in charge of a young fellow named Ferrier, who had been with the defendant for some five years, and who told the deceased he had learned his business in Surinam. Ferrier was not a qualified chemist and druggist. He had passed no examinations, but for that matter neither had the defendant, but the latter has had, he says, twenty-five years practical experience in druggist shops here and in Surinam. It is plain that defendant could not himself attend at one time to the three shops. The working of this Lombard street shop was in fact

practically left to Ferrier excepting this, that the defendant says he, only, bought the supplies from time to time as required.

Now, being in charge of this Lombard street chemist and druggist shop, what was it that Ferrier, by virtue of his employment, was required to do? If it were the case of such a shop in England the answer would be, to dispense and sell drugs and other articles usually kept in shops of that kind—to make up prescriptions, but not to pretend to diagnose disease and prescribe; that is the province of a duly qualified medical man.

But it is said that in this colony these chemist and druggist shops, commonly called "doctors' shops," are run on different lines, that in all the shops in this colony there is a regular "counter-practice," that in these shops not only the masters but the clerks one and all undertake to diagnose, prescribe, and dispense in the case of anybody suffering from any ailment! That is a very startling proposition, and before accepting it we should require to have very clear proof. What is the proof offered? Two medical men, who were examined for the plaintiff, say that such is the practice all over the colony—in every shop in the colony. Now the very extent of such sweeping statements throws doubt upon them. Can these two doctors pretend to say that they know what is done in every druggist shop in the colony? And what can they personally say of any shop in the colony that such things are done in it? Were they there? If not, all they can know is what they may have been told; that is hearsay, and is not evidence which we can act upon. Particular instances may have come to their knowledge, and they were both evidently very sore on the subject, but to argue from particular instances that a general practice exists is one of the simplest of fallacies.

Then we have a very remarkable thing as regards this particular case. While saying that the practice is general throughout the colony, they both practically say that, so far as they know, the defendant never acted in this improper way. One specially exempts him from the list of black sheep, the other has good reason for believing that the defendant is not guilty because he (the defendant) had sent numerous patients to him, for whom he might himself have prescribed if he had really gone in for "counter-practice."

Then we have it that the plaintiff called the defendant and so made him her witness, and he swore that he never did prescribe, so far as he himself was concerned, and that he had given Ferrier strict instructions not only not to prescribe, but also not even to dispense, that all prescriptions taken to the Lombard street shop were to be taken to the Camp street shop to be made up. The defendant swore, too, that no respectable shop would go in for

"counter-practice." He is, of course, still the defendant though made by the plaintiff her witness, and in so far, his testimony may be looked upon as interested; but is the plaintiff entitled to ask us to believe him as her witness so far as his evidence helps her case, and to disbelieve him when it tells against her? In one sense of course the defendant's statement as to respectable shops is merely an expression of opinion, but he had served in his time in one or two respectable shops, and, to that extent, his statement would be based upon experience and can be so far accepted, although we may not feel bound to accept his general proposition as to all respectable shops.

Now, unless it can be shown that in all druggists' shops in the colony this "counter-practice" prevails, it cannot be presumed that the defendant, in engaging Ferrier, employed him upon the implied understanding that he was in carrying on the shop, to go in for counter-practice. To do so would be to presume that the defendant employed Ferrier to do that which, if not contrary to statute law, is most immoral in the highest degree—to risk human life daily in order to put money into his employer's pocket. How great the risk is when unqualified persons undertake to dispense poisonous drugs, is shown by what has happened in the present instance. We are not entitled to presume that the defendant would act in that grossly immoral way. On the contrary, before coming to the conclusion that he did so act, we ought to be convinced by strict proof. There is no such proof here. On the contrary, the weight of evidence is the other way.

It is quite true that Ferrier, in his ignorant presumption, undertook to prescribe and dispense, and did so in several instances besides this one which ended so fatally. As appears from what has been said, this cannot be deemed to have been understood to have been part of his duty, as implied by the mere fact of his engagement to serve in this druggist's or "doctor's shop." It is not shown by other evidence that it was part of his duty as the defendant's servant, but if anything, the very contrary. That being so, the act of Ferrier, although he was the defendant's servant, must be deemed to have been outside the scope of his employment according to the English phrase, or outside of the particular duty or office he was set to perform or fill, according to our law. (*Voet*, 9. 4. 10.). The defendant therefore cannot be held liable for Ferrier's wrongful acts, it not having been shown that the defendant was aware of those wrongful acts, or had expressly or tacitly adopted them. This has not been shown; on the contrary the defendant denies that he had any such knowledge.

Having come to the conclusion that the acts were not done in the course of the employment, it is unnecessary to enquire whether they were or were not done in the master's interest, assuming that the English decisions on that question are applicable in this colony.

The claim of the plaintiff must be rejected, but under the circumstances there should be no costs.

SHERIFF J.: I have had the advantage of perusing the decision of my brother Atkinson in this case, and I concur generally in the conclusion at which he has arrived. I am contented to base my decision on the broad grounds he has adopted, obviating thereby the necessity for the expression of any opinion on other parts of the case. It does appear to me incomprehensible that the numerous members of the medical profession in this colony should for so many years have tamely submitted to such an invasion of their undoubted rights as is involved in the expression "counter-practice." But what is still more incomprehensible is that chemists and druggists should not long ere this have been subjected to legislative control.

APPELLATE JURISDICTION.

KERR v. PEREIRA.

1895 *Feb.* 4. ATKINSON, C.J. (Actg.)

Appeal—Magistrates' Decisions (*Appeals*) *Ordinance 1893. s.9.—Reasons for appeal—Decision erroneous in point of law.*

Appeal from the decision of Mr. R. Swan, acting Police Magistrate for Georgetown, who dismissed a charge brought against the respondent (Pereira) for the sale of an article of food not of the nature, substance and quality demanded.

W. Nicoll, Acting S.G., for the appellant.

D. M. Hutson, for the respondent.

ATKINSON, C.J. (Actg):—When this case was called the respondent's counsel objected that it could not be heard, inasmuch as none of the reasons for appeal alleged in the notice were reasons within the meaning of any of the reasons stated in section 9 of ordinance 16 of 1893 (*a*), as reasons which, any or all, "and no others," might be set forth as reasons for appeal. The 9th of these reasons is "that the decision is erroneous in point of law."

The third reason for appeal is "that the document produced by the defendant and relied upon by him as an invoice, is not an invoice within the meaning of section 24, sub-section 1 (a) of ordinance No. 14 of 1892." Whether the document is an invoice as the term is usually understood in commerce is one thing; whether it is an invoice within the meaning of the section is another.

The magistrate held that the document is an invoice, and proceeded to dismiss the case. He must, therefore, be taken to have held that it is an invoice within the meaning of the section. The third reason for review alleges that it is not. Whether it is or is not, depends upon what is the true construction of the section.

The third reason for review, therefore, raises, in effect, if not in terms, the question whether the decision is or is not erroneous in point of law, which brings it within the 9th reason in the section above stated.

This being so, the appellant must be heard on this reason, at any rate, and I need not consider here whether the other reasons for appeal are within the reasons prescribed by the section.

(*a*) Ordinance 13 of 1893, in 1905 Edition of Laws. Ed.

ADMIRALTY JURISDICTION.

POLLARD v. S.S. TERRIER.

1895. Dec. 2. SIR EDWARD O'MALLEY, C. J.

Admiralty—Collision at sea—Steam vessel and sailing vessel—Steam vessel keeping out of way of sailing vessel—Want of look-out—Damages.

Action by the plaintiff, as owner of the schooner *Eagle,* for damages and loss sustained by him from a collision between the *Eagle* and the steamship *Terrier* on the high seas on July 12th, 1895.

All the necessary facts appear from the judgment of SIR EDWARD O'MALLEY, C.J.

D. M. Hutson, for the plaintiff.

A. Kingdon, Q. C, for the defendant.

O'MALLEY, C. J.—This is an action by the owner of the British schooner *Eagle* against the steamship *Terrier,* for damages occasioned by a collision which took place between four and five miles north-west of the Demerara lightship, on the 12th of July in the present year. Soon after eight o'clock on the evening of the 12th of July, the schooner *Eagle,* which had left Barbados on the 10th, was approaching Demerara, steering a course South-West by South, and having the lightship bearing South South-West, about four miles distant. About the same time the steamship *Terrier,* bound from Georgetown to New York, which had discharged her pilot at the lightship at about 7.30 p.m, was proceeding upon her outward voyage on a course which had been set at North half West, when the vessels collided. The stern of the *Terrier* struck the port side of the *Eagle* just about the foremast, and sank her. The night was dark but starlit, the weather fine, the wind east north east and moderate, and the tide just beginning to ebb.

The plaintiff seeks to establish that the *Terrier* is solely to blame for the collision. The defendant contends that the *Terrier* is not to blame, and that the fault was wholly that of the *Eagle,* or that at all events, if the defendant was to blame, the plaintiff is to blame also.

Captain Darsey, the master of the *Eagle*, says that he sighted the lightship about ten minutes to eight, the lightship being then between four and five miles distant, and that about ten minutes later he saw a white light almost in a line between himself and the lightship's light. These lights were on his port bow. At first he did not know whether the ship's light was that of a ship at anchor, or a steamer coming out, but about half an hour after he saw a red light, and concluded that the lights were those of a steamer coming out. After he had seen the lights thus for a short time the steamer's green light became visible, and the vessel ran square on towards the *Eagle* in a manner that made collision inevitable. Up to that moment the captain of the *Eagle* had followed the Admiralty rule and had kept his course, but then and not till then he gave the order "hard up, hard a port" with the view of throwing his ship's head off to starboard, and so easing the inevitable blow.

[After a review of the further evidence led for the plaintiff, his Honour proceeds:]

That is the evidence for the plaintiff and, in so far as it relates to what was seen from the *Eagle*, I think it is to some extent confirmed by evidence of the defendant's witnesses as to what actually happened. They say that the steamer anchored and lay for half an hour with her head towards the North East, and then moved on bringing her head round to a course of North half West; during the time she was at anchor, her white light alone would be exhibited. The side lights would be put up when she started again and before she began to move, and for at least a portion of the time, during which she was going ahead and working her head round from North East to North half West, the port light might well have been visible to the *Eagle*, and the green light invisible. When she got round the green light alone would be visible. How long did it take her to get round? We know that she was going slow. "I started slow" says the captain. Would she not take just that short time, those "few minutes" as Captain Darsey says, those "five or six" minutes, as the *Eagle's* steersman says, during which the *Eagle* could see the red light and could not yet see the green light. Then when she got round and when she would also be getting near the *Eagle*, the green light would be seen and the red would be invisible, and this would be still the case after the captain of the *Terrier* turned his own ship's head to port, as he says he did when he saw the schooner.

But as to what was done on board the *Eagle*, there is some conflict between the plaintiff's witnesses, and those of defendant. The plaintiff says the *Eagle* never changed her course till the

collision had become inevitable; the defendant says she did change her course before that, and had been for some time porting her helm and working her head off to starboard, contrary to the rule which required her to keep on her course. Captain Berg said she must have done so, but he was not able to give any reason that satisfies me that he had real ground for his opinion, and I think there must have been considerable doubt on the point when the preliminary act of the defendant was framed—a preliminary act which, as explained by counsel for the defendant, was adapted for alternative defences. "If we can prove that the schooner changed her course to starboard, we will say she ought to have kept her course. If we cannot prove that she changed her course to starboard but kept to her course, then we will say that she ought not to have kept to her course but ought to have luffed to port," and it was only during the trial that the defendant made his election as to which line of defence it was best to try.

[After a further review of the evidence His Honour continues:]

My conclusion therefore is that up to the time when the collision was inevitable, the schooner held on her course as required by the Admiralty Rules 17 and 22.

It was suggested on the part of the defendant that there was a time before the collision became inevitable when the *Terrier* was helpless to avoid the schooner by any further manoeuvre but when the *Eagle* might still have avoided the *Terrier* by starboarding her helm, and that the *Eagle* was to blame for pertinaciously adhering to Rule 22 and not adopting that manoeuvre. But in order to make her blameworthy for adherence to rule, I think it would have to be shown at least that the manoeuvre suggested really would have saved her. I do not think that the defendant's evidence establishes that, and on the whole I conclude that the *Eagle* acted properly according to the rules, and was in no way to blame.

As regards the conduct of the *Terrier*, I think it will suffice to take the evidence of defendant's own witnesses. They prove that shortly before the collision the captain had left the bridge and gone below, leaving no one in charge of the navigation and no special look-out, relying for all look-out upon the crew generally who were forward settling the anchor and handling the sails, and that this state of things prevailed when the captain came upon the bridge again, and perceived the red light of the schooner, and called the attention of the mate to it.

This want of look-out was in itself a breach of Admiralty Rule 24, and under the circumstances undoubtedly contributed directly to the accident. The result of it was that when the red light of

the schooner was seen, it was so near that the captain of the *Terrier* felt that he had no time to wait and consider his course, and acted hastily upon what was nothing better than a guess, that the schooner was coming nearly end on to him, and instead of starboarding his helm which would have been an absolutely safe manoeuvre if it was begun soon enough, felt himself compelled to take the more risky, and, as it proved, fatal course of attempting to cross the bow of the approaching ship.

When a steamer and a sailing ship are approaching each other, the steamer has to keep out of the way of the sailing ship. The captain of the steamer is not absolutely bound to adopt the safest manoeuvre, hut if he adopts another and fails, of course he is responsible. In this case he failed, and for the failure under the circumstances I hold that he is solely to blame. I, therefore, find for the plaintiff.

As regards damages, I think that the plaintiff's claim must be considered as limited by the description of the capacity in which he sues as given upon the indorsement on the writ of summons in the suit. He claims simply as owner of the British schooner *Eagle*, and I do not think he can recover for loss of freight or for cargo or for personal property and effects other than the ship. The ship was a total loss, and for the purpose of assessing the damages I have endeavoured to form as fair an estimate as I can from the evidence of what she was worth at the time of the loss. She cost $12,250 in Barbados four years ago, and her owner swears that he could not now replace her for that sum, that he could have got $12,000 for her, and that was her market value at the time of the loss. Toppin, the ship-builder, says the same. John Phillips says he would give $10,000 for her. Domingo Teixeira says he would not sell her for $12,000. On the other hand Mr. Sadler values her at $6,000, and Mr. Ridley says he would not give more than $7,000, but I cannot gather that they have any real ground for assessing the depreciation of the vessel from $12,250 which she cost four years ago, at such a very high figure as this involves.

From the higher estimate, I think, something reasonable must be deducted for four years' depreciation and also for a general fall in prices, and against that must be set off that the ship had just received a new set of sails worth $700.

Taking all the facts into consideration, I think that $11,000 is a fair value for the ship. It was suggested that, inasmuch as it appeared in evidence that the captain of the ship had some beneficial interest in one-eighth of it, the plaintiff in this action could only recover as for damages in respect of seven-eighths. But I am of opinion that in these proceedings, where we have a legal claim

to deal with, and where there are no equities as between the parties to the action we must consider the legal ownership, and my judgment is therefore for $11,000 with costs.

One word with regard to the evidence of Captain Berg. As a witness in this trial he was placed in a very painful position, inasmuch as he was practically pronouncing his own condemnation, and I think it only just to him to say that I was very much impressed by the absolute truthfulness with which he gave his testimony.

As to the other question of costs; if any costs were incurred by the defendants before they filed their answer, I think the plaintiff must pay them; for subsequent proceedings I think under the circumstances each party should pay their own costs.

APPELLATE JURISDICTION.

DE FREITAS *v.* FERREIRA.

1895, *Dec.* 10. ATKINSON, J.

Appeal—Shopman and employer—Action for wages due—Claim to set off credits given by shopman to customers—Scope of authority.

Appeal from the decision of Mr. J. E. Hewick, Stipendiary Magistrate of the New Amsterdam Judicial District, who gave judgment for the plaintiff Ferreira (now respondent) for the sum of $51.03, balance of wages due by the defendant (appellant). The decision was varied to judgment for the plaintiff for the sum of $21.79.

N. R. McKinnon, for the appellant.

S. E. Wills, for the respondent.

ATKINSON, J.—In this matter the respondent sued in the court below for $51.03, being balance of wages alleged to be due from August 1st, 1894, to April 14th, 1895, $169.24, after giving credit for amount drawn, $118.21.

The defendant (now appellant) sought to set off a sum of $66.15 being the amount of certain credits given by the plaintiff as shopman, contrary, it was alleged, to the instructions of the defendant, his employer.

The magistrate gave sentence for the respondent (then plaintiff) for the balance claimed, relying on *Rodrigues v. De Freitas* decided by Semper, J., in December, 1879. In that case also, the plaintiff, a shopman, was alleged to have given credits contrary to the instructions of his employer, and the employer claimed to be entitled to set off the amount of those credits against the wages, but Semper, J., held that this claim could not be supported in law.

In the present case the appellant's counsel argued that *Rodrigues v. De Freitas* was not on all fours with the present, that here there was a special agreement when the respondent was employed that no credit should be given. That is not so. The instructions in this case were given after the engagement to serve had been entered into by the respondent, just as was the case in *Rodrigues vs. De Freitas,* The respondent was not, indeed, engaged by the

appellant at all, but in New Amsterdam by Mr. Walls. It was not till he went down to the shop at Hopetown that he was told by the appellant that he was not to give credit. The cases are, therefore, on all fours and, so far, the magistrate's decision was right.

It was urged, however, as part of a second reason for appeal, that it was not competent for the magistrate to give decision for $51.03. It was said, and the evidence shows, that the respondent was discharged on the 27th of March, 1894, that consequently the respondent could not claim as for wages for the month of March or for the fourteen days in April, but only by way of damages. That is so. *Watt v. Gomes* decided by Chalmers, C.J., in October, 1892, was cited. In that case it was laid down that, in the case of monthly service, faithful service to the end of the month was a condition precedent to the right of wages accruing. In the present case, whatever right the respondent may have had as to the month of March and the fourteen days in April, it certainly was not for wages accrued due.

The respondent, therefore, was not entitled to recover on his claim for wages either the sum of $20 for March, 1895, or the sum of $9.24 for the fourteen days in April.

The magistrate's decision should have been for $21.79 with costs, and I vary it accordingly.

As neither party has entirely succeeded in this appeal, there will be no costs.

No question was raised during the argument, but I may call attention to the fact that in the copy of the proceedings the title of the court is not correctly stated in the rubric. It is entitled "In the Magistrate's Court of Civil Jurisdiction." It should have run," Magistrate's Court" with the words "Civil Jurisdiction" below. (See schedules, Ordinances 12 and 13 of 1893.)

GENERAL JURISDICTION

HOGG, CURTIS CAMPBELL AND CO. v. HUNTER AND OTHERS.

1895, *Dec.* 16. SIR EDWARD O'MALLEY, C.J., ATKINSON, J., AND KIRKE, J., Actg.

Sugar plantation—Goods sold and money advanced in respect of the working and cultivation of the plantation—Three co-owners possessing undivided shares—Partnership—English and Roman Dutch law—Individual liability of partners for whole debt of partnership—Usage in Holland in the years 1698 and 1803—Prescription.

Action against Andrew Hunter, Gibson Munro and the executors of the late Alexander Barr, for the sum of £7,465 3s. 8½d. ($35,832.89) and interest thereon for goods sold and delivered and moneys advanced to the first-named two defendants and Alexander Barr, deceased, as proprietors of pln. Blenheim in the island of Leguan, and on an account stated between them in respect of the working and cultivation of the plantation.

Judgment was given against the second and third defendants on March 5th, 1895, they not having appeared to the summary citation after personal service thereof on them. The action then proceeded against the first-named defendant, plaintiffs claiming from him the whole amount of the debt.

Defendant denied the claim, denied that any accounts had ever been stated between the parties, pleaded prescription as regards plaintiffs' claim, under Ord. 27 of 1856 (*a*), and counter-claimed for the sum of $8,348, overpaid to the plaintiffs. The counterclaim was subsequently withdrawn,

A. Kingdon, Q.C., for the plaintiffs.

D. M. Hutson and *P. Dargan,* for the defendant.

All further necessary facts and the arguments appear from the judgment of the Court (*per* O'MALLEY, C.J.), as follows:—

(*a*) See Ordinance 1 of 1856, in the 1905 Edition of the laws.—Ed.

This is an action brought by Messrs. Hogg, Curtis, and Campbell to recover from Messrs. Andrew Hunter and Gibson Munro and the executors of the late Mr. Alexander Barr, a sum of £7.465 3s. 8d. alleged to be due from the defendants to the plaintiffs in respect of the working and cultivation of plantation Blenheim. Judgment has been signed against the two last-named parties, but there is nothing out of which to realise the same, and it is now sought to make Mr. Hunter answerable for the whole amount.

Messrs. Hunter, Munro and Barr became co-proprietors of the Blenheim estate in 1884, each being owner of an undivided one-third share, and entered into an arrangement with Messrs. Hogg, Curtis and Campbell for financing the plantation.

The plaintiffs' case is—

(1.) that Messrs. Hunter, Munro and Barr were partners in respect of the working of the plantation, and that, as one of such partners, Mr. Hunter is individually liable for the whole of the partnership debt incurred in such working; and

(2.) that whether there was a partnership in fact or not between Messrs. Hunter, Munro and Barr, Mr. Hunter held himself out to the plaintiffs as assuming the responsibility of a partner, and obtained from them on the faith of such representation the advances and goods in respect of which the present action is brought.

The defendants' case is a denial of the plaintiffs' case, and, as against the plaintiffs' contention that the defendant assumed responsibility covering the whole debt, a counter contention that the responsibility that he recognised was limited to his one-third share of the losses. The defendant raises also a further contention to the effect that, whatever may have been his responsibility as a partner in the absence of special agreements, that responsibility was limited by certain special separate agreements between Messrs. Hogg, Curtis, Campbell & Co., and the other two partners, according to which, as he contends, each of them is liable for no more than one third of the debt. The defendant also says that the plaintiffs' claim is barred by the Prescription Ordinance 1856.

The defendants filed a counter-claim but that has been withdrawn. It was contended for the defendants that there was no partnership here, but that Messrs. Hunter, Munro and Barr, having each an undivided third in the plantation, worked it not as copartners but merely as co-owners.

The first question to be considered, therefore, is whether Messrs. Hunter, Munro and Barr were in fact partners in the working of the Blenheim estate.

It is not suggested that there was any written contract of partnership between them, but it is said that a mutual agreement between them, amounting to partnership is shown by the evidence before the Court. We have to ask, therefore, what understanding as between these three persons is it necessary to prove in order to establish partnership? If it were a question of an English partnership, that is to say, of partnership as defined by English law, I should say it would be sufficient to show that the three agreed to work the estate together and to share profits and losses. But this is a question of partnership according to Roman Dutch law. Will the above facts if proved establish a partnership according to Roman Dutch law? Taking the definitions of partnership as given in Bk. 4. chap. I. s. 11 of *Van der Linden's Institutes* (*a*), I am of opinion that they will. Did Messrs. Hunter, Munro and Barr, then being each owner of one third undivided share of the estate, agree to work the estate together and to share the profits and losses resulting from such working? Upon this point the evidence is to my mind so clear, if indeed the fact is not admitted, that it is unnecessary to discuss it in detail, and I hold that a partnership in fact as between Hunter, Munro and Barr in the working of Blenheim estate, must be accepted as established. A great deal of evidence was given as to the language used both in conversation and in writing by Mr. Hunter as going to show what he thought of his liabilities in connection with the working of the estate, but such evidence is not relevant to this particular issue, which is not what liabilities did the parties think they were incurring, but was their agreement to share profits and losses. If this was their agreement it does not matter what view Mr. Hunter or any one of them held as to their liability to third parties; that liability would be determined by the law of partnership. So again as I understood it, one use that it was sought to make of the agreements in the mortgages given by Munro and Barr, to Hogg, Curtis and Campbell was to show that when Messrs. Munro and Barr entered into those agreements they could not have supposed that they were liable for all the debts of Blenheim to the full extent of partners, and that therefore it must be inferred that they were not partners. But again here, what they supposed is beside the point in this particular issue where the question is, not what view of their liabilities did they hold, but had they made an agreement as to profits and losses.

I take it then as established that there was a partnership in fact between Messrs. Hunter, Munro and Barr in the working of plantation Blenhim, and if this were a case to be determined by

(*a*) See *Institutes*, Juta's translation, 3rd Ed. p. 397.—ED.

English Law that would suffice to make Mr. Hunter individually responsible for the whole debt. But it is to be decided by Roman Dutch Law, and that law seems to make a distinction between partnerships worked in one way, which do entail upon each partner individual liability for the debts of the partnership, and partnerships worked in another way where each partner is only responsible for his proportionate share, and therefore we must determine whether this partnership comes within the former class.

That class is described in Bk. 4., chap. I., s. 13 of Van der Linden's *Institutes* as follows: "In partnerships carrying on trade as a *firm*, each partner is liable *for the whole* of the debts of the partnership; provided those debts have been incurred by a person who had authority to bind all the partners and provided they were incurred in the name of the partnership." Was the partnership and were the debts of the classes mentioned in these provisos? I think they were. According to the course of business between Messrs. Hogg, Curtis, Campbell and Co., and the estate, the moneys and supplies were procured for the carrying on of the estate, and the bills for the same were drawn by one member as representing the partnership; the moneys so obtained were charged in the half-yearly accounts to the estate and those accounts were rendered to and accepted and ratified by each of the members of the partnership. That seems to me sufficient under the circumstances to show that the debts were created by a person who had power to bind the partnership and that they were made in the name of the partnership. I conclude, therefore, that in this case the partnership is one which entails upon each partner an individual liability for the whole of the debt. There were three or four hills at the end of the account rendered which appeared to have been drawn by all three partners, and there might perhaps be a question whether these items come within the above proviso, and whether, if not, they are items for which the partners respectively are fully liable. As to this latter question I have had the advantage of reading my brother judge's judgment, and I concur with the conclusion to which he comes. Apart moreover from liability as partners I think that in case of these bills governed as they are by the English law of Bills of Exchange each of the signatories is jointly and severally liable. On the whole I hold, therefore, that there was in fact a partnership and a partnership of such a kind and the debt of such a kind as that each partner would be individually liable for the whole debt of the partnership.

We have then to consider, as a second question, whether Mr. Hunter held himself out to the plaintiffs as assuming the responsibility of a partner and obtained from them, on the faith

of such representation, the advances with which we are concerned in this action, or whether he limited his responsibility to one-third of the losses. If my decision be right upon the first question there would be no need to go into this, but as that decision involves a determination upon points of law and might be upset, I think the parties are entitled to the views of the court upon the second question also, which is one of fact.

[His Honour proceeds to review at length the evidence relating to this second question and then continues:]

The conclusion therefore that I come to on the plaintiffs second contention is that the defendant Hunter did throughout the whole business hold himself out to Messrs. Hogg, Curtis and Campbell as being ready to meet whatever liability legally attached to his position, but that he never went so far as to undertake any liability outside or independent of that which legally resulted from his position whatever it might be. If therefore there was a partnership in fact upon which the defendant was liable on the first head of claim, there was such a holding out as might make him liable independently on the second head, but if he was not liable as a partner in fact, neither was he liable upon any undertaking or representation or holding out made in the course of the correspondence.

The accounts which were proved to have been rendered half-yearly to all the partners during the period of the correspondence point to the same conclusion. In accepting those accounts as they were rendered, Mr. Hunter accepted the liabilities with which they charge him, which in my opinion are simply those of a partner *qua* partner in Blenheim, neither more nor less. There is not one word either in correspondence or accounts so far that would point to any limitation of Mr. Hunter's liability to one-third of the debts of the estate. But then it was said on behalf of the defendant that, as between Hogg, Curtis, Campbell & Co., and Mr. Hunter, it was understood that Blenheim estate should be financed and the liability of the co-proprietors should be regulated on the same footing as in the case of Adelphi, and that in the case of Adelphi the partners were only charged with their respective proportionate shares of the losses, and were not treated as being each jointly and severally liable for the whole debt. And counsel for the defendant procured a statement of account rendered to the Adelphi estate which, as they argued, conclusively established this point. On careful examination, however, and having regard to the clear and consistent explanations that were given by Mr. Hogg, and to the Solicitor General's argument thereon I am of opinion that it went far to establish the contrary, and to prove the plaintiffs' case by showing that Adelphi had always been treated by

Messrs. Hogg, Curtis and Campbell as a partnership with partners jointly and severely liable I confess that I am not surprised that the attempt to put before us one selected account, and to force upon us a purely theoretical construction of its meaning, instead of fairly putting before us the whole of the Adelphi accounts as facts upon which we could decide, turns out unfortunately. The proper way as it seems to me, if the course of accounts is relied on to establish any fact, is for the parties who rely on them to put the whole of the accounts before the Court, and then to point to those features in them which appear to support their contention. Be that as it may, this account, in failing to prove the defendant's case of liability limited to one-third of losses, becomes at the same time a strong piece of evidence for the plaintiffs, as showing that the understanding between the parties was one according to which Hunter was in fact liable as a partner for the whole.

I come now to the defendant's contention that, even though there may have been a partnership which under ordinary circumstances would have made each partner liable for the whole debt, yet that there were separate special contracts between the plaintiffs and each of the other defendants which limited their respective liabilities for debts for the estate to one-third each, and that the defendant's liabilities must be taken to be limited in the same way. This point was very fully discussed before us, and after considering all that was said I cannot come to the conclusion that the special agreement had any such effect. Mortgage clauses of the deed by Munro (the two deeds are on the same lines and it suffices to consider one) relating to this one-third share of the ownership of the estate in no way affects his status as a partner in the working of the plantation or his liability in that capacity on the working account. The other clauses of the deed, by which he undertakes to consign produce and provides for the appropriation of his share of profits on the working of the plantation, are no more than the expression in writing of what are the usual terms of agreement as between Messrs. Hogg, Curtis and Campbell and the partners of any plantation that they finance, and I cannot find one word therein that either directly or impliedly provides that Munro shall not be liable as a partner to the full extent in the ordinary way for losses in the working account of the estate as a whole, nor do I think that the agreement to pay a share of the town agent's salary can be construed to have that effect. What the deed seems to me to come to is this; one proprietor being about to mortgage his one-third share of the property and being about to join his other two co-proprietors in the working of the plantation which is to be financed by Messrs. Hogg, Curtis and Campbell, Messrs. Hogg, Curtis and Campbell take the opportunity of the

mortgage to obtain from him as much security as the mortgage can be made to afford for any debt for which he may become liable to them on the working account, but without either defining the nature or limiting the extent of that liability whatever it was. I hold therefore that this defence fails to establish the defendant's point.

Lastly there is the question of prescription. It is admitted that no debt can be recovered in this action which accrued before February, 1892; it is also admitted that out of the total amount, £13,334 10s. 2d. due from the defendant to the plaintiffs before the commencement of the action, £5,468 14s. 2d. was in respect of debt which had accrued before February 5th, 1892. But the plaintiff's had in their hands certain moneys of the defendant which had not been appropriated by him or by them to any particular items of his indebtedness to them, and they said that they had a right to apply those moneys, amounting to £6,184 3s. 1d., to pay this £5,468 14s. 2d. It appears to me that this is so. Then there is a question as to two items comprised in the plaintiffs' claim being for bills drawn and accepted before February 5th but payable after that date. The defendants say that upon the accounts rendered these items are charged as debts from the date of acceptance, not from the date when they fell due, and that that must be taken as against the plaintiffs to be the date when the debt accrued. But we have evidence of the actual transaction that those entries represent, and I think that we are to look to the explanation that it affords as to the entries in the account, and that shows, I think, that in neither case did the debt actually accrue before the date of prescription.

On the whole, therefore, I think that there should be judgment for the plaintiffs for the full amount claimed with interest and costs.

[His Honour proceeded to add that during the case imputations had been made against Mr. Hunter but that he saw no just cause for them.]

ATKINSON, J.:—We have consulted fully together with respect to this case, and the conclusions stated in the judgment just read are the conclusions of the Court, but I think it is desirable to deal a little more fully with the law as it relates to the liability of partners.

It was argued by the defendant that, even allowing for the sake of argument that Messrs. Hunter, Munro and Barr were partners, they, having themselves worked the plantation in common and undividedly, would, according to Roman-Dutch law, be each liable to one-third only of the debt incurred; whereas if

they had appointed one of their own number or a stranger as manager, they would each have been liable for the whole debt *singuli in solidum. Voet,* 17. 2. 13, 14 and 15 was cited, as also *Van der Keessel,* Th. 702-3.

As to the latter of these two propositions, it will presently appear that *Voet,* in the very par. 13 cited, says that the law in his time was the very opposite of that stated by defendant's counsel.

As to the proposition first stated, it is not necessary for us to consider here how far the passages cited bear it out, inasmuch as it appears from the evidence that the defendant and the other two did not in common and without division manage the joint business of the plantation. On the contrary Mr. Munro was entrusted with that part of the business which consisted in the actual management of the plantation, and resided on it. Mr. Barr was entrusted with the part of the business which comprised the town agency, and the financial arrangements generally, and resided in town. The defendant, when in the colony, acted as planting attorney, but when he was out of it that duty also seems to have been entrusted to Mr. Barr.

The case therefore comes within the class described by *Voet* (par. 13, "*Idemque est,*" etc."), that when the partners manage the business dividedly or separately, and the administration is distributed in different departments or in different localities— since then each partner is in turn considered to be a manager or agent, so far as the section entrusted to him by the rest, it follows that they are all bound *in solidum* by a contract of one of their own number—just as if he were their agent. *Voet* had just previously (par. 13) dealt with the question of what would happen if one partner or a stranger were appointed manager of the business. "But if several partners appoint either one of their own number or some stranger over the business, and thus select him to be manager over the company, it seems that he, contracting in the name and on behalf of the partnership, would not only bind himself for the whole, but would render the remaining partners, who appointed him manager, liable each of them *in solidum* to the creditors of the partnership." And the law is the same when all the partners do join in managing the business but do so "dividedly or separately" as above cited.

This passage is evidently the one on which the defendant's counsel relied when he stated that the partners would each be liable *in solidum* if they appointed one of their number or a stranger as manager. It is manifest that *Voet* was, so far, discussing what in his view would "seem" to be the liability of partners under "the written" law, not only because he cites the Roman

law from which this branch of Roman-Dutch law is expressly derived, but because he winds up this paragraph (13) by stating what the law is in his day:—"I should perhaps say that, by present usage amongst traders, even when several partners have appointed one of their number or a stranger to be manager of the business, each of them is only held rateably liable on the contracts of the manager; thus far the Roman law, which bound such partners each for the whole amount, has been departed from, and the rule regarding those who jointly work a vessel been adopted." This rule will of course apply equally, as *Voet's* reasoning shows, to those cases also where partners do themselves manage the business but do so dividedly and separately. Of course, in the absence of the local usage stated by *Voet*, the Roman law, as the subsidiary law, would have applied.

We must therefore take that usage to have been the law of Holland in 1698, when the first edition of *Voet's Commentaries* was published. But we have to enquire here, not what the law of Holland was in 1698, but what it was immediately before the introduction of the Code Napoleon into Holland in 1811—in other words, what was the law of Holland in 1803 when the colonies of Demerara, Essequebo and Berbice were finally surrendered to the British. It by no means follows that what was usage when *Voet* wrote was usage a hundred years later. As pointed out in a note to the preface in *Van der Linden's* Introduction published in 1806, *Van Leeuwen's* Commentaries published in 1678 were open to the objection that many changes had been made in the law of Holland since that time; and *Van der Keessel*, in his preface to the Theses, written in 1800, tells us that he has added all the laws and decisions since 1619 when *Grotius'* Introduction was written. So with *Voet*, there must have been many changes in the law of Holland between 1698 and 1803. For those changes we must look to later writers, and amongst these no one takes higher rank than *Van der Keessel.* In Thes. 702 (*a*), referring to *Voet* (17. 2. 13) he says: "As regards the right which third parties have against several partners, it is indeed clear that the contracts of one of them whom the others employ to manage the business as their agent bind such others also; but the doctrine of *Voet*, that by the law of the present day the latter may (as in the case of shipowners) discharge themselves by ceding their share in the partnership to the creditors seems wholly opposed to the reason of law."

By describing it as a mere "doctrine," and speaking of it as seemingly opposed to the reason of law, *Van der Keessel* plainly

(*a*) *See Van der Keessel,* Lorenz' translation, 2nd ed., p. 250.—Ed.

indicates that in his opinion, that doctrine is not regarded as law in his day.

The prior statement as to the other partners being bound by the contracts of their manager may mean either that they are bound *in solidum* or only rateably as stated by *Voet.* But, in Thes. 703, *Van der Keessel* goes on to discuss the question; "whether partners are liable each *in solidum*, on the contracts of one or more of them who are in the place of agents for the others or for each other, in that they allow him or them or each other to contract in the name of the firm, has been the subject of opposite opinions among the lawyers. In the *Hollandsche Consultatien* it is answered in the affirmative, upon the authority of the statute of *Antwerp.* But others have maintained the negative; and this seems also to have been the opinion of *Grotius.* The former opinion has, however, been since adopted by the custom of *Amsterdam,* as testified by an eminent jurist and a great number of merchants. And several advocates and proctors practising in the courts of *Amsterdam* have testified in court to the same effect; and the merchant *Verwer* and several learned advocates of recent times, as well as a number of merchants, have given their adherence to the same opinion." He gives references and authorities for each of these statements, extending from 1707 down to 1790, showing a continuous custom. There seems to be some error in the reference to Grotius, because it is there laid down that if any one contracts on his own behalf and on behalf of his partner and a third party becomes surety, both partners are bound *in solidum* and the surety may proceed against either of them. (*Holl. Consult.*, d. iii, st. 2, Cons. 143, n. 5.)

Antwerp and Amsterdam were the principal commercial cities of the Netherlands, and the latter was not only the capital of the Netherlands, but was situated in the province of North Holland, and we may, not unreasonably presume, that this custom, if it did not prevail throughout the Netherlands as a whole, did prevail in Holland. Indeed that must be taken to be the effect of Th. 703. The question discussed as to how far partners are bound is not as to how far they are bound in any particular place, but what is the law of Holland and Zeeland on the subject. The title of the book is "Select Theses on the Laws of Holland and Zeeland, being a commentary on Hugo Grotius' Introduction to Dutch Jurisprudence, and intended to supply certain defects therein, and to determine some of the more celebrated controversies on the law of Holland." The expression in Thes. 703, "the former opinion has, however, been since adopted by the custom of *Amsterdam,*" shows that the learned author looked upon that as determining this particular controversy as to the liability of part-

ners, and so settling what the law of Holland on the subject was when he wrote. That means that in 1800, according to the law of Holland, partners were each liable *in solidum* on partnership contracts made by one or more of their number. That being so, that law was then the law of this colony.

Then we have *Van der Linden* writing in 1806 stating (bk. 4, chap. I., sec. 13., par. 6) that in those partnerships which carry on trade as a firm each of the partners is liable for the whole of the debts of the partnership, provided these debts have been created by a person who had power to bind the partnership and provided they were made in the name of the partnership.

I may add that this is the first time during my lengthened experience in this colony that it has ever been, to my recollection, even suggested that by the law of this colony, in the absence of special agreement, partners are not liable *singuli in solidum* to third parties with whom any or all of them have contracted debts on account of the partnership.

COURT OF APPEAL.

PATTERSON AND OTHERS v. ATTORNEY GENERAL OF BRITISH GUIANA.

1895. *Feb.* 12. ATKINSON, C.J., Actg., SHERIFF, J., and KIRKE, J., Actg.

Appeal—Acquisition of land for public purposes—The Lands (*Acquisition for Public Purposes*) *Ordinance 1889—Rights of persons interested—Jurisdiction and functions of judge under the ordinance—Discretion—Validity of resolution of Governor - in - Council.*

Held that a judge sitting apart for the special purpose of assessing compensation to be paid for land compulsorily taken under the provisions of the Lands (Acquisition for Public Purposes) Ordinance 1889, cannot enquire into the question whether the Governor-in-Council had acted *bona fide* or otherwise under the ordinance.

Appeal from the decision of KIRKE, J., (Actg.) in the matter of a motion by the Attorney General for ascertaining the value of a piece of land on Pln. Wismar, Demerara river, acquired under the Lands (Acquisition for Public Purposes) Ordinance 1889, for a public work.

The judgment appealed from was delivered on November 2nd, 1894, and was in the following terms:—

KIRKE, J., (Actg.):—This is a matter brought before me under Ord. 14 of 1889, as amended by Ord. 11 of 1894, arising out of a motion *ex parte* for the Attorney General on behalf of the colony for ascertaining the value of a piece of land at Wismar on the upper Demerara river.

In 1893 the Government made a contract with the Sproston Dock and Foundry Co., in which *inter alia* the Government agreed to give to that company a free grant of land on the course of the said railway to the width of 300 feet, and also 200 acres of land at each terminal station, the station on the Demerara river to be at or near Christianburg.

After the contract was made it was discovered that the Government had no control over any land on the river at or near Christianburg, which was all private property. After various proceedings, legal and otherwise, a compromise was arrived at. The matter had been referred by the Governor to a committee of six members of the Court of Policy, of which the acting Attorney General was chairman, and they reported as follows:—

"That the Government shall with all possible despatch acquire under the Lands (Acquisition for Public Purposed Ordinance of 1889 a tract of land 300 feet wide for the line of railway for such portion thereof as passes through Pln. Wismar, and also such land on Pln. Wismar as can be obtained for the purposes of a terminal station at the Demerara river terminus not exceeding fifteen acres."

The report of the committee was adopted by the Court of Policy. The matter was brought before the Governor-in-Council who now performs the function formerly exercised by the Governor and the Court of Policy in the ordinance, and the Governor issued his warrant as follows:—

"Whereas the Governor-in-Council has this day declared that the land hereinafter described, that is to say, the piece of land on Pln. Wismar on the left bank of the Demerara river delineated on a plan signed by M. K. North, Assistant Colonial Civil Engineer, and dated 15/10/94, therein marked A & B and coloured yellow, containing 65 acres, 2 roods and 18 perches, shall be acquired for a public work, now therefore I do hereby, under the provisions of the Lands (Acquisition for Public Purposes) Ordinance, 1889, by this my warrant under ray hand and the Public Seal of the colony direct that proceedings shall be taken to acquire the said land for the colony."

In consequence of this warrant a motion *ex parte* was made for the Attorney General before a judge, who issued and published his order in these terms: "I do order and direct that the value of the land described in the warrant be ascertained, and that the amount of compensation to be paid to the parties interested be ascertained." A day, hour and place were appointed by the order "at which the court will sit to hear the party or parties interested in the said piece of land, as well as the mover herein, and determine and assess the amount of compensation to be paid by the colony to the owner or owners of the land described in the warrant."

At the hearing certain objections were raised by the learned counsel who appeared for the Pattersons, who claim to be the owners of Wismar. Amongst them the most important were:

(1) That the land mentioned in the warrant does not come under Ord. 14 of 1889, inasmuch as the work for which it is required is not a public work under the description of "public work," in the second section of the ordinance;

(2) That persons who are authorised by law to take land compulsorily can only use it for the purposes for which it is acquired;

(3) That the Government have been guilty of *mala fides*, inasmuch as they profess to be acquiring this property for themselves, whereas they are only obtaining it to hand it over at once to the Sproston Dock and Foundry Co., which is illegal.

The learned counsel supported these objections in a well-sustained and well-illustrated argument, and he maintained that as the parties he represented had been cited by the judge to appear, he had a right, and it was his only opportunity, to uphold his clients' interests and to seek for justice for them—and he appealed to the judge not to allow private property to be taken compulsorily in an illegal manner, as the Government was now doing.

The Administrator General, who was appointed to represent the heirs of E. H. Huss, deceased, also argued on the same lines, and requested that the objections put forward by Mr. Dargan might be applied to the case of his clients.

The acting Solicitor General on the other hand maintained that all these objections were irrelevant and beside the issue, which was simply to assess the value of the land, and that the judge could not go behind the Governor's warrant and his own order.

It is true that a judge of the Supreme Court sits to hear and determine this matter, but does he sit as a judge trying a cause? Is he not rather an arbitrator or assessor appointed for a particular purpose—and for no other? In the Ord. 14 of 1889 a special jury of seven was struck by the Registrar to assess the value of the property to be acquired under the ordinance, but by Ord. 11 of 1894 a judge was substituted for the special jury. If we consider the wording of the report of the committee, the resolution of the Combined Court, the warrant of the Governor, and the order of the judge, it is clear that they all point to the fact that this matter has been decided rightly or wrongly by the Government, and that one item alone, viz., the assessment of the value of the land and the compensation to be paid, has been left to the judge, who is apparently appointed as an impartial and unbiassed arbitrator. The judge is only tilling the place of the special jury and he has no functions which could not have been discharged by that jury.

If I had been sitting as a judge of the Supreme Court trying an action for damages, by the owners of Wismar v. the Colony of British Guiana, for illegally dispossessing them of certain lands, the arguments of the learned counsel would have had great weight with me; but in the present case I think these objections cannot succeed and are irrelevant to the issue before me. I therefore dismiss them, and the investigator will proceed to assess the value of the land in question.

His Honour thereafter (November 10th) proceeded to ascertain the value of the land and fixed the amount to be paid at $499.78, the Government also to pay the costs of the award.

The appeal came before the Full Court, and decision was given on February 12th, 1895, dismissing the appeal.

P. Dargan, for the appellants.

W. Nicoll, Acting S. G., for the respondent.

The reasons for appeal, facts and arguments sufficiently appear from the judgment of the Court (ATKINSON, C.J. Actg., SHERIFF, J. and KIRKE, J. Actg.,) which was as follows:—

The appellant moves by way of appeal that the whole of the judgment pronounced by KIRKE, A.J., on November 10th, 1894, in the matter of the motion of the acting Attorney General of British Guiana for ascertaining the value of a piece of land on Pln. Wismar on the left bank of the Demerara river, which is required for a public work, may be discharged and reversed.

The reasons of appeal, so far as it is at present necessary to consider them, are briefly stated:—

1. That the appellant is one of the proprietors of the piece of land in question; and that he appeared at the hearing of the motion, having been served with notice of the motion by order of the judge.
2. That the motion is not a proceeding to acquire land for a public work within the meaning of Ordinance 14 of 1889, under the provisions of which the motion was brought.
3. That the motion is not a proceeding to acquire land for the colony within the meaning of the said ordinance.
4. That the motion is illegal, and the acquisition of the said piece of land is *ultra vires,* inasmuch as the resolution of the Governor-in-Council, and the warrant of the Governor laid over at the hearing, were not made *bona fide,* or within the provisions of Ordinance 14 of 1889.
5. That the acting judge had jurisdiction to determine the matters herein before mentioned, which were raised at the hearing, and was wrong in refusing to do so.

The appellants' counsel proposed to argue reason 5 in the first instance, as, if that reason were decided against him, it would, he said, settle the whole matter, except as to the question of compensation raised in the 6th reason. This was agreed to.

Section 3 (1), Ordinance 14 of 1889, The Lands (Acquisition for Public Purposes) Ordinance, enacts that whenever the Governor and Court of Policy (*a*) resolve that any land is required for a public work they may authorise any person to enter on the land and make surveys. By s. 3 (2), the report of such person, with a plan of the land, is to be laid before the Governor and Court. Sect. 4 (1) says that whenever the Governor and Court of Policy by resolution declare that any land shall be acquired for any public work it shall be lawful for the Governor by warrant under his hand and the public seal of the colony to direct that proceedings shall be taken, "as hereinafter mentioned," to acquire such land for the colony. By s. 4 (3) the warrant is to be deposited in the office of the Registrar of the colony.

By s. 31 of the British Guiana Constitution Ordinance the executive and administrative functions of the Governor and Court of Policy were transferred to the Governor and the Executive Council; and, by s. 32, where in any enactment or document reference is made to the Governor and Court of Policy or to the Court of Policy in relation to such executive or administrative functions the Governor in Executive Council shall, if such Council is constituted, be intended and taken in lieu thereof. The Council is constituted.

Sect. 5 (1) enacts that "when any such warrant is deposited, any judge of the Supreme Court of Civil Justice to whom application may be made by motion *ex parte* by or on behalf of the Attorney General . . . . shall direct that the value of the land described in the warrant be ascertained, and that the amount of compensation which ought to be paid to the several persons interested therein be determined."

By warrant dated October 15th, 1894, the Governor directed that proceedings should be taken to acquire for the colony the land in question here. The warrant recites that the Governor-in-Council had that day declared that the said land should be acquired for a public work. The warrant having been deposited, a motion was made by or on behalf of the acting Attorney General before KIRKE, A.J., *ex parte*, for an order under s. 5. (1). The order was made and a time and place fixed for the hearing, as required by the new s. 5 (2) introduced into Ordinance 14 of 1889 by s. 8 (a) of Ordinance 11 of 1894.

The matter was heard in due course. At the hearing the objections stated in the reasons for appeal 1 to 4 were urged. The judge over-ruled the objections, refused afterwards to allow an appeal from his interlocutory decision and proceeded to assess

(*a*) Now Governor-in-Council. Ordinance 8 of 1889 in 1905 Edition of Laws.—Ed.

the value of the property. Having done so he gave his decision, and the present appeal is from that decision. The question as to whether this was an appealable matter was not contested, and the appellants counsel proceeded to argue:—

(a) That, from the terms of the ordinance itself, the acting judge had jurisdiction to hear and determine the question as to the *bona fides* of the Executive Council, etc., which was raised before him.

(b) That the court had an inherent jurisdiction to deal with such matters, and that a judge sitting apart could exercise that jurisdiction.

(c) That in matters of far greater importance than those here involved the courts had enquired whether persons vested with statutory powers had exercised those powers *bona fide.*

As to the first branch of his argument the appellants' counsel said the judge below had held in his interlocutory judgment that he stood rather in the position of an impartial arbitrator, whose duty was simply that of assessing the compensation, than in that of a judge trying a cause, and went on to contend that, by the very terms of the ordinance itself, the judge had many other things to do besides assessing the damages. By s. 6 (1) notices were to be served to enable all persons interested to protect their rights. "Rights" was a very wide term and the appellant, he contended, had a "right" that his land should not be taken away from him unless the law authorised that being done. This was not the case here—the land was not required, in fact, for a public work; and, therefore, this attempt to take it was not *bona fide* and was *ultra vires.*

The term "rights" of course, will in its general sense, cover everything appertaining to an individual that can be called a right. Is the term as it occurs in s. 6 (1) used in its general sense? If not, what is the more restricted meaning? To get at that we must look at the whole ordinance. Sect. 5 (1), as we have seen, directs that the value of the land described in the warrant be ascertained, and that the amount of the compensation which ought to be paid to the persons severally interested therein be determined. 'Paid'—for what? What but their "rights" in or with respect to the land, as owners, lessors, etc. When, therefore, persons interested are notified in pursuance of s. 6 (1) to appear and protect their "rights" what rights would as a matter of ordinary construction and common sense be understood? Again, what but their rights in or with respect to the land proposed to be taken from them in pursuance of s. 5 (1), and their rights as to the compensation to be paid therefor. That this is so is shown by s. 8 (1). As it stood, a jury was

to assess; but as it stands in the section substituted by s. 8 (b) of Ordinance 11 of 1894, a judge is to assess the amount of compensation to be paid by the colony to the owner of the land described in the warrant and to all other persons "having any just right, title, or interest in respect of the land or any portion thereof." That the rights of the parties interested are, by the ordinance, contemplated only with respect to their right of compensation for such rights clearly appears, further, from s. 9 (1), which enables the parties interested to tender evidence in support of their "alleged rights" *and the value thereof.*

In construing an ordinance or statute, a word used therein is to be taken to have the same meaning throughout, unless the contrary clearly appears in the ordinance or statute itself. There is nothing in the ordinance to show that the word "rights" as used in s. 9 (1) has any different meaning when used in s. 6 (1), and if we look at the phraseology of the sections it is manifest that the word "rights" must be taken to have the same meaning in ss. 6 (1) and 9 (1). The whole tenor of the ordinance goes to show that a right to resist the taking of the land at all is not within the purview of s. 6 (1.)

The appellants' counsel however strenuously contended that the sections showed that the judge sitting in the matter had to hear and determine many other matters besides merely assessing the amount to be paid by the colony; he would, for instance, have to determine whether persons claiming, other than the owner, had in fact any interest and if so what?

Supposing that to be so, it in no way advances the appellants' contention that the acting judge had jurisdiction to determine whether the warrant was issued *bona fide.*

On the contrary, the determination of these very points was necessary in order to enable the judge to comply with the requirements of the law—to ascertain the amounts which ought to be paid to the persons interested, other than the owner. In order to ascertain that, the judge must, of necessity, first determine what were the respective rights of those persons.

If the appellants' contention, that the judge, who sat under and by virtue of the judge's order made in terms of s. 5 (1) in pursuance of the Governor's warrant had power to enquire into the validity of the warrant, is correct, *a fortiori* the judge who made that order could so enquire. That implies necessarily, that the judge had a discretion whether he would or would not issue the order for the ascertainment of the amount of compensation, etc. But the section is imperative. It says in the first place, that—the Governor's warrant having been deposited—on motion made, the judge *shall* direct that the value of the land described

in the warrant be ascertained. "Shall direct." Thus far the judge has no discretion. He must direct. Whether the warrant is *ultra vires* or not, it is still "the Governor's warrant" that is deposited, and upon the deposit of the Governor's warrant the section says, the judge, being moved, shall make the order. Then the section goes on to say that the judge *shall* further direct that the amount of compensation be ascertained. Here again, the judge has no discretion. In the face of these provisions is it even arguable, either that the judge who makes the order, or that the judge who by virtue of the order sits to hear and determine, can enquire into the validity of the warrant or the *bona fides* of the proceedings which led to its issue?

We are of opinion that the appellant has entirely failed to shew that there is anything in the ordinance under which the judge was acting, either requiring or enabling him to enquire into the *bona fides* of the procedure which resulted in the issuing of the Governor's warrant.

As to the second branch of his argument that the court has an inherent jurisdiction to deal with questions such as were raised in the court below, the appellant's counsel, besides citing various text writers, Broom, Maxwell and others, relied upon s. 36 of Ordinance 8 of 1893 (*a*) which runs thus:—"The court in the exercise of the jurisdictions vested in it by this ordinance, shall in every cause or matter pending before it, have power to grant, and shall grant either absolutely or on such terms and conditions as the court may think just, all such remedies or relief whatsoever as any of the parties may appear to be entitled to in respect of any and every claim properly brought forward by him or them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively, may be completely and finally determined and all multiplicity of proceedings concerning any of such matters avoided." It was argued by the appellants' counsel at very great length, although it was not in dispute and hardly could be, that this court has power to deal with this matter. In declaring that the land in question was required for a public work the Governor-in-Council was exercising a discretionary power conferred by statute. If the land was not really required for a public work within the meaning of the ordinance, the declaration or resolution of the Governor-in-Council would be *ultra vires.* Whether this is or is not the case this court has full power to determine if the question is properly brought before it. Section 14 of Ordinance 8 of 1893 was next cited. It provides that a single judge may exercise the jurisdic-

* (a) See now Sect, 33, Ordinance 10 of 1915.—Ed

tion and powers vested in the court in all such causes and matters as, firstly, might before the commencement of the ordinance have been tried or heard by a single judge of any court whose jurisdiction is by the ordinance vested in the court; or as, secondly, may be directed or authorised by any statute to be so tried or heard. It was contended that under this section the judge below was sitting apart in this matter, and had power to deal with any question whatever that the court itself could have dealt with. The words of the section are wide, no doubt, but they must be reasonably construed so as not to result in absurdity. The argument for the appellant carried to its full extent, would go to this, that a single judge sitting apart, being empowered to exercise all the powers of the Full Court, could in any matter before him decide questions incidentally arising in the proceedings before him which, otherwise, it would be competent for the Full Court alone to deal with. That can hardly be the true construction of the section.

For example, a judge passing transports is sitting apart in terms of s. 14 of Ordinance 8 of 1893. If the argument for the appellant were sound, the judge so sitting, if any question were raised before him as to the validity of the transport or letters of decree by virtue of which any person sought to transport or mortgage any property, would not only have power but be bound—being empowered by s. 14 to exercise all or any part of the jurisdiction and powers vested in the Court—to enquire into and decide upon the validity of such transport or letters of decree. We need hardly say that the Full Court only could decide any such question.

Again, by Ordinance 8 of 1893, certain causes and matters are enumerated as those which a judge sitting apart may deal with in the limited jurisdiction of the court. It is self-evident that a judge sitting apart cannot deal with causes or matters which are not within this enumeration. Causes or matters may however be brought before a judge sitting in the limited jurisdiction which, on the face of them, are within the enumeration. The judge proceeds to hear. It then appears that the cause or matter is not within any of the classes of cases within the limited jurisdiction. That being so the judge has no jurisdiction in the particular cause or matter. But, if the appellants' contention be well founded, the cause or matter is before the judge, and he—being vested with all the powers and jurisdictions of the Full Court—not only may but must proceed to hear and determine! The contention is absurd.

If, indeed, the appellants' contention were right and that were the true construction of the section, we should have to give effect to it however absurd the result. But that is not the true construction. The judge sitting apart exercises those jurisdictions

and powers vested in the court which are necessary to enable him to deal with the cause or matter within his jurisdiction which he has before him. In the present matter the judge had to hear evidence and determine the question as to the amount of compensation to be paid to the owners and the other persons, if any, interested in the land; and while so hearing and determining, he would exercise any of the powers vested in the court which were necessary to enable him to properly hear and determine that question.

We are of opinion that the appellant has failed to show that the judge sitting apart in this matter had any "inherent" or statutory power to inquire into the *bona fides* of the resolution, in pursuance of which the warrant was issued which set the proceedings before him in motion.

As to the third branch of his argument, the appellants' counsel cited a number of cases to show that where persons, no matter how high their position, were entrusted with a statutory discretion, the courts would enquire whether they had exercised that discretion *bona fide* and whether their acts were not *ultra vires.* Two of these cases *ex parte Foreman,* (18 Q. B.D. 393) and *Institute of Patent Agents* v. *Lockwood* (1894, A. C. 347) can scarcely on the face of them be said to support that proposition. In the former case the Board of Trade, and in the latter the Lord Chancellor and the President of the Board of Trade, had made rules which, it was alleged, were *ultra vires.*

In both eases the rules had been laid before Parliament for the number of clays required by the respective statutes, and, that having been done, they were, by the terms of the statutes, to be judicially noticed and to have the same effect as if contained in the respective acts. In both cases the question arose as to the power of the court to enquire whether the rules were or were not *ultra vires.* In the former case the court expressly refrained from expressing any opinion, it not being necessary as the case stood. But, in the latter, it was held by the Lord Chancellor (Herschel) and Lord Watson (Lord Morris dissenting), that the rules, having been laid before both Houses of Parliament for forty days without being annulled, were of the same effect as if they were contained in the statute, and that, as long as they remained in force, it was not competent to question their authority.

It is plain, however, that if the rules had not had to be laid before Parliament, the courts both could and would have enquired whether the Lord Chancellor's discretion had been rightly exercised.

We have taken these cases first, because in one of them a

question was raised as to the exercise by the Lord Chancellor of England of a discretionary power vested in him along with another.

In *Clow* v. *Harper* (47 L.J., Ex., 393) a question arose as to the exercise of his discretion by one of the judges. The action was for breach of covenant to repair, etc. The defendant denied his liability. Section 3 of the C. L. Proc. Act, 1854, says: "If it be made to appear that the matter in dispute consists wholly or in part of matter of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for the court or judge to order that such matter, either wholly or in part, be referred." The judge acting as in pursuance of this section referred the matter. It was held that the order must be reversed as the judge had wrongly exercised his discretion in referring, because, until the question as to whether a breach had been committed had been decided, no question of account arose at all.

Barry Ry. Coy. v. *Taff Vale Ry, Coy,* (64 L.J. Ch, 230) does not seem to have much bearing. The question was not whether anybody has wrongly exercised a discretion vested in him, but as to whether a statute having given jurisdiction to the Railway Commissioners to deal with such matters as the one in dispute, the court had any authority to entertain the action. It was held that an option merely was given to apply to the Commissioners, and that the jurisdiction of the court was in no way ousted.

Nor does the case of the *West India Improvement Co.* v. *the Attorney General of Jamaica* (1894, A. C., 243) seem much more in point. There a public officer had, by statute, the power of entering into agreements for accommodation works connected with a railway, and the questions to be decided were firstly, whether he could bind the appellate company by such agreements; secondly, whether he could do so without their consent or against their express orders; and thirdly, whether the cost of the accommodation works was to be borne by the company. All these questions were answered in the affirmative, both in the court below and on appeal.

The following are eases in which the persons empowered to exercise a discretion were held to have acted *ultra vires.*

Macbeth v. *Ashley* (L. R., 2. S. and D. App. 352.) The hour for closing public houses in Scotland as fixed by the State is eleven p.m., but power is given to the magistrates to change the hour with reference to any particular locality requiring other hours. In this case the magistrates of a certain burgh made an hour for closing at ten o'clock, professing to apply to a particular locality, but the boundaries of that locality were so ingeniously

framed that they included every public house in the burgh. The order was set aside as being in effect an evasion of the act.

The case first cited was that of the *Secretary of State for India* v. *Srimati Fahamidunnissa Begum,* (L.R. 17 Ind. App. 40.) In this case the Board of Revenue had imposed an additional assessment upon lands forming part of a permanently settled estate. Thereupon the owner exercised the right conferred upon him by the Regulations of 1819, and appealed to the Court of Judicature to reverse the decision of the Revenue authorities. The case came in the first instance before the "Subordinate Judge," and from him went through court after court to the House of Lords, by whom the action of the Board of Revenue was held to have been *ultra vires.* The case cited which is most in point is *Lynch* v. *The Commissioners of Sewers, London* (L.R. 32 Ch. D. 72). The Commissioners sought to take certain houses and land under a statute which empowered them to alter, widen, turn, extend, open, or lengthen streets, and to raise, level, etc., any street *so altered,* etc. It turned out that all the Commissioners wanted to do was to raise the level. The Commissioners gave notice to the owner, and proceeded to have the house and land assessed before the justices in sessions, whether County or Quarter does not appear, and a jury. The owner did not wait to raise before the justices the question as to whether the action of the Commissioners was *ultra vires,* but at once moved for an injunction to restrain them from proceeding, and it was held that it was a question to be tried at the hearing of the action whether the Commissioners were acting *ultra vires,* and the injunction was granted.

These cases, or some of them, go to establish what was never in dispute here, that the court has jurisdiction to control the action of persons vested with discretionary powers; but they do not show that a single judge sitting apart for a special purpose such as the assessment of compensation when land is compulsorily taken can exercise such a control. It was said that in all or most of the cases the proceedings had been begun before a single judge who dealt with the questions before him, the inference suggested being, of course, that the single judge who sat in this matter in the court below should have dealt with the objections taken to the proceedings of the Governor-in-Council. But in those cases the questions dealt with were properly brought before the judge for decision.

As was pointed out at the hearing, the appellant, if he felt that his rights were being infringed, or believed that the declaration of the Governor-in-Council that the land should be taken was *ultra vires,* could have applied for an interdict or injunction

restraining the acting Attorney General from proceeding upon the Governor's warrant to assess the amount of compensation. If that had been done the matter would have been properly brought before the court and decided.

For the respondent the acting Solicitor General contended, briefly, that the judge below could not go beyond the order made in pursuance of s. 5 (1) of the Ordinance.

We dismiss the appeal so far as reasons 1 to 5 are concerned, with costs.

COURT OF APPEAL.

HARRIMAN & Co. v. EXORS, OF M. CARREIRO.

1895. *December* 17. Sir E. L. O'MALLEY, C.J., ATKINSON, J. AND KIRKE J. (Actg.)

Appeal—Insolvency petition—Insolvency Ordinance, 1884, ss. 5 and 9—Inheritance Ordinance, 1887, s. 15—Two separate Ordinances providing for petition and administration in insolvency—Interpretation.

Application to reverse the decision of SHERIFF, J., dated June 22nd, 1895, refusing to entertain a petition in insolvency in the matter of the estate of Manoel Carreiro, deceased, under the provisions of the Insolvency Ordinance, 1884.

P. Dargan, for the appellants.

D. M. Hutson, for the respondents.

The necessary facts appear from the judgment of the Court which was as follows:—

O'MALLEY, C.J.: This is an appeal from an order of SHERIFF, J., sitting as Judge in Insolvency refusing to entertain a petition in insolvency by certain creditors of the estate of Manoel Carreiro for a receiving order against the said estate under the provisions of ss. 5 and 9 of the Insolvency Ordinance, 1884 (*a*) such refusal being on the ground that upon the petition of the executors of the said Manoel Carreiro the Supreme Court had already made an order under the provisions of s. 15 of the Inheritance Ordinance, 1887, declaring the said estate insolvent. It was contended for the appellants that the right given to creditors to have an estate administered in insolvency by the Administrator General would be practically abrogated by the provisions of s. 15 of the Inheritance Ordinance, 1887, if such a procedure as it was proposed to follow was not allowed, and that it must be taken that, although the Inheritance Ordinance of 1887 provides that when, upon the petition of an executor, an estate has been declared insolvent, and by law vested in the

(*a*) See now Ordinance 29, 1900, ss. 5 and 9. 1905 Edition.—ED.

executor to administer as assignee appointed under the Insolvency Ordinance, that provision creating though it does a title, so to speak, in the executor to administer, does not give him an indefeasible title, and that it may be overridden by a subsequent order under the Insolvency Ordinance, vesting the administration in the Administrator General. This would involve as it seems to us the absurdity of a double enquiry and a double determination of the question of whether the estate was insolvent, for the title to administer is founded upon such enquiry in both cases. The estate having already been declared insolvent by the Court sitting in one capacity, can it be supposed that a judge of a Court sitting in another capacity is to treat that order as a nullity and to re-open the enquiry as to the insolvency of the estate. We cannot think that an interpretation of the Insolvency Ordinance involving such a possible contingency can be reasonable.

The appeal is dismissed, costs of both sides to be paid out of the insolvent estate.

COURT OF APPEAL.

SANTOS v. FARIA.

1895. *December* 19. SIR E. L O'MALLEY, C.J., ATKINSON, J., AND KIRKE, J. (Actg.)

Appeal—Assessment of debt—Garnishee order—Rules of Court, 1893. Order XXVII r. 2—Judgment creditor who has already obtained fiat executio—Amended Manner of Proceeding Ordinance 1855, s. 170.

The plaintiff Santos obtained judgment against the defendant Faria on July 6th for the sum of $1,698.19, which remained unsatisfied to the extent of $1,368.36. He ascertained that one Rodrigues, a widow, was indebted to the defendant in the sum of $2,964 and thereupon proceeded to attach this debt to satisfy his judgment against the defendant. As a result thereof Sheriff, J., granted an order dated August 26th, calling upon the garnishee to show cause why she should not pay to the plaintiff so much of the debt due from her to Faria, the defendant, as might be sufficient to satisfy the judgment debt and costs.

P. Dargan appeared for the plaintiff.

D. M. Hutson showing cause.

On September 14th judgment was delivered in the following terms by SHERIFF, J.

This is a garnishment case. The garnishee appeared and raised two preliminary objections.

The first was of a highly technical character, viz., that as the word "attorney-at-law" had been abolished and the word "solicitor" substituted, the word "attorney" in Order XXVII, r. 2. (*a*) must be taken to mean attorney as employed in the sense of the agent of a person absent from the colony. This is a fallacy and one reference will explode the same, see the Magistrates Decisions (Appeals) Ordinance, 1893, s. 8. (1) which provides that the notice of appeal may be signed either by the appellant or his counsel or attorney-at-law. During the argument it was said that

(*a*) See now Rules of Court, 1900, Order XXXVI, r. 73—Ed.

it was not competent for the judges by the Rules to substitute the word 'solicitor' for 'attorney-at-law,' but this also is a fallacy. See the Supreme Court Ordinance, 1893, s. 58 (2.).

The second objection was that as the plaintiff had obtained a *fiat executio* on his judgment it was not competent for him to proceed as he did under O. XXVII. The point taken is a good one and must prevail. The question may be looked at from two points of view; first that of the English law. This may legitimately be done because O. XXVII, rr. 1 and 2, are more or less close adaptations of some of the provisions of the imperial statutes known as the Common Law Procedure Acts, 1854 and 1880. It is true that these provisions have been repealed but they are practically still in force by virtue of the English Rules of Court. *Cababe on Attachment* (p. 12) remarks: "The next consideration is—has the creditor taken any steps which disentitle him from attaching a debt which he otherwise could have attached?" The question is answered by C*ababe* on p. 13. From the cases there cited it would appear that if the plaintiff seeks to enforce his judgment otherwise than by attachment he cannot subsequently avail himself of such remedy. Secondly, under our local law, s. 170 of Ordinance 26, 1855, provision, and in my opinion adequate provision, is made for levying on debts. It will be seen that in the marginal note to the sections the word "debts" is used. In my opinion it is not competent for the plaintiff who is not merely a judgment but an execution creditor to avail himself of the provisions of O. XXVII, and I am the more satisfied with this opinion because the plaintiff is not remediless. The order is discharged with costs.

From this decision the plaintiff appealed, and asked that the order appealed from should be reversed, and that an order should be made absolute arresting the debt sought to be arrested, or in the alternative that an order be made directing that the question of the liability of the garnishee be heard and determined under the provisions of O. XXVII, r. 5. The appeal was allowed.

P. Dargan, for the appellant.

D. M. Hutson, for the garnishee.

The arguments appear from the judgment of the Court (*per* O'MALLEY, C.J.) which was as follows:—

This is an appeal from an order made by SHERIFF, J., in the action of Santos v. Faria, upon an application made by the plaintiff, under the provisions of Order XXVII, r. 2 of the Supreme Court Rules, 1893, for an arrestment of debt owing from one Maria Rosa Rodrigues to the defendant, the judgment debtor Faria.

The order dismissed the application on the ground that the plaintiff had already obtained a fiat of execution on his judgment under which he might levy on the debt by ordinary process of execution, and that therefore it was not competent for him to avail himself of the provision of O. XXVII, r. 2, as a cumulative proceeding.

The appellant contends that the process under O. XXVII, r. 2, is intended to be in aid of proceedings under the ordinary fiat of execution, and further, that under the ordinary fiat there is no power to levy on debts in the hands of third parties.

The respondent says that the plaintiff, having obtained an ordinary fiat of execution and a levy having been made thereunder which has satisfied the judgment in part, is limited to that process for obtaining the rest of his judgment, and further that under that fiat a levy on debts can be made under the provision of s. 170 of Ordinance 26 of 1855 (the Amended Manner of Proceeding Ordinance).

It is necessary to consider carefully the wording of the rule in question. It is in the same terms as s. 116 of Ordinance 26 of 1855, except that whereas the section is so worded as to make the process of attachment under it applicable as soon as an action is commenced, the rule is so worded as to make that process only applicable after judgment obtained. It is obvious that the rule as it stands restricts the process to cases where judgment has been obtained, because in the previous rule the words "any creditor who has obtained a judgment" are used, and in this rule the proceeding is limited to "such creditor." But we think that the framers of the rule must have overlooked this fact, because throughout the rule they retain the words of s. 116, which are properly applicable to the larger scope of a garnishment order under that section, but which are not applicable to the more limited scope of the garnishment order under the rule. We refer to the words "shall be arrested to answer the *debt*" in the sixth line, and to the words "may satisfy the *debt*" in the last line of the rule, whereas they ought to be "to answer the *judgment*" and "may satisfy the *judgment*" respectively.

The corresponding provisions of English procedure are contained in Order XLV, r. 1. of the English Supreme Court Rules. That rule is taken from the Common Law Procedure Act, 1854, s. 61. It restricts proceedings for garnishment to cases where judgment has been obtained and it uses the words "shall be attached to answer the *judgment*" and "may satisfy the *judgment*" accordingly. Moreover as the proceeding is to be adopted only where a judgment has been obtained the rule takes care to provide that an application made under it shall be accompanied by an affidavit stating "that judgment, : . . .has been recovered

and that it is still unsatisfied and to what amount." Our rule has no such words, but we think this omission is obviously due to the same oversight as that which accounts for the use of the word "debt" instead of "judgment" as already mentioned.

The foregoing review of the scope and words of the English rule and of our local ordinance and rule respectively is, we think, sufficient to show that the policy and scope of our local rule 2 of O. XXVII., and of the English rule 1 of O. XLV are practically identical.

Look then to the English cases bearing on O. XLV, r. 1; do they decide that if the plaintiff seeks to enforce his judgment otherwise than by attachment he cannot subsequently avail himself of such remedy? SHERIFF, J., seems to found his judgment on the cases cited on p. 13 of C*ababe* on Attachment. The first of these is *Jones* v. *Jenner,* 25 L.J., Ex. 319, where it was held that when a plaintiff has sued in the county court on a judgment in the inferior court and has obtained an order for payment by instalments some of which have been paid, he cannot resort to the process of attachment in the inferior court to enforce the judgment of that court; but the ground of the judgment, which was that after the plaintiff had elected to enforce and had actually enforced the judgment of the inferior court, he could not resort to that of the superior court, does not seem to cover the point in the present case.

The judgment in *Haytor* v. *Beall,* 29 W.R. 333 which is the other case cited in C*ababe* did seem, as there cited, to be authority for the proposition that two processes cannot be enforced concurrently, but we find that that judgment was reversed by the Court of Appeal.

No other authority was cited to us in support of Mr. Justice Sheriff's decision, and in the absence of authority we see no reason in law why the fact of having obtained an ordinary fiat in execution should be a bar to proceedings for attachment. In the absence of clear authority preventing, we think it is for the ends of justice that we give the fullest possible effect and scope to the procedure furnished by O. XXVII r. 2. Granting that debts might be levied on in pursuance of s. 170, Ord. 26 of 1855, that process might and almost certainly would be attended with such great difficulty, delay and expense—the debt when levied on might for example have to be recovered by action—that it is most undesirable in the interests of all parties that that course should be adopted. Looking at the difficulties that might attend its recovery, a purchaser of a debt at an execution sale would not give anything like the actual value of the debt; a valuable claim might be sold for a mere trifle, the judgment creditor would remain still

unsatisfied, and the judgment debtor could remain still liable for practically the original amount of the judgment. On the other hand if, instead of levying on the debt, it were arrested under the provision of O. XXVII, the whole amount of the debt might and in most cases would be recovered and applied in satisfaction of the judgment.

There will be judgment for the appellant with costs, and the matter will be referred for hearing and determination by the court below.

APPELLATE JURISDICTION.

PEREIRA v. BOURNE AND OTHERS.

1895. *December* 20th. ATKINSON, J.

Appeal.—Land Surveyors' Ordinance, 1891—Placing of boundary marks—Unlawful removal—Disputed title—Jurisdiction of magistrate.

Appeal from the decision of Mr. J. T. Thorne, Stipendiary Magistrate for the Mahaica Judicial district, who dismissed a complaint brought by the appellant Pereira against the respondents (defendants in the court below) for the unlawful removal of certain paals, on the ground that the ownership of the land on which the paals were planted was *bona fide* in dispute, and that the planting was not "lawful" within the meaning of the ordinance.

D. M. Hutson, for the appellant.

Respondents in default of appearance.

ATKINSON, J.—This is an appeal from a decision of Mr. Thorne, S.J.P., dismissing a charge brought by the appellant against the respondents under sec. 19 (5) of Ordinance 20 of 1891, of unlawfully removing a paal, lawfully planted by a land surveyor in pursuance of the provisions of the Land Surveyors' Ordinance, 1891.

In giving decision the magistrate said: "The paal must have been lawfully planted before it could have been unlawfully removed. To sustain the lawful planting it must be settled by a competent jurisdiction that the land on which a person caused a surveyor to plant a paal was really and *bona fide* his property, and that he had a lawful right to have it so planted. The land in which this paal was planted, and, undoubtedly, removed from, is *bona fide* in dispute between the parties, and I don't think that the planting of it was done so 'lawfully' as is intended by the ordinance."

No doubt, where a question of title is in dispute the jurisdiction of the magistrate is ousted, but here the magistrate was not asked to decide any question as to the title to the land in question, but merely to decide whether a paal had been 'wilfully' removed by the defendants, which had been "lawfully placed." If he had carefully read section 15 of the ordinance he would have seen that it is by reason of the very fact that the land *is in dispute,* that

the law authorizes a laud surveyor to enter upon the land and make a survey, having first, however, given the notice required by the section to the owner, &c, of the adjacent land. The preliminary formalities required by section 15 having been duly complied with, the surveyor may lawfully enter, survey and plant paals, and any person removing one of those paals will be guilty of an offence punishable under section 19 (5) of the ordinance. I need hardly point out that the object of such a survey by a land surveyor is to prepare the way for getting the question in dispute settled by a court of competent jurisdiction.

The magistrate is empowered to impose a penalty of $500, and to justify a conviction, there should be clear and satisfactory proof before the magistrate that the preliminary conditions required by section 15 have been strictly complied with. The proof here as to the service of the notice and of the representative capacity of the person served is not so clear and satisfactory as it might have been, and I do not, therefore, feel called upon to interfere with the magistrate's decision, as I should otherwise have done.

LIMITED JURISDICTION.

TEIXEIRA v. TEIXEIRA.

1895. *December* 24th. KIRKE, J., (Actg.)

Landlord and Tenant—Notice to quit—Obvious error in notice—Conduct of parties—Interpretation.

Where T. a landlord gave on June 14th a written notice dated July 14th to his tenant to vacate certain premises on July 15th, the premises being held on a monthly tenancy and the tenant by his conduct showed that he regarded it as a month's notice from June 14th;

Held that the notice was good as a monthly notice terminable on July 15th.

Action for the recovery of possession of premises hired by defendant on a monthly tenancy from plaintiff.

P. Dargan, for the plaintiff.

D. M. Hutson, for the defendant.

KIRKE, J. (Actg.):—

In this case the defendant is a tenant of the plaintiff. The plaintiff gave him notice to quit which he has not obeyed, so the plaintiff has appealed to the court to obtain possession of his property.

Defendant in his answer admits the tenancy, but denies that it has been duly determined by a notice to quit. The service of the notice was not denied and was proved conclusively by the plaintiff to have taken place on June 14th, 1895. The whole case turns upon the sufficiency of the notice.

The defendant rented three tenements from the plaintiff, a shop at $13 a month, the rooms over the shop at $8, and another room at $2.40 a month, and he has been in occupation of these premises for many years. The notice served upon him on June 14th, 1895, was as follows:—

Georgetown, Demerara,
14th July, 1895.

FRANCISCO R. TEIXEIRA, Esq.

Sir,—I give you notice to deliver up the possession of the premises which you hold of me on West ½ Lot No. 101, corner of Regent and Cummings Streets, Bourda, under a monthly tenancy on the 15th July proximo.

And I also give you notice that if you do not comply with the notice, I shall claim from you the sum of forty-five dollars as rent of said premises for so long as you shall keep possession of same after the expiration of this notice.

LEOPOLDINA TEIXEIRA,
by her attorney,
(Sgd.) ALEX. TEIXEIRA.

Mr. Hutson for the defendant argues that:—

(1.) There were three distinct hirings, and that it is impossible from this notice to say to which it refers. There must be three separate notices, or in the notice they must describe the particular holding of which they desire to obtain possession.

(2.) The notice is dated July 14th, 1895, to quit on July 15th proximo. This can only mean July 16th, 1896, and he quoted *Duke of Bedford* v. *Kightley* (7. T. R. 63) in support of this contention.

There is no doubt the notice was dated July 14th by mistake for June 14th, and counsel for defendant asserts that the notice is still a good one and must be interpreted to mean a notice to quit in a year's time.

With regard to the first point the premises, although hired at different periods, were held together and the smaller hirings were held subsidiary to the shop. Without the shop the upper premises and the room would not have been rented, so a notice to quit the substantial part of the premises is sufficient to include the auxiliary portion, although hired at different times. (See *Doe* v. *Watkins and anr.*, 7 East 551.)

With regard to the second objection, there can be no doubt that on the face of it the notice means a notice to quit on July 15th, 1896, but when the mistake is obvious, and the conduct of the parties shows that they both understand what was meant, I think the notice is good as a monthly notice terminable on July 15th, 1895.

In the case quoted by the learned counsel in support of his contention, the Court allowed a possible date to be substituted

for an impossible one. Lord Kenyon in delivering judgment says: "The time that the notice was given and the words in it 'which will be' manifestly showed that this was a notice to quit on the then next Lady clay, and the conduct of the parties also showed that they so considered it." But in this case where tenements were held by monthly tenancy it would be highly improbable that a year's notice to quit would be given, and the conduct of the parties negatives that idea. The plaintiff served the notice on the defendant on the 14th June, his agent met defendant two days afterwards when the latter speaks about the notice to quit, said he had received it and looked vexed about it. On July 16th, defendant goes to pay up all arrears of rent, and when asked for the key of the premises never denies that he had received a due notice to quit, but says that he cannot give defendant the key yet, as he had some goods still in the shop. Plaintiff then asked him if he agreed to pay the increased rent as stated in the notice, and he replied that he could not answer then. By the conduct of the parties it is clear that both understood that notice to quit in a month had been given on June 14th, 1895.

At the same time I consider that the plaintiff when he found his notice was wrongly dated should have withdrawn it and served another on defendant, so avoiding all misunderstanding and subsequent litigation.

There will be sentence for the plaintiff in terms of his claim; each party must pay his own costs.

COURT OF APPEAL.

EX PARTE COLONIAL BANK AND OTHERS;
IN RE JULIUS CONRAD, INSOLVENT.

1895. *March* 1. ATKINSON, C. J., Actg., SHERIFF, J., and KIRKE, J., Actg.

Insolvency Ordinance, 1884—Proof of debt—Application to expunge proof—Settlement "in consideration of marriage"—Rules of construction of statute—Additional documentary evidence of consideration—Admissibility of evidence—Payment in futuro.

Benjamin Conrad as the duly constituted attorney of Julius Westaway Conrad and Arthur William Dean, trustees of the marriage settlement made on the marriage of Walter Samuel Scott and Beatrice Bertha Conrad, daughter of the after mentioned insolvent, filed a claim in the amount of £7,500 or $36,000 being the amount of a second mortgage executed on December 5th, 1891, by the attorney of Julius Conrad, the insolvent, on part of mud lot A, Water Street, Georgetown. This claim was admitted by the Administrator General as preferent on the net proceeds of the mortgaged property and as concurrent for the balance.

Application was thereon made by certain creditors, including the Colonial Bank, of the insolvent estate for an order expunging the proof in question. The grounds for such application were as follows:

(a.) That a receiving order was made against Julius Conrad on November 10th, 1892, and on November 26th he was adjudged insolvent.

(b.) That the marriage settlement having been made by the insolvent within two years of his becoming insolvent was void against the Administrator General.

The application came on for hearing before SHERIFF, Acting Chief Justice.

A. Kingdon, Q. C, and *D. M. Hutson* for applicants.
L. E. Hawtayne for respondent, Benjamin Conrad.

The mortgage given in terms of the settlement was for valuable consideration, and at the time of the passing of the mortgage and when the deed of settlement was executed Julius Conrad was quite solvent. There was no opposition to the mortgage and the settlement was made in consideration of marriage.

1893. *December* 16.

SHERIFF, C.J. (Actg.):—This is a motion made under section 25 of the second schedule of the Insolvency Ordinance, 1884 (*a*) whereby the movers (the Administrator General declining to interfere) seek to reduce the proof filed against the estate of the

(a) See now sections 25 and 26, Second Schedule, Ord. 29, 1900.—Ed.

insolvent on the 6th July, 1893 by Benjamin Conrad as the attorney of Julius Westaway Conrad and Arthur William Dean, trustees under the marriage settlement dated April 17th, 1891, of Walter Samuel Scott and Beatrice Scott, daughter of the insolvent, by the sum of £7,500 or $36,000.

By the said settlement and by a mortgage executed by way of further security the said Julius Conrad covenanted for the payment of the said sum of £7,500 or $36,000 to the trustees within twelve months after his decease. The said Julius Conrad was adjudged insolvent on November 26th, 1892, that is to say, within two years after the date of the settlement. The question arises whether this settlement is to be regarded as a settlement made before and in consideration of marriage within the meaning of section 44 (1) of the Insolvency Ordinance, 1884 (*b*). To determine the point it is essential to ascertain whether the words "in consideration of marriage" refer to the marriage of the settler himself alone, or are to be construed in the widest sense as applicable to the marriage of anybody. In the present case nothing could be more reasonable than the desire of Julius Conrad, moved thereunto by feelings of natural love and affection for his daughter, to make some settlement upon her upon her marriage. As between the contracting parties themselves his lability is indisputable, the contract being one based not merely on meritorious but on what in law is regarded as valuable consideration. So far so good. But the question here is not between the parties; though good as against Julius Conrad, is it good as against the Administrator General representing the creditors of Julius Conrad? In section 44 (3) of the ordinance it is enacted that "settlement" shall for the purposes of the section include any conveyance or transfer of property.

Up to 1869 in England and 1872 here it would appear that a settlement such as the one under consideration would have prevailed, being expressly exempted from the operation of the ordinance, but, as pointed out by *Williams* in his treatise on *Bankruptcy* (c) (3rd Ed. p. 226) "the exceptions in the present act (1883) are less wide than those under that act (1849), there being no exception in favour of settlements by the bankrupt. . . . upon the marriage of any of his children. Such settlements, therefore, unless made for valuable consideration, are, as against the trustee, void if the settlor becomes bankrupt within two years……" If this view is the correct one there is an end of the matter.

I have come across a case, *ex parte Hillman, in re Pumfrey*

(b) See now Section 43 (1), of Ord. 29, 1900.—Ed.
(c) *Cf.* Williams, 8th Edition, p. 244.—Ed.

(L. R., 10 Ch. D. 622), to which I refer not as being actually in point but on account of the language used by Bacon, C.J., at p. 624, from which I think it may be inferred that he regarded the word "marriage" in the act of 1869 as referring to the marriage of the bankrupt. The corresponding section of the act of 1883 is the same, the difference being that the former enactment applied only to traders. The difficulty I feel in deciding this case is considerably enhanced by the ruling of ATKINSON, J., in the case of the *Administrator General* representing the estate of *De Carmo* v. *De Carmo* (I. C. C. April 4th, 1892,) where he decided that cattle made over to a stranger by a father in contemplation of her marriage with his son was good as against the Administrator General, although the father became bankrupt three months after the transaction. The learned judge in a written decision reviewed s. 44 referred to above and evidently adopted the wider construction to be placed upon the word "marriage" in the section. It is hard to say whether his attention was drawn to the earlier enactments, but if I may hazard a guess I am inclined to think not. Be that as it may, however, I find myself with regret unable to adopt the same view of the section as he apparently does, because I think the only marriage referred to in the section is that of the settlor. It is unnecessary to decide whether, as the payment of the £7,500 or $36,000 is a payment *in futuro*, the Administrator General was right in treating the claim as standing upon the same footing as if the amount were now actually due and payable.

There will be an order for the reduction of proof as asked for, with costs to the movers.

From this decision Benjamin Conrad as attorney of the trustees appealed; the grounds of the appeal appear from the judgment.

The appeal was allowed by a majority of the Court (ATKINSON, C. J., Acting, and KIRKE, J. Actg., SHERIFF, J., dissenting).

1895. *March* 1.

Judgment was given by ATKINSON, C. J., Actg., as follows:—

In this matter the trustees of the marriage settlement of Walter Samuel Scott and Beatrice Bertha Conrad, appearing by their attorney Benjamin Conrad, move that the order of SHERIFF, C. J. acting, sitting apart, on December 16th, 1893, in the matter of the Colonial Bank and others in appeal from the decision of the Administrator General as representing the estate of Julius Conrad, an insolvent, be set aside. The motion is in effect an appeal from the order of the judge below and the grounds of the appeal are—

(1.) that the said B. Conrad as such attorney was possessed of a mortgage on mud lot A., Cumingsburg, which is in full force and effect;
(2.) that the judge had no jurisdiction to set aside a sentence of the Supreme Civil Court or willing condemnation as by his order has been done;
(3.) that if the judge had jurisdiction to set aside such a sentence or willing condemnation he exceeded his jurisdiction, as the court was not asked by either party to set aside such sentence or willing condemnation.
(4.) that the said Walter Scott, by virtue of his marriage under the settlement referred to in the proceedings herein, was a creditor of the said Julius Conrad, and he and those representing him is and are protected under the provisions of the Insolvency Ordinance, 1884, as a creditor;
(5.) that the said Benjamin Conrad in his quality aforesaid being seized of and holding the settlement referred to in the proceedings herein was protected under the provisions of the Insolvency Ordinance, 1884.

The marriage settlement referred to was executed on April 17th, 1891, by Julius Conrad of the first part, Walter Samuel Scott of the second, Beatrice Bertha Conrad of the third, and J. W. Conrad and A. W. Dean (the trustees) of the fourth. By it Julius covenants that, in consideration of a marriage to be solemnized between Walter and Beatrice, his executors within twelve months after his death shall pay to the trustees £7,500 to be held by them on the trusts named in the settlement; he also covenants that he or his executors shall pay interest at four per cent., per annum on the said sum from the date of the marriage until payment of the principal. He further covenants that, for the further securing of payment of the said sum of £7,500 and the interest, he will pass such mortgages as may be necessary on the premises named in the schedule to the settlement, *i.e.*, on mud lot letter A., Cumingsburg.

The mortgage which is mentioned in the grounds of appeal appears to have been passed to the trustees in pursuance of this covenant. It is a second mortgage on part of mud lot A., dated December 5th, 1891.

Upon the insolvency of Julius Conrad a claim was filed on July 6th, 1893, on behalf of the trustees, by Benjamin Conrad, for the amount of the second mortgage £7,500, and also for a sum of $15,000 due to Beatrice Bertha Scott in terms of a first mortgage on mud lot A., passed on April 10th, 1886, to the executors of Herman Conrad, deceased, and transferred to Beatrice Conrad on July 4th, 1893.

The Administrator General admitted the whole of the claim or proof, and subsequently informed the opposers through their solicitor that he did not intend to apply to the court to have the proof expunged. The opposers, being creditors of Julius Conrad, moved the judge below in pursuance of section 25 of the second schedule to the Insolvency Ordinance, 1884, to have the proof reduced by the said sum of £7,500, on the ground that Julius Conrad having been adjudged insolvent on November 26th, 1892, the settlement had been made within two years of his becoming insolvent and was therefore void as against the Administrator General.

The matter was argued before SHERIFF, C. J., Actg., who came to the conclusion for reasons which he stated that the settlement in question was not a settlement within the purview of section 44 (1) of the Insolvency Ordinance, 1884, and was void as against the Administrator General. He accordingly ordered the proof to be reduced by the amount settled, £7,500, or $36,000.

When the appeal from that order first came before this court, the movers asked for and were granted time to enable them to send to England for certain documents which they said would enable them to show that the settlement was made, not only in consideration of marriage, but for other valuable considerations. These documents having arrived, the matter came on for argument. The documents were tendered and admitted subject to all just exceptions. The first is an indenture executed by Walter Samuel Scott of the first part, Beatrice Bertha Conrad of the second, and A. W. Dean and J. W. Conrad (the trustees) of the third. The indenture recites the intended marriage between Walter and Beatrice, and witnesses that in consideration of such intended marriage, Walter as settlor with the approbation of Beatrice, grants certain freehold and leasehold premises to the trustees to hold upon such trusts as shall be declared by another indenture intended to bear even date with and to be executed by the same parties as this indenture. The other document put in is this other indenture which was to be so executed. It creates divers trusts relating to the spouses, the children, etc. Both indentures bear the same date as the marriage settlement itself—April 17th, 1891.

Counsel for the opposers contends that these documents were inadmissible and could not be looked at to vary or add to the consideration stated in the marriage settlement. Counsel for movers argued on the other hand that it was competent for them to prove that there were other considerations, and that these documents were admissible for that purpose.

Julius Westaway Conrad, one of the trustees, was called as a

witness. One of the questions put to him was "What was the agreement between your father (Julius Conrad) and Mr. Scott as to the settlements to be made on the intended marriage between Mr. Scott and your sister?" This was objected to and disallowed, the agreement whatever it was having admittedly been reduced to writing. The witness stated that before his sister got married to Scott, an agreement was come to between his father, his sister, Scott, Dean, and himself. The examination then runs:—

"Was that agreement put into writing?—Yes."

"Is that the writing you hold in your hand?—Yes."

"It is in three documents?—Yes."

The three documents the witness held in his hand were the marriage settlement and the two indentures above described. All those documents were, as we have seen, executed on the same day and have relation to the same transaction—the marriage of Walter and Beatrice, and in our opinion are properly before the court.

As to the question whether the two latter documents could be looked at in order to ascertain whether there was or was not consideration other than that appearing on the face of the marriage settlement itself, the case was argued for the movers at very great length but to very little purpose. Counsel for the movers argued the matter as if the marriage settlement in question here was equivalent to a voluntary settlement or one made, on the face of it, for a nominal consideration only, and cited a number of decisions to show that in such cases the courts allowed proof *dehors* the written documents to prove that there was in fact a valuable consideration. But a settlement made in consideration of marriage such as the one in question here is in law and in fact made for a valuable consideration, and the cases cited therefore had very little, if any, bearing upon the point in dispute. When the arguments on both sides were closed, counsel for the movers called the attention of the court to a case, *Clifford* v. *Turrell* (14 L.J. Ch. 390), which was in point, but coming at that stage the effect of it was not discussed by either side.

In support of his contention that no evidence could be given to show that any other consideration could be proved than that stated in the marriage settlement itself, counsel for the opposers cited *Taylor* on *Evidence* (8th Ed.), Vol. II., p. 969. "If an instrument under seal specifies any particular consideration as, for instance, love and affection, and omits all mention of any other consideration, no extrinsic proof of another can in general be given because such proof would contradict the deed." The authority cited in support of that is a *dictum* of Lord Chancellor Hardwicke in *Peacock* v. *Monk* (1. Ves. Sen. at p. 128); "For to be sure where any consideration is mentioned, as of love and

affection only, if it is not said also *and for other considerations,* you cannot enter into proof of any other; the reason is because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration and is negative to any other." But in *Clifford* v. *Turrell* (*ubi supra,*), Knight Bruce, V.C., having referred to the rule excluding parol evidence, where there is a written instrument in competition with which the parol evidence is adduced, said: "It has however long been settled that it is not within that rule to adduce evidence of a consideration for a written instrument additional to that expressed provided the two be consistent." On appeal Lord Chancellor Lyndhurst said: "Now the settled rule of law is that you may prove a further consideration which is consistent with the consideration stated on the face of the deed. You cannot be allowed to prove a consideration inconsistent with it, but you may prove another which stands with it." In support of this, Lord Lyndhurst cited several cases, old and modern, and went on to say "I should not have gone so minutely into the details of those cases but for the case before Lord Hardwicke (*Peacock* v. *Monk*) in which he said to have expressed a contrary opinion . . . . . In that case there was no consideration expressed in the deed. Lord Hardwicke was of opinion that, under these circumstances, a consideration might be proved because it would stand with the deed; and then he went on to state that which was unnecessary to the decision of the case before him, that where a consideration as 'of natural love and affection' is stated in a deed, another cannot be proved, because that would be inconsistent with the deed. I do not undertake to say whether Lord Hardwicke is correctly reported in *Vesey*; but if he is, Lord Hardwicke expressed an opinion directly at variance with the decisions in the case I have cited, and it is probable he may have been incorrectly reported."

We are of opinion that we can look at the other two documents put in, to ascertain whether there was any other consideration for the marriage settlement than that which appears upon the face of it. When we do so look it appears clearly that there was. That being so, if any consideration other than marriage were required in terms of section 44 (1) to support the settlement in question here, that consideration appears and the order of the judge below cannot be sustained. These other documents were not laid before the judge below as they ought to have been if the matter had been properly placed before him. If they had he would not, in all probability, have made the order appealed from.

But apart from this, in our opinion, the settlement in question here is, as it stands, a valid settlement and needs no additional

consideration to support it. In the argument before us counsel for movers did not attempt to contest the validity of the reasons stated for the making of the order. When stating his reasons the learned judge said that the question arose whether the settlement was to be regarded as a settlement "made before and in consideration of marriage" within the meaning of section 44 (1) of the Insolvency Ordinance, 1884, and that in order to determine that point it was essential to ascertain whether the words "in consideration of marriage" refer to the marriage of the settlor himself alone or are to be construed in the widest sense as applicable to anybody. As to this he quoted a passage in *Williams* on *Bankruptcy* 3rd. Ed., p. 226; (for quotation see above). He also referred to *Hillman* v. *Pumfrey* (L. R. 10 Ch. D. 622) to quote his words "not as being actually in point but on account of the language used by BACON, C.J., at p. 624, from which I think it may be inferred that he regarded the word 'marriage' in the act of 1869 as referring to the marriage of the bankrupt." What BACON, C.J. said was this "But what has that to do with the Bankruptcy Act, in which there is a special provision that a settlement made by a trader within two years of his bankruptcy, unless it is made before marriage or in favour of a purchaser or incumbrancer, in good faith and for valuable consideration, shall be void as against the trustee in the bankruptcy?" We fail to see how that can be construed to mean that the C. J. regarded the word 'marriage' in sec. 47 of the English Act of 1869 (32 and 33 Vict. c. 83), as referring to the marriage of the bankrupt only. The settlement it is true must have been made by the bankrupt, because the section applies only to settlements made by traders; and it is only when the trader becomes bankrupt that the question of the validity of the settlement arises. But the question before BACON, C. J. was not upon whose marriage could a settlement in consideration of marriage be made in the terms of the section, but was whether the settlement before him was a settlement within the exceptions contained in the section. It was a settlement made after marriage of property belonging to the trader upon his wife and children. It was not therefore a settlement of the wife's property acquired after marriage, nor was it a settlement in favour of a purchaser (which it has been decided means buyer) or incumbrancer, nor was it a settlement made before marriage. Consequently it was not within any of the exceptions, and BACON, C. J., in effect asked what has a post nuptial settlement of the trader's own property got to do with s. 47 of the Bankruptcy Act. That section is precisely the same as s. 44 (1.) of the Insolvency Ordinance, 1884. A settlement made in consideration of marriage by a trader whether made on

his own marriage or on the marriage of his child or sister, if made prior to the ceremony, would be within the words 'made before and in consideration of marriage,' and the words of the Chief Judge would apply to the latter cases just as much as to the former. The effect of the section is not quite accurately stated in the Chief Judge's question. As reported, the question seems to imply that a settlement, whether before marriage or in favour of a purchaser or incumbrancer, would be void against the trustee unless made in good faith and for valuable consideration. But what s. 47 actually enacts as to this is that "any settlement of property made by a trader not being a settlement made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration . . . . shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee of the bankrupt." The true construction of this is, if the settlor becomes bankrupt within two years after the date of the settlement, such settlement not being made before and in consideration of marriage, and not being made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, is void against the trustee.

That disposes of the statement in the passage quoted from *Williams* on *Bankruptcy*, that settlements made by a man on the marriage of his child are void against the trustee if the settlor becomes bankrupt within two years, unless made for valuable consideration,—which must be taken to mean some valuable consideration other than marriage. Marriage itself must be regarded as a consideration of a very high degree, if for no other reason, by reason of its effects as regards the spouses, the wife especially.

The conclusion arrived at by the judge below, that the only marriage referred to in the section is that of the settlor was based upon the passage in Williams and on the words of BACON, C. J. It appears to us that neither the passage nor the words support that conclusion.

So far from the exceptions in the act of 1883 being, as stated in the passage quoted from W*illiams* on *Bankruptcy*, less wide than those in the act of 1849, they are, it seems to us, infinitely wider. Section 126 of the Bankruptcy Act, 1849, (12 and 13 Vict, c. 106) enacts "that if any bankrupt being at the time insolvent, shall (except upon the marriage of any of his children or for some valuable consideration) have conveyed, assigned or transferred to any of his children or to any other person, hereditaments," etc., the court may order the sale of the same for the benefit of the creditors. Under this section, outside of con-

veyances, etc, for "some valuable consideration" the only exception was a conveyance upon the marriage of a child of the bankrupt. Under the act of 1869, the act of 1883, and our ordinance of 1884 the exception is not limited to the marriage of a child but is extended to every "settlement made before and in consideration of marriage." These words, as they stand, include every settlement made before marriage of which it can be said that it was made in consideration of marriage. To limit the words as including only settlements made by men on or with respect to their own marriages would be to construe the section as if it read "in consideration of the marriage of the settlor," which, unless there were something in the context to render that reading absolutely necessary, would be contrary to the rules of construction—would, in fact, be an act of legislation by the court. There is nothing in the ordinance requiring such a construction to be put on the words "made in consideration of marriage." Those words as they stand will include not only a settlement or conveyance, made by a man on his own marriage, but by a father on the marriage of his child, a brother on the marriage of his sister, an uncle on the marriage of his niece, a man on the marriage of his adopted daughter or of his friend's daughter and so on. In all these cases, and in others which might be enumerated, men not only may but every day do make settlements, conveyances, etc., in consideration of marriage. By way of example we may cite *Frederick* v. *Aynscombe* (1. Atk. 392.) it being a very similar case to the one before us. There, a father, by articles of agreement previous to the marriage of his son, covenanted at the end of three years from the solemnization thereof to pay to trustees the sum of £12,000 to be settled to certain specific uses. In the present case as we have seen, the father by deed covenanted that, the marriage of his daughter having been duly solemnized, his executors within twelve months after his death should pay to trustees the sum of £7,500 to be settled to certain specific uses. It may be well to point out that by s. 44 (3.) of the Insolvency Ordinance 1884 it is enacted that "settlement" shall for the purposes of the section include any conveyance or transfer of property.

On the facts and on the true construction of the section we have no hesitation in coming to the conclusion that the settlement in question here is a valid settlement made before and in consideration of marriage within the meaning of the section. For this reason, also, the appeal must be allowed and the order appealed from set aside. The settlement being valid, the mortgage executed in pursuance of it is presumably valid also, and must be taken to

be so until the contrary is declared in due course of law. It is unnecessary therefore to consider grounds (2) and (3) of this appeal.

In the concluding sentence of his reasons for making the order, the judge below says: "It is unnecessary to decide whether as the payment of the £7,500 or $36,000 is a payment *in futuro*, the Administrator General was right in treating the claim upon the same footing as if the amount were now actually due and payable." Having come to the conclusion he did, it was unnecessary for the judge to decide that point. The point is not taken expressly on the grounds of appeal from the order of the judge below. If the judge had decided the point it might, perhaps, have been argued before us under the fourth ground of appeal. The judge below did not decide the point. There is therefore as to this point no appeal before us as from his decision. As the judge below, in stating his reasons for making the order, has noticed this point, it was presumably argued before him. The proper course would seem to be to refer the matter back to the judge to determine the point, and we so order.

The order appealed from is set aside with costs.

SHERIFF, J.: I concur in this judgment in so far as the admissibility of the two indentures to prove consideration other than that appearing on the face of the marriage settlement itself is concerned.

LIMITED JURISDICTION.

MARCUS v. THE DEMERARA RAILWAY CO.

1895. *March 2.* SHERIFF, J.

Damages—Negligence—Horse killed on railway—Fencing of railway—Works of accommodation—Companies' Clauses and Powers Consolidation Ordinance, 1846, s. 280., and the Demerara Railway Company's Ordinance, 1846, s. 68.—Contract or agreement between company and landowners out of statutory obligations—Doctrine of acquiescence—Prescription.

Claim for the sum of $150, the value of a horse the property of plaintiff alleged to have been killed by a train on the railway of the defendant company through the negligence of defendants in not maintaining proper fencing and gates to the said railway.

Defendants pleaded in answer that plaintiff's claim showed no cause of action against them, that there was no obligation upon them to fence plaintiff's land, nor was it shown that she had any land, that if she had any claim it was against the owner of plantation Annandale, and lastly that if the horse was on the line it was a trespasser.

M. R. Gonsalves, solicitor, for the plaintiff.

A. E. Messer, solicitor, for the defendant company.

Argument was first heard on the points of law raised by the defendant, and on November 3rd, 1894, SHERIFF, J., before whom the case was heard, gave the following judgment:—

This is an action to recover compensation for a horse killed on defendants' railway. Certain legal objections were raised by way of defence and having heard the plaintiff's solicitor I reserved consideration thereof.

It is urged that the plaintiff has no cause of action, and that the status of the defendant company is defined and regulated by the Companies' Clauses and Powers Consolidation Ordinance, 1846, and the Demerara Railway Company's Ordinance, 1846. In s. 2 of the former ordinance its provisions are extended to every joint stock company incorporated by any ordinance hereafter to come into operation save so far as they may be expressly varied or excepted by any such ordinance. If s. 280 of the former ordinance, which deals with works for the accommodation of the owners and occupiers of land adjoining the railway, be compared with s. 68 of the latter ordinance it will be observed that the words to be found at the end of s. 280 are omitted in s. 68. The words expressly exempt a company from liability with respect to accommodation works, where the owners and occupiers of the lands have agreed to receive and shall have been paid compensation instead of erecting such accommodation works.

It is established that the railway line which passes through plantation Annandale so far as that property is concerned, is fenced in, but that there is a road which leads down to the railway line where in the ordinary course of things a gate should be placed, but where no gate has stood, it is said, for twenty-six years. My attention was not drawn to the distinction between the two ordinances above referred to, and it follows that there was no argument thereon. It is also proved that owners and those who represent them do not care to have gates, as it entails the expense of keeping someone to open and close them. That may well be, but the larger question arises whether the defendant company may shelter itself from the performance of statutory obligations by the express or implied acquiescence of such owners. I deem it necessary to have this question argued and I am prepared to name a day for that purpose.

Thereafter, on December 6th, after hearing further argument His Honour gave decision as follows:

Having carefully considered the arguments addressed to me by the solicitor to the defendants upon certain points which I directed to be argued I have come to the conclusion that I am bound by the decision of the Supreme Court of Civil Justice in the case of the defendant Company, appellants v. Cavan, respondent, decided on December 5th, 1864. There it was assumed that the defendant company could enter into an agreement or something equivalent to an agreement and so contract out of their statutory obligations, but that evidence of anything of the sort was wanting, and the mere fact that the respondent himself had erected fences did not exonerate the defendant company from their liability to do so. Applying the law as laid down in that case, can I say that the defendant company have adduced evidence of such an agreement as is contemplated by the Companies' Clauses and Powers Consolidation Ordinance or the Demerara Railway Company's Ordinance of 1846. Mr. George Bagot, the manager of Annandale, says "there never were any gates at the middle-walk—there was no fencing at first—I would rather have no gates and I have not asked to have one." Mr. Dorman, the manager of defendants' railway, deposes that "No gates have ever been there for 26 years; I gather this from the books to which I have access. The line was opened in 1851. No gates to middle-walks. I have asked proprietors who said it would be inconvenient to have them as they would have to employ people to open and shut them." In my opinion this evidence is insufficient.

The question of prescription does not appear to have been

raised in the case to which I have referred, but the section relied on only shelters the company from demands from further or additional accommodation works, not when the company has totally neglected to fulfil a statutory obligation. It would serve no good purpose to dwell longer on these points. I therefore overrule the objections raised and am prepared to continue the hearing on the merits.

After further hearing, judgment was given on March 2nd, 1895, by ATKINSON, J., for SHERIFF J., as follows:—

This case is now before me for decision on the merits, but the solicitor for the defendant company having drawn my attention to the fact that I had expressed no opinion on one of the points of law raised by him, I shall proceed to dispose of the same, although I was under the impression that I had expressed my veiws thereon during the argument.

The point is this—Can the plaintiff maintain her action in face of the provisions of s. 74 of the Demerara Railway Company's Ordinance, 1846? I am inclined to think that she can. I read the section to mean this—that if the company have made an honest and substantial endeavour to conform to the requirements of the law, then any person having the right so to do may make application for further or additional work, provided however that such application be made within a period of ten years. In the present case the defendant company have certainly not carried out the law, and they are certainly not in a position to set up prescription.

It was further argued that, although in the case of *Cavan* v. *the Demerara Railway Company* (Dec. 5th, 1864) the doctrine of acquiescence was held inapplicable, yet in the present case the length of time which had elapsed without any action on the part of legally interested parties was sufficient to let in the doctrine of acquiescence. I hold however a contrary opinion. The defendant company could only escape liability for their negligence in the planner provided in their ordinance, that is to say, by agreement.

This brings me to the merits, and there is a conflict of evidence which makes it a difficult matter to decide. In such cases it must be kept in view that the onus of establishing the case is on the plaintiff, and that being so my mind is not so free from doubt as to give her a sentence. There can be no doubt that the mare in question was killed on the Demerara railway, but the difficulty I feel is to determine how and by what means the animal managed to get on the line.

There will therefore be rejection but under all the circumstances without costs.

LIMITED JURISDICTION.

EXORS. D'ANDRADE v. TEIXEIRA.

1895. *April* 9. KIRKE J., (Actg.)

Landlord and tenant—Notice to increase rent—Tenant remains in occupation—Tacit consent to pay increased rent.

Where a landlord, after due notice, increases the rent of premises and the tenant remains in possession and occupation without remonstrance or offer, he impliedly accepts the condition to pay the increased rent. *Quail v. Davis* (L. J. 19. 3. 1892.) followed.

Claim for the sum of $240, the amount of three months rent of premises on lot 117, Lacytown, Georgetown, the property of plaintiff's testator, from September 1st to November 30th, 1894, at the rate of $80 per month.

Defendant admitted the claim to the amount of $120, being rent at the rate of $40 per month.

Further necessary facts appear from the judgment.

J. B. Woolford, solicitor, for plaintiffs.

W. S. Cameron, solicitor, for defendant.

KIRKE, J., Actg: This is a claim for $240 for rent; $120 of this amount has been admitted and paid into court, and leave was given to defend as to the balance.

The defendant rented a shop from the plaintiffs at the rate of $40 a month; on July 18th, 1894, a notice was served upon her by the plaintiffs to the effect that after September 1st the rent would be raised to $80 a month in lieu of $40. Defendant never answered the notice nor made any remonstrance or offer in the matter. The tenancy continued up to the end of November and plaintiffs seek to recover the amount of increased rent.

It was argued for the defendant that there must be a clear assent on her part and that the tenancy at $40 a month still remained in force, and that the landlord could not raise the rent without determining the tenancy.

My attention was called to the case of *Quail* v. *Davis* decided by ATKINSON, J. on March 19th, 1892, which is a case somewhat similar to this. The learned judge in his decision says: "A new state of things arose by reason of the notice intimating that, if the defendant continued to hold on, the amount payable would

be increased to $60 a month. The defendant did continue to occupy the premises, and therefore he impliedly accepted the condition or obligation to pay the increased amount."

In this case the defendant received notice on July 18th, such notice to take effect on September 1st; she continued to occupy the shop until November 30th, so she impliedly accepted the condition to pay the increased the rent.

There will be sentence for the plaintiff's with costs.

LIMITED JURISDICTION.

MARTINS v. DE FREITAS.

1895. *April.* 9. KIRKE, J. (Actg.)

Action for accounts—Marriage in community of property—Community of goods between the surviving parent and children—Common law.

Children are entitled to participate in all the profits and increase of the community of goods which may exist between the surviving parent and themselves, and the surviving parent is bound to render a proper account thereof.

Defendant, the father of plaintiff's wife, had been ordered by the Full Court on February 27th, and June 16th and 23rd, 1894, to render to plaintiff a true and correct inventory of all the property, estate, and effects which he was possessed of at the time of the death of his wife, and also a true and correct account of his administration of all such property, estate, and effects, and of all the rents, profits and interest arising therefrom.

Accounts were filed as ordered and referred to the Accountant of Court for report, and after enquiry the latter official reported that on the accounts as filed, the sum of $775.23 was due to Maria Martins, born de Freitas, wife of plaintiff. Plaintiff thereupon applied to the court by motion for an order on defendant to immediately pay the sum so found due into the Registry of Court, and in addition to furnish the Accountant of Court with details as to his financial affairs at the date of his first wife's death, the accounts he had already filed not commencing until 1889, after an interval of more than eleven years after his wife died.

On the motion coming on for hearing, there appeared,

D. M. Hutson, for plaintiff.

J. A. G. C. Belmonte, for defendant.

KIRKE, J., (Actg.): This is a motion calling upon the defendant to furnish the Accountant of Court with a correct statement of the money possessed by him in the banks at the time of his first wife's death, together with a statement of interest received thereon, also a statement as to $2,000, capital of a mortgage received by defendant, with the date of its receipt, later investment, and interest thereon, and an account of the profits earned by the use of the money.

The plaintiff was married to his first wife in community of goods; she died on October 1st, 1878, leaving several minor children. No inventory was taken by the defendant, as required by law, so the property remained in community between himself and his children.

Dr. Belmonte urged that by the common law of the colony defendant was not bound to and cannot be called upon to account, as he had the usufruct of all the profits arising from the joint property in consideration for maintaining and educating the children according to their status in life; that he can spend the money as he likes, and need not account to anyone. This may be so, but it is certainly not the opinion formed by the Full Court when the matter was before them, and certainly, reading *Van der Linden, Institutes,* p. 88, it would seem that "the community of goods continues between the survivor and the children, and to the advantage of the latter, who enjoy the half of all the profits that accrue to the estate after the death of the first dying parent," and the profits cannot be ascertained unless the surviving parent furnishes correct accounts of his dealings with the common property. *Van der Keessel* in his Thesis CXLII. (*a*) makes it a pecuniary penalty on the surviving parent who neglects to make an inventory that he must share the profits of the common property with his children and bear all the losses himself.

In the judgment of the Full Court (see *Martins* v. *De Freitas,* 1894 L.R., B.G., 4.) it is laid down "that the plaintiff is entitled to receive his share of the estate and of whatever increase has taken place thereon during the defendant's administration thereof" and the Court made an order "for an inventory and accounts of the common property and for an account of the defendant's intromissions therewith in ordinary form."

The children are entitled to participate in the profits of the business and in all receipts for interest and other increase, and the defendant is bound to render a proper account of them.

The motion is granted in terms with costs.

(*a*.) See Select Theses, translated by Lorenz, 2nd Ed., p. 43—Ed.

LIMITED JURISDICTION.

SPROSTON DOCK AND FOUNDRY COMPANY,
v. CLEGHORN.

1895. *April* 9. KIRKE, J. (Actg.)

Husband and wife—Marriage by ante-nuptial contract—Married woman entering into trading contract—Validity of contract—Ratification by husband—Sole trader.

A contract or agreement entered into by a wife without her husband's authority consent or ratification is *ipso jure* void.

Action for the recovery of the sum of $409.33, being the balance of an amount due to the plaintiff by the defendant, a married woman carrying on business in the colony as a sole trader, on an agreement between the parties and others in connection with the working of a placer on the Essequibo river.

Further necessary facts and arguments appear from the judgment.

D. M. Hutson, for plaintiff.

P. Dargan, for the defendant.

KIRKE, J. (Actg.): This is an action to recover $409.33, money due upon an agreement between the parties.

The defendant is a married woman married by ante-nuptial contract, and the plaintiff's assert in their claim—

(i.) that the defendant is a sole trader;
(ii.) that she is married by contract and so is liable for her own debts;
(iii.) that in pursuance of her business as a sole trader she, with the knowledge and consent of her husband, entered into a written agreement with the plaintiffs;
(iv.) that the agreement was carried out with the knowledge and consent of her husband.
(v.) that defendant owes $409.33 to the plaintiffs.

In her answer defendant—

(i.) denies that she is a sole trader;
(ii.) admits she is married by contract;

(iii.) denies that she signed the agreement in pursuance of her business as a sole trader, or that it was signed with her husband's knowledge and consent;
(iv.) denies that the agreement was carried out with the knowledge and consent of her husband;
(v.) denies that she owes $409.33, or any part thereof;
(vi.) denies that the agreement has ever been ratified or confirmed subsequently by her husband.

These are shortly the main points in issue between the parties, and I think the plaintiffs have failed to prove the allegations in their claim which are denied by the defendant.

There is no evidence before me that defendant is a sole trader—quite the contrary. Nor is it proved that it was in pursuance of her business as a sole trader that she signed this agreement. The agreement was signed by her on May 29th, 1893, when her husband was in the North-West district, where he remained until July 10th, so that she could not have signed it with his knowledge and consent, unless he had given it in writing, of which there is no proof.

The husband swears that he knew nothing of the agreement until after he came down to town, when a statement of account together with a copy of the agreement was sent to him. That he ratified the agreement on his return is uncertain. There is some evidence given by Mr. Vanier as to some words which passed between himself and Cleghorn, but Vanier's memory seems untrustworthy and the words might bear any construction. The mere fact that Cleghorn, when he first heard of the agreement, did not go to the plaintiff's and repudiate all liability would not in itself make him liable if the previous agreement had been invalid.

There was no evidence given that the defendant owed $409.33, as stated in the claim. It was asserted generally that the expense, of which the defendant was to pay half, amounted to about $1,100 but no books or vouchers were produced in proof of this statement.

On the whole case I am of opinion that the plaintiffs have failed to make out their claim. The defendant was partner with Mrs. de Vries and one Hicearee in a gold placer, and de Vries through his agent Vanier approached Mr. Sproston to obtain funds to carry on the placer. Mr. Sproston agreed, and he was admitted as a partner. Mrs. Cleghorn was persuaded by Vanier to sign the agreement in which Mrs. de Vries and Hicearee were excused from all liability and Mr. Sproston and Mrs. Cleghorn were to pay all the expenses and get only a half of the profits.

It is difficult to believe that Mr. Cleghorn would have consented to this or ratified it when he knew it.

There is a great amount of rascality going on in this colony by men who shelter themselves behind their wives' petticoats. At the same time women must be protected from their own indiscretions, and I think this is one of the cases where the law of this colony with regard to married women can be justly enforced.

There will be a non-suit with costs.

GENERAL JURISDICTION.

MAIR v. CUNNINGHAM.

1895, *April* 23. Sir EDWARD O'MALLEY, C.J., ATKINSON and SHERIFF, JJ.

Summary citation—Rules of Court, 1893, O. VIII. r. 5—Affidavit of defence—Accounts stated, and conditions under which such accounts can be attacked—Fraud—Allegations of fraud without definite averment—Arguable defence.

Action for the recovery of the sum of $15,344.86, due on an account stated between the parties.

Proceedings were commenced summarily under the provisions of the Rules of Court, O. VIII. r. 5, and leave to defend was granted, fraud being alleged by defendant against the plaintiff.

The judgment of the Court (ATKINSON, C.J., Atg.) in the summary proceedings fully sets out the facts and arguments.

Thereafter the matter came before the Full Court (O'MALLEY, C.J., ATKINSON and SHERIFF, JJ.) for trial, and judgment was given for plaintiff for the amount claimed with costs.

1894. *March* 14.

In the summary proceedings the following decision was given by ATKINSON, J.

This is a summary citation under Order VIII. r. 1. of the Rules of Court, 1893, the sum claimed being $15,344.86, the amount of an account stated with interest up to December 31st, 1893. The defendant appeared under Order VIII, r, 5. (*a*) to show cause. The amount claimed is the balance with interest of an old account owing to the plaintiff's then firm by the firm of Park and Cunningham.

Mr. Park died on June 26th, 1886, and on February 1st, 1887 an agreement was entered into by William Cunningham the surviving partner of the firm of the first part, the executors of Park of the second part, and the plaintiff's firm of the third part, whereby William Cunningham assumed all the liabilities and took over all the assets of the late firm of Park and Cunningham as on July 31st, 1886. In this agreement it was stated that Park and Cunningham owed the plaintiff's firm £12,340 11s. 5d.

(*a*) See now Rules of Court, 1900, Order XII. r. 4. Ed.

sterling, which W. Cunningham undertook to pay by instalments with interest at the rate of five per cent.

Plaintiff's attorney has filed an affidavit alleging that, in the course of a conversation, defendant had stated that he would pay at once if he had the money but that he had not a penny, and if sued would dispute everything, or spoke to that effect. In a letter to the plaintiff dated February 22nd, 1893, the defendant wrote "with regard to placing something definite before the trustees of your father will you kindly tell them that if the necessary support can be obtained they may depend upon us paying as quickly as we can the principal owing by us, viz., £1,277. 14s. 7d. old account and the new account with interest. The interest on the old account we cannot pay, but if we get over our present trouble we would . . . . pay one-half of this interest although we still are of opinion it should never have been insisted upon."

The defendant, in his affidavit showing cause, says that the alleged conversation took place in pursuance of certain correspondence between him and plaintiff's solicitors, and that it was distinctly understood that what was said should be without prejudice.

As to the letter of February 22nd, 1893, the defendant says it "formed part of certain negotiations for a settlement of the disputes between the plaintiff and myself of the accounts between us which had been going on for some time, without prejudice to either party," which negotiations fell through, and he denies that the letter by itself is an admission of indebtedness.

The defendant further alleges that at the time of the execution of the agreement of February 1st, 1887, and long previously thereto, the plaintiff had unknown to him or to his said firm received large sums of money by way of cash and trade discounts on purchases made as the agent of the defendant and of his firm, which ought to have been but were not credited in the accounts rendered by the plaintiff; that the plaintiff fraudulently and in breach of his duty as such agent appropriated such cash and trade discounts to his own use, and concealed the fact of the receipt thereof from the defendant at the time of the execution of the said contract, and thereby fraudulently induced the defendant to sign the agreement; and that on a correct adjustment of the accounts, after giving credit for sums so fraudulently appropriated, for moneys short credited and for compound interest wrongfully and fraudulently charged, it will be found that the defendant is not indebted to the plaintiff in any sum whatever, but the contrary.

The defendant thus seeks to open the account stated and settled

up to July, 31st 1886, the amount then found to be due having been embodied in the agreement of February 1st, 1887.

The principles which are to guide our courts in cases of accounts stated are laid down in the case cited at the hearing, *Conrad* v. *Newton* (1890 L. R. B. G. 113). The practice which commends itself to the court is that which has been established and is substantially followed in the Court of Chancery, viz., that there should be something distinctly alleged by the party who is attacking accounts stated and treated as settled—to the effect that, although the account has been thus stated and acquiesced in, there are errors which escaped notice and which must be rectified, and these errors should be specified and also a statement given of the grounds as regards each of the errors in respect of which it is proposed a rectification should be gone into.

In the present case we have general allegations that there are cash and trade discounts which have not but should have been credited and that compound interest has been improperly charged, but no specific errors with the grounds thereof are set forth. So far, therefore, the plaintiff, putting aside for the moment the question of fraud, has not made out a case entitling him to enter a defence.

As to fraud in these cases I may quote what was said by Lord HATHERLY (at p. 701) in *Wallingford* v. *Mutual Society* (5 A.C. 685); "I take it to be settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without definite character being given to those charges by stating the facts upon which they rest."

It was urged for the defendant that, if the plaintiff were referred to his ordinary remedy, all the matters in dispute could be fully enquired into; and *Williamson* v. *Barbour* (9 Ch. D. 529) was cited as being on almost all fours with the present matter. But there the principals, as plaintiffs in the action, sought to impeach the agent's accounts and were not only prepared to specify but did specify and prove sufficient errors to justify the court in ordering the accounts to be opened. In the present matter the suit is brought not by the principal but by the agent. The principal has been cited summarily to pay the balance of a sum which he had admitted to be due in an agreement solemnly entered into by the parties after the accounts had been stated and

settled as up to July 3rd, 1886. The principal is endeavouring to re-open those accounts which go as far back as 1873, relying upon the general allegations stated above.

In the case of the *Anglo-Italian Bank* v. *Wells* (38 L. T. N. S. 197.), JESSEL, M.R., said (at p. 200) "I agree entirely with the Vice-Chancellor, that when the judge is satisfied not only that there is no defence, but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give effect to this section, and to give judgment for the plaintiff."

In that case the facts were very similar to those here. The action there, as here, was for an ascertained sum covenanted to be paid; there, as here, there had been payments on account; and there, as here, the plaintiff's affidavit stated an account settled showing the balance. In that case the defendant's affidavit was also very similar to the defendant's in this—containing general allegations only, neither dates nor amounts being stated. JESSEL, M. R., one of the ablest judges who ever sat on the bench, after discussing the statements in the affidavit went on thus:—"I must say, if the answer in this case were to be held to be sufficient, no man would ever get judgment . . . . . under this rule in the Judicature Act, because if a man were allowed to say simply, 'You have not given me credit for what you ought to have given me credit for,' without giving a single item, a single date, or a single fact, I think defendants would be only too ready to believe there were some mistakes in the account. It would be quite impossible to act upon such an unsupported statement, or to look upon it as anything but a sham defence."

These observations as to the want of averment of fact, etc., are very apposite to the present case. There are here general allegations only, and that being so I cannot say that the defendant has shown that he is entitled to defend. The defendant Cunningham either has facts to produce which will support his allegations of fraudulent dealing on the part of the plaintiff, or he has not. If he has not, this is an attempted sham defence for the purpose of delay; if he has, then he could have stated those facts in his affidavit. He has not done so. In a letter dated October 17th, 1893, he speaks of "the facts which my change of agents revealed," and goes on to say "I have good and sufficient reasons to think that a very large sum in trade and cash discounts should have been credited this account, but which were withheld." Why did he not state in his affidavit the facts on which he relies as establishing such good and sufficient reasons. If those facts exist and really go to that extent, the court would have been satisfied, and would have at once given him leave to defend. A defendant is not entitled to

defend merely because he is of opinion that he has good and sufficient reasons for believing that he has a defence. It is for the court to decide, upon the facts stated, whether, if those facts were proved, there would at the least be an arguable defence. If I were to deal with the matter as it stands now, I should be constrained to give judgment for the plaintiff. But I think the ends of justice as between the parties and as regards the interests of the minors Park will be best served if, before deciding finally, I order, as I do now order the defendant, in terms of Order VIII. r. 5, to attend on a day to be fixed and be examined upon oath, and to produce all books or documents or copies of or extracts therefrom in his possession or control which relate directly or indirectly to the defence he wishes to set up.

Under the circumstances the defendant must pay the costs of the suit to date and of this motion.

1894. *August* 17.

Defendant subsequently attended before the court and was examined as directed, and after hearing his evidence ATKINSON, C. J., Actg., gave his decision as follows:—

By the interlocutory decision in this matter the defendant was ordered to attend and be examined and to produce books, etc. He has been examined and has produced books, letters, and invoices, and he alleges that from these and in other ways it can be shown that the plaintiff's then firm, as agents of the defendant's then firm, received very large sums by way of cash and other discounts which ought to have been credited to the defendant's firm, but were retained by the plaintiff's firm.

The accounts extended over many years, and the items as to which this question of discounts may relate are very numerous. It was therefore agreed that certain typical cases only should be referred to in this summary proceeding. As to some of these it would seem from the evidence that certain cash and other discounts were received by the plaintiff's then firm in respect of goods purchased by them for the defendant's then firm and were not credited in whole or in part to the latter firm. Defendant swears that the whole ought to have been credited. Plaintiff says that his firm was entitled to retain them. This is a question of fact.

Further as to these discounts, defendant swears that when he signed the agreement on February 1st, 1887, he had no knowledge that they had been received and retained by the plaintiffs firm, and that if he had had such knowledge, he would not have signed the agreement. In cross-examination it was attempted to be shown that defendant, before he signed the agreement, knew that these

discounts had been retained. This also is a question of fact, and I have no power to determine such questions in this summary proceeding. It is true, as stated by JESSEL, M.R., in the case cited by me in the interlocutory decision, that "when the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give effect to this section, and to give judgment for the plaintiff." It is equally true that when facts are placed before a judge which are really or apparently in dispute and out of which a defence may arise, it is the duty of the judge not to give judgment for the plaintiff. It is impossible for me upon the evidence here to say absolutely that there is no defence. An arguable defence is certainly disclosed. Whether a defence will be ultimately made out is another matter. As the case stands I am bound to give the defendant leave to defend.

I may point out that under s. 186 of Ordinance 26 of 1855, which provided a summary remedy on bills of exchange, etc., it was held sufficient if the affidavit disclosed, not that there actually was a defence, but reasonable and probable grounds for supposing that there was a defence, *Parnell v. Cambridge*, 31st July, 1872, and cases there cited.

1895. April 23.

Leave to defend having been granted the action came on for hearing before the Full Court (Sir EDWARD O'MALLEY, C.J., ATKINSON and SHERIFF, JJ.)

D. M. Hutson, for plaintiff.

A. Kingdon, Q.C., S.G., for defendant.

After the evidence had been led for plaintiff counsel for defendant stated he proposed to offer no further evidence on behalf of the defendant, the Court expressing the opinion that counsel had exercised a wise discretion.

Judgment was thereupon given for plaintiff for $15,344.86 with interest, and costs.

LIMITED JURISDICTION.

PINTO v. GONSALVES AND PINTO.

1895. *April* 27. SHERIFF, J.

Opposition to execution sale—Mother-in-law—Venia agendi—Petition for venia agendi during non-session of the Court.

Persons cited without the *venia agendi* or leave of the Court to sue being obtained are entitled to be absolved from the instance.

Application to the Court of trial for leave, after objection taken, refused.

Watson v. Sproston and others (Jan. 10th, 1872.) distinguished.

Action by plaintiff to declare an opposition to an execution sale, advertised in the *Gazette* of November 24th, 1894, on behalf of the first defendant against the second defendant, to be just, legal and well founded, and to condemn the first defendant to cancel and withdraw the levy in pursuance of which the sale had been advertised. Plaintiff admitted that the second defendant was her mother-in-law, and defendants thereupon objected that she was not entitled to maintain the proceedings, as she had not obtained the *venia agendi.* Defendants further objected that in her reasons of opposition plaintiff had not described, either in her claim or reasons, what interest she claimed in the immovable property levied on, nor had she complied with the requirements of the Rules of Court, 1893, Order I, r. 12.

W. E. Lewis, for the plaintiff.

D. M. Hutson, for the defendant.

After argument on the preliminary objections taken, decision was given as follows: —

SHERIFF, J.: In this case two preliminary objections are taken:—

It is admitted that the second defendant is the mother-in-law of the plaintiff, and it is urged by way of defence that these proceedings will not lie, because the plaintiff had not obtained the *venia agendi* or leave of the court to sue.

On the face of the pleadings it appears that the plaintiff did petition for the *venia agendi*, but it does not appear whether she obtained any order or not. It was contended that it was not necessary to do more than show that leave had been applied for. I am unable to concur in this view. The order is not obtained as

of course, but a *prima facie* case must be disclosed. It was further admitted during the argument that the petition was addressed to ATKINSON, C.J., (Actg.) during non-session of the court, and that he had refused to grant the order prayed for. Counsel for the plaintiff then asked me to grant the *venia agendi*. He cited the case of *Watson v. Sproston and others* (January 10th, 1872), where KING, J., had granted the application after the pleadings were closed. I pointed out that, while assenting to the course pursued in that case, it was not on all fours with the one under consideration. In the former the application was made before trial, in the latter it was made at the last moment at the hearing, although the objection was taken by the defendants in their answer and, what is still more important, after a previous application had been refused by the acting Chief Justice during non-session. In compliance with the request of plaintiff's counsel I have consulted my brother ATKINSON, and he concurs with me in thinking that under the circumstances disclosed it is not competent for me to entertain the plaintiff's application. He drew my attention to *Voet* Bk 2., tit. 4, par. 6, where it is laid down that persons cited without the *venia* are absolved from the instance, and the party citing condemned in the costs.

I rule that the objection is well taken and must prevail. It becomes unnecessary to consider the other objection. The plaintiff is non-suited with costs.

SEQUESTRATORS OF PLN. LA GRANGE v. HOGG, CURTIS, CAMPBELL & CO.

GENERAL JURISDICTION.

SEQUESTRATORS OF PLN. LA GRANGE v. HOGG, CURTIS, CAMPBELL & CO.

1895. *May* 13 SIR EDWARD O'MALLEY, C.J., ATKINSON and SHERIFF, JJ.

Mortgage—Foreclosure action—Sugar plantation—Appointment of receivers followed by sequestration—First and second, mortgages—Manufactured sugar on the premises claimed by first mortgagees—Effect of delivery to and possession by second mortgagees—Produce bound in consignment—Amended Manner of Proceeding Ordinance 1855, s. 153 (*a*)*—Interdict—Supreme Court Ordinance 1893,* s. *37.*

Application was made *ex parte* on January 8th, 1895, by the committee of the Trotman Fund, as constituted under the provisions of Ordinance 6, 1887, as first mortgagees, for the appointment of a receiver of pln. La Grange, pending the appointment of sequestrators. Messrs. C. B. Hamilton and D. M. Hutson were appointed receivers the same day.

The committee of the Trotman Fund had commenced their foreclosure action against R. B. Butts, owner of pln. La Grange on January 7th.

The receivers thereupon, on January 12th, applied *ex parte* for and the Court granted an interim order against Messrs. Hogg, Curtis, Campbell & Co., to interdict them from interfering in any way with the said plantation, or from disposing of any produce removed therefrom since January 8th.

On appointment, the sequestrators were substituted for the receivers as plaintiffs by order of the Court dated March 27th, and the matter then proceeded to hearing.

D. M. Hutson, for the plaintiffs.

P. Dargan, for the defendants.

All other necessary facts appear from the judgment of the Court as follows:—

Curia, (per O'MALLEY, C.J.) On the 8th January, 1895, a foreclosure suit was commenced by the Trotman trustees as first mortgagees against Mr. R. Butts, as owner of plantation La Grange, to

(*a*) See now Rules of Court, 1900. Order xxxvi. r 49.—Ed.

realise the debt secured by the latter to the former by mortgage of the plantation. Receivers of the estate were appointed on the same day, and sequestrators on the 23rd of the same month. In this present action, which was commenced by the receivers and is now carried on by the sequestrators, the plaintiffs sued for a decree, ordering the defendants to deliver over to them certain sugars and produce of the estate which were upon the estate at the time when the receivers were appointed, and which, as they contended, were wrongfully removed by the defendants, and for an interdict restraining the defendants from further interfering with the plantation or the produce thereon. In order to make the positions of the parties clear it is necessary to give a short outline of the recent history of the estate.

In 1886, Mr. Butts purchased La Grange plantation from Messrs. Hogg, Curtis, Campbell and Co. for £14,000, paying £6,000 in money and giving them a mortgage of the estate for the remaining £8,000.

In March, 1889, Mr. Butts being then in debt to Messrs. Hogg, Curtis, Campbell and Co., new arrangements were made.

The mortgage to Messrs. Hogg, Curtis, and Campbell was cancelled. Mr. Butts obtained £10,000 from the Trotman trustees on a new first mortgage of the plantation to them, and Messrs. Hogg, Curtis, Campbell and Co., took a second mortgage on the plantation for £9,500, stated in the deed to be in respect of the purchase money of plantation La Grange—although in the original mortgage of the 19th June, 1886, the balance of the purchase money due to them is stated to be £8,000, a circumstance which does not explain itself by anything that has appeared before us. This second mortgage is also stated to be intended to cover past and future advances. By the first mortgage deed, the deed to the Trotman trustees, it was provided that the mortgagor should, on pain of foreclosure, keep the plantation and cultivation in good working order according to the requirements of the mortgagees who had power to see that this was duly done. To enable Mr. Butts to fulfil this condition, Messrs. Hogg, Curtis, Campbell and Co. found the money, and for their protection and security, no doubt with a view to this, the second mortgage deed contained a stipulation that so long as any of the moneys secured should be outstanding Butts would "ship, consign and deliver to Hogg, Curtis and Campbell through their agents or attorneys in the colony, or to such other person or persons in the colony or elsewhere as they might from time to time appoint, the entire produce of the plantation for sale and disposal by them."

The arrangement thus made was carried out down to the end

of 1894, and Messrs. Hogg, Curtis, Campbell and Co., advanced the moneys needed for working the estate; regularly receiving the produce in consignment. During the earlier portion of that period Mr. Butts was his own manager, but subsequently Messrs. Hogg, Curtis, Campbell and Co., acting under a power given them by the deed, appointed Mr. Stogden to be manager.

At the end of 1894, Mr. Butts being then largely indebted for advances and the estate not paying its way, Messrs. Hogg, Curtis and Campbell determined to give up their connection with it, and so informed Mr. Butts and the Trotman trustees. The correspondence that passed between Mr. Garnett on behalf of Messrs. Hogg, Curtis, Campbell and Co., and Mr. Hamilton, the chairman of the Trotman trustees, consisted of the following letters:—

La Penitence,
22nd December, 1894.

HON. C. B. HAMILTON,
Chairman of the Trotman trustees.

Sir,—

Confirming our conversation of this morning bearing on your letter of the 20th inst. to Mr. Butts, I beg to inform you on behalf of Messrs. Hogg, Curtis and Campbell, that they are not prepared to continue financing pln. La Grange after the 31st instant, under the existing terms of the first mortgage over the property given by Mr. Butts. In the event, however, of your agreeing in writing within seven days, say by the 29th inst., to waive the supervision clause of the mortgage whereby you can compel the mortgagor to spend what money you like on the place, they will be willing to continue the financing of the property up to the 31st December, 1895. It must be distinctly understood that in such an event we are to be allowed to take off any crop that we may grow during the next twelve mouths without being molested in any way, and I would point out to you that at the end of December, 1895, you will be in no worse condition as regards the property than you are at present. The whole cultivation will have been reaped, and the land laid open can then be worked as we are working at present. As I have said before, this offer is open up to the 29th instant. After that date, if we receive no answer from you, we at once cease all connection with the property. I may tell you that pending this arrangement I am giving the whole staff 14 days' notice, and have issued orders to do no work on the place at all, more than will occupy the indentured coolies.

I have, etc.,

G. R. GARNETT.

SEQUESTRATORS OF PLN. LA GRANGE v. HOGG, CURTIS, CAMPBELL & Co.

Public Buildings,
Georgetown,
28th December, 1894.

G. R. GARNETT, ESQ.
As representing the proprietor of pln. La Grange.

Sir,—

I have the honour to acknowledge the receipt of your letter of the 22nd inst., which the committee of the Trotman Fund presume has been written on behalf of the proprietor of pln. La Grange, Mr. R. B. Butts, and to inform you that the matter referred to therein is receiving the careful consideration of the committee, who hope to be able to give you a reply in a short time.

(Sgd.) C. B. HAMILTON,
Chairman of the Committee of the Trotman Fund.

Riverside Lot,
Demerara, British Guiana,
29th December, 1894.

Hon. C. B. HAMILTON,
Chairman of the Committee of the Trotman Fund.

Sir,—

I have the honour to acknowledge the receipt of yours of the 28th instant, in reply to which I beg to say that, unless a definite reply to mine of the 22nd. inst., reaches me to-day, it will be necessary to stop all work on the estate at once, and instructions have been given to the manager to this effect, which will be confirmed or otherwise to-day by wire according to your reply and when it reaches me.

I have, etc.,
G. R. GARNETT.

Public Buildings,
Georgetown,
29th December, 1894.

G. R. GARNETT, ESQ.
As representing the proprietor of pln. La Grange.

Sir,—

In reply to your letter of this day's date and previous correspondence on the subject, I have the honour to inform you that the committee of the Trotman Fund intend to adhere strictly to the terms of their mortgage on plantation La Grange.

(Sgd.) C. B HAMILTON,
Chairman of the Committee of the Trotman Fund.

SEQUESTRATORS OF PLN. LA GRANGE v. HOGG.
CURTIS, CAMPBELL & CO.

Riverside Lot, Demerara,
29th December, 1894.

Hon. C. B. HAMILTON,
Chairman, Committee of the Trotman Fund.

Sir,—

I have the honour to acknowledge receipt of yours of to-day's date informing me that the committee of the Trotman Fund intend to adhere strictly to the terms of their mortgage on pln. La Grange, and I beg to thank you for your prompt decision in the matter. It only remains for me now on behalf of Messrs. Hogg, Curtis and Campbell to inform you, as mentioned in my letter this morning, that after to-day no expenses of any kind will be incurred by them. All produce made to date will of course be delivered to us, and in similar manner all liabilities to date will be met by us. There are also 40 iron cane punts on the property and a cane mill, which have been loaned to the proprietor by Messrs. Hogs, Curtis and Campbell, which will be removed at the earliest date possible. It is very much to be regretted that such should be the termination of our connection with the property, but far too much money has already been sunk in it by Messrs. Hogg, Curtis and Campbell to justify them in continuing to finance the proprietor. In future will you kindly address Mr. Butts direct on all subjects relating to the mortgage, and I am writing to him to-day to inform him of your and our final decision.

I have, etc.,
G. R. GARNETT.

P. S.—I would specially remind you that some arrangements should be made at the earliest moment for the upkeep of the hospital on the estate.

In this letter I think one may particularly notice the plain statement by Mr. Garnett of Messrs. Hogg, Curtis and Campbell's claim to the sugar.

Mr. Stogden, Mr. Butts' manager, continued in his capacity as manager of the plantation for Mr. Butts down to the 7th January, 1895, when his notice of dismissal expired. He did not quit the estate at that date, but remained there acting under the exclusive instructions of Messrs. Hogg, Curtis, Campbell and Co., from the 7th till the 12th, and during this period he was removing the sugar under their instructions.

Meanwhile the Trotman trustees, seeing that the arrangements for working the estate were at an end, determined to foreclose, and commenced the foreclosure suit above-mentioned on the 8th January, 1895, and the above-mentioned order appointing

receivers, was made on the same day. Mr. Hamilton then wrote to Mr. Stogden as follows:—

Audit Office,
8th January, 1895.

Dear Sir,—

Mr. D. M. Hutson and I have been appointed receivers by the Court, in the case of pln. La Grange.

As it will be necessary to make preliminary arrangements regarding the estate as soon as possible might I ask you to do me the favour of calling at my office to-morrow (9th inst.) at any time between 10 and 4 o'clock which may best meet with your convenience?

I am, etc.,

(Sgd.) C. B. HAMILTON.

T. S. STOGDEN, Esq.,
Pln. La Grange,
West Bank, Demerara.

On the 9th Mr. Hamilton and Mr. Stogden had a friendly interview to arrange accordingly. At this interview, according to Mr. Hamilton's evidence, nothing was said about the sugar, and it is clear from the rest of Mr. Hamilton's account of what passed, and from the fact that he proposed to Mr. Stogden that he should continue in charge of the plantation for the receivers, that he had no idea of there being any dispute about this sugar between Messrs. Hogg, Curtis and Campbell and the Trotman trustees or the receivers. On the 10th Mr. King went to the plantation carrying with him another friendly letter from Mr. Hamilton.

Audit Office,
10th January, 1895.

Dear Sir,—

Mr. Napleton W. King has been appointed by the receivers in the case of pln. La Grange, to take charge of the estate, and he will hand this to you. The receivers will feel obliged if you will afford Mr. King any facilities in your power.

I am, etc.,

(Sgd.) C. B. HAMILTON.

T. S. STOGDEN, Esq.,
Pln. La Grange.

Mr. King took possession of the plantation with the exception of that portion of it in which the sugar was stored. Mr. Stogden retained the keys of that part, and went on removing the sugar in spite of Mr. King's protest. The receivers being informed of this, and thinking it right to stop it, commenced this action for an interdict on the 12th January, and obtained an interim interdict the same day on Mr. Stogden, who then ceased all interference.

The action is for a return of the sugar removed and for an interdict, and if the plaintiffs can establish their right to the sugar, we think there is no doubt as to the power of the Court to grant an interdict if it be thought just. The statutory power of this Court to grant interdicts is conferred and defined by section 37 of the Supreme Court Ordinance, 1893, (a) which corresponds substantially with the words of section 25 of the Judicature Act, 1873 (36 and 37. Vict. c. 66), and it maybe exercised on the same principles as the power given under that act. If the plaintiffs established a legal right to what was removed the Court might, under this power, if it thought just and convenient, super-add to any other remedy to which they were entitled, an injunction for their future protection and for securing them in the quiet possession of what was left. We refer to this because it would appear, from the terms in which the plaintiffs frame their claims, that they contemplate something in the nature of the penal mandament known to the Roman Dutch law, a remedy which can hardly now be appropriate in cases where injunctions under the power abovementioned can be properly granted.

Now the question is, who had a right to the possession of this sugar on the 8th of January, 1895, the receivers or Messrs. Hogg, Curtis and Campbell? The receivers say, firstly, that this sugar was part of the property mortgaged by the first mortgage to the Trotman trustees, and no subsequent agreement contained in the second mortgage deed to Hogg, Curtis, Campbell and Co. can derogate from their rights as first mortgagees. The question is one of the construction of the first mortgage deed, and the words defining the property mortgaged are "plantation La Grange, *cum annexis*, on the west bank of the river Demerary, in the county of Demerary, comprising the land, buildings, machinery, cultivation and further appurtenances."

We do not think that manufactured sugar comes within the words "land, buildings, machinery" or "cultivation." Each of these expressions has a well-understood and limited meaning.

(*a*) Cf. Supreme Court Ordinance, 1915. s. 34—Ed.

Does it come within the term "further appurtenances?" We do not think it does. We take it that an appurtenance of a plantation, giving that term its widest meaning, must at least be something necessary for or conducive to the commodious enjoyment and working of the plantation as a manufacturing concern. Can it be said that the manufactured article, the produce, that which represents the whole object for which the machine is worked, is necessary or conducive to the working of it. One might as well say that a newspaper is conducive to the workage of a printing press, or a ship to the working of a shipbuilder's yard. We do not think, therefore, that this sugar in question was part of the property comprised in the first mortgage, or that the first mortgagees have any claim to it, under their mortgage.

But then the receivers say, secondly, we were appointed for the preservation, management and custody of the plantation, with power to take possession of and have the entire custody of the same, and to collect the rents, profits and income thereof, and under that appointment we had a right to take possession of the sugar, whether or not the mortgagees should prove to be ultimately entitled to it. To this we understand Messrs. Hogg, Curtis and Campbell to reply, "When you were appointed receivers of the estate we were already in actual possession of this sugar, and our possession was founded on a good legal right." If that were really the case then we think that the receivers would have no right to the possession of the sugar then, and can have none to it now. (See judgment in *Evelyn v. Lewis,* 3 Hare, 475). But is it so?

And (1), were Messrs. Hogg, Curtis, and Campbell in actual possession at the time when the receivers were appointed? We hold that they were. Mr. Stogden, under orders from Hogg, Curtis and Campbell, and as their agent, was holding the keys of the building where the sugar was stored and directing the removal of the sugar on their behalf, and that is, we think, sufficient to constitute actual possession by them.

But, (2) had they a legal right to the possession that they thus held? The deed of second mortgage had provided, as we have seen, that so long as the mortgage debt was unpaid (which it was at that time) the owner and his representatives should ship, consign and deliver to Messrs. Hogg, Curtis and Campbell through their agents or attorneys in the colony, or to such other person or persons in the Colony as they might from time to time appoint, the entire produce of the plantation, and under that provision Messrs Hogg, Curtis, Campbell and Co., had a right at any time to require that the produce of the estate should be delivered to them

through any agent whom they might appoint: and the question would seem to be, had Messrs. Hogg, Curtis and Campbell, under that provision, duly obtained delivery and so come into lawful possession before the receivers were appointed? We take it that as long as Stogden continued manager of the estate he was, having regard to the way in which business was carried on, a sufficiently authorised agent of Mr. Butts to deliver sugar to the order of Messrs. Hogg, Curtis and Campbell in the ordinary way, and that all sugar that he delivered to their agents in the regular way up to the time when the receivers were appointed was lawfully in possession of Messrs. Hogg, Curtis and Campbell.

But then what was the position with regard to this particular sugar still in the store of the estate on the 8th? Can it be said that that sugar had been duly delivered to Messrs. Hogg, Curtis and Campbell in the ordinary way? There is no evidence of delivery having ever been made in ordinary course in this way, that is, by suffering Messrs. Hogg, Curtis and Campbell or their agents to take possession in the store on the plantation, and we do not think that we are entitled to assume that there was authority in Mr. Stogden as Mr. Butts' agent to deliver to Messrs. Hogg, Curtis, and Campbell in that way. So that, according to our view, they were on the 8th in possession without that right which a previous duly authorised delivery to them would have given them.

We are of opinion, therefore, that as from the date of the receivers' appointment, while actual possession was in Messrs. Hogg, Curtis and Campbell, the right which was needed to make such possession good as against the receivers was wanting.

So far for the technical rights of the parties. But looking through these to the real substantial rights it is, we think, clear that though Messrs. Hogg, Curtis and Campbell were not technically entitled to remove the sugar after the 8th in the way they did, yet that the sugar is sugar that they would in due course have been entitled to have delivery of, sugar which, even if it were returned to the sequestrators by order in this action, would be bound to be sent back by them to Messrs. Hogg, Curtis and Campbell under the provisions of section 153 of the Amended Manner of Procedure Ordinance, 1855. (*a*)

Taking all the facts into consideration and using the power which we possess of granting remedies even though not asked for (section 36, Supreme Court Ordinance, 1893) our judgment will be for the plaintiffs for one cent damages for the removal of the sugar. No order of interdict will be made, and no order for the

(*a*) Cf. Rules of Court, 1900. Order xxxvi, r. 49—Ed.

return of the sugar, provided that defendants give an undertaking:

(1) to deal with the sugar they have taken in account with Butts strictly as sugar received in consignment under their deed; and,

(2) to abstain from further interference with sugar on the estate.

If that undertaking is given the judgment will be for plaintiff one cent damages, each party to pay his own costs. If the undertaking is not given the judgment will be for plaintiff one cent damages, for a return of all sugar taken or its full value, and for a perpetual interdict against further interference with the estate or produce, and costs for the plaintiffs.

We have to deal separately with the costs of a motion to set aside the interim interdict in the action. We do not think the defendants should be allowed costs in that proceeding. The interim interdict worked no hardship, there was no need to have it removed pending the trial of the action, and we do not think the grounds of the motion are such as we should have acted on under the circumstances.

It is asked that Mr. Stogden's costs should be allowed him in respect of his application to remove his personal property from the estate, in spite of the interim interdict. We think he ought to have applied to the sequestrators before he took this step, and that he should pay his own costs in the proceeding.

[Note.—Defendants gave the undertaking required on June 17th, 1895.—Ed.]

GENERAL JURISDICTION.

COMMITTEE OF THE TROTMAN FUND

v.

BUTTS;

Ex Parte HOGG, CURTIS, CAMPBELL & CO.

1895. *May* 13. SIR EDWARD O'MALLEY, C.J. ATKINSON AND SHERIFF, J.J.

Mortgage—Foreclosure action—Sugar plantation—Mortgage of land buildings machinery cultivation and further appurtenances'—Claim to produce punts, engine and mill as subject to mortgage—Opposition—Multiplicity of actions—Costs.

Application by Hogg, Curtis, Campbell & Co., in a foreclosure action that the sequestrators of pln. La Grange, the property of Butts, the defendant, and mortgaged to the plaintiffs, at whose instance the property was placed under sequestration, deliver to the movers a quantity of sugar, massecuite and molasses, one cane-mill and engine, forty iron punts, eight steel drums, and certain laboratory instruments, all the property of movers, or to pay the sum of $12,032, the value thereof.

The application was made on February 28th, when other proceedings (see above p. 54) in the same matter were pending. Leave to serve notice of motion on the plaintiffs was granted, returnable on March 22nd. By the order of the Court on March 25th the sequestrators were substituted for the plaintiffs.

P. Dargan, for the movers.

D. M. Hutson, for the sequestrators.

All other necessary facts appear from the judgment of the Court delivered on May 13th as follows:—

Per O'MALLEY, C. J.—This is a motion on behalf of Messrs. Hogg, Curtis, Campbell and Co. in a foreclosure suit, wherein the Trotman trustees, first mortgagees of the estate La Grange, are plaintiffs, and Mr. Richard Butts, proprietor and mortgagor of the estate, is defendant.

Messrs. Hogg, Curtis, Campbell and Co. now seek for an order requiring the sequestrators in the suit to deliver over to them as being entitled thereto, certain sugars produce of the estate, and certain punts and machinery found on the estate when the receivers took possession and now held by the sequestrators. In the motion, as originally framed, the claim was for seventy-five

tons of molasses sugar, one hundred and eighty-four casks of molasses and massecuite estimated to produce twenty-five tons molasses sugar, one cane mill, one engine, forty iron cane punts, eight steel molasses drums, eight massecuite receivers. But we understand that the claim to the drums is not disputed, and that the claim to the massecuite receivers is withdrawn, so that we have to deal with on the motion now is:—

(1) The sugar and massecuite;
(2) The punts, engine and mill.

The motion was also for an inquiry as to what damages Messrs. Hogg, Curtis and Campbell had suffered by reason of the sequestrators having wrongfully taken or retained possession of the above-mentioned produce and property, but no evidence was offered on that part of the claim, and it may be considered as withdrawn.

An affidavit by Mr. R. Garnett, attorney of Messrs. Hogg, Curtis and Campbell, was filed in support of the motion, and an affidavit by Mr. R. Butts against it, but as more evidence appeared to be necessary for the decision of the points raised, the parties were allowed to call witnesses, and it was further agreed that the evidence recently given in suit 21/95 (*a*) between the sequestrators and Messrs. Hogg, Curtis and Campbell should be taken by the court as evidence in this proceeding.

As regards the produce, the question might have been raised and disposed of by a counter-claim in the interdict suit. Upon the evidence before us including the evidence in that suit, and for the reasons given in the judgment in that suit, we hold that the sugar in question is rightly in the hands of the sequestrators, although in due course it will be their duty to deliver it to the movers, to be applied by them in manner provided by their mortgage deed. As to the machinery, viz., the punts, the mill, and the engine, we have to determine whose they were. We hold it to be the effect of the evidence that the punts in question had been substituted for certain old wooden punts which had been on the plantation when the first mortgage was given, and that they were part of the plant necessary for the working of the plantation as such. We take it that the old punts were included in the first mortgage under the general term “further appurtenances.” The use of the term appurtenances in a sense sufficiently wide to cover such things as punts would seem to be sanctioned by the language of section 145 of the Amended Manner of Proceeding Ordinance 1855, (*b*) where

(*a*) See above p. 54.
(*b*) cf. Rules of Court 1900. Order xxxvi. r. 34 Ed.

implements of husbandry, utensils and instruments are referred to as objects capable of being included in a mortgage of a plantation as appurtenant and appendant to a plantation. The question then would seem to be whether the old punts having been included in the mortgage property under the general term "appurtenances," and the present punts having been substituted for those old punts, the mortgage must be taken to cover those new punts from the time when they were put on the estate. The punts are not specially mentioned in the mortgage as individual punts, or even as so many punts, but come merely under the general term "appurtenances," and the new punts substituted for the old would seem to be covered by the mortgage. (See *Voet*, 20, 1, 5.) Six punts representing the difference between thirty-four and forty must be given up to Messrs. Hogg, Curtis and Campbell.

As to the mill and engine, we think it clear that these accrue to the mortgagees (See *Burge*, Vol. III p. 202 and the authorities there cited; also *Van Leeuwen, Censura Forensis,* Bk. 2, ch. 5 par. 7.) The decision of these questions seems to us to be independent of what may have been the intention of Mr. Butts or Mr. Garnett.

It was objected that the motion was one which could not be properly brought by the movers, inasmuch as a special procedure is prescribed for opposition to sales in execution, and that this motion was under the circumstances in the nature of such an opposition. It is not necessary to decide the point inasmuch as we have decided against the motion on the merits.

In this case, as the movers have taken a double proceeding in respect of what might have been properly dealt with in suit 21, we think they ought to pay costs.

APPELLATE JURISDICTION.

WINTER AND ANR *v.* WARNER.

1895. *May* 15. SHERIFF, J.

Appeal—Claim for wages—Employers and Servants Ordinance 1853—Conviction by one magistrate of servant and forfeiture of wages for breach of ordinance—Action by servant for recovery of wages before second magistrate—Review of first magistrate's decision by second magistrate.

Appeal from a decision of MR. R. SWAN, acting Police Magistrate for Georgetown, who gave judgment for the plaintiff Warner (now respondent) for the sum of $9.04, being balance of wages due to him from the defendants (now appellants). Defendants had pleaded that plaintiff was unable to recover the amount as he had been convicted under section 3 of the Employer and Servants Ordinance, 1853, and the convicting magistrate had ordered all his wages to be forfeited. The conviction was duly proved. In the course of his decision MR. SWAN stated he could find nothing in the ordinance to warrant such a conviction, which he did not consider to be a bar to plaintiff recovering the amount claimed. The appeal was allowed with costs.

D. M. Hutson, for the appellants.

No appearance was entered on behalf of the respondent.

SHERIFF, J.—This is an appeal from the acting Police Magistrate of Georgetown. I deem it necessary only to give some of the reasons of appeal from which the nature of the case may be ascertained.

"(b.) That even if there was proof of such indebtedness, which however is denied, it was clearly shown and not denied, that the wages sued for were in respect of a certain contract of service entered into between the complainant and defendants; that the complainant was tried and convicted for a breach of the said contract and his wages were ordered to be forfeited by the magistrate who tried the case (Mr. P. H. R. HILL) and whose certificate of conviction was laid over and received as evidence in the proceedings before the court below.

"(c.) Because it was not competent for the said court to impeach the order of Mr. Magistrate HILL ordering a forfeiture of the com-

plainant's wages, or to sit in review on the decision of the said magistrate in respect of such order."

It appears to me that the magistrate has taken an erroneous view of this case. A certificate of conviction which had been obtained on the merits in a court of co-ordinate jurisdiction was tendered and admitted in evidence. The question for decision then was whether such previous conviction was or was not a bar to the second case, now the subject of appeal.

I think it was. The magistrate in the first case had jurisdiction to try the case, and he decided that the contract had been broken and gave a decision, which may or may not have been erroneous, that is beside the question; until reversed by a court of competent jurisdiction such conviction was conclusive. See *Overton v. Harvey,* 9 C.B. 324, and *Huffer v. Allen* L.R. 2 Ex. 15. The law is laid down in the *Duchess of Kingston's case,* 2 Smith's L.C, p. 731, thus: the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties upon the same matter directly in question in another court. Here the question before the two courts between the same parties, was identical, viz., had the contract been broken? A court having jurisdiction decided that it had, it was not therefore competent for another court of co-ordinate jurisdiction to entertain a claim for wages arising out of the same contract, for as remarked by COCKBURN, C. J., in *Routledge v. Hislop.* L. J. N. S. Vol. 29, Mag. Cases, p. 90, it would be to re-open the question and have it tried a second time; *res judicata* is the maxim and it applies to the law of master and servant.

Appeal allowed with costs.

GENERAL JURISDICTION.

PATTERSON AND OTHERS v. ATTORNEY GENERAL OF BRITISH GUIANA AND OTHERS.

1895. *May* 27. SIR EDWARD O'MALLEY, C.J., ATKINSON and SHERIFF, JJ.

Interdict—Lands (*Acquisition for Public Purposes*) *Ordinance, 1889—Land proposed to be acquired for a private firm contracting with the Government of the Colony—*"*Public*" *work—Principles of construction of statutes conferring compulsory powers of expropriation—Obligations of undertakers.*

Claim by John Dalgleish Patterson and others, as the owners in possession of plantation Wismar, Demerara river, for an order of interdict restraining the Attorney General from proceeding with the acquisition of a piece of land on pln. Wismar under the Lands (Acquisition for Public Purposes) Ordinance, 1889, for a stay of proceedings under an order granted by KIRKE, J. (Actg.) dated October 20th., 1894 (see above p. 12), and for an order restraining the Registrar of British Guiana from passing transport of the piece of land in question under the said ordinance.

Plaintiffs claimed in addition the sum of $10,000, as and for damages for unlawful acts on the part of defendants in dispossessing plaintiffs of their property.

P. Dargan, for plaintiffs.
J. W. Carrington, Q.C. A.G., in person.
The Registrar did not appear.

After hearing and argument, on May 13th, the Chief Justice intimated to counsel that the court, after considering the case in all its bearings, had come to the conclusion that it was one which it would be for the credit of both parties to settle amicably. It was very desirable to avoid having to give a judgment if possible. Judgment for the defendants would be giving effect to a proceeding which, however legally justifiable, did, under all the circumstances, appear to work some real hardship on the plaintiff. On the other hand, judgment for plaintiff would put the court in the position of condemning, from a legal point of view, the position taken up by the Executive, and the Court of Policy, a thing to be avoided if possible. The Chief Justice said the Judges thought they saw indications, in the course of the trial, of some possibility

of a settlement, and therefore they considered it right to try what could be done. They would be glad if counsel on both sides would come into Chambers at 2.30 p.m.

Attempts at a settlement were however unsuccessful, and thereafter, on May 27th, the Court proceeded to give judgment.

Curia (per O'MALLEY, C. J.):

In this action the plaintiffs claim an interdict to restrain the Government of the colony from acquiring by compulsory purchase, under the provision of the Lands (Acquisition for Public Purposes) Ordinance, 1889, certain land belonging to them at Wismar, Demerara river. The land proposed to be taken is in all about sixty-five acres, consisting of two parts, A. and B., as shown on the plan, prepared by Mr. North, the assistant Government civil engineer. About fifty acres are comprised in B., with regard to the taking of which, plaintiff's raise no opposition, and fifteen acres are comprised in A, and this forms the subject of the dispute.

The Government claims to take this land A., as for a public work. Plaintiffs say that it is not being taken for a public work within the meaning of the ordinance, but for another purpose, and a purpose not contemplated by the ordinance; that it is not required for a public work; and that it is more than sufficient for the purposes for which it is alleged to be required.

On December 11th, 1893, the Government entered into a contract with Mr. Sproston, whereby the latter contracted to construct and maintain a single line of light railway with all proper works from Christianburg on the Demerara river to a point opposite Gluck island on the Essequebo, a distance of some twenty miles, and to maintain and work the line and run steamers on the rivers in connection therewith, for twenty years, subject to stipulations on a variety of details contained in the contract. In consideration for what he was to do Mr. Sproston was to receive from Government a free grant of land on the course of the line to the width of 300 feet, and also 200 acres of land at each end of the line, and such further lots for the purposes of stellings, stations, warehouses, and buildings, not to exceed three acres in any one case, as might be agreed upon; further, the Government was to advance to the contractors $200,000 as a loan without interest, to be repaid at specified dates during the twenty years, the loan being secured by mortgages on Mr. Sproston's steamers. There were other matters and terms which it is not material to notice here.

The contract was signed by the parties, but when the Government came to enquire they found that unfortunately they did not possess Crown lands at the Demerara terminus from which to give

the 200 acres that they had promised, and it became necessary to try and arrange some new terms with Mr. Sproston in substitution for the grant of this land, and for compensation to Mr. Sproston for the breach of contract committed by the Government. This new arrangement was called a compromise. The matter was referred to a committee of the Court of Policy who, after consideration, reported, the material part of their report being as follows:—

"2. The acting Attorney General, who presided, explained that the Government was unable to carry out that part of the contract, by which it agreed to give the contractors a free grant of land on the course of the line of the railway to the width of 300 feet and also 200 acres of land at each terminal station, as regards a portion of the line towards the Demerara river terminus and the land at that terminus, in consequence of its having been ascertained that there is no Crown land at or near Christianburg the locality agreed upon for the commencement of the railway on the left bank of the Demerara river, and that it had consequently become necessary to consult the Court of Policy, who had approved of the heads of the contract providing for the construction and maintenance of a light railway between a point near Christianburg on the Demerara river and a point opposite the northern end of Gluck island on the Essequebo river.

"3. He also stated that he understood the contractors would claim compensation for the losses to which they alleged they had been put by reason of the inability on the part of the Government.

"4. The members of the Committee, after a consideration of the circumstances, expressed an opinion that, if possible, a compromise should be effected with the contractors, as it was most desirable to avoid further delay. Negotiations were accordingly entered into with Mr. Sproston, who finally has stated that the contractors will accept a compromise on the following terms:—

"(i.) that the Government shall with all possible despatch acquire, under the Lands (Acquisition for Public Purposes) Ordinance, 1889, a track of land 300 feet wide for the line of railway for such portion thereof as passes through pln. Wismar or any other private property, and also such land on pln. Wismar as can be obtained for the purposes of a terminal station at the Demerara river terminus not exceeding fifteen acres; the course of such line thereon to be agreed upon between the contractors and the Colonial civil engineer on behalf of the Government.

"(ii.) that, in lieu of the remainder of the 200 acres of land at the terminal station on the Demerara river which the Government has agreed to give to the contractors under clause 20 of the contract, the contractors agree to accept a similar quantity at the Essequebo terminus (in addition to the 200 acres at that terminus to be granted under the contract) the position of such land to be agreed upon between the contractors and the Governor-in-Council."

The report was submitted to the Combined Court, which gave authority to incur the expenditure involved. The Government then took measures to acquire the land, and correspondence ensued between them and the plaintiffs; on July 18th the Government wrote informing the plaintiffs of their intention to rake the land. The usual course for a body armed with compulsory powers of purchase is to make some attempt to deal in the first instance by friendly arrangement. The fact that there is the power of compulsion in reserve is sufficient warning to owners to be reasonable in their demands, and if they are contented to take a fair price the transaction is completed without friction. But that course does not seem to have been adopted here. The owners wrote in reply protesting against the taking of this land under the circumstances, and pointing out the hardship that such a proceeding would entail upon them. They say they "have held to their land "relying for many years past upon the ultimate development of the interior "of the colony to increase its value, extend their present business, and, with "the advent of railway and increased steamboat communication, enable "them to start new industries upon and otherwise develop their property. It "is clear that the unconditional handing over to general contractors of fif-"teen acres of their land would as effectually ruin the proprietors of Wis-"mar and Christianburg as the taking of 200 acres, or 500 acres, for such "space would be ample for the erection of works and buildings and carry-"ing on of businesses entirely outside the legitimate purposes of the railway "itself (and the situation clearly shows that the space is not intended for the "latter purpose), of which the contractors will no doubt not be slow to take "advantage, such as hotels, rum and provision shops, saw-mill, timber flats, "and other businesses and trades to which the development of that part of "the country will doubtless give rise, and which, in the hands of the pro-"prietors of the railway, would render the business of our clients incapable "of further existence. To the benefit of these works, for the opportunity of "which, consequent upon the development of the country, they have so "long waited, our clients are justly

"entitled to look for themselves, upon the passing of a railway through their "land, and we cannot believe that it can be the intention of the Government "to add such benefits and opportunities to the consideration which the con- "tractors have no doubt secured for their work, or that any ordinance can be "interpreted to deprive the landowner of such prospective benefits, as we "have alluded to, in favour of a private contracting firm, or that, if it could, "the Government would take advantage of such interpretation."

The protest had no effect and the proceedings (*a*) for taking the land went forward. Compensation was assessed at a sum of $499.78 for the whole land, and the transfer of the property to the Government was about to be completed when stopped by *interim* interdict in this suit.

Now the right of the parties here turn largely on the meaning of the Lands (Acquisition for Public Purposes) Ordinance, 1889, and we have to consider the principles applicable to the construction of that ordinance.

This ordinance is one of a class, of which the Lands Clauses Consolidation Acts are the best known instances, of ordinances that provide in certain ascertained cases and classes of cases, where it is held that the object for which land is necessary is one in which the public generally have sufficient interest, private rights of property shall not be unduly asserted so as to stand in the way of its acquisition. They are based on the broad principle, that all civilized communities recognise, that in case of public necessity and even for objects of general public advantage not amounting to necessity, the rights of the individual must give way to the interests of the public. Where laws of this kind are well devised in their scope and justly interpreted, no more sacrifice is entailed upon the individual than the necessity of the particular case actually requires, and the presumed object of those who make these laws and the duty of those who interpret them, if there be any doubt about their meaning, is to secure that end. If the law, while sufficient for the public purpose, subjects the individual to a larger sacrifice of rights than is actually necessary, the law is unjust, and in so far as the court may upon sound principles of construction do so, it will interpret doubtful expression and definitions so as to prevent that injustice and "so," as Lord Hobart says, "according to reason and convenience mould it to the truest and best use." In *Hardcastle on Statutes,* 2nd ed., p. 294, the effect of the law is thus stated: "Inasmuch as in the exercise of statutory "powers both public

(a) See page 12 above.

"and private rights may be and are infringed, the persons to whom these "powers are granted may not only be restrained from exceeding these pow- "ers, but also from infringing upon the rights of other persons in a greater "degree than is absolutely necessary for the purpose of effectuating the ob- "ject for which the powers have been entrusted to them."

In *Hill v. East and West India Docks* 9 A.C. at p. 456., Lord CAIRNS says that if it appears that one of two doubtful constructions will do injustice, and the other will avoid that injustice, it is the bounden duty of the court to adopt the second and not to adopt the first of these constructions.

BOWEN, L. J., in *Wandsworth Board of Works v. United Telephone Co.*, 13. Q.B.D., at p. 920, says: "If a word in its popular sense and read in "an ordinary way, is capable of two constructions, it is wise to adopt such a "construction as is based upon the assumption that Parliament merely in- "tended to give so much power as was necessary for carrying out the ob- "jects of the act and not to give any unnecessary powers."

Here, as it appears to us, we have a reasonable principle to which we are bound to give effect in the interpretation of this ordinance, and a principle which in one form or another governs the construction of all laws of this kind. It is established by numerous authorities that in these laws the limits of the powers to be exercised and the definition of the purposes for which they are granted shall be strictly interpreted against those who have the powers; for instance, in *Tinckler* v. *Wandsworth Board of Works* 2. De G. & J., 261, TURNER, L.J., says, with regard to the effect of statutes which give power to carry out some object which it is assumed will benefit the public at large like making a railway, one of the most important rules is that "it is their bounden duty to keep strictly within those powers;" and in *Campbell's Trustees* v. *Leith Police Commissioners*, 2. H.L. (Sc.) 1, Lord HATHERLEY, speaking of local boards and commissioners of public work, says "the courts will hold a strict hand over those to whom the legislature "has entrusted large powers."

In *the Mayor of Liverpool v. Chorley Waterworks Co.*, 2. D. M. and G., 852, it is said, where interference with private property is authorised by statute, the person authorised to interfere must strictly adhere to the powers conferred and do no more than the statute has sanctioned; and in *Simpson v. South Staffordshire Waterworks Co.*, 34. L. J. Ch., 380, at p. 387, it is said that it is incumbent upon a company, seeking to exercise compulsory powers, to prove clearly and distinctly from the act of parliament the existence of the power which they claim a right to exercise; and if there is any doubt with regard to the extent of the power

claimed, that doubt will be solved for the benefit of the landowner, and not in a manner to give to the company any power not most clearly and expressly defined by the statute.

On the same principle, in the *Queen v. Wycombe Railway Co.* 2. Q. B., 310, it was held that where an act authorised a company to do all acts necessary for making, maintaining, altering or repairing and using a railway, provided always they did as little damage as can be, such powers could not be exercised merely for the purpose of saving expense; and again in *Webb v. Manchester and Leeds Railway Co.*, 4 Myl. & Cr., 116, it was held that ambiguous words in acts of parliament authorising a public company to take land by a compulsory process are to be construed against the company and in favour of private property. Lord COTTENHAM says "it is extremely "important to watch over the interests of those whose property is affected "by these companies, ... and to keep them most strictly within the pow- "ers of the act of parliament. The powers are so large—it may be necessary "for the benefit of the public—but they are so large, and so injurious to the "interest of individuals, that I think it is the duty of every court to keep "them most strictly within those powers; and if there be any reasonable "doubt as to the extent of their powers, they must go elsewhere and get "enlarged powers; but they will get none from me, by way of construction "of their act of parliament."

It was contended before us by the Attorney General in his very able argument that the public is entitled to insist upon the sacrifice of private rights for sufficient cause, and that we must not shrink from interpreting the law so as to give full effect to an enactment prescribing such a sacrifice, and the maxim *salus populi suprema lex* was even pressed into service to remind us of our duty in that respect. But the *salus populi* consists, not so much in the promotion of public works, as in securing the rights of liberty and property, and in construing an ordinance, where chose rights appear to conflict with any object short of absolute necessity, the principle would seem to point to a strict construction in favour of those rights rather than in favour of the object.

Again it was urged that powers given to public bodies are to be more liberally construed than powers given to bodies whose primary object is profit to themselves. In *Hardcastle* on *Statutes*, p. 296 it is said, "If the "powers are conferred in order to enable a body of adventurers like a rail- "way company to construct works which, though of public utility, will or "ought to yield to the constructors a lucrative return, those adventurers will "always be compelled to confine their operations strictly to the purposes

"contemplated by the enabling statute, whereas if the powers are granted to "some public body, like a corporation or vestry, solely to enable them to "carry out some work of public utility or necessity, like making a new "street or constructing a sewer, more latitude will be allowed in the exer- "cise of the powers which have been granted." This distinction was relied upon as entitling the Government to the benefit of a liberal construction of the ordinance in their favour in the present instance. But we cannot think that it operates in that way. The distinction turns, not upon the point of who formally receives the powers in the first instance, but upon that of who enjoys and exercises the powers when they are received. Under the ordinance that we are considering the Government, the public body, takes the land, but the powers with regard to the land, and the use of the land when taken, are to be in the hands of Mr. Sproston, the adventurer, who looks solely for a lucrative return from the enjoyment of them. Therefore, as it seems to us, the distinction as to the principle upon which powers are to be construed in the two classes of cases serves only to emphasize the application of the stricter rule in relation to the powers that are given under this present ordinance; so far from helping the case of the defendants it seems to tell rather against them.

Then again it was said, this is a remedial statute and should therefore be liberally construed in favour of its object. *Blackstone* defines a remedial act as one made to supply defects and abridge superfluities in the common law. How does the ordinance answer to that description? If it be a superfluity of the common law to allow a man to be heard in defence of his property before it is taken away, this ordinance undoubtedly abridges that superfluity. But we do not see on the face of it any other indication from which we should be justified in terming it a remedial statute, at least in *Blackstone's* sense. In short, all the conditions seem to enforce upon us a strict construction of doubtful provisions of the ordinance where that strict construction maybe for the benefit of the private landowner. And it must be added that there are features in the ordinance itself which seem to point in the same direction. To begin with, it has no preamble, nothing to indicate or explain the necessity for the large invasion that it makes upon common law rights. Then, the definition of the objects for which it may be put in motion is of an abstract character, in the application of that definition to concrete cases much seems to be left to the interpretation of the law, and at the same time the procedure laid down allows the Government apparently without check or challenge to act upon its own interpretation in carrying out the law. The procedure is of an arbitrary and peremptory

character. There is no provision for voluntary treating before the compulsory powers are put in action, and the authority for setting the law in motion is a resolution by the Governor-in Council, the warrant of the Governor founded thereupon simply declaring what land shall be taken for a public work but giving no indication of what the work is, while, in the steps that follow, no opportunity is afforded to the landowners of disputing the legality of the proceedings or of defending his own rights. In most acts of this kind the opposite rule is observed, as the Lord Chancellor says in *Simpson v. The South Staffordshire Water Works Co.* (34 L. J. Ch. at p. 387):—"In legislating for public undertakings and conferring compulsory "powers to take land, parliament has at all times manifested the utmost "anxiety to impose upon the company or the undertakers the obligation of "giving to the landowner the most precise and definite information with "regard to the quantity of land to be taken, or the manner in which the "land is intended to be affected, and the enactments contained in the acts "of parliament conferring the powers to carry an undertaking into effect "will be generally found to embody, by reference, the plans and the notice "given by the plans to the landowners of the intention of the company."

Moreover there is an omission in the ordinance of all provisions for the restoration of the land to the owner in case it should in fact not be used for the purpose for which it is taken, and there are no means provided by which the owner can set up any rights as against the mis-user of the land after it has once been taken.

When therefore the question is raised, as it is in this action, the landowner would seem to be specially entitled to the protection of the court, and the court specially bound to scrutinize the proceedings brought before it, and to lay down clear lines as to what the ordinance does and does not allow.

We come now to the issues raised by the pleadings. It is contended for the plaintiff's that the failure of the judge who assessed compensation under s. 8 of the ordinance (see above p. 12) to specify the parties to whom the same would be awarded, and the omission by the Registrar to state, in the advertisement of the intended transport of the land under the ordinance, the name of the owner on whose behalf the transport was to be made, were such failures and omissions as to render the proceedings preliminary to transport invalid, and to entitle the plaintiffs to the injunction asked for. We have considered this question but, as our decision is upon other and more substantial issues, we do not think we need pronounce a definite judgment thereupon.

For a like reason we do not think that we are required to

decide upon another contention of the plaintiffs, which we understand to be to the effect that lands taken under this ordinance can only be taken to be retained by the Colony and not for the purpose of being granted to third persons.

Now these acts which were omitted by the Judge and Registrar respectively are part of the procedure which is required to be observed for the protection of private interests. They are not to assist the owner to defend his land.

Plaintiffs say that the land is not required or intended to be taken for a public work within the meaning of the ordinance, but for another purpose. This is the real issue in the case. Is this land being taken for a public work within the meaning of that term as used in the ordinance, or for something else? And to determine this we have to settle first, what is the meaning of the term "public work" in the ordinance. "'Public work' includes any pub- "lic road or building, and any work executed, maintained or repaired, and "any measure or undertaking prosecuted, whether wholly or partly, at the "public expense," This definition would seem in the first place to cover work executed by the Government itself with public money, and in the next place works executed for the Government by contract and paid for by the public. The case here is a special one. It is the case of work executed by a person for his own profit, but with regard to which he at the same time contracts with the Government that it shall be executed in a certain way and subject to certain conditions in consideration of a subsidy of public money. In what sense and to what extent is that a public work? We take this to be Mr. Sproston's case. He enters into a contract with the Government that he will make and maintain a certain railway along a specified line and with proper works, fulfilling certain specified conditions, that he will erect and maintain all terminal and other stations, warehouses, and stellings, which may be required for the railway, and further that he will carry on the service of the railway, subject to certain specified stipulations and perform certain other specified services, and in consideration of this specific undertaking he is to receive a free grant of Grown land along the line and at the two ends, and a subsidy of public money in the way of a loan without interest. Looking to the nature of this contract it is quite possible to understand that the contractor may find it for his profit to carry out his enterprise upon a larger scale, and with developments and accessories far in excess of anything that is required by his contract with the Government. It may suit his purpose to build quarters for all his officers and labourers, to erect rumshops and co-operative stores and lay out recreation grounds for their benefit, he may put up timber yards

and sawmills, and shops and factories for work connected more or less with the railway. He may establish hotels for travellers resorting to his line, he may even build a house for himself from which to overlook and direct his works. All these things may be called, in a vague and loose way, and by a very liberal construction of terms, works connected with the railway, and possibly some of them works for the railway, using the term railway in the larger sense of the railway together with such accessories as may suit Mr. Sproston. But could it be said that all works of this kind were part of a public work within the meaning of the ordinance. Observe that in none of these works has the public the slightest pecuniary interest, that none of them are within the terms of the contract Mr. Sproston has made with the public, that the public does not contribute a farthing towards them, and will not get any profit from them, but that they are carried out by Mr. Sproston at his own expense and for his own purposes. Could it be said that land might be taken for them under the ordinance as land for a public work? Are we to give the ordinance the vague loose interpretation needed to make it cover all these auxiliary and voluntary works? And if not, where are we to draw the line between such as are and such as are not public works?

Here is the very point in the ordinance, the definition of the purpose for which the ordinance may be used, where, if at all, we are bound to apply the principle of precise construction. But where is the line to be drawn? The circumstances demand the application of some clear and intelligible principle, and it seems to us the line may be drawn in this way. What the public pays for, contracts for, and is thus interested in, what the contractor is paid for executing and is bound by his contract to execute in consideration of public money, is a public work, but what he does in excess of this, with a view to his own objects, at his own expense, and outside of his contract obligation, does not form part of the public work. The object of the ordinance is expressed to be to take lands for works for which the public is paying, and where you can draw a clear line between what the public is paying for and what it is not paying for, even though the latter may be connected with and auxiliary to the former, you must not extend the definition to cover it. We think this view is confirmed by a consideration of the procedure laid down, as well as by that of the whole scope and intention of the ordinance. The “public work” must be something so far definite in its nature as that the Governor-in-Council may have a clear conception of what it is, what its extent is, before they proceed

to declare what land is required for it. The Governor-in-Council cannot reasonably use the power given them to declare such a requirement, unless they have a clear understanding what is the extent and nature of the public work which gives rise to the requirement. The declaration is evidently not to be a formality, but an expression of deliberate and honest judgment arrived at in each case. Upon the facts and evidence before the council it is obvious that they may have a clear conception beforehand of work for which a contract has been made and of the contract work that is to be done, which would be either according to some specification in the contract or according to stipulations and directions which the contract enables them to insist upon. But they can have no clear conception of what the work will be, nor can they possibly declare what land is required for it, if the work is to include anything that the contractor may choose to do outside his contract, even though it be with a view to his contract.

To determine, now, how this rule applies in the present case, we must look carefully to see what is the contract work, what part of the railway work is the public interested in and paying for. We find this in paragraphs 1 and 6 of the contract:—

> (1). To construct and maintain a single line of light railway with all proper works and conveniences connected therewith for the passage thereon of carriages properly constructed.
>
> (6.) To erect and maintain in good order all terminal and other stations, warehouses, and stellings which may be required for the said railway.

Applying the above rule to this, we hold that land required for these specific purposes is for a public work, land required for anything beyond these, however useful and advantageous to the railway, is not for a public work.

We have then to ask, what was this land being really taken for, and so we come to look at the evidence. And here we should bear in mind the peculiar position that Mr. Sproston occupied in the negotiations for the compromise Mr. Sproston dictated the terms, and prescribed what was to be done, and how it was to be done. “The Government shall acquire under the ordinance . . . such land on plantation Wismar as can be obtained for the purposes of a terminal station . . . . not exceeding fifteen acres, and the Government proposed to take the whole fifteen acres comprised in “A,” avowedly in order to meet that demand. We look therefore to see what is to be done with it. For this we have the evidence of Mr. North. It is very much to be wished that we had something more than that evidence to act upon. We cannot

but feel a misgiving lest, in taking Mr. North's evidence as we are bound to do, owing to the course pursued by the Attorney General at the trial in abstaining from calling evidence, we may be doing less than justice to the case of the Government, for it is but fair to say that that evidence was not originally given in support of the position which the Government has to defend in these proceedings, and is naturally not so carefully qualified as it might perhaps have been if Mr. North's mind had been directed to the issue before us.

It must be understood that in saying this we make no reflection on Mr. North. Quite the contrary. He seems, so far as we can judge, to have given his evidence fairly and frankly enough for the purpose for which it was required, but we should have been glad of more evidence in support of the Government case in the present action if it could have been had.

Looking to the Attorney General's statement at the bar we should certainly have expected such evidence. But without it we are helpless. We cannot take counsel's assurances, however well founded they may be, in lieu of sworn testimony. It appears to be the practice of the courts to require from the defendants in such proceedings as these clear and precise evidence;—in *Hardcastle* on *Statutes* (p. 298) it is said: "It is not sufficient "for the company to make a mere statement that the purposes for which "they are about to exercise their power of taking lands are within the con-"templation of the act, they must do more than this, they must be prepared "with satisfactory evidence to prove this to a court of justice if they are "called upon to do so. Thus in *Flower v. London and Brighton Rail Co.* "1865, 2 Dr. & Sm., 330, Kindersley, V.C., held that the mere affidavit of "the company's engineer that the land about to be compulsorily taken from "the plaintiff was required for the purposes of the railway was not suffi-"cient, but the purposes for which the company desired to take the land "must be fully and particularly set out so that a court of justice may be in a "position to try the question whether the lands are fairly and *bona fide* "wanted for the purposes of the railway." We cannot but feel that we should have been much helped in coming to a conclusion in this matter if Mr. Sproston himself or some Government official who could have spoken with full authority as to the facts upon which we now have to decide had been called before this court. In a few words they might have placed all questions of fact beyond dispute. But no evidence was called, and therefore we are obliged to act upon Mr. North's testimony as it stands, unqualified and unexplained. And Mr. North says (he is asked what the sixty-five acres are wanted for) "for a railway including all the buildings and appurtenances of

a railway. . . . Mr. Sproston is going to build the railway. The land is wanted by Government to give to Sproston." Then he is asked particularly as to this plot "A," and he says, "greater part is 70 or 80 feet above the river. This is not for a terminus, must be required for other purposes than a terminal station," and further on he repeats that it is required for residential purposes. Then he is asked apparently what would be the terminal requirements of the railway, and he gives a list, including sidings, engine sheds, coalsheds, workshops, receiving sheds, etc., and railway station which he says would be 200 feet by 25, and he adds "these would be on 'B' not on 'A,'" that is, on the strip 300 feet wide that extends along the river bank. 'B' is sufficient for all purposes of the line itself and terminus, but not for residential purposes. Everything has to be built for the men, a shop and a grogshop, possibly a mission chapel, and a large number of buildings to be put up during construction which are removed afterwards. Here we have it all, the Government taking this land at Mr. Sproston's dictation, the Government witness saying they want it to give to Sproston, and the same witness saying, "this is not for a terminus and must be required for other purposes," mentioning residences and grogshops. The terminal requirements would be on 'B,' not on 'A.' 'B' is sufficient for all purposes of the line itself and terminus. He proves the plaintiffs' case and disproves the defendants'. What other conclusion can we come to, than that the land is not required for a terminus, and is not being taken for a terminus, but for Mr. Sproston's own purposes in connection with the railway, residences, grogshops, and the like; not for the work for which the public is paying, but for Mr. Sproston's buildings and so on, which are outside his contract.

A suggestion was thrown out by the Attorney General to the effect that the court might reduce the amount of land to be taken to what it might consider was really required for a terminal station. The difficulty in which we find ourselves as to taking that course is that, while Mr. North says that none of this fifteen acres is required for a terminus, no witness for the Government qualifies that statement in any way. It stands really uncontradicted that no part is required. We are bound to act upon evidence, and the evidence that might have justified us in taking some such course as that indicated is not forthcoming.

In the course of his argument the Attorney General repeatedly referred to the question as one involving the *bona fides* of the Government. We may therefore say, lest there should be any misunderstanding, that our decision involves no impeachment of the perfect *bona fides* with which the Government have acted in this matter. They were placed in a very difficult position, and their

proceedings were such as they were advised they were justified in taking. But they were seeking to do what we hold, upon a true construction of the law, they were not authorised to do, and in that sense only can it be said that they were not acting *bona fide*. The plaintiff, as he has a right, by these proceedings claims our decision as to whether the Government were right or wrong. And we are obliged to say that they were wrong, and to give him the relief that he seeks accordingly.

The conclusion upon the whole matter is that the interdict must be granted as prayed in respect of the fifteen acres comprised in plot "A."

ATKINSON, J. stated that he concurred in the decision but that he must not be understood as responsible for all the reasons upon which the decision is based.

Dargan, for the plantiffs, having pointed out that the plantiffs had not withdrawn their claim for an interdict in regard to the fifty acres in plot 'B,' the Chief Justice said that the court had throughout understood that no question was raised as to the *bona fides* of the Government in taking that portion of the land. If, however, the plaintiffs still claimed an injunction as to that portion the court was quite clear that they had made out no case. The evidence they had given was entirely confined to the fifteen acres.

The court thereupon made an order confirming and making absolute the *interim* order of interdict made on February 12th, 1895, as regard the land marked 'A' on the plan of October 15th, 1894, put in by the witness North, but rejected the claim made by the plaintiffs in all other respects, and discharged the said *interim*, order of interdict as regards the balance of the land, the subject of the proceedings, and ordered the defendant, the Attorney General, to pay the costs.

APPELLATE JURISDICTION.

WILSON AND ANR. v. BINNS.

1895. *Feb.* 1. ATKINSON, C.J. (Actg.)

Appeal—Unlawful possession—Magistrates' Decisions (*Appeals*) *Ordinance 1893. s.s. 3, 16, and 23—Manner and conditions of appeal—Entry into recognizance before serving notice of appeal—Non-compliance with requirements of ordinance.*

Appeal from the decision of the acting Stipendiary Magistrate for the West Coast, Berbice, Judicial District, who convicted the appellants for the unlawful possession of a heifer, and sentenced them each to two months' imprisonment with hard labour.

D. M. Hutson, for the appellants.

*W. Nicoll, Acting S.*G., for the respondent.

ATKINSON, C.J. (Actg.)—There has been some delay in the hearing of this appeal, owing to the fact that the papers have had to be referred back two or three times to the acting magistrate who tried the case, for further information.

At the hearing before me the respondent's counsel objected that the appeal could not proceed—the recognizance to prosecute the appeal not having been entered into at the time required by law.

The right to appeal from a magistrate's decision is given and regulated by Ord. 16 of 1893 (*a*). Section 3 enables a person dissatisfied with the magistrate's decision to appeal to this court "in the manner and subject to the conditions hereinafter mentioned."

After the magistrate had in this case pronounced his decision, notice of appeal was given by the defendants before the rising of the court; and, on the same day, the defendants entered into a recognizance to prosecute the appeal.

Reasons for appeal, dated May 21st 1894, were afterwards served.

Section 16 (1), ordinance 16 of 1893 says, that the appellant shall, also, after giving or serving notice of appeal, and serving

(*a*) Ordinance 13 of 1893, in 1905 Edition of Laws. Ed.

notice of reasons for appeal, and within fourteen days after the pronouncing of the decision, enter into a recognizance for the prosecution of the appeal.

Section 16 (2) enacts that, if the appellant is in custody, he may be released "on complying with the requirements of this section."

It was contended for the respondent that, the recognizance having been entered into *before* the reasons of appeal had been served, it was not duly entered into, as the section required that it should be done after the reasons had been served; and that the appeal could not, therefore, proceed. On the other hand it was urged that the recognizance was merely to secure the due prosecution of the appeal, and it did not matter whether it was entered into before or after the reasons for appeal had been served, especially as notice of appeal had been previously given. It was argued, also, that the court would not take a technical view of the matter. This latter is an argument which is always advanced when counsel feel that the law as it stands is against them. When it is the other way they contend, of course, that the letter of the law must be strictly observed. Counsel in these cases ignore—they cannot be ignorant of the fact—that a judge is bound to administer the law as it stands—to give effect to its provisions although in the case in hand it may seem to work hardship. If he did otherwise he would, in effect, be substituting for the law as it exists the law as in his opinion it ought to be. The result would be confusion. *Quot homines tot sententiæ.*

Now, as regards appeals generally, the right to appeal is given by statute, and the courts have held always, that a party wishing to avail himself of the provisions of a statute by way of appeal must act in strict accordance with those provisions. "If the liberty of appealing from a decision is given, subject to the fulfilment of certain conditions, such as giving notice of appeal and entering into recognizances, or transmitting documents within a certain time, a strict compliance with these conditions would be imperative, and non-compliance fatal to the right of appeal." (*Max. on Stats.*, 334).

As we have seen, by section 3, a dissatisfied party may appeal *in the manner and subject to the conditions* in the ordinance mentioned. One of those conditions, as stated in section 16 (1), is that the would-be appellant may enter into a recognizance to prosecute the appeal, *after* serving notice of reasons for appeal.

In this case the recognizance was entered into *before* notice of the reasons for appeal was served. This, it was argued for the appellant, was a substantial if not a literal compliance with the requirements of the section. But, as the ordinance is drafted,

and as it stands, there must be an actual and absolute compliance with its requirements. The proviso to section 23 enacts that "if it appears or is proved to the court that the appellant *has not complied* with the requirements hereinbefore contained with respect, (among other things), to the serving of notice of the reasons for appeal, and with the requirements of section 16, the court *shall* dismiss the appeal and affirm the decision."

This is not a case in which the equitable jurisdiction of the court arises. The court is exercising here powers conferred upon it by statute; and the court can act only in accordance with those powers.

It is manifest that the requirements of the ordinance have not been complied with in this case. If the Crown were to proceed to recover upon such a recognizance as the one here in evidence, the defendant might, it seems to me, successfully contend, by way of defence, that the recognizance was not valid, the requirements of the law upon which its validity depended not having been observed before it was entered into.

I dismiss the appeal, and affirm the decision of the magistrate with costs.

GENERAL JURISDICTION.

1895. *June* 14. SIR EDWARD O'MALLEY, C.J., and SHERIFF, J.

COMACHO v. D'AGUIAR AND OTHERS.

Succession—Marriage in community—Administrator General and adiation—Insolvency—The Inheritance Ordinance, 1887, s. 3—Legitimate portion of father—The right of heirs of father to claim legitimate portion of father not claimed by him in his life-time.

Claim by plaintiff M. F. Comacho, as sole heir under the will of his wife Christina Comacho, who was heiress for one-fifth share under the will of her mother Christina Gomes D'Aguiar, to one-fifth share of the common property that existed between the said Christina Gomes D'Aguiar and her husband Jose Gomes D'Aguiar, and for a true statement and inventory of the property and effects of the said common estate.

During the course of the action the original plaintiff died, and on application, counsel for defendants consenting, KIRKE, J. Actg., made an order that the proceedings be carried on by his widow and heirs in like manner as such proceedings might have been carried on by the late plaintiff if he had not died.

Claim was also made by the Administrator as representing the creditor of the original plaintiff M. F. Comacho, who was adjudged insolvent on November 8th, 1884, that he was entitled to receive the share to which the wife of M. F. Comacho was entitled under her mother's will.

The two matters were heard together.

P. Dargan, for plaintiff.
A. Kingdon, Q.C., S.G., for defendants.
R. J. P. Hendricks, for the Administrator General.

The arguments and other facts sufficiently appear from the judgment of the Court (per O'MALLEY, C. J.), which was as follows:

Christina Gomes D'Aguiar married Jose Gomes D'Aguiar in community of property. In January 1886 the said Christina Gomes D'Aguiar died leaving by her will her half of the property then held in community

(a) to her husband for life and over to the five children, or

(b) half to the husband out and out and the other half to the five children.

The amount of the property taken possession of by the husband as executor on his wife's death is in dispute and will be determined by inventory (A) when finally settled. Having held and managed the whole of the property during his life, he died in July, 1893.

The plaintiff, by whom we mean the original plaintiff in the suit, Manoel Comacho, under the will of his late wife, who was one of the five children of Christina and Jose D'Aguiar, claims one-fifth share of the property coming to them under their mother's will.

There appears to be no question but that the said wife would have been entitled to such one-fifth share. But the defendants say that when Christina Gomes D'Aguiar died in January, 1886, plaintiff was an undischarged bankrupt, and that his wife's share of the inheritance under the will of the said Christina D'Aguiar should have gone to the Administrator General as representing the creditors of the bankrupt.

Defendants also say that when Mrs. Comacho died in her father's lifetime, *i.e.*, in March, 1890, she made a will leaving the whole of what she then had to dispose of away from her father and brothers, and that in spite of such will the father, Jose Gomes D'Aguiar; was entitled to his legitimate portion as heir of what she died possessed of. There was a question whether the share would be one-sixth or less of the said property, the question turning on the operation of s. 3 of Ordinance 9 of 1887 (*a*), the Inheritance Ordinance. Upon careful consideration of the bearing of that ordinance we accept Mr. Kingdon's contention, and hold that the share is one-sixth. The amount will depend upon the adjustment of the inventory (B.) of the property held in community between Manoel Comacho and his wife at the date of the wife's death, which is before the court and the one-sixth will be the one-sixth of the wife's half of that.

As regards this one-sixth, it is said that though Jose Gomes D'Aguiar might in his lifetime have claimed it, yet if he did not, as he did not, the right does not descend to his heirs. As to this we hold that in this case, where the claims arose originally from a silent passing over of the parent, his heirs are not precluded from asserting the claim that he might have asserted, and that they may so claim the one-sixth.

Then as to the Administrator General's claim to take for the

(*a*) Cf. section 3 of Ordinance 9, 1909.—Ed.

creditors of Manoel Comacho his deceased wife's inheritance from her mother, it is said that the Administrator General should have adiated in respect of that inheritance. But in the case of a child inheriting from a parent adiation is unnecessary, and the Administrator General represents the child; he is not bound to do more than the child would have to do. Moreover, it seems clear that the law has never been held to require adiation by the administrator administering a bankrupt estate in respect of property which he claims in that capacity. We hold that adiation was not necessary to vest the inheritance in the Administrator General. It was further contended that his failure to seek the property or right in the share was a forfeiture of his right to take it, but we hold that the ordinance referred to for that proposition does not support it.

Then it was said that, so long as it was open to Jose Gomes D'Aguiar to exercise his choice or to take a life interest in the whole or an out and out interest in the half of what his wife left, the children's rights which depended on his choice one way or the other were either way defeasible, and that they were so up to the time of the bankrupt's discharge at the end of 1886. But we think that according to the evidence, Jose Gomes D'Aguiar on the death of his wife entered at once upon the beneficial enjoyment of the whole of the property under his wife's will. By Ordinance 8 of 1838 he might by an act of deliberation have obtained six months in which to make his choice. But he did not do this. Moreover, if he had intended to have taken the half of the property out and out, it would have been his duty to get a division made, which he did not. We hold, therefore, that he had made his choice to take the life interest of the whole before the end of 1886 when the bankrupt got his discharge, and that at the same time the children's shares in the reversion of the whole became indefeasible, and that this one-fifth vested in the Administrator General.

There were two proceedings before us which for convenience were heard together.

In one, the plaintiff opposed the right of the Administrator General to deal with this disputed share, and we hold that the opposition fails, but as since questions had arisen and there had been some delay by the Administrator General in asserting his right and that delay had in part created these questions we think that in that proceeding each party should pay his own costs.

As to the suit, the plaintiffs have failed to make out their case and must pay costs.

IN RE JOSE GOMES,
ADMINISTRATOR GENERAL v. GOMES.

1895. *July* 6. SHERIFF, J.

Insolvency—Discovery of debtor's property—Application to summon person capable of giving information—Insolvency Ordinance 1884, s. 24, and rule 61—Irregular application and order—Summons set aside.

Application arising on the public examination of the insolvent Jose Gomes. A summons for the attendance of Alexander Phillips of pln. Perth, Essequebo, as a person capable of giving information respecting the debtor and his property, had been granted by the court. On the attendance of the witness an objection was raised.

D. M. Hutson, for the insolvent, objected to the procedure taken to bring the witness before the court, and said the witness should not be heard.

P. Dargan, for the Administrator General.

SHERIFF, J. In this case a person appears before me on summons as a witness. Counsel on his behalf challenges the regularity of the procedure adopted to bring him before the court.

It is admitted that the court was moved by a creditor under section 24 of the Insolvency Ordinance 1884 (*a*). "The court may on the application . . . . . summon before it," etc., etc. Rule 61 of the general rules under that ordinance requires any application under section 24 to be in writing, and except where the applicant is the Administrator General it must be verified by affidavit.

In Baldwin on *Bankruptcy* (*p.* 357) it is said: "But where a creditor makes the application he is bound to show a *prima facie* probability that some benefit will result thereby to the creditors generally or to the estate." It will be observed that the words of section 24 (1) are "summon before it." Now I issued the summons on an off-hand application which should not have been made and which as I readily admit I should not have granted. It

(*a.*) Cf. sect. 25. Ordinance 29, 1900, and Rule 58 of the Insolvency Rules 1901.—Ed.

is clear that I had no jurisdiction. It is however said that it is not competent for the witness to raise the question now, as he should have moved to set aside my order. I express no opinion as to whether this course was open to him or not. The view I am inclined to take is this, that no matter by whom the attention of the court is drawn to the fact that it has acted or is still acting without jurisdiction it is sufficient to cause the court to stay its hand. To allow the examination of a witness who has demonstrated that he was not legally compellable to attend would be to perpetuate the original error. It is no answer to say that the witness by attending waived the irregularity because it is not a question of a mere irregularity; it goes beyond that, the act of the court amounted to a nullity, and the mere fact that the witness did in fact attend cannot by itself confer jurisdiction where none previously existed. I rule that the objection taken must prevail, not merely in the interest of the witness, but on the broader ground which I have above endeavoured to lay down.

APPELLATE JURISDICTION.

DUGGIN v. SPENCE.

1895. *August* 7. SHERIFF, C.J. (Actg.)

Appeal—Magistrates' Decisions (*Appeals*) *Ordinance 1893—Jurisdiction—Amendment of reasons of appeal—Summary Conviction Offences* (*Procedure*) *Ordinance 1893, s. 97—Effect of variance or defect in proceedings—Case referred back for fresh adjudication.*

Appeal from a decision of Capt. A. W. BAKER, Stipendiary Magistrate of the Essequebo River Judicial District, who convicted the appellant Duggin for the unlawful possession of raw gold, and sentenced him to pay a fine of $250, or in the alternative to three months' imprisonment with hard labour.

Mc Ogle, for the appellant.

Respondent did not appear.

SHERIFF, C. J., (Actg)—This is an appeal from the decision of the stipendiary magistrate for the Essequebo river judicial district.

The first reason of appeal, as amended by leave of this court, reads as follows:—

"1. Because the information upon which the warrant was granted is bad, inasmuch as it speaks of the court as the stipendiary magistrate's court at Bartica, and that there is no such court in existence, and that, therefore, the magistrate had no jurisdiction to grant the warrant." Respondent did not appear.

A reference to the copy of the information discloses that it professes to have been made in the stipendiary magistrate's court, Bartica, and to have been signed by A. W. BAKER, stipendiary magistrate, without, however, stating for what district.

This objection in cases of notice of appeal is fatal. See decision of ATKINSON, acting Chief Justice, in the case of *Da Silva v. Kerr,* September, 28th 1894, which was followed by KIRKE, acting judge, April, 9th 1895, in *Quinta v. Bridgewater,* and by myself in *Gonsalves & Yearwood v. Correia* so recently as May 29th 1895. In the present case there are two errors. There is no longer a court called "Stipendiary Magistrate's Court," and

2ndly, "Bartica" is not the name of any district, nor does the information state, as it should do, in what district this "Bartica" is situate. Though this is so, yet it is the obvious intention of the legislature that such objections are not to prevail. See ordinance 12 of 1893, section 97, evidently an adaptation of section 19 of the Imperial Act, 11 and 12 Vic. cap. 43. In reviewing these provisions, Paley in his work on convictions, page 86, remarks:— "Notwithstanding these important changes in the law the decisions which have proceeded upon that part of the information containing the charge are still applicable to *convictions* which must state the offence and the time and place of its having been committed. Applying this test to the case before me, the *offence* is stated, viz., *unlawful possession of gold; time,* 11th October, 1894; *place,* within the Essequebo river judicial district. See moreover, ordinance 13 of 1893, section 26. Under the provisions of this ordinance, I direct the information to be amended so that the title shall read thus: "In the Essequebo River (Judicial District) Magistrate's Court, sitting at Bartica within the said district."

This disposes of the first reason of appeal.

The second reason alleges that the decision is altogether unwarranted by the evidence in like manner as if the case had been tried by a jury there would not have been sufficient evidence to sustain the verdict, and that it was fully proved that although the canister in which the said gold was found by the government officer was the property of the appellant, yet he had not the exclusive control over it.

I have considered this objection, and under the provisions of Ordinance 13 of 1893, section 27, I refer the case back to the magistrate to recall the witnesses for the prosecution to ascertain what else (if anything) was in the canister when the gold was found, and to whom such other articles (if any) belonged. See evidence of Goodluck that the canister, when he examined it, contained nothing but two books, letters and a cake of soap, and generally, to test the accuracy of the statements made by Goodluck. After taking such evidence the magistrate will adjudicate afresh.

APPELLATE JURISDICTION.

BUTTERY v. EWING.

1895. *August* 10. SHERIFF, C.J., (Actg.)

Appeal—Petty Debts Recovery Ordinance, 1893, s. 7.—One person sued where several persons jointly answerable—Funeral expenses—Adiation of estate.

Appeal from the decision of Mr. P. H. R. HILL, acting Police Magistrate for Georgetown, who dismissed a claim by the plaintiff Buttery (now appellant) against the defendant as having adiated the estate of Eliza Peltier, deceased, for the sum of $67.60 for furnishing the funeral of Eliza Peltier.

The evidence disclosed that defendant was one of the sons of deceased, and gave verbal orders to the plaintiff for the funeral.

Appeal allowed with costs.

L. Hawtayne, for the appellant.

A. B. Brown, for the respondent.

There was no proof of adiation. Respondent was not the only heir of the deceased.

SHERIFF, Actg. C. J.—This is an appeal case. The only reason for appeal argued reads thus:

Because the claim of plaintiff was fully proved and the liability of the defendant was fully established by the evidence before the court.

The case lies in a nutshell. The magistrate held that it had not been satisfactorily proved that the defendant had adiated the estate, and that he should not be sued alone, there being other heirs equally liable. It is clear that his attention was not drawn to section 7 of ordinance 11 of 1893. This section provides that "where a plaintiff has any claim against two or more persons jointly answerable, it shall be sufficient if any of such persons is or are served with process and judgment may be obtained and execution issued against the person or persons so served notwithstanding the others jointly liable may not have been sued or served, or may not be within jurisdiction of the court . . . . . ."

Counsel for the respondent contended that though one person might be served still the names of all the parties liable should appear. That however is not so, as the section distinctly pro-

vides that the other persons jointly liable "may not have been sued." The question of adiation is one partly of law and partly of fact. If it were merely one of fact, I should not interfere, but here I think the court below erred in the proper deduction in law from the facts as proved. Thus I hold that it was proved that the respondent attempted to sell the estate, which of itself is *prima facie* evidence of an act of adiation. I reverse the decision in the court below, and give sentence for $67.60 with costs, both in this court and in the court below.

IN RE JOSE GOMES,
ADMINISTRATOR GENERAL v. GOMES.

1895. *Oct.* 4. SHERIFF, J.

Insolvency—Duties of debtor as to discovery of property—Application for committal for contempt of court—Insolvency Ordinance 1884, s. 21. (*4.*)*—Failure to deliver up property in his possession or under his control.*

Application under rule 67 of the Insolvency Rules 1884 calling upon Jose Gomes, insolvent, to show cause why an order for his committal for contempt of court should not be made, on the ground that he had failed to deliver up to the Administrator General possession of a lot of plated ware, glassware, crockery, china plates and other articles of household furniture of a like and other nature, which were in his residence at Henrietta, Essequebo, immediately before his insolvency.

P. Dargan, for the Administrator General.

D. M. Hutson, for the insolvent.

Application for the committal of any person for contempt should be made in open court, under rule 5 (g).

Objection overruled. The order to show cause was obtained as of course. The application is yet to be made, all that has been done being purely formal.

After evidence and argument, judgment was delivered as follows:—

SHERIFF, J. This is an application purporting to be brought under s. 2 (4) of the Insolvency Ordinance, 1884 (*a*.) It is in effect there provided that "if a debtor wilfully fails . . . . to deliver up possession of any part of his property which is divisible amongst his creditors under this ordinance, and which is for the time being in his possession or under his control, to the Administrator General . . . . . he shall, in addition to any other punishment to which he may be liable, be guilty of a contempt of court, and may be punished accordingly."

I will first of all observe that a contempt of court is a quasi

(*a*) cf. s. 22 Ordinance 29 of 1900.—Ed.

criminal offence, and in cases like the present one the enactment creating the offence must be construed strictly. It is objected that the Administrator General has failed to establish a case under the section. It is said that at the time of demand made on the debtor by the Administrator General for delivery of the articles claimed it is not proved that such goods were then "in his possession or under his control," and unless that is proved there can be no order for committal. I am prepared to go further and to hold that the application for delivery of possession of the articles was bad for vagueness and uncertainty. Possession is demanded of a "lot" of plated ware, crockery, china plates and other articles of household furniture of a like and other nature "which were at your residence at Henrietta village immediately before your insolvency and were removed therefrom by you."

If you require a person to do something under the penalty of imprisonment if he does not, surely you must explicitly state what it is that he is called upon to do. This is just what the Administrator General has failed to do.

The latter part of the application is also bad in law, for even assuming that the "lot," whatever that may mean, was at the debtor's residence at Henrietta village immediately before his insolvency, and he had removed the same, such conduct however reprehensible would not constitute a contempt of court as contemplated by section 21 (4) of the ordinance. In other words such wrongful acts are punishable, but not by committal for contempt.

The application and the affidavit in support thereof are drawn on the same lines and open to the like objections. Had they been objected to *in limine* the objection must have prevailed. The case has, however, been fully investigated, with the result that I am of opinion that the evidence adduced, even if true, does not warrant my finding the debtor guilty of a contempt of court within the meaning of the ordinance.

To succeed it was essential to show that the debtor was wilfully contumacious, that having the possession of certain specific articles or such specific articles being under his control at the time when the Administrator General demanded the delivery thereof, he refused so to do. It may be said, how can the Administrator General particularise the various articles he claims. I say that if he cannot do so. proceedings by way of contempt will not lie. The section only applies to flagrant cases, as where the debtor wilfully retains in his possession or under his control any one or more specific articles after demand thereof specifically. This is exemplified in *in re Cox* 2 Morr, B.C. 23, where the debtor refused to deliver up possession of a house held by him.

I was referred to Stroude's *Judicial Dictionary* to show what

"possession" means in criminal cases. It is unnecessary to discuss this reference, as I am not called upon to put any construction upon the word "possession" standing alone and by itself, on the contrary it has to be construed coupled with the words, "for the time being" in the same connection.

To sum up, the Administrator General has failed to grasp the true intent and meaning of the law which he has invoked. I am glad to be able to decide the case without reference to the evidence as to which a great deal might be said. For the reasons I have given this application must be dismissed.

APPELLATE JURISDICTION.

CABRAL *v.* TRENT.

1895. *October* 21. SHERIFF. J.

Appeal—Magistrates' Decisions (*Appeals*) *Ordinance 1893—Service of notice of appeal.*

Appeal from the decision of Mr. P. H. R. HILL, Stipendiary Magistrate for the Georgetown Judicial District, who in a claim by plaintiff Trent (now respondent) to recover possession of a piece of land in Thomas street, Georgetown, leased by the defendant Cabral (now appellant) from him ordered that possession be given up by December 31st 1895, which would allow time for the removal of buildings.

R. J. P. Hendricks, for the appellant.

H. F. Reece, for the respondent.

August 29th.

SHERIFF, C.J., Actg., —In this case my attention has been drawn to the fact that the papers sent in by the magistrate, as required by law, are apparently incomplete. There is no copy of the notice of appeal. As I read section 23 of the ordinance it is obligatory upon me to dismiss the appeal and affirm the sentence, which 1 do with costs.

I may not assume that the magistrate has neglected his duty, but in furtherance of justice I will give the appellant leave, if he be so advised, to move on Saturday next to set aside this preliminary decision, provided it be made to appear by affidavit that as a matter of fact notice of appeal was served on the *magistrate,* stating the time when, and the circumstances under which such service was effected, together with a copy of the notice so served.

I moreover grant a stay of proceedings until Saturday.

Posted. (October 21st.)

SHERIFF, J. This is an appeal, and the question to be decided is whether a notice of appeal left with the magistrate's clerk, constitutes a good service or not. Such a mode is nowhere recognized or prescribed by the appeal ordinance. If any difficulty arises in serving the magistrate, recourse should be had to a registered letter. In order to entitle a person as appellant to

have his case heard he must have performed all the conditions required of him by the ordinance.

By merely leaving his notice of appeal with the magistrate's clerk, he has not done all that was required of him by the ordinance, and is consequently debarred from audience. The cases chiefly relied on are *The King* v. *Inhabitants of Kimbolton,* 6 A. & E. 603, at p. 609; *Reg.* v. *Justices of Essex*; *ex parte Stark*, 17 C. C. C. 521; *Lockhart* v. *The Mayor of St. Albans*, 36 W. R., 800. I have, as I promised to do, consulted my brother judges, with the result that although this is to be regarded as my individual judgment, yet the law therein laid down meets with the approval and sanction of both. In other words the three judges are practically unanimous in ruling that the mode of service adopted was bad. I therefore dismiss the appeal and affirm the decision as required by section 23 of ordinance 13 of 1893. I make no order as to costs.

APPELLATE JURISDICTION.

THE BARIMA DEVELOPMENT SYNDICATE v. MENZIES

1895. *October* 26. SHERIFF J.

Review—Gold Mining Regulations, 1892—Appeal from decision of commissioner—Abolition of court of review.

Application for review of the decision of the Commissioner of Mines in a dispute between the Barima Development Syndicate and J.C. Menzies. The review was asked for at the instance of the syndicate.

SHERIFF, J.—On this case coming on for argument counsel for the respondent raised certain preliminary objections, but there is another, and, in my opinion, most important, defect which he did not raise but which it is my duty, nevertheless, to consider and dispose of. I am sitting in this court by virtue of the Magistrate's Decisions (Appeals) Ordinance, 1893. The solicitor for the appellant gave written notice in a document headed "In The Supreme Court of British Guiana, Appellate Jurisdiction," by which he asks that the above matter may be entered on the general list of appeals and an early date fixed for its hearing. I refer to this notice to show that the appellant considers that he has a right to invoke the intervention of this court, as constituted under Ordinance No. 13 of 1893. It is beyond dispute that a judge before adjudicating must see that he has jurisdiction to entertain the matter. There is nothing in the Ordinance 13 of 1893 which refers in any way to appeals from a decision of a gold commissioner. On referring, however, to the gold regulations of 1892, regulation 162 (1), an appeal on questions of law is given to the Court of Review, and in regulation 164 it is said the term "The Court of Review in these regulations means The Supreme Court of Civil Justice sitting as a Court of Review under the provisions of Ordinance No. 5 of the year 1868, or any ordinance amending the same." On this regulation the following observations are pertinent: there is no longer a Supreme Court of Civil Justice, (see section 3 of Ordinance 8 of 1893); Ordinance No. 5 of the year 1868 has been repealed *simpliciter* by Ordinance 25 of 1893; in no sense can this ordinance be said to have been amended. 1 wish to be very guarded in my remarks, and to confine myself strictly to deciding whether, sitting as I am under a new jurisdic-

tion, it is competent for me to entertain the case submitted. I of opinion that the matter is one which this court has no jurisdiction to entertain. Whether there is any other right of appeal is a matter into which I am not called upon to enter, and as to which I shall say nothing. Having no jurisdiction I can make no order as to costs.

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LL. C. DALTON, M.A., CANTAB.,
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PREFACE.

The attempt, represented by Volume IV, to continue the scheme for the publication of local Law Reports planned by the late SIR DAVID CHALMERS has met with some encouragement the result of which is the appearance of this further volume.

It has been found that the reports will be of more value if the review cases, although already separately published, are included. In this volume therefore the review cases, revised and in the form of reports, have been included, a course which will be followed in future publications.

LL. C. DALTON.

April 11th, 1917.
Law Courts,
Georgetown, Demerara.

1895.

TABLE OF CASES REPORTED.

PAGE.