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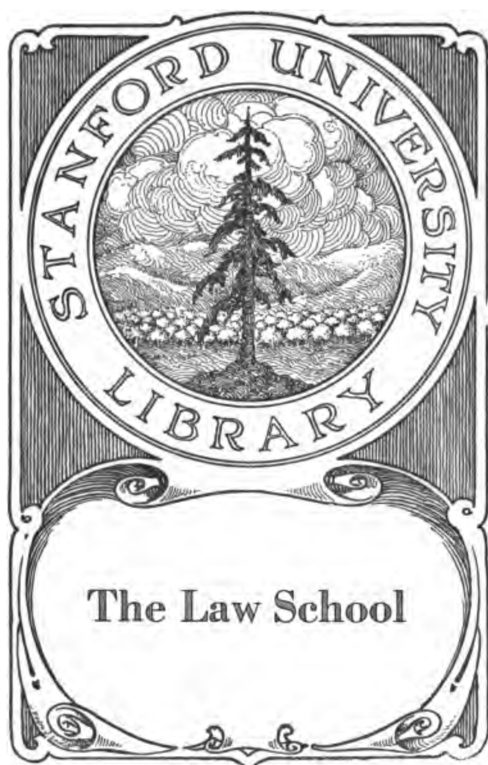

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REPORTS OF CASES

3058

ARGUED & DETERMINED

IN THE

SUPREME COURT OF QUEENSLAND

WITH

TABLES OF CASES AND INDEX.

BY

GEORGE SCOTT, M.A. (Oxon.); L. E. GROOM, M.A., LL.M.

(Barristers-at-Law);

AND

A. DOUGLAS GRAHAM, B.A.

(Solicitor).

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PREFACE.

In the present volume, which concludes the series of Supreme Court cases, will be found, *inter alia*, the remaining decisions revised from 1 Q.L.R., cases not reported in the supplement to 1 Q.L.J., along with decisions pronounced in 1880 and 1881, hitherto unreported, up to the commencement of the first volume of the *Queensland Law Journal*.

Brisbane,

30th May, 1903.

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JUDGES OF THE SUPREME COURT:

SIR JAMES COCKLE, CHIEF JUSTICE,
Appointed 21st February, 1863.
Resigned 24th June, 1879.

ALFRED JAMES PETER LUTWYCHE, PUISNE JUDGE,
Appointed 21st February, 1859.
Acting C.J. 26th June, 1878.

SIR CHARLES LILLEY,
Appointed 4th July, 1874.
Chief Justice, 25th June, 1879.

EDMUND SHEPPARD, PUISNE JUDGE,
Appointed 17th July, 1874.

GEORGE ROGERS HARDING, PUISNE JUDGE,
Appointed 14th July, 1879.

* RATCLIFFE PRING, PUISNE JUDGE,
Appointed 11th November, 1880.

* Acting Judge, 13th July, 1880.

ATTORNEYS-GENERAL:

SAMUEL WALKER GRIFFITH ...	3rd Aug., 1874, to 7th Dec., 1878.
JAMES FRANCIS GARRICK ...	7th Dec., 1878, to 21st Jan., 1879.
RATCLIFFE PRING	16th May, 1879, to 4th June, 1880.
HENRY ROGERS BEOR ...	4th June, 1880, to 25th Dec., 1880.
POPE ALEXANDER COOPER ...	31st Dec., 1880, to 5th Jan., 1883.

MINISTER FOR JUSTICE:

JOHN MALBON THOMPSON ... 21st Jan to 16th May, 1879.

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SUPREME COURT REPORTS.

VOL. V.

In re SPARKES.

Insolvency—Debtor's summons—Dismissal of petition—38 Vic, No. 5, ss. 44 (9), 48, rr. 18-20, 29, 30.

[IN INSOLVENCY.]
1877.
11th January, 24th January.
Cockle, C.J.

Where a debtor's summons has been granted, and a petition thereon dismissed, no further proceedings can be had on that summons.

PETITION by Alonzo Sparkes for the adjudication of John Nolan.

In this case a debtor's summons had been granted, but Lilley J. dismissed the petition, not being satisfied that the alleged act of insolvency had been committed.

Thynne, for the debtor. The matter is *res judicata*, and cannot be reopened.

Liddle, for the petitioner. Assuming the two petitions are the same, there is nothing to show that the debtor's summons is identical with the one now submitted. There is nothing in the Insolvency Act to prevent the present petition from being presented.

C.A.V.

24th January, 1877.

COCKLE, C.J. This matter being new—and will perhaps be important—I took time to consider it. The debtor's summons was issued on the 21st October; and I notice that form No. 4 is perhaps rather more stringent than s. 48 of the Act. In the form we find the words

In re SPARKES.

Cockle, C.J.

"you may be adjudged insolvent;" in the section the words are, "a petition may be presented against him, praying that he may be adjudged insolvent." Now, by s. 44 (9), there must be a sum due, and the summons must be by the creditor presenting the petition; and by s. 51 (9) there must be a debt. If the debtor appears on the petition, then, under s. 63, the Court must require proof of the debt; and if he denies the debt, the Court, under s. 64, may stay all proceedings for such time as may be required for trial of the question. The summons enables an alleged creditor to create an act of insolvency, and, under the judge's discretion, to litigate under certain advantages. But on the other hand, it renders him liable to be forced to a speedy litigation. It seems to me that the summons is in the nature of a notice; and looking at s. 49, and rr. 18, 19, and 20, as well as forms Nos. 4, 5, 6, and 12, it also appears to me that the application to dismiss is an original proceeding, the carriage of which belongs to the alleged debtor. Nothing, however, turns upon this, for the order made on the application is recognised in the bill of costs; nor is it necessary to decide whether the party drawing up the order has so far deviated from the form No. 6 as to render his proof a nullity, or whether the order was made on November 1 and mis-dated November 11. Under r. 29, if a creditor neglects to appear on his petition, no subsequent petition can be presented by him without special leave, and a creditor who had appeared, and had his petition dismissed, would seem, even under this rule, to stand in no better position. Indeed, I question whether special leave could be given after a dismissal. In any case, I strongly incline to the opinion that it cannot be granted under the present circumstances. At all events, I am not aware of any such leave, and as the first petition, filed on November 11, was dismissed by his Honor Mr. Justice Lilley on December 1, I think, on general principles, the petitioner is barred from all further proceedings upon this debtor's summons, with the identity of which I am satisfied. Moreover, I think the proceedings on the first petition ought to have been brought under my notice by the petitioner, and, in that sense, that there has been a suppression of a material fact. I think, under all the circumstances, this petition must be dismissed with costs.

Petition dismissed with costs accordingly.

Solicitors for the petitioner: *Roberts, Liddle, & Roberts.*

Solicitor for the debtor: *Thynne.*

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In re HANSFORD.

[IN CHAMBERS.]
1877.
24th January,
31st January.

Cockle, C.J.

Deserted Wives and Children Act (4 Vic., No. 5), s. 4—Maintenance—Desertion—Evidence of marriage—Means of support—22 Vic., No. 6, ss. 6, 12.

Where a wife was called at the hearing, made a statement on oath as to her marriage, signed it, and the statement was also signed by the magistrates:

***Held,* there was evidence on affidavit of marriage within the meaning of s. 4 of 4 Vic., No. 5.**

An offer of maintenance, conditional on the wife's return to the husband's house, is some evidence of a refusal to maintain.

Quære,* whether justices are obliged to presume that a wife has means of support, in the absence of any evidence to that effect

APPLICATION by William Hansford for a rule *nisi* for a prohibition against an order of H. Burkitt, Police Magistrate, and Samuel Johnstone, Justice of the Peace, Bundaberg, directing the applicant to pay £1 2s. 6d. per week for the support of his wife and child for twelve months from the date of the order, and to pay up back payments at the same rate from 29th October previous, and binding the defendant over to enter into a recognizance, himself in the sum of £120, with two sureties of £60 each, for the due performance of the order.

The defendant stated in his affidavit that he was a working farmer, occupying 82 acres of land, and that his profits and earnings did not amount in all to more than £1 per week; and, being consequently unable to comply with the order, he was, by the direction of the magistrates, taken into custody, and was now a confinee in the Brisbane Gaol. He had informed the Police Magistrate that he could find bondsmen, but had been told that they could not be accepted until he deposited one year's maintenance money.

Mayne, for the applicant.

The grounds for the application are stated in the judgment.

C.A.V.

---

* But see *Kelly* v. *Kelly* (6 Q.L.J. 72).

In re HANSFORD.

Cockle, C.J.

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31st January, 1877.

COCKLE, J. In this case application was made to me for a prohibition in respect of an order made under *The Deserted Wives and Children Acts*. The first ground on which the rule *nisi* was asked is that there was no evidence of the marriage; but under s. 4 of the first Act, in the event of the inability of the wife to produce direct evidence of the marriage, her affidavit suffices, and here I think that the evidence was on affidavit within the spirit of that section. There appears to be a caption at the commencement of the proceedings. In the course of the hearing the wife is recalled, and makes a statement about the marriage, signs it, and the statement is also signed by the justices. I think, therefore, that there was evidence of the marriage. If it is desired to question that fact, means are given by that section, for any two justices are empowered to rescind an order upon sufficient proof of the falsity of an averment as to the marriage. The second ground was that there was no evidence of desertion, or of acts amounting thereto; but in s. 6 of the Amending Act there is a provision within which I think this case falls. The third ground is, that there was no evidence of refusal to maintain; but in the first section of the first Act, desertion and a leaving without means of support, are each specified, and I cannot say that there was no evidence of refusal to maintain within the meaning of the Acts, because the offer of maintenance is found, at all events, on the face of the order, to have been conditional on a return to the house. The fourth ground is, that there was no evidence of want of means of support; but I am not aware that the justices were obliged to presume that the woman had means of support, in the absence of any evidence to that effect. Moreover, I would point out that, not only may any wrongly-decided question of fact be settled by an appeal—which, in many respects, is a proceeding preferable for the purpose of determining a question of fact—but, by s. 12 of the Amending Act, any two justices may exercise the power, which otherwise would only belong to the quarter sessions, of varying an order of maintenance. Under these circumstances, I think this Court ought not to interfere on any of the four grounds to which I have referred, and therefore on those grounds I refuse the order. The fifth ground is that the bond was excessive. There may possibly be a point raised upon that, or rather upon the bond as connected with the order itself, although I by no means express an opinion as to the validity of the point. The sixth ground is that the justices were

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wrong in demanding a year's maintenance. This ground I understand to refer to the sixth paragraph of the applicant's affidavit. I express no opinion as to how far the alleged act of one justice can affect either his brother justices, or the person in whose favour the order was made. If the applicant chooses to have the latter grounds urged—it will, of course, perhaps be at the peril of costs—he can do so; and he may take the order *nisi* upon the ground of the excess in the bond and order, and on the alleged demand of a deposit of a year's maintenance. In saying excess, I mean, of course, any excess in point of law, for any excess in point of fact, arising from the man's inability to pay so large a sum, would more properly be a subject either of appeal or of an application to two justices to vary the order under s. 12 of the Amending Act.

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WOOD *v.* CORSER.

1877.
23rd February.
Cockle, C.J.

Practice—Order—Effect of a judge's minute.

The minute made by the judge of the decision of the Court was that, upon payment into Court of the amount due on certain mortgages and a bill of sale, and on the plaintiff undertaking to abide by the order of the Court as to damages, an injunction should issue forthwith to restrain defendants from selling certain real estate. The plaintiff did not take out an order embodying this decision, but an injunction was issued upon the terms therein set out.

***Held*, that the injunction was liable to be dissolved on the ground of irregularity.**

MOTION to dissolve an injunction issued under the decision of Cockle, C.J., on the ground of irregularity.

Plaintiff sought an injunction to restrain the defendants from selling certain lands, and on hearing the parties the Court decided that the plaintiff was entitled to an order to the effect that, upon payment into Court of certain amounts due under mortgages and a bill of sale, and on the plaintiff giving an undertaking to abide the order of the Court as to damages, an injunction should issue restraining the defendants from selling. No order for the injunction was taken out, but the injunction was issued.

Griffith, A.G. (*Harding* with him), moved to set aside the injunction on the ground of irregularity.

Pring, Q.C., supported the injunction.

COCKLE, C.J. As this is an important matter, I think it right there should be no doubt as to what opinion I at least entertain upon the subject. I think that my minute was not an order, and was not, in itself, an authority to issue the injunction. A different view would be very inconvenient. The judge, making a mere rough memorandum, might commit an error or make an omission. In that case it would be the duty of the professional gentlemen to point out the error, or to give the means of correcting the omission, so that the person affected may have not only the view of the judge in the case, but the responsibility of the other side to properly carry out the judge's view. The minute itself cannot be authority, because how could the officer of this Court know that the party in whose favour the order purported to

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be made liked the order—how, without some further act of the party, could he know that it was desired that such an order should be made? Then, what act is the proper act for the party to do to show the manner in which he wishes the order to be drawn up? Why, to draw it up, and present what he thinks to be his view of the judge's minute, and have it passed and properly vindicated. I cannot for a moment let my opinion remain uncertain, and I think the objection is fatal, and dissolve the injunction.

Solicitors for the plaintiff: *Roberts, Liddle, & Roberts.*

Solicitor for the defendants: *P. Macpherson.*

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PAUL v. BUTTENSHAW.

Prohibition—Police Magistrate—Hearing of case.

[IN BANCO.]
1877.
13th March.

Cockle, C.J.
Lutwyche, J.
Lilley, J.

A Police Magistrate, who was engaged in hearing a case, left the bench in order to give evidence. His place was taken by a Justice of the Peace. After giving his evidence he returned to the bench, and continued the hearing of the case, and made an order.

Held, that the proceedings were irregular, the case not having been heard either by a Police Magistrate or by two Justices of the Peace as required by the Act under which the proceedings were being had.

MOTION for a rule *nisi*, calling upon the defendants, H. R. B. Buttenshaw, P.M., Maryborough, R. B. Sheridan, Polynesian Inspector, and F. Bryant, J.P., to show cause why a writ of prohibition should not issue to restrain them from further proceeding upon an order made by the defendant Buttenshaw, upon the ground that the whole of the hearing was neither before the Police Magistrate nor before two justices, as required by the Act under which the proceedings were taken; and upon other grounds not necessary to be stated.

The defendant Sheridan laid an information against John Paul, charging him with having employed a Polynesian labourer otherwise than under the Regulations of *The Polynesian Labourers Act of 1868*, without reporting the same to the nearest Bench of Magistrates. The defendant Buttenshaw alone heard a part of the case as Police Magistrate, and then left the bench in order to give evidence himself. While he was giving evidence his place on the bench was filled by another of the defendants—a Justice of the Peace; but as soon as his evidence was completed the Police Magistrate returned to the bench and continued to hear the case, and afterwards made the order directing Paul to pay £10 and costs, from which order the defendant now appealed. There were no other magistrates on the bench during the hearing besides the Police Magistrate and the Justice of the Peace who occupied his place while he was giving his evidence.

Harding moved the rule absolute.

Griffith, A.G., showed cause.

LUTWYCHE, J. I think that the rule for this prohibition must be made absolute, but I found my opinion chiefly on the first ground

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taken. It seems to me that ss. 23 and 24 of *The Polynesian Labourers Act* may well be read together, and that it is required, in all cases where the regulations of the statute have not been followed, that an information should be made and determined by either a Police Magistrate or two Justices of the Peace. Now, in this particular case, the information was not heard either by the Police Magistrate or two Justices of the Peace. Mr. Buttenshaw, the Police Magistrate, heard the first witness, and then he left his place and appeared in the witness box as a witness himself. Now, according to the text writers, at all events, he should then have retired from any further interference with the case. There was another magistrate present (Mr. Bryant), who took down his deposition, but he was not present, it appears, when Mr. Buttenshaw took down the evidence of the first witness. His presence on the bench was therefore not equivalent to the presence of a single justice; and, speaking of the Police Magistrate only, and of his sufficiency as a tribunal to hear the case, it seems to me that he did not hear the case, as he did not hear the case throughout. I think it would be exceedingly undesirable to hold that the case was heard judicially by him, and I think in point of law that it was not judicially heard by him. That being the case, I think the rule must be made absolute.

Lilley, J. I think also that the rule ought to be made absolute. I think the case was not heard judicially throughout, either by the Police Magistrate or by Mr. Bryant, who went up for a time on the bench to take his place and hear the evidence of the Police Magistrate who, it seems to me, had left the bench; and it certainly was not heard throughout by any other magistrate. Upon the first ground, therefore, I agree that the rule ought to be made absolute.

Cockle, C.J., concurred in the order of the Court on other grounds.

Solicitor for the plaintiff: *P. Macpherson.*

Solicitors for the defendants: *Little & Browne.*

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In re TOOTH'S TRUSTS.

1877.
22nd March,
23rd March.

Lilley, J.

*Trustees and Incapacitated Persons Act of 1867 (31 Vic., No. 19), s. 6**
—Petition for advice—Will—Substitution of mortgage at lower interest on devised estates.

A testator being at the time of his death possessed of a station consisting partly of freehold land and partly of leasehold, and of the stock, by his will directed that it should be carried on and managed under the direction of his executrix until his youngest child should come of age; but at the time of the testator's death the station was mortgaged for a large sum at a high rate of interest, but the will contained no power for the executrix to mortgage.

The Court directed that the executrix should be at liberty to substitute for the existing mortgage a mortgage for a sum not exceeding the liability of the station under the previous mortgage at a lower rate of interest.

The provisions of 31 Vic. No. 19, s. 6, instead of being restricted, should be beneficially interpreted and applied. As there is no appeal from the advice or direction given by the Court, the interpretation should be restricted, where there are conflicting interests to be decided. A short affidavit should be filed verifying the allegations in the petition.

PETITION for opinion and advice under 31 Vic., No. 19, s. 6, by the executrix of the will of W. B. Tooth, deceased.

All the material facts appear in the judgment.

Griffith, A.G., and *Harding*, for the petitioner.

LILLEY, J. Upon the question of practice that I have adverted to —namely, the necessity or the advisability of having an affidavit verifying petitions presented for advice under this section of *The Trustees Act*—I adhere to my opinion that it would be better in all cases —and it will be understood to be the practice before me, at all events —that there should be a short affidavit verifying the allegations in the petition. Of course, I do not mean that affidavits should be filed setting out a series of contested facts, because in that case I should refuse to exercise a discretion under the statute, and should leave the parties to proceed by the regular course of practice in the Court, by bill or by an action under *The Judicature Act*. Upon the merits it appears that the testator Tooth, at the time of his death, was possessed of various

* See now 61 Vic., No. 10, ss. 45, 48.

† *In re the Will of Adams, Deceased* (5 Q.L.J. 2).

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properties—some personal property, and other portions realty. The part of his property with which we are now dealing is that known as "Clifton," the station or run of Clifton. That appears to consist partly of real property lands, I suppose purchased, and partly of personal property, leaseholds, and partly of the stock. So far as the personal property is concerned, the executrix—in the absence of any prohibition or express direction to deal with the property otherwise—would have the power to mortgage. I think the authorities go to that extent for general purposes under the will. With regard to the realty, it seems to me that she would have no such power in the absence of express authority. The testator left his property upon trust for sale; but with regard to Clifton, he seems to have been anxious that it should be carried on and managed until the youngest child became 21. That would take away, as it seems to me, any power to deal by way of mortgage, either with realty or the personalty, unless there are other circumstances and directions in the will which would justify some form of dealing with the property, by way of mortgage or otherwise, for the benefit of the estate. Now, to ascertain whether that is so or not, I must look to the circumstances under which he left his property. At the time of his decease there was a mortgage subsisting upon the whole of Clifton, as I understand it from this petition, of both the personalty and realty, for a very large amount at a heavy rate of interest. If the executrix has no power whatever to change the form of that mortgage, the intention of the testator may be entirely defeated. I must therefore consider what he meant by carrying on and managing the estate; that, it seems, would give no power to create a mortgage—no power, as it seems to me, to create an original mortgage; on the realty, certainly not, but it might perhaps be otherwise with regard to the personalty. There is another circumstance which is very important in ascertaining the intention of the testator, and in enabling me, perhaps, to offer some advice to the executrix, that not only was the estate under mortgage at the time, and that he must have contemplated the power, or probably so, to deal in some way with that mortgage when he directed Clifton to be managed to the best advantage. But the mortgage had been made by himself, subject to advances and payments to the executrix; so that he must have contemplated the dealing with the estate in a state of mortgage by the executrix after his death. I am of opinion, also, that a substituted mortgage would be for the relief of the estate, and greatly for the

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benefit of those for whose advantage he made his will and created these trusts. I am inclined, therefore, to think and advise, and as far as I have the power to do it, to direct that the executrix may, under this will, substitute another mortgage for a sum not exceeding the liability when the present mortgage is paid off, at a lower rate of interest; and I think it would be well if that can be effected by way of assignment of the present securities to a new mortgagee, with a covenant on his part to accept that lower rate of interest. But if there be any objection to that, either in form or substance, I see no reason why a new or substituted mortgage should not be executed by the executrix. The property is devised to her, and the legal estate is in her by virtue of the will. I may say that it must be effected in such a way as in no way to compromise or prejudicially affect any of the parties under the will: care must be taken of that. That will be my advice or direction.

I may further add that this statute, instead of being restricted, should be beneficially interpreted and applied. But where there are conflicting interests to be decided under the statute, then it should be restricted, because there is no appeal from the advice or direction given by me.

The costs will be paid out of the estate.

Solicitor for the petitioner: *P. Macpherson.*

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FRASER v. HARDEN AND LOMAX.

1877.
28th March,
6th April.

Cockle, C.J.

Sheriff's sale—Prior purchaser—Notice of prior purchase—Pastoral Leases Act of 1869 (33 Vic., No. 10).

L., the licensee under *The Pastoral Leases Act, 1869*, of certain pastoral holdings, agreed with F. for the sale of them to him at a price to be paid partly in cash and partly by promissory notes, payment of which was to be secured by a mortgage over the holdings and over lands held by L. F. paid to L. the cash and delivered the promissory notes, and executed the mortgage and entered into possession and continued in possession of the holdings. L. executed letters of transfer of them to F., and deposited the letters with his banker, to be handed to F. upon payment of the promissory notes, L.'s name remaining in the records of the Lands Office as the licensee of the runs. A writ of *fi. fa.* having been afterwards issued against the goods and lands of L., subsequent to a judgment given against him in an action for divorce, all his right, &c., to the runs were sold at a Sheriff's sale under the *fi. fa.*, and bought by H., and a deed in the usual form, conveying all L.'s right, title, and interest (if any) in the runs to H., was executed by the Sheriff.

Held, that knowledge of the possession and interest of F. must be imputed to H.

Held, also, that H. was not entitled to have his name substituted for that of L., in the books of the Lands Office, by virtue of his purchase at the Sheriff's sale.

Quære, whether the words in the Sheriff's deed, limiting the sale to all the right, title, and interest (if any) of L., were not alone sufficient to render notice to H. of F.'s previous purchase unnecessary.

Trial of a suit for the declaration of the interests of the parties in certain lands and for an injunction.

The defendant James Rhodes Lomax, being the licensee, under *The Pastoral Leases Act, 1869*, of certain stations or runs, entered into an agreement with the plaintiff John Fraser for the sale of them to him at a price to be paid partly in cash and partly by promissory notes. Payment of the promissory notes was to be secured by a mortgage over the runs and lands, the property of the purchaser. In pursuance of the agreement the cash was paid and the promissory notes delivered by the plaintiff to Lomax, and the plaintiff entered into possession of the runs and continued in possession of them, and Lomax executed letters of transfer of the runs to the plaintiff, and deposited them with his banker, to be handed to the plaintiff upon payment of the promissory notes. Lomax's name remained upon the books of the Lands Office as that of the licensee of the runs. A writ of *fieri facias* was afterwards

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issued out of the Supreme Court against the goods and lands of Lomax, against whom a judgment had been given in an action for divorce, and an order for payment of alimony made, and under it all his right, title, and interest in the land was sold by the Sheriff and bought up by the defendant George Harden, and a deed in the usual form, conveying all the right, title, and interest (if any) of Lomax, of, to, and in the runs, to Harden, was executed by the Sheriff. Harden then applied to the Commissioner of Crown Lands to transfer the runs and the rights of lease of the defendant Lomax to the applicant. The plaintiff thereupon gave the Commissioner notice of the sale of the runs to him, and requested him not to proceed in the matter of the application of Harden. The Commissioner declined to accede to the request, and the plaintiff filed his bill against the defendants. At the time of the commencement of the suit a portion of the promissory notes were still current.

The defendant Harden alleged that, at the time of the purchase, he was not aware that the plaintiff had any interest in the station (Manaroo), or that he was in possession; and that both the plaintiff and Lomax were personally unknown to him; that the purchase was *bonâ fide*, and that he had no notice of the agreement between the plaintiff and Lomax; and that the plaintiff did not apply to him to concur with Lomax in performing the said agreement.

The plaintiff's bill was for a declaration that the defendant Harden acquired no right, title, or interest in the runs by virtue of the Sheriff's sale. (2) Specific performance of the agreement. (3) An injunction to restrain the defendant Harden from further proceeding on his application to the Commissioner. (4) Or, if it should appear that the defendant Harden was a purchaser without notice of the agreement, then for damages against the defendant Lomax for non-performance of the agreement.

Griffith, *A.G.*, and *Harding*, in support of the bill, cited *Holmes* v. *Powell* (8 DeG., M. & G. 572), *Daniels* v. *Davison* (16 Ves. 249, 17 Ves. 433), *Shaw* v. *Foster* (L.R. 5 H.L. 341), *Pastoral Leases Act of 1869*, (Regulations, 1st December, 1869, No. 27), *Benham* v. *Keane* (1 Johns. & Hem. 685), *Finch* v. *Ld. Winchelsea* (1 P. Wms. 277), *Whitworth* v. *Gaugain* (3 Hare 427), *Lodge* v. *Lyreley* (4 Sim. 70).

Pring, *Q.C.*, and *Pope Cooper*, for defendant Harden.

Beor and *Garrick*, for defendant Lomax.

COCKLE, C.J. The defendant Harden claims a legal estate in the runs in dispute under a deed-poll from the Sheriff. The question has

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been raised whether, at the time of the purchase, he had not notice of the previous sale by the defendant Lomax to the plaintiff. There is no evidence of any express notice to Harden. It is clear that he was a *bonâ fide* purchaser for value, nor was there any constructive notice to him, if constructive notice is to be taken to mean the notice which a man may be said to have who is in that state of mind that he does not know a thing because he has abstained from inquiry; but there is a class of cases which have been decided upon the ground of what may be termed an imputed knowledge. In such cases we may say that notice is unnecessary, either because knowledge is imputed to the purchaser, or because it is not competent to the purchaser to set up want of notice, or because the purchaser is put upon inquiry. The question remains, therefore, whether the present case falls within this third class of cases, for it does not fall within either of the other two classes. There is room to remark how far a person is put upon inquiry by the words of *The Process Act* (31 Vic., No. 4.) The object of that Act is to enable creditors to obtain their just rights, not to disturb the rights of others. Moreover, there may be something in the very words of the deed-poll to put a purchaser on inquiry. The words of the deed confine the sale to the right, title, and interest (if any); but the principle laid down in *Holmes* v. *Powell* (*supra*) is clear, cogent, just, and expedient. The decision in that case does not turn upon any notice of the occupation, so far as I can see; it was implied from the fact of the tenancy. Lord Justice Turner goes into the evidence for the purpose of seeing whether there was an occupation, and not whether there was notice. The case of *Daniels* v. *Davison* (*supra*) adopts the same principle, and, though that case has been questioned, it has not been questioned on this point. In the case of *Hervey* v. *Smith* (22 Beav. 299) there was no knowledge of the fact that the owner of a neighbouring property was entitled to an easement, and yet the purchaser was fixed with implied notice.

It was contended, on behalf of the defendant Harden, that Fraser was not rightly in possession of the premises; but in *Hervey* v. *Smith* the person in possession of the easement had no grant, and it was held unnecessary for the purpose of imputing notice to the purchaser. Moreover, it is doubtful whether it is competent to Harden to deny the plaintiff's right. I am unable to follow Harden's claim to have his name entered in the books of the Lands Office as lessee or licensee of the runs. If the equities attach, why should the runs go into his

FRASER v. HARDEN AND LOMAX.

Cockle, C.J.

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hands? If they do not, he would be entitled to something more. The order of the Court will be therefore to declare that the agreement ought to be performed, and that the defendant Harden be enjoined, according to paragraph 3 of the prayer of the bill, until further order.

Solicitors for the plaintiff: *Little & Browne.*

Solicitor for defendant Harden: *P. Macpherson.*

Solicitors for defendant Lomax: *Bunton & Mayne.*

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[IN BANCO.]
1877.
28th May.
Cockle, C.J.
Lutwyche, J.
Lilley, J.

THE QUEEN *v.* TOWNLEY AND OTHERS.

Mandamus—Justices—Appeal—Rating—The Municipal Institutions Act of 1864 (28 Vic., No. 21), s. 79.

Rateable property in a municipality was assessed by the Municipal Council at a certain sum, and the assessment entered in the Council's assessment book. Afterwards, without the authority of the Council, this amount was altered, and a notice of assessment at the substituted amount was served upon the owner. The owner appealed against the assessment, and the evidence before the justices disclosing the above facts, they decided that the assessment—notice of which was served upon the owner—was not the assessment of the Council, and declined to proceed any further on the appeal.

Held, that there was no ground for a mandamus to compel the justices to hear and determine the appeal.

MOTION to make absolute a rule *nisi* for a mandamus at the instance of the Municipal Council of Ipswich, calling upon the Justices of Ipswich to show cause why they should not hear and determine an appeal under *The Municipal Institutions Act of 1864*, in which appeal John Pettigrew was appellant, and the Muncipal Council respondent.

The Municipal Council of Ipswich assessed certain lands and houses for rating purposes at the value of £30 and £110, and the assessment was entered in the assessment book of the Council. Afterwards, without the authority of the Council, the amounts entered in the book were altered to £35 and £120 respectively, and notice of assessment of the property—at the larger amounts—was served upon the owner. The owner appealed to the magistates in petty sessions against the assessment, and a majority of them decided after hearing evidence disclosing the above facts, that the assessment—notice of which was served upon the owner—was not the assessment of the Council, and declined to proceed any further with the inquiry.

Griffith and *Power*, for the Council, moved the rule absolute, and cited *R.* v. *Freemen of Leicester* (15 Q.B. 671), *R.* v. *Mayor of Monmouth* (L.R. 5 Q.B. 251). The Bench gave no decision on the amount

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of the assessment, which was necessary to enable the Council to levy the rate. The question alleged to have been decided was not that which they were called upon to determine, therefore a mandamus should issue.

Real, for the Justices, and the appellant Pettigrew, showed cause, and cited *R.* v. *Kesteven* (3 Q.B. 896).

Cockle, C.J. Section 79 of *The Municipal Institutions Act* provides that "if any person shall think himself aggrieved by the value at which his property has been assessed by the assessment thereof for the current year, he may appeal against such assessment;" and if we are to refer the appeal to that assessment which was last mentioned, and to interpret the section accordingly, it would seem that an appeal will lie against the whole assessment. I do not think that either rational interpretation or popular acceptation, or either of them, are infringed by taking that view; for, a man who ought not to be rated at all, by being rated might feel himself aggrieved by the value at which his property had been assessed. Now, again, on looking further down this sentence, you find that an appeal to a Court to be held on a day "not being earlier than twenty-one days after such service of notice as aforesaid." Now, it might be that a person having received a notice which he believes not to represent or refer to any rate actually made, yet being apprehensive that he may be distrained upon or otherwise vexed if he did not appeal, may go to the next court of petty sessions, and, without admitting the notice to be a good one, may take it to be so far good as to afford him a *locus standi*, and he may so protect himself from the consequences of this notice, which he alleges to be an unjust one. Taking that to be a preliminary notice, it might be that the justices might say to the appellant, "The notice may be irregular, but undoubtedly some such rate as this was made; you ought to have gone to the Town Clerk, pointed out the discrepancy, and have had the mistake rectified." But can we say that the magistrates were bound to take such a course? If they thought the discrepancy so serious, and that the repetition of such discrepancies might prove injurious to the community at large, can we blame the magistrates if they took another view, and said, "No; we leave you to begin again; we do not think the public at large should be harassed." I think, even taking this to be a preliminary point, we ought not to interfere with the discretion of the magistrates, unless we can say that it has been wrongly exercised; and,

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Cockle, C.J.

for myself, although, perhaps, the other course would have been equally convenient, I cannot say that the magistrates exercised their discretion wrongly; their powers are somewhat ample; they may afford relief as the justice of the case requires, and their decision is to be final, as far as the matter of the appeal is concerned. I do not attach much weight to the portion of the section providing that the decision shall be "deemed to be notice to the appellant to pay the sum decided against him," because, if no sums whatever were decided to be payable, why, it would not be notice to pay any sum. It would be a strained meaning to say that that rendered it necessary for some sum to be mentioned; probably the true meaning in law would be, "it shall be notice to the appellant to pay the sum, 'if any,' decided against him." I think that to hold that the appeal was against the whole of the assessment is by far the most salutary interpretation to be placed upon this section, and I think, therefore, that this rule for a mandamus must be discharged.

Lutwyche, J.

LUTWYCHE, J. I am of the same opinion. It appears to me that, under this Act, the justices in petty sessions assembled have power to decide whether an assessment has been properly made, or whether, having been properly made, the assessment in the case of an individual who appeals has been too great. The Act gives any person who thinks himself aggrieved by the assessment power to appeal against it, and that privilege he may exercise by asking for the rate to be reduced, or by contending that it ought never to have been made at all as against him. The complaint made against the magistrates in this case was, that they had neither heard nor determined the matter of the appeal; but they say that they did hear and determine it, and, having heard the evidence of the Town Clerk and of Peter Brown—the assessor appointed by the Council, and after having seen the minutes which were produced, it appeared to them that the "assessment—notice of which had been served upon John Pettigrew—was not the assessment made by the assessor appointed by the Council, nor in any other way the assessment of the said Council;" and that affidavit is borne out by that of Peter Brown, who says, "that he made an assessment, and it was approved of by the Council; that it was afterwards altered—by whom does not appear; that he was then asked by the Town Clerk to assent to the alterations, and that he met that application by a flat refusal." That there was no other assessment made appears, also, from the fact that no minute of council could be found showing that another

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assessment had been made. The magistrates, therefore, appear to me to have decided that, in point of law, no assessment was made. I think they were quite right; and if they were right on a matter of law no mandamus can issue against them, and upon that point alone the rule onght to be discharged.

Lilley, J. I think the rule ought to be discharged, and with costs.

Solicitor for the plaintiff: *C. F. Chubb.*

Solicitor for the defendants: *J. O'Sullivan.*

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In re THOMAS PERKINS, DECEASED.

Intestate—Administration—Foreign Court.

[IN CHAMBERS.]
1877.
26th June.
Lilley, J.

The Judicature Act does not necessarily require that all contentious proceedings in probate should be by way of action. The Court may, without the institution of an action upon a motion, direct issues to be tried.

Where a plaintiff has obtained in a foreign court a decree for an account against a defendant who has since died intestate, leaving property in Queensland, he is entitled to have an administrator appointed in that colony.

Semble, if the personal representative of an intestate refuses administration, the applicant will not be appointed administrator, but the Curator of Intestate Estates and not the applicant will be appointed.

MOTION for an order calling upon Bridget Mary Perkins, widow, to take out letters of administration of the estate of Thomas Perkins, deceased, within fourteen days, or to submit to a decree that such letters should be granted to T. Stacpoole, who claimed to be a creditor.

Harding, for Stacpoole, in support of the application.

Griffith, A.G., on behalf of Mrs. Perkins, opposed the application.

The facts appear in the judgment.

LILLEY, J. Thomas Perkins died in 1876 intestate, and domiciled in Queensland. He left personal property to which no administration had been taken out. He also left a widow surviving him, who has been cited, and she has appeared. A motion has been made that she be required to take out letters of administration within fourteen days, or that they may be granted on her default to Stacpoole, who claims to be a creditor of the deceased. On the death of Perkins his personal estate vested, under s. 2 of our *Probate Act*, in the Chief Justice, in like manner as it would under the old law have vested in the Ordinary in England. None of the next-of-kin make any claim. There are, therefore, two parties before me claiming or having a right to administration, the widow and an alleged creditor, and a third party, so to speak—the Court, which has a duty to perform in the matter—namely, to see that the personal estate of the deceased is collected and properly distributed. The right of the widow to administration is conceded, and in respect of that there is no contest She has not stated whether

In re Thomas Perkins, Deceased.

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she will accept or reject administration, and it seems to me to be clear on authority that I have no power to compel her to administer. She claims, however, without making an election herself, to be entitled to contest the right of the alleged creditor to have administration committed to him. He rests his claim as creditor upon the fact that in a suit in the Colony of Victoria by him against Perkins, to which Perkins appeared and submitted to the jurisdiction, a decree was made in the lifetime of Perkins entitling his alleged creditor, Stacpoole, to an account. No account was taken, and in the meantime, by the death of Perkins, the suit has become defective. The alleged creditor claims a right to have an administrator appointed in this jurisdiction, in order that the suit in Victoria may be carried on by making the administrator here a party to it, or that, by the appointment of an administrator here, he (Stacpoole) may be in a position to sue within this jurisdiction. He has claimed that he himself should be appointed administrator, but he is willing that administration should be granted to any proper person, so that he may be in a position to seek his account against the estate of the deceased. It has been objected on behalf of the widow that the present application by way of motion is irregular, and not according to the present practice of the Court; that the proper course is by a probate action under *The Judicature Act*. This objection is based on the ground that the subject-matter of the application has become contentious business, and not common-form business within the meaning of *The Probate Act* and *The Judicature Act*. It is not disputed, nor do I think it could be, that the business in its inception was common-form business and not contentious; if it is now contentious business it has become so by the conduct of parties, or by matter subsequent to the citation, which I think was properly issued. I have been referred to Dodd and Brooks' "Probate Practice," in which it is stated that "on appearance the business becomes contentious." think the proposition is too large. A party may obviously appear without intending to contest the right alleged by the party citing. He may appear for the purpose of submitting, and stating his intentions to take out administration where his right is conceded, as in this case; the right of the widow is admitted. It is clear, also, that in many cases matter in respect of which no contest is anticipated may become contentious, and the question for me is whether it is inevitable that the moment a contest arises the parties must proceed *de novo* in a probate action, or whether I must order the proceedings subsequent to appearance to be taken in

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Lilley, J.

accordance with *The Judicature Act*. I think *The Judicature Act* does not necessarily require that all contentious proceedings should be by way of action. I think the Court, when matter originally non-contentious assumes the character of a contest, may still continue the proceedings on the citation, and may direct an issue or issues to be tried to ascertain the necessary facts for a decision. The interpretation clause of the Act merely shows what business shall be included in the procedure called a "probate action," and excludes its application to "common-form business," but it does not abrogate the other practice of the Court, or require a departure from the former course of procedure where the proceedings are originally well founded and correctly taken. The question then arise, Is there anything in the nature of a contest in this case which requires any question of fact to be submitted to a jury? If I directed an issue to try the right of the widow, I should perform an entirely useless act, because it is not denied, and she can have administration whenever she sees fit to apply for it; so that, whether she were made plaintiff or defendant in such an issue, it would be an unnecessary act on the part of the Court. With regard to the right of the alleged creditor, the facts upon which it is founded are, in like manner, not in dispute. He has not yet been proved to be a creditor of the deceased. He has established in a suit, in a foreign jurisdiction, a right to an account; but it is manifest, from the form of the decree which is set out in the affidavits, that on the account taking he may be shown to be either no creditor, or, in fact, a debtor; but whether creditor or debtor, he would, under ordinary circumstances, seem to have a right to insist that administration should be granted to some person. If a creditor, he would at least in this jurisdiction have a right to litigate his claim; if a debtor, he may fairly say, "I wish to discharge my debt, to be rid of all further trouble about it, and to know to whom I am to pay it—who is the person legally entitled to receive it and give me an acquittance." The facts being undisputed as to the position of the alleged creditor, that he has a right to litigate at least, the question of granting administration to him becomes one of mere discretion to be exercised by the Court. Under the circumstances of this case, I should decline to grant administration to him personally, because he would be at once placed in the position of plaintiff and defendant, of a party seeking an account and being himself the partner to render it—a position which would enable him, and indeed give him an interest, in doing injustice to other

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parties interested. Nor would I, by appointing him, enable him in effect to place the administration of the goods of a domiciled Queenslander in the hands of the Court of a foreign jurisdiction, and I should restrain any other person whom I might appoint as administrator from accounting to any Court not having jurisdiction in the Colony of Queensland. There is a necessity for administration of the deceased's estate, and whilst the widow, who has the right to administer, refuses to do so, or makes no attempt to obtain the legal status of administrator, she at the same time opposes the claim of the alleged creditor, without asserting a better right either in herself or any other person. Under such circumstances, the result of an inquiry or trial could only be, if adverse to the alleged creditor, to leave us where we are, with an estate unadministered, in the hands of we know not whom, and with a prospect of renewed litigation at the instance of the widow, who may in like manner seek to contest the right of any person other than herself to administer the estate. To leave affairs in this position would be to give deliberate encouragement to waste and to the unauthorised possession of the estate by persons having no legal title. I do not think, therefore, that there is anything in this case strictly of a contentious nature which requires the intervention of an inquiry before a jury. The facts are all before me, and I think I am in a position to exercise the discretion of the Court in granting or refusing administration. It is clear that there is a personal estate, probably of considerable value, remaining uncollected, and liable to waste. It seems to me *primâ facie* that the applicant Stacpoole has at least a right to litigate his alleged claim in this jurisdiction. The estate is now vested, as I have said, in the Chief Justice, and it is the right and duty of the Court of the deceased's domicile—that is this Court—to order that the estate be collected and properly administered for the benefit of the person or persons entitled in distribution (*Enohin* v. *Wylie*, 10 H.L.C. 1). I do not advert to the rights of the Crown, because the order I am about to make will sufficiently protect them. I shall therefore order that the widow elect within seven days whether she will take out administration or not, and that she takes out such administration within twenty-one days from the date of this order; in default, that administration be committed to Alexander Raff, the Curator of Intestate Estates, and that he be ordered to account only to this Court for his administration until further or other order. I reserve all questions of costs.

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In re THOMAS PERKINS, DECEASED.

Lilley J.

On 16th July an order was made "that letters of administration be granted to the said widow, but so far as regards becoming a party to any suits or other proceedings now pending, or that may hereafter be instituted, limited for the purpose of becoming a party to such suits or proceedings only as are now pending or may hereafter be instituted in the Courts of the Colony of Queensland."

Solicitors for Stacpoole: *Little & Browne.*

Solicitors for Mrs. Perkins: *Hart & Flower.*

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1877.
16th July.
Lutwyche, J.

PETTIGREW *v.* TOWNLEY.*

Prohibition—Justices—Petty Sessions—Small Debts—Costs—17 Vic., No. 39, s. 5—Small Debts Act of 1867 (31 Vic., No. 29), ss. 1, 3, 9—33 Vic., No. 4, ss. 2, 3.

A writ of prohibition will issue to the justices of a Court of Petty Sessions whenever they have decided without jurisdiction, or have exceeded their jurisdiction.

A Court of Petty Sessions cannot allow more than £2 2s. for professional costs to either party in any Small Debts cause decided by it.

MOTION to make absolute a rule *nisi*, calling upon the respondents, W. Townley, P.M., J. Macfarlane, J. Brady, W. Watkins, JJ.P., and Donald McNeil, to show cause why a writ of prohibition should not issue to prohibit them from proceeding upon an order made by the said justices, whereby the plaintiff was ordered to pay to the respondent McNeil certain costs and expenses.

Real, for the plaintiff, moved the rule absolute.

J. M. Thompson, for McNeil, showed cause.

The facts sufficiently appear in the judgment.

C.A.V.

LUTWYCHE, J. An order *nisi* was granted on the 9th instant, calling upon the respondents to show cause why a writ of prohibition should not issue to prohibit them from proceeding upon an order made by such justices on the 4th instant, whereby Pettigrew was ordered to pay to McNeil £9 8s. for costs, being £3 3s. costs from District Court, £4 4s. professional costs, £2 witnesses' expenses, and 1s. filing plea, upon the following grounds :—

1. That, having given a verdict for the plaintiff, the said justices had no power to order the plaintiff to pay costs to the defendant.

2. That the said justices had no power to order the plaintiff to pay the defendant £4 4s. professional costs.

3. That the said justices had no power to order the plaintiff to pay the defendant £2 for witnesses' expenses.

* See *Ex parte Zagami* (11 Q.L.J. 81), *Ex parte The Treasurer of Queensland* (*Ib.* 77).

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4. That the said justices upon giving their verdict were *functi officio*, except for the purpose of making an order under the provisions of ss. 2 and 3 of the Act 33 Vic., No. 4.

It appeared from the voluminous affidavits which were filed on both sides that a cause in which Pettigrew was plaintiff and McNeil defendant was originally heard at the sittings of the Petty Debts Court held in Ipswich on the 7th of March last.

The cause of action was for goods sold and delivered, and the plaintiff sought to recover a debt of £29 3s. 3d. The defendant pleaded a set-off as to the sum of £19 10s., and, as to the sum of £9 13s. 3d., the balance of the plaintiff's claim, the defendant paid that sum into Court together with 6s. costs, making altogether £9 19s. 3d. This sum the plaintiff took out of Court, and, after hearing the cause, the justices of the Court of Petty Sessions caused the following entry to be made in a book kept at the Court House, Ipswich, in which small debts cases heard at Ipswich are entered:—"Verdict for plaintiff, debt £9 13s. 3d., costs 6s., total £9 19s. 3d." The plaintiff being dissatisfied with this verdict, appealed to the Southern District Court, and, the appeal having been heard on the 20th March, the judge ordered that the case be sent back to the Court below for a new trial, the costs of the appeal, £3 3s., to be costs in the cause. On the 2nd of May last the case came on again for trial before two justices in the Petty Debts Court at Ipswich, and, after hearing evidence on both sides, the Bench were unable to agree, and the case was adjourned *sine die*. At a sittings of the Court of Petty Sessions, held at Ipswich on the 4th July instant, before five Justices of the Peace, the case was again heard, and, by consent of the parties, the minutes of evidence taken at the May sittings were also taken as minutes of evidence for the purpose of the cause. The Court caused the following entry to be made:—"Verdict for plaintiff, £9 13s. 3d.; plaintiff to pay defendant £9 8s. costs, £3 3s. costs from District Court, £4 4s. professional costs, and £2 witnesses' expenses, and 1s. filing plea." Upon this state of facts the order *nisi* was granted, as in my opinion a *primâ facie* case was made out for the issuing of the writ of prohibition.

When cause was shown against the order *nisi* on the 13th instant, a preliminary objection was taken by Mr. Thompson that it ought not to have been granted, on the ground that a writ of prohibition could not be issued to a Court of Petty Sessions, and reference was made to a former decision of mine in Chambers given on an *ex parte* application

Pettigrew v. Townley.

Lutwyche J.

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in a case of *Warry* v. *Marsh* for a writ of prohibition, and reported in the *Courier* of November 9, 1872. The point having now been fully argued, I have now come to a conclusion that in deciding the case referred to I gave too much weight to a passage in Wilkinson's "Plunkett," p. 449 (Ed. 1866). I think that a writ of prohibition will issue to the justices of a Court of Petty Sessions when they have no jurisdiction, and also when they exceed their jurisdiction, although the Court of Petty Sessions is a Court of Record, and, whether the proceedings be criminal or civil, by s. 5 of the Act 17 Vic., No. 39, a judge of the Supreme Court may hear and determine applications for writs of prohibition, directed to any justice or justices, in all cases where imprisonment shall have been directed, or where the fine awarded, or the amount ordered to be paid, or the value of the matter adjudicated upon, shall not exceed £30. (See, further, *The Small Debts Act of 1867*, ss. 1 to 3 inclusive.

I come now to deal with the application on its merits. Mr. Townley, the Police Magistrate of Ipswich, who was the chairman of the Court of Petty Sessions held on July 4, has made an affidavit that the decision of the Court, although apparently for the plaintiff, was virtually for the defendant, but that, as there is no provision in the rules of the Small Debts Court, nor any process by which money can be properly taken out of Court, which has been paid in with pleas, without an order, it has always been the custom, *pro formâ*, to give judgment for money paid into Court with pleas as a justification to the Registrar for so paying the same. I am not prepared to say that the custom, which it seems has obtained in this respect, ought to be abandoned, but in future it will be well, for the sake of avoiding expensive litigation, if Courts of Petty Session, when they mean to give a verdict for the defendant, will add to the entry of a verdict for the plaintiff for the amount paid into Court, an entry in this wise: "Verdict for the defendant on the whole record," and under the provisions of s. 10 of Act 17 Vic., No. 39, I order that the record in the present case be amended accordingly.

There remains for consideration the question of costs. The Court should have allowed only £2 2s. for professional costs. See *The Small Debts Act of 1867*, s. 9, Sch. B. The hearing of 2nd May was abortive, and the hearing properly so-called took place on the 4th of July. £2 witnesses' expenses, also, ought not to have been allowed. No witnesses were called or examined at the hearing on the

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4th of July, and the case stands on the same footing in this respect as the admission of facts by parties in a suit. It was to the mutual advantage of the plaintiff and defendant in this case that the evidence that had already been taken on both sides should not be gone through again, and the justices who heard the case were not in a position to exercise a discretion given them by the second section of *The Small Debts Courts Act of 1867 Amendment Act*. They could not judge from the demeanour of the witnesses whether they ought to be allowed their costs or not. I order, therefore, that the record in this case be further amended by substituting £2 2s. in place of £4 4s. professional costs, and by striking out £2 for witnesses' expenses. The verdict, as amended, will be for the defendant upon the whole record, with £5 6s. costs. I discharge the order *nisi* for a writ, and make no order as to the costs of the present application.

Attorney for the plaintiff: *J. O'Sullivan*.

Attorneys for the defendants: *Thompson & Hellicar*.

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BEARKLEY *v.* PURTILL.

Specific performance—Sale of land.

[IN EQUITY.]
1877.
20th July.

Cockle, C.J.

It was a condition of sale of certain land by auction that the balance of the purchase money above £100 should be paid by a promissory note at four months, and that, upon payment in full of the purchase money, the vendor should execute a conveyance of the land. A purchaser gave his promissory note for the balance of his purchase money, and before it became due paid the amount into the bank at which it was due, to the credit of the auctioneer by whom the land was sold. The promissory note was not met, and no conveyance was executed. The vendor died, leaving a will, by which he appointed executors, and which was duly proved. On a suit being brought against the executors by the purchaser for the specific performance of the agreement for sale, Cockle, C.J., directed that the defendants should execute a transfer of the land to the plaintiff on payment of the balance of the purchase money, and that the plaintiff should pay the costs of the suit; or, if the defendants decline to execute a transfer, that damages should be assessed, and each party pay his own costs.

MOTION for a decree for specific performance or in the alternative for damages.

John Sondergeld, being the registered proprietor of portion 40, in the Toowoomba Agricultural Reserve, on the fourteenth day of December, 1874, caused it to be put up to auction, subject to the following conditions:—That the purchaser should pay a deposit of £100, and give his acceptance for the residue of the purchase money at four months. bearing interest at ten per cent.; that the vendor should, upon the payment of the full amount of the purchase money, execute a conveyance of the land to the purchaser.

The plaintiff, Archibald Bearkley, became the purchaser of the land at the auction at the price of £215, and paid £100 cash to the auctioneer, and gave him his acceptance for the balance at four months, payable at the Queensland National Bank, Toowoomba, and a day was agreed upon by Sondergeld and the plaintiff for executing a transfer of the land. Sondergeld, however, never executed any transfer, and always refused to execute one. Before the commencement of the suit Sondergeld died, leaving a will which was duly proved, and by which he appointed the defendants his executors. They also declined to execute a transfer of the land to the plaintiff, and this suit was brought by him for the specific performance of the agreement. The defendants,

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by their answer, denied that the purchase money had ever been paid by the plaintiff. The evidence in the case showed that the promissory note was lodged in the Queensland National Bank for presentation, and that the amount of it was paid by the plaintiff into the bank to the credit of the auctioneer by whom the land was sold. At the time of the commencement of the suit it was still held by the bank for the auctioneer, and the promissory note had never been met.

Harding, for the plaintiff.

Griffith, A.G., and *Beor*, for the defendant.

COCKLE, C.J. It has not been contended that the right, if any, of the plaintiff has been abandoned, or that time has been made of the essence of the contract. Judging from the projected receipt on the back of the agreement, it was intended that the bill or promissory note should be necessarily payable at the bank named; but in such case the money should have been paid in to the credit of the plaintiff, as otherwise the endorsee or bearer would not be paid, nor even if Mr. Sondergeld were the holder could he be paid without his own agent's authority. The intention, however, was not carried into effect, and I have to look at other facts. It would appear, on the evidence of Mr. Mackenzie, the manager of the bank, that £118 was, on April 17th, 1875, paid into the bank by the plaintiff to the credit of Mr. Robinson, the auctioneer, for the purpose of retiring a promissory note made by the plaintiff, in favour of Mr. Sondergeld; that the money was very lately lying in the bank to the same credit; that the note was left at the bank by Mr. Robinson, to whom it was returned on June 26, 1877; that by a note in the corner the promissory note was made payable at the same bank; and that it was left with Mr. Mackenzie for presentation at maturity. According to the affidavit of Mr. Robinson (par. 5), on April 17, 1875, the plaintiff paid £118 into the bank to provide for the promissory note, and that £118 is now held by the bank for Mr. Robinson, as agent for Mr. Sondergeld, to provide for the same; and it would seem (par. 2) that the note came into Mr. Robinson's hands from the plaintiff. From Mr. Hamilton's affidavit (par. 7) it appears that the note was in favour of Mr. Sondergeld, and from the plaintiff's affidavit (par. 7) that it was at the request of Mr. Robinson that the plaintiff paid the £118 into the bank. It is not shown that Mr. Sondergeld ever authorised or required, or even wished or contemplated, the payment to Mr. Robinson's credit, or ever recognised such payment as a payment to him of the note. Mr. Robinson's letters

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(par. 6) are consistent with the supposition that the note required endorsement, and was not endorsed by Mr. Sondergeld. That the note was not paid at maturity, and was very lately in Mr. Robinson's possession, are facts equally consistent with the supposition. If it be payable to bearer, that fact might have been shown; as it is, there is a defect of proof of authority to the agent to receive, or to the plaintiff to pay to the agent's credit, or to the agent to have the money paid to his own credit at the bank. I do not find that the £118 was paid, and I think the plaintiff was never absolutely entitled as against the trustees. If the defendant Purtill wishes for his costs, the transfer must, on payment of the remainder of the purchase money, be made. If he consent to do this, the plaintiff must pay the costs of this suit. If he refuses, there must be an assessment of damages; but I shall leave the parties to bear their own respective costs hitherto incurred. The defendant may pay in a sum to cover damages. The taking forcible possession (to say nothing of the accompanying circumstances) is an inexpedient course for a man to pursue who wishes for the interposition of this Court. I cannot, however, accede to paragraph 19 of the answer. The remedy was under s. 13 of *The Common Law Practice Act*. Leave to apply, if necessary.

Solicitors for plaintiff: *Hamilton & Son*, by *Thynne*.

Solicitors for defendant: *Dodd*, by *Daly & Abbott*.

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WATSON v. BECKERLEG.

Administration—Intestacy—Personal representative of debtor—Curator of Intestate Estates.

1877.
17th August.

Lutwyche, J.

The Curator of Intestate Estates, who has duly acted as such in the administration of the estate of a person dying in Queensland, is his legal personal representative.

SUIT by creditors for administration of the real and personal estate of James Beckerleg, deceased.

The deceased, died intestate at Rockhampton, and unmarried. The defendants were Thomas H. Beckerleg, a brother resident in England, the heir-at-law of the intestate, and the Curator of Intestate Estates. An affidavit of the Curator was read, which stated that he had administered all the personal estate of the intestate, under an order made by Lilley, J., on June 17th, 1874, and that it was insufficient to discharge his debts.

Griffith, A.G., and *Beor* with him, for the plaintiff, prayed for the usual decree.

Harding, for the defendant Beckerleg objected that the personal representative of the deceased was not before the Court.

LUTWYCHE, J. The Curator of Intestate Estates is the legal personal representative. Decree as prayed, with costs.

Solicitors for the plaintiff: *Hamilton & Sons*, Toowoomba, by *A. J. Thynne.*

Solicitors for the defendants: *Dodd*, Toowoomba, by *Daly & Abbott.*

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BYERS *v.* ROLLS.

[IN BANCO.]
1877.
5th September.
6th September.

Cockle, C.J.
Lutwyche, J.
Lilley, J.

*Appeal—Special case—Gold Fields Act, 1874 (38 Vic., No. 11), ss. 71, 73, 74.**

On an appeal from an inferior court to the Supreme Court, the special case should state the questions to be decided.

Proof of s. 73 of *The Gold Fields Act, 1874*, having been complied with is not *primâ facie* proof that s. 71 has also been complied with.

SPECIAL case by way of appeal from the decision of the Judge of the Northern Supreme Court.

The case came before the Northern Supreme Court Judge (Mr. Justice Sheppard) by way of an appeal from a decision of the Northern District Court, held before Mr. Judge Blake, at Cooktown, before whom it came in the nature of a rehearing from the warden (W. M. Mowbray) and assessors of the Hodgkinson goldfield. The case, as stated by the District Court Judge for the decision of the Northern Supreme Court, was to the effect that, upon the appeal being called on before Mr. Judge Blake, the Registrar produced certain papers which had been transmitted to him by the warden, purported to be copies, signed and certified under the hand of the said warden (as prescribed by s. 73 of *The Goldfields Act*), of the plaint, notice of defence, and minutes of the decision of the warden and assessors, together with the order thereunder. The learned judge was satisfied that these papers were genuine, and that they were, as they purported to be, signed and certified by the warden. Mr. Pring, Q.C., who appeared as counsel for the then appellant (Rolls), having called the attention of the judge to the provisions of the statute under which the appeal was brought, Mr. F. A. Cooper, who appeared for the respondents (Byers and party), by way of a preliminary objection to the hearing of the appeal, said the notice of the appeal which had been served upon the respondents did not state any grounds of objection. He at the same time produced a paper which he alleged to be the notice of appeal that had been served upon the respondents, and demanded that the

* Cf. 62 Vic., No. 24, s. 150.

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judge should read it. After hearing argument, the judge, being satisfied that the notice of appeal had been given, overruled the objection, and heard the appeal. At the close of the respondents' case, the judge reversed the decision of the court below on the merits. After he had pronounced his judgment, Mr. Morgan, who appeared with Mr. Cooper for the respondents, asked the judge to reserve, as a point of law for the consideration of the Supreme Court, the question whether proof of service of the notice of appeal should not have been given before the appeal was heard. This objection had not before been raised by the respondents' counsel or attorney, and the notice of appeal had been produced in Court by the respondents' counsel, and objected to on the grounds stated, which objection had been overruled. The judge was of opinion that s. 73 having been complied with, the appeal was properly brought; and the question for the decision of the Supreme Court was whether, under the circumstances, he was right.

When this case came before the Northern Supreme Court Judge, he said, in giving his decision, that two questions arose upon the case stated—(1) Whether the notice of appeal served on the respondents upon the appeal from the Warden's Court to the District Court should set forth the grounds of the appeal; and (2) whether proof of the service of notice of appeal is a condition precedent to the hearing of the appeal—and, upholding the ruling given in the Court below, dismissed the appeal, with costs; after which the case was sent down for the decision of the Full Court at Brisbane.

The questions now submitted by counsel for the present appellants were—(1) That there was not sufficient evidence before the District Court Judge that the papers mentioned in s. 73 of *The Goldfields Act* were properly before the Court; and (2) that no grounds of appeal were stated. Objection was taken that these were not the grounds stated; and as the case, as stated, was ambiguous on the point, in the course of the argument an application was made, on behalf of the appellants, to refer it back.

Beor and *Garrick*, for the appellants.

Griffith, *A.G.*, and *Pring*, *Q.C.*, for the respondent.

Cockle, C.J. First, the Judge of the District Court is to give his report in the shape of a special case; and I think some such form as that which will be found at p. 451 of Chitty's Forms of 1862 ought to be followed. That it should be said the questions for the opinion of the Court are, first, so-and-so; second, so-and-so; and that afterwards

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the alternative form of judgment expected of the Court should also be set out. The only question stated by the learned Judge of the Northern District Court for our opinion is, whether, s. 73 having been complied with, all further inquiry was dispensed with. Answering that question by itself, we simply say that the compliance with s. 73 did not dispense with further inquiry so far as the matters in s. 71 are concerned. But it is not sufficient to express this opinion, for it may be that behind the other facts glanced at in the special case—so called—there may lie the two questions raised by our brother Sheppard at Bowen, but not raised in the case itself, or not stated, and no opinions asked upon them. I say that behind the facts of the case may lurk the other two questions which Mr. Justice Sheppard says arise in the case; and it may be that a further question may arise respecting the existence or non-existence of proof of the notice, in fact, to the Warden. Under these circumstances, we are unable to decide the question; because the statute requires them to be raised for us, and raised for us they are not. The only order, therefore, which we can make is, that the order of the Supreme Court, Bowen, be rescinded, and that no further order be made by that Court until the case has, on the application of either of the parties, been remitted by the Supreme Court at Bowen to the Northern District Court Judge to be re-stated. There will be no order as to costs.

Solicitors for the appellants: *Morgan*, Cooktown, by *Daly & Abbott.*

Solicitor for the respondent: *W. H. Wilson.*

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RAFF *v.* JONES.

[IN EQUITY.]
1877.
18th September.
Lilley, J.

Insolvency Act of 1864 (28 Vic., No. 25), ss. 6, 88, 89, 90—Mortgage —Redemption—Mortgagee in possession—Insolvency—Official and Creditors' Assignees—Costs.

Held, that the Official and Creditors' Assignees under *The Insolvency Act, 1864*, were not joint tenants, and *held further*, that neither of them could separately transfer that part of the insolvent estate of which they were assignees.

An assignee under *The Insolvency Act, 1864*, cannot delegate his general authority.

C. mortgaged lands to J., and, in August, 1866, assigned the equity of redemption to M., by way of mortgage, with a proviso for redemption. A month afterwards C. became insolvent. R. later became official assignee of his estate, and F. was thereafter appointed creditors' assignee. J. then took possession of the mortgaged land as mortgagee, and remained in possession and in receipt of the rents and profits till the year 1877. M. proved in the insolvency for the difference between his debt and the value of his security. The assets, including C.'s equity of redemption, were sold by one of the assignees without the concurrence of the other.

Held, that the sale was invalid as to the whole of C.'s interest; that M. did not, by proving for the difference between his debt and the value of his security, become a purchaser of the equity of redemption, and that the security remained a pledge redeemable by the assignees; and that the case was not one in which the Court would oblige the mortgagee to account for the rents received by him while in possession.

In a suit for redemption of mortgaged lands, the mortgagee is entitled to his costs, where his refusal to reconvey upon tender of the amount due for principal and interest is founded upon a reasonable and *bonâ fide* doubt of the title of the person claiming to redeem.

SUIT for the redemption of a mortgaged estate.

All the facts sufficiently appear in the judgment.

Griffith, A.G., and *Harding*, for the plaintiff, cited *Ex parte Griffin* (2 Gl. & J. 114), *Doiley* v. *Sherratt* (2 Eq. Cas. Ab. 742), *Boursot* v. *Savage* (L.R. 2 Eq. 134), *Jones* v. *Smith* (1 Ha. 43), *Neesom* v. *Clarkson* (2 Ha. 163), *Webb* v. *Rorke* (2 Sch. & Lef. 672; Seton 399, 400), *Incorporated Society* v. *Richards* (1 Dr. & War. 287), *Powell* v. *Trotter* (1 Dr. & S. 388), *Harmer* v. *Priestley* (16 Beav. 569; 22 L.J. Ch. 1041), *Hosken* v. *Sincock* (11 Jur. N.S. 477; 34 L.J. Ch. 435), *Coppin* v. *Fernyhough* (2 Bro. C.C. 291), *Proctor* v. *Cooper* (2 Drew 1).

Pring, Q.C., and *Power*, for the defendant Jones, cited *Thornbrough* v. *Baker* (2 Tudor L.C. 973), *Wilson* v. *Clewer* (3 Beav. 130), *Powell* v.

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Trotter (1 Dr. & S. 388), *Horlock* v. *Smith* (1 Colly. 287), *Patch* v. *Wild* (30 Beav. 99), *Neeson* v. *Clarkson* (4 Ha. 104), *Davis* v. *May* (19 Ves. 383), *Wilson* v. *Metcalfe* (3 Madd. 45), *Loftus* v. *Swift* (2 Sch. & Lef. 642), *Detillin* v. *Gale* (7 Ves. 583, at p. 672).

Garrick, for the Bank.

Real, for Maria Costin, cited *Jackson* v. *Cator* (5 Ves. 689), *Proctor* v. *Cooper* (2 Drew 1), *Hunsden* v. *Cheyney* (2 Vern. 150), *Raw* v. *Pote* (2 Vern. 239), *Draper* v. *Borlace* (2 Vern. 370), *Ibbotson* v. *Rhodes* (2 Vern. 554), *Berrisford* v. *Milward* (2 Atk. 49), *Oliver* v. *King* (8 DeG. M. & G. 110), *Morecock* v. *Dickens* (Amb. 678), *Fuller* v. *Bennett* (2 Ha. 394), *Ex parte Jackson* (5 Ves. 357), *Ex parte Wright* (1 Dea. & C. 573), *Ex parte Allison* (Fonb. 26).

Griffith, A.G., in reply: *Horlock* v. *Smith* (1 Colly. 287), *Patch* v. *Wild* (40 Beav. 99).

Lilley, J. In 1862, W. J. Costin being seised of certain land in Brisbane, mortgaged it in fee to one Hughes and the defendant Jones on a joint account; Costin made a further charge to them, amounting, with the original mortgage, to £1300. He afterwards in August, 1866, assigned his equity of redemption to Isaac Markwell, who had become surety for him to the defendant (Commercial Bank) by way of mortgage, with a proviso of redemption. Hughes has since died, and the legal estate is now in Jones, subject to the equity of redemption, the right to which is contested in this suit. Costin became insolvent in September, 1866, and his estate vested in the Official Assignee, William Pickering (s. 88, *Insolvency Act of 1864*). At the first meeting of creditors, the plaintiff Forrest was elected creditors' assignee; the election was confirmed, and the estate then vested in him jointly with the Official Assignee (s. 89). The equity of redemption of the mortgaged estate was inserted in his schedule by W. J. Costin as an asset. The defendants Jones and Hughes entered into possession of the property, but did not prove under the insolvency, and nothing was done by the assignees to realise the insolvent's interest for the benefit of the creditors. Jones has continued mortgagee in possession, and in receipt of the rents and profits up to the present time. Markwell proved contingently under the insolvency, and valued his security at £1000, his proof being for a deficiency. Markwell became ultimately liable to pay for Costin only one promissory note, and assigned his interest in the property to the defendant bank, subject to redemption. He has paid not more than £100, if he has paid even that sum, in

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respect of his suretyship for Costin. Pickering died in March, 1868, and the plaintiff Raff was appointed in his stead as Official Assignee, and the estate then vested in him jointly with the plaintiff Forrest (s. 6 and latter part of s. 89). Raff seems to have been led by an examination of Pickering's books to conclude that the whole estate had been disposed of, but he must be taken by me to have had notice of the existence of the equity of redemption as a possible asset. Pickering before his death had sold other real estate to Miskin, who took no transfer, and Raff from time to time executed alone, without the concurrence of Forrest and without his knowledge, conveyances in favour of sub-purchasers from Miskin In May or June, 1876, the defendant Maria Costin purchased the remaining allotments from Miskin, and immediately entered into negotiations with Raff through her solicitor Murphy and W. J. Costin for the purchase of the "remaining estate" in the insolvent estate, and a bargain was concluded at the price of £5 5s. Raff executed to the defendant, Maria Costin, a deed dated the 12th July, 1876, he which he described himself as "official and sole assignee," and conveyed to her "all the real and personal estate, equities of redemption, &c., and all other assets, &c., forming the whole or any part of the estate of W. J. Costin." There is no particular description in this deed of any part of the property or assets. Raff asserts that he believed he was transferring merely the remainder ot Miskin's purchase, and was in entire ignorance of the existence of the equity of redemption in the mortgaged estate in Jones' possession. Forrest knew nothing of the negotiations between Raff and Maria Costin, nor of the deed of the 12th July, 1876, until the 30th October following, on which day he instructed his solicitor to take steps to protect the interests of the creditors.

On the 3rd August, 1876, Maria Costin obtained an assignment by deed-poll from Isaac Markwell in consideration of £100 recited to have been paid, but which she merely promised to pay to him.

Under this last-mentioned instrument and Raff's deed of the 12th July, 1876, she claims to be absolutely entitled to the equity of redemption of the mortgaged estate in the possession of Jones. On the other hand, the plaintiffs Raff and Forrest seek a declaration that they are entitled to redeem, inasmuch as Raff's deed was unauthorised, was a breach of trust and inoperative, but, if effectual to pass the estate, was executed under such circumstances as entitle them to have it declared void and to have it set aside.

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The first question to be decided is whether Raff's deed was effectual to pass the whole estate? If it is, it must rest upon either a general or particular delegation of authority. An assignee in insolvency cannot delegate his general authority to his colleague (*Douglas* v. *Browne*, 1 Mont. 93)—that would be to appoint or substitute a new assignee, which the Court only can do. An authority to act by deed must be created by deed. In the absence of authority so given, one of the assignees could have no power at law to execute a deed transferring the whole interest in the estate (*Harrison* v. *Jackson*, 7 T.R. 207; *Steiglitz* v. *Egginton*, 1 Holt N.P. 141; and *Williams* v. *Walsby*, 4 Esp. 220). If such authority could be assumed by the Official Assignee, the purpose of appointing a Creditors' Assignee, which is for the protection of the interests of the creditors, might be defeated. Moreover, throughout our *Insolvency Act of 1864* the powers and authorities are given to the "assignees" without any words of severance. It has been suggested by plaintiffs' counsel, but not pressed or argued by counsel for defendant, that Maria Costin might take a moiety of the estate, or Raff's interest in it, by the conversion into severalty of some supposed estate of joint tenancy in the assignees. A joint tenancy is *created* only by deed or devise, and so arises either by *grant* or *purchase* —that is, by the act of the parties; it never arises by the mere act of law, and so it does not come by descent or succession (2 Bla. Com. by Christian 179, and Watkins' Conveyancing, 152). The estate of the assignees (Raff and Forrest) vest in them by force of the statute by operation of law, and would pass to their successors, if any were ever appointed. (*See* ss. 6, 88, and 89 of the Act.) They took the estate which the insolvent had at the time of his insolvency for the purpose of sale and distribution amongst his creditors, but they did not take as joint tenants. Raff, therefore, could not pass to Maria Costin any interest severable from that of his co-assignee Forrest. She must therefore take the whole or none. As Forrest could make no delegation of his general authority as assignee, and gave no express particular power to sell the equity, or to execute the deed of 12th July, 1876, and as Raff could not convey a part, it follows that, as an instrument capable of passing at law either the whole or a part of the estate of the assignees in the mortgaged property, it was inoperative. The defendant Maria Costin insists, nevertheless, that it is effectual in equity, if not at law, because Forrest by his conduct has precluded himself from denying the deed of Raff to be the deed of both. It is

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shown that in the lifetime of Pickering a portion of the insolvent's property had been advertised for sale "by order of the Official Assignee." Supposing Forrest to have seen the newspaper, it might prove at most that he had permitted that particular act to be done, but as showing that he had given a general authority to Pickering to act without him it would prove nothing, and would, as we have seen, be of no effect even if it proved so much. Nor had it any connection with the property which is the subject-matter of this litigation. Forrest has not denied defendant Costin's statement that he allowed Pickering to act as sole assignee. It seems that he did not interfere with Pickering's administration; but that cannot deprive him of the right to interpose when the interests of the creditors require him to do so. It is further pressed upon me that Forrest must have known of the conveyances by Raff alone to Miskin's sub-purchasers, but this he explicitly denies; and even if he had admitted it, however effectual it might have been to protect those purchasers, it could not amount to a valid general delegation, and was not an express authority touching the sale of the equity or the deed of 12th July, 1876. Forrest has directly denied that he knew Raff was acting as sole assignee, or had made the deed of July, 1876—and I believe him. He is also confirmed by Raff's testimony that he himself was not aware there was any creditors' assignee. I find, therefore, that Forrest, in fact, gave neither general nor particular authority to Raff to execute the deed of the 12th July, 1876, and that his acts and conduct did not give either previous sanction or subsequent confirmation to it. There was never anything like acquiescence by Forrest. Raff's deed was consequently a breach of trust, and the defendant Maria Costin's title, so far as it is supposed to rest on his deed, cannot stand. A deed would not be necessary to pass the right of redemption in equity if there were a sufficient contract otherwise, but there must be authority in the vendor to support it. I should be satisfied to rest my decision as to Raff's deed on the conclusions already stated by me, but the plaintiffs have urged one or two other topics which I must consider and decide. They say that the deed was fraudulent because defendant Costin concealed from Raff that he was selling the equity of redemption, and so obtained it at a grossly inadequate price. I think it is clear that Raff, with this particular asset in the schedule, must be held responsible for, and be taken to have had knowledge that he was selling it when he sold the "remaining assets;" and although a sale by a trustee for a grossly inadequate

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value would be evidence of fraud, it must not be forgotten that the charges upon the property were at that time unknown quantities which have only been discovered since the beginning of this suit, and that there was no certainty that the property might be acquired without great expense and litigation. I think, also, that there was nothing in the nature of mistake entitling the plaintiffs to relief. The case lacks all the elements of mistake; with Raff's knowledge actual or imputed, and with the actual knowledge of the defendant Maria Costin that she was buying the assignee's rights, there was no mistake, and beyond any reasonable doubt no *mutual* mistake, for we find her taking a sale or gift from Markwell on the 3rd August, within three weeks of the 12th July, and in September her agent, W. J. Costin, tried to get the legal estate from defendant Jones. She clearly knew she was buying the equity of redemption from Raff. The defendant Costin insists that without Raff's deed she has a good title under Markwell's deed-poll of August, 1876; that he conveyed the equity of redemption to her which had been mortgaged to him by Costin, and that he did so in exercise of the power of sale, and so extinguished it. The deed contains no evidence of this latter fact, and it would have been a fraud on the defendant bank if he had done so, because in July, 1867, he had assigned to them his mortgage with all his rights and remedies under it. The construction of the deed-poll is, however, very simple. It is an assignment of Markwell's mortgage debt (if any) with the accessory security for it, and is in truth merely a transfer to Maria Costin of Markwell's right to redeem his pledge from the bank, and of any sums he may have paid on account towards that object. She will therefore be entitled to be paid to the same extent that Markwell would on a redemption from him. The deed was not and could not be an absolute sale of W. J. Costin's equity of redemption or of that of his assignees. But it is contended that Markwell was not himself a mere mortgagee—that he became a purchaser when he valued his security, and deducting it proved for the balance of his liability as surety. There is nothing in *The Insolvency Act of 1864* to justify such a claim. Section 129 gives a creditor who has an insufficient security the right to receive dividends on the difference between the amount of his debt and the value of his security, but this last remains a pledge redeemable by the assignees. The section is entirely for the benefit of the creditor, and does not deprive the assignees of their rights. The consequent claim to priority by registration which the defendant Costin has made is unimportant if

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she was not a purchaser, because it is conceded to her as mortgagee in right of Markwell. But even if she were a purchaser she had "notice of the insolvency" in Raff's deed, and could not displace the title of the assignees under s. 90 of the Act. The defendant Maria Costin claims, however, to be under some of the instruments a *bonâ fide* purchaser for value without notice of Forrest's title. I have disposed of her position as purchaser, and, I think, she had constructive notice that Forrest was assignee. She had actual notice of the insolvency in Raff's deed, and that he was assuming to act as "sole" assignee, which she must be taken to have known in law was essential to give her a title from him when he acted alone. She was thus put upon inquiry, and by a search in the proceedings in Costin's insolvency she would have found the record of Forrest's appointment and confirmation. Her own solicitor, too, prepared the deed describing Raff as "sole" assignee. She must be held, therefore, to have had notice of a circumstance which she might have ascertained by the exercise of ordinary prudence and business precaution. I do not think the facts sufficient to charge her with notice through Mr. Murphy. This being my view of her case as to notice, it is not necessary to dwell minutely on the facts tending to show constructive notice through her agent, W. J. Costin. He swears he *never knew* that Forrest was creditors' assignee, and, although I think that is improbable, his statement is one which a person who had entirely forgotten the circumstance might well have made. It appears, also, that in respect of the Hill End Estate, where he could have no reason, that I can see, to take titles on defendant Costin's behalf from Raff alone, he acted seemingly in entire ignorance of Forrest's assigneeship. We may impute to the defendant knowledge which her agent may reasonably be believed to remember, but we cannot hold her responsible for his memory or for circumstances which he has forgotten. There will be a declaration that the plaintiffs are entitled to redeem. The defendant bank and the defendant Jones are entitled to the benefit of their securities. In the case of the defendant Jones, however, the plaintiffs claim that the account should be taken with rents—that the excess of rents after payment of the interest may go towards sinking the principal. The account is generally ordered to be taken with rests when there is no interest in arrear—when the mortgagee takes possession; but the rule is not inflexible, and where other circumstances justify or require the mortgagee for the protection of the estate to take possession, it may be ordered otherwise. All the circumstances must

RAFF v. JONES.

Lilley, J.

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be regarded, and in this case the mortgagee was compelled to take possession by the insolvency of the mortgagor; the assignees seem to have abandoned the property not formally, but in fact, as insufficient to satisfy the charges upon it, and, after an ineffectual attempt to sell it, it was left for ten years in the possession of the mortgagee as owner. I think it would not be equitable to make him now liable as a receiver in past years of his principal in driblets which he could not profitably re-invest, and which he was encouraged to believe was income and not capital. Moreover, as between the assignees and a secured creditor, the interest may be said to be always in arrear, because the assignees have a right to anticipate the time agreed upon for redemption, and to make the mortgagee receive his money at a time when it may be difficult to find a new investment (s. 96 of the Act). He may also prove for his principal and interest under the insolvency at once, deducting the value of his security. There will be no rests. The ordinary decree for redemption would give the mortgagee his costs, but the plaintiffs insist that the defendant Jones has so conducted himself that he should pay costs, or at least have his own disallowed. It is shown that a sum supposed to be sufficient to pay off his debt, with six months' interest in lieu of notice, was tendered to him by the plaintiffs, and that he refused to accept it, alleging that his deceased co-trustee Hughes had purchased the equity of redemption at auction in Brisbane. This would, of course, be a fraud; and there is no proof that Hughes did so. But Jones believed he had acquired the equity of redemption fairly, and all the parties interested by their conduct had allowed that belief to remain undisturbed. When asked for accounts he said he had kept none (I suppose he meant as mortgagee), which is not surprising considering his long possession without a claim. It appears, however, that accounts have been kept by Hughes' family. When a reconveyance to the plaintiffs was tendered to Jones for execution he refused to sign it, giving the same reasons that he had on the tender being made to him. In all the cases where a mortgagee has lost his costs or been ordered to pay costs, his conduct has been vexatious or oppressive. The refusal to accept a tender of the money due to him, and to reconvey where the right of the party tendering is clear and indisputable, or the assertion in the suit of an unfounded right to the property by the mortgagee, would be fit cases for the payment of costs; and it is only in such cases, so far as I can discover, that he has been ordered to pay them. I think it is clearly shown that in September, 1876, before

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Jones knew that the plaintiffs were trying to redeem, he knew from W. J. Costin, who visited Rockhampton, that the equity of redemption had been purchased by Maria Costin; this was before the tender either of the money or the re-conveyance. To accede to the plaintiffs' request might have exposed him to litigation with the defendant Costin; and although it must have been at last unsuccessful, yet in judging of conduct with a penal consequence in view, I must regard the conduct of one of the plaintiffs, who by his own deed and breach of trust had subjected his title to serious contest and difficulty. The plaintiffs ought to have told Jones of the existence of Raff's deed. The defendant Jones had not a clear way before him to accept the tender, his conduct was not vexatious or oppressive, he has submitted to account, and there must be in his case, also, the ordinary decree for redemption with his costs and all just allowances. The defendant Maria Costin, however, who has persisted in the assertion of an unfounded claim, must pay costs of the suit, limited to the contest between herself and the plaintiffs. She may set off against costs the £5 5s. paid to Raff, and any sum that may upon an inquiry be found to be due to her in right of Markwell's deed-pole.

Declare the deed of 12th July, 1876 to be void. Order it to be set aside as to the property in the pleadings. The rest of the decree will be according to the prayer of the Bill, modified by my judgment.

Solicitors for the plaintiffs: *Hart & Flower.*

Solicitors for defendant Jones: *Rees R. Jones & Brown.*

Solicitor for the Commercial Bank: *P. Macpherson.*

Solicitor for Maria Costin: *W. E. Murphy.*

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In re WILDASH AND KENNETH HUTCHISON,
Ex parte MISKIN.

1877.
12th September.
13th September.
14th September.
17th September.
18th September.
24th September.

Lilley, J.

Insolvency Act of 1874 (38 Vic., No. 5), ss. 87, 107, 108, 109—Real Property Act of 1861 (25 Vic., No. 14), ss. 9, 43, 44, 56, 99, 101, 102 — Equitable mortgage — Priorities — Fraudulent preference — Caveat.

In 1875, W. and K.H., then owners and conditional lessees of certain lands in Queensland, transferred their leases to G. H., the latter being unaware of the transfer, W. acting for him under a general power of attorney. The balance of the rents having been subsequently paid, Crown grants of the lands were issued to G. H. In April, 1876, the lands were transferred from G. H. to A. H. without the knowledge of either of them, W. acting for G. H., and the solicitor for all the parties acting under a general power of attorney for A. H. No evidence was given of any consideration for the transfer. In September, 1876, W. and K. H. became insolvent, and in January, 1877, obtained certificates of discharge. On June 5th, 1877, A. H.'s attorney deposited the deeds relating to the lands with a Bank to cover an advance to W. and K. H. On June 16th, 1877, the Official Trustee in Insolvency lodged a caveat in the Real Property Office, against any dealings with the land. The bank made no advance until June 25th.

Held, that the transfer to G. H. and subsequent dealings with the land were fraudulent and void under ss. 107, 108, 109 of *The Insolvency Act of 1874.*

Held, also, that *The Real Property Act of 1861** does not invalidate equitable mortgages by deposit.

Held, also, that the trustee having lodged the caveat, had protected his claim against all subsequent transactions, and that his claim had therefore priority over that of the bank.

MOTION to set aside certain transfers as fraudulent.

The insolvents were the proprietors of a station in the neighbourhood of Warwick, and were conditional lessees of certain portions of land on or adjoining their stations. In the year 1875 they transferred the leases to George Hutchison, a brother of Kenneth Hutchison, but without the knowledge of George Hutchison, the matter being conducted on his behalf by Wildash, who held a general power of attorney from him. The balance of rents was subsequently paid, but by whom it did not appear, and Crown grants of the lands were issued to George Hutchison. The lands were afterwards, in April, 1876, transferred from George to Alexander Hutchison, also a brother of Kenneth

* *See* 41 Vic., No. 18, s. 30.

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Hutchison, and a creditor of the firm of Wildash & Hutchison. The transfer was made without the knowledge of either George or Alexander Hutchison, Wildash acting for the former, and the solicitor for all the parties acting under a general power of attorney for Alexander. It did not appear that any consideration passed from Alexander to George Hutchison. In September, 1876, Wildash and Kenneth Hutchison became insolvent, and obtained their discharge in January or February, 1877. On the 5th of June, 1877, the certificates of title to the land were deposited by Alexander Hutchison's attorney in the Joint Stock Bank to cover an advance to Wildash and Kenneth Hutchison. The advance was made on the 25th of June. In the meanwhile the trustee of the insolvent estate of Wildash and Kenneth Hutchison had, on the 16th of June, entered a *caveat* in the Real Property Office against any dealings with the land.

Griffith, A.G., and *Harding*, moved on behalf of the trustee, and cited *Newton* v. *Newton* (L.R. 6 Eq. 135 ; L.R. 4 Ch. 143), *Cory* v. *Eyre* (1 De J. & S. 149), *Thorpe* v. *Holdsworth* (L.R. 7 Eq. 139), *Phillips* v. *Phillips* (31 L.J. Ch. 321), *Parker* v. *Clarke* (30 Beav. 54), *Russell* v. *Russell* (1 White and Tudor 674), *Hughes* v. *Morris* (2 DeG. M. & G. 349, 355).

Garrick, for Alexander Hutchison, cited *Ex parte Blackburn* (L.R. 12 Eq. 358), *Ex parte Topham* (L.R. 8 Ch. 614).

Pring, Q.C., and *Beor*, for the Joint Stock Bank, cited *Ex parte Ainsworth, In re Goren* (1 Mont. & A. 451), *Ex parte Bolland* (L.R. 7 Ch. 24), *Hunter* v. *Walters* (L.R. 11 Eq. 292).

LILLEY, J. The motion asks to set aside certain instruments as void against the Official Trustee, etc., etc., on the ground that they are fraudulent preferences. (Here His Honour stated the facts relating to the deeds of 29th August, Crown grants, and certificates of title, and deposit with the bank.) What is the result of these transactions? At the beginning the insolvents are possessed of the property. Long (for years) before, and at the time of the act of insolvency, they were the lessees under the Crown. Then by transfers, of which the transferee, under Geo. R. Hutchison, was entirely ignorant, they divested themselves of their leases. Of the object of those transfers they gave contradictory and unreliable accounts. The balance of rents is afterwards paid by someone, we know not by whom, and Crown grants are issued in the name of Geo. R. Hutchison. He knows nothing of these or of his estate in the lands. Then a memorandum of conveyance

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under *The Real Property Act* is made from him to the respondent, Alexander R. Hutchison. George knows nothing of this, and he receives none of the alleged consideration money and no account of it from Wildash or anybody. Alexander, too, knows nothing of the transfers, of the memorandum of conveyance, of the purchase of the land for him, nor that any part of the £2000 given to Liddle went to George, or was ever intended to go to him. All these affairs were negotiated, deeds signed, and moneys passed between the insolvents, Wildash and Hutchison, and their solicitor, Liddle, without the knowledge of the persons who were mainly interested—the young Hutchisons—by means of powers of attorney to Wildash and Liddle; and at the end of five months, after the insolvents get their certificates of discharge, we find the certificates of title of what were ostensibly Alexander R. Hutchison's lands pledged to the bank by Liddle without Alexander's knowledge or authority, with a memorandum of deposit for moneys advanced to the insolvents, Wildash and Hutchison. This was done after notice to Liddle, who was also solicitor for Alexander R. Hutchison, that the Official Trustee claimed the lands. There is nothing before me to displace the evidence that Alexander R. Hutchison was a creditor. His moneys have most probably been received and used by the insolvents, or one of them, but there is no reliable evidence to connect the payments with the purchase of these lands. The proper conclusion seems beyond reasonable doubt that the insolvents fraudulently divested themselves of the ownership of these lands in favour of a person who seems to have been a creditor. I decide nothing to the prejudice of Alexander's rights (if any) under the deed of 3rd April, 1876, except that it will not support the subsequent dealings with the land. I think, therefore, all these transactions were fraudulent and void, whether we look to ss. 107, 108, or 109 of the Act. The bank claim, however, that they are within the exceptions to ss. 107 and 108, as "incumbrancers in good faith and for valuable consideration" (s. 107), and as "mortgagees who had not at the time of such mortgage notice of such fraudulent preference" (s. 108). The decision on this point depends in part on the answer to the question raised: Can there be an equitable mortgage by deposit of instruments under *The Real Property Act?* There is nothing in the Act to lead me to the conclusion that equitable estates and interests cannot be created and exist in land outside the Act. The purpose of the Act is to give persons dealing with the registered owner under its forms and safeguards, as

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far as it can, an indefeasible title by registration. Dealing with the registered proprietor in pursuance of the Act, and in the absence of fraud or of any impediments expressly created by the Act itself, your title is safe. But the statute recognises the existence of trusts (ss. 77, 78, and 79, and following sections), and allows the instrument declaring them to be deposited with the Registrar-General. They are not, however, allowed to prevent the transfer or other dealing with the estate by the registered trustee (ss. 79, 80, and 81). All the old estates and interest are recognised by the Act—estates tail (s. 26), remainder (s. 36), reversions (s. 47), estates for years (s. 52), estates in fee simple (s. 58), joint tenancy (ss. 40 and 82), a beneficiary not registered (s. 84), life estates (s. 36), co-parceners and tenants in common (ss. 40, 92), etc., etc. When the statute means to exclude the incidence of an equitable interest, it does so by express words, as in s. 97, where it declares that no vendor of land under the provisions of the Act shall be entitled to an equitable lien thereon for his unpaid purchase money; and I think s. 95—as to omitting endorsements on the certificate of title—provides, by publication, for the protection not only of the registered proprietor, but of all persons dealing with the land. The Act recognises specific performance of a contract for purchase of land under the Act, no provision being made for the contract being a registered transaction (s. 96). We have, also, estates arising through natural causes, such as death, and also by operation of law, as in insolvency; and the Act recognises them, and provides for transmission. Examples might be multiplied by a diligent search through the patchwork of this ill-drawn statute to show that there was no intention to destroy legal and equitable interests outside the Act. There is nothing in the Act to justify the belief that the Legislature intended to introduce into our Real Property law the rigid rule of our Shipping Acts, that there can be no title or interest outside the register. If such is the policy of the Act, let it be explicitly declared and the whole statute recast. I have been referred, in support of the view that there cannot be an equitable mortgage by deposit, to the repealing clause of the Act, which abrogates all "laws, etc.," so far as regards their application to land under the provisions of this Act; but that is controlled by the context, "so far as they may be inconsistent with the provisions of this Act." Section 48 is also relied on (His Honour reads it). There is nothing in that or in the statute expressly requiring estates to be *created* by instrument. That section appears to me not to exclude

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equitable interests, but to relate solely to the passing of the legal estate, security, or interest under the Act, and to require them to pass by instruments capable of registration, where an instrument is used—but, perhaps, not necessarily by instruments in the form required by the Act (see interpretation clause—"instrument"). A security might be created by *deed*, *assurance*, or *will*. Now, the forms in the Act are not to be inevitably deeds (s. 9), and there is nothing restricting or controlling a disposition by will. And s. 44, also, shows that there may be estates or interests outside the certificate of title in lands which are under the Act, but which are overridden or displaced by a *bonâ fide* certificate of title. Section 56 prescribes the mode of mortgaging or encumbering the legal estate in lands under the Act, prescribes the form, but contains no words invalidating an equitable mortgage. It seems to me the Legislature would have used express words if it had been intended to destroy a right so long and firmly established as that of pledging the title-deeds of land. I adopt the language of Kindersley, V.C., in *Pryce* v. *Bury* (2 Drew 42), in describing the effect of a mere deposit:—"By the deposit, the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee." There is nothing in *The Real Property Act* inconsistent with the validity of this class of security. The statute does not create *new* estates and interests in land, nor does it abolish the old, except the vendor's lien; it does, however, create a vast practical change—it gives paramount title to the registered proprietor, and prior title to dealings in pursuance of the Act. Unless, therefore, an equitable encumbrance is protected by caveat, its practical value as a security is very doubtful, and it is not to be commended as a mode of investment. In this case there is a promise to give a bill of mortgage, but no caveat on the bank's behalf on the register. There can be no doubt that the bank were encumbrancers in good faith, and for valuable consideration, and that they had no notice of the fraudulent preference, or of the notice to Alexander Hutchison. The last and most important question now remains: Has the Official Trustee secured priority of title over the bank, either by the notice of his title in December, 1876, to Alexander Hutchison, through his solicitor or by caveat, under *The Real Property Act?* The estate and rights of the insolvents at the time of the fraudulent transfers were vested in him by force of the second section of *The Crown Lands Alienation Act of 1875*, and of *The Insolvency Act of 1874*, s. 87 (4). It

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is contended for the Official Trustee that the notice made Alexander a trustee for him, and that, his equity being equal to that of the bank, must prevail, as it arose prior in time. In all the cases cited, beginning with *Manningford* v. *Toleman* (1 Colly. 670), none of the rights or equities arose out of statute or had any statutory protection. In this case, on the contrary, the Official Trustee, and all his estates, rights, and equities, are the creatures of the Act, and limited by its conditions and circumscription. Outside the statute the whole body of the creditors have no equity against a single creditor, and the trustee is in the same position. The notice could not enlarge his title, which depended on the transactions being fraudulent preferences under the Act, and not within the protection to innocent encumbrancers. The notice, therefore, and the authorities cited in aid of it, will not avail anything for the Official Trustee. There has been nothing in his conduct, had other things been equal, to deprive him of his right to his equity. Has the caveat, then, given him a priority? Dates now become exceedingly important. The caveat, which I assume was absolute (ss. 98, 102), was entered on the 16th June, and the bank made no advance until the 25th June. Until that date they had, therefore, not complied with all the conditions of *The Insolvency Act* necessary for their protection, as innocent encumbrancers, and they had taken no steps by caveat or otherwise to protect their interest under *The Real Property Act*, although the deeds were deposited with them on the 5th June. What, then, is the effect of the Official Trustee's caveat? By s. 9 it forbids the registration of any instrument until after notice of intention to register —"no instrument affecting the land, estate, or interest, shall be registered whilst the caveat remains in force" (s. 101). And, according to the "nature of the estate, interest, or claim," it entitles the caveator to forbid the sale or mortgage or other dealing with the land, estate, "or interest" (s. 102). Certain "claims, rights, titles, or interests" may be "notified or protected" by entry in the register (s. 99). Trusts do not seem to be protected, even when notified. The only entry that can notify or protect a claim seems to be a caveat. I think a caveat is not actual or constructive notice* to all the world of a claim, and the statute itself makes provision for actual notice to the person whose estate it affects (s. 99). The caveat, however, prohibits any subsequent dealing under the Act, and with greater force outside the Act, in

* See *Queensland Trustees Limited* v. *Registrar of Titles* (5 Q.L.J. 51).

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derogation of the claim it protects, if it is well founded. The Official Trustee had consequently a title prior to that of the bank, and Alexander Hutchison will be declared to be a trustee for him. There will be other declarations in accordance with my judgment, and an order to vest the selections in the Official Trustee. The Official Trustee's costs, including his costs against the bank, to be paid by the respondent.

Solicitors for the Trustee: *Little & Browne.*

Solicitors for Alexander Hutchison: *Roberts, Liddle & Roberts.*

Solicitors for the Joint Stock Bank: *Daly & Abbott.*

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In re HAUGHTON.

*Illegally using cattle—Prohibition—17 Vic., No. 3, s. 6**

[IN BANCO.]
1877.
13th November.

Cockle, C.J.
Lutwyche, J.
Lilley, J.

In order to support a conviction under s. 6 of 17 Vic., No. 3, for illegally using an animal, it must be shown that the animal was used for the profit, convenience, or pleasure of the party using it.

***Emmerson* v. *Clarke* (3 S.C.R. 76) followed.**

MOTION to make absolute a rule *nisi* calling upon Thomas John Sadlier, P.M., Tambo, and Maurice Solomon to show cause why a prohibition should not issue restraining them from further proceeding in respect of a conviction against George Haughton for illegally taking and using a horse, upon the grounds: (1) That the magistrate acted *ultra vires* in admitting evidence given in another case; and (2) that there was no evidence to support the conviction, or, in other words, that there was no evidence of using on the part of Haughton.

Haughton and a man named Lacy were originally charged before the Police Magistrate with stealing the horse in question. After several witnesses had been examined this charge was withdrawn, and one for illegally using substituted. The depositions previously taken were read over and accepted as evidence against the defendants, no objection being taken by him. The evidence was again sworn to, and an opportunity of cross-examination allowed.

Haughton was sentenced to six months' imprisonment with hard labour.

The facts appear in the judgment.

Garrick, for Haughton, moved the rule absolute.

Griffith, A.G., for the Crown, in support of the conviction.

LUTWYCHE, J., delivered the judgment of the Court.

In this case, as we are all agreed upon the second ground on which the rule was obtained, it will not be necessary for me to say anything about the first. With regard to the second ground of the objection to the conviction, which is that there was no evidence to support the conviction, I think that, after the very careful investigation that the Court has made of the evidence, that the learned counsel, Mr. Garrick,

* *See* Criminal Code, s. 445.

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Lutwyche J.

who appeared on behalf of the prisoner Haughton, is right. To support a conviction for illegally using an animal under s. 6 of 17 Vic., No. 3, it must appear the animal was used for the profit, convenience, or pleasure of the party using it—that was the definition which I gave in my construction of the meaning of the statute in the case of *Emmerson* v. *Clarke* (3 S.C.R. 76). Now, in this case I am unable to see that there is any evidence to show that Haughton used the mare in question for his own profit, pleasure, or convenience. So far as I have been able to form a judgment on the facts of the case, the animal was at one time in the course of the present year the property of Haughton. It was sold by him to Lacy, it appears, in this way, that he gave Lacy the right to sell any horses belonging to him. Then it appears that, in April of the present year, Lacy sold a number of horses, which had been running the mail on the Charleville line, to Solomon and Bredhauer. This mare in question was, as late as July of the present year, running at large, and a day or two afterwards was, by the order of Haughton, driven by Williams to his place at Nive. A week after that he, accompanied by Lacy, came to the paddock and assisted him in catching the mare, which was then mounted by Williams. But there is no evidence in the case from which it can possibly be inferred that Haughton was aware of the sale by Lacy to Solomon and his partner of the animal in question. Then, if Haughton did not know of the sale to Solomon, but was aware that he had given Lacy authority to sell any horse belonging to him, he might, and no doubt did, reasonably infer that Lacy was desirous of selling this mare which was included in the terms of the contract between himself and Lacy, and it seems to me to be a very natural course of conduct for him to tell Lacy where the mare was, to point her out, to assist in catching her, and let her be used by the owner. Therefore he cannot be said to have illegally used the mare, not having done so for his own profit, convenience, or pleasure. Therefore I think the conviction must be quashed.

Rule absolute.

Solicitor for the Crown: *The Crown Solicitor.*

Solicitors for George Haughton: *Daly & Abbott.*

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DAVENPORT v. THE QUEEN.*

[PRIVY COUNCIL.]
1877.
7th November.
8th November.
9th November.
10th December.

Sir B. Peacock.
Sir M. E. Smith.
Sir R. P. Collier.

Agricultural Reserves Act of 1863 (27 Vic., No. 23), s. 8—The Leasing Act of 1866 (30 Vic., No. 12), ss. 5, 6, 12, 17—The Crown Lands Alienation Act of 1868 (31 Vic., No. 46), ss. 51 (9), 68—Lease—Forfeiture—Waiver—Rent received under protest—Ejectment.

A lease of Crown lands for eight years having been granted by the respondent under 31 Vic., No. 46, subject to the terms and conditions contained in *The Agricultural Reserves Act of 1863* and *The Leasing Act of 1866*, the lessee failed to perform his covenant to cultivate one-sixth of the said lands within a year from the allotment thereof. Rent, however, for the whole term of years was subsequently received by the Government, the latest being in 1873, with full knowledge of the above breach of covenant, but after notification in the *Gazettes* of 1869, 1870, and 1871, that the same would be received conditionally, and without prejudice to the rights of the Government.

Held (reversing the Full Court), in ejectment brought by the respondent, that whether or not a valid grant could be made to a selector failing to perform the condition, under s. 8 of *The Agricultural Reserves Act*, the same section read into the above lease does not render it void, but voidable at the option of the lessor on breach of conditions by the lessee.

Held, further, that assuming a forfeiture had accrued, it was waived by the receipt of rent, notwithstanding the notifications. Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such receipt.

APPEAL from an order of the Supreme Court (9th March, 1875) discharging a rule to set aside a verdict found for the respondent, and to enter a nonsuit or a verdict for the appellant, or for a new trial in an action of ejectment brought in the name of Her Majesty, on the fiat of her Attorney-General for Queensland, to recover 320 acres of land in the county of Aubigny. The action was brought under s. 57 of *The Audit Act* (25 Vic., No. 15). The writ of ejectment, dated September 16th, 1874, was directed to the appellant as tenant in possession, and laid the title of Her Majesty as having accrued on and since the 3rd of May, 1869. Afterwards, on the 11th of November, 1874, one C. G. D'Abedyll appeared by leave of a judge and defended as landlord of the appellant for the whole of the land mentioned in the

* 3 App. Cas. 115.

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writ. On the 1st of December, 1874, a suggestion of the death of D'Abedyll was entered on the record, and the proceedings were, by order of the Court, continued against the appellant.

The main questions involved in the appeal were: first, whether a lease granted by the Crown under and in pursuance of *The Agricultural Reserves Act of 1863* and *The Leasing Act of 1866*, to the person under whom the appellant claimed, ever became liable to be forfeited; and next, whether assuming that it had become so liable, the right of forfeiture had not been waived.

The terms of the lease and the sections of the various Acts, so far as they are material, together with the facts of the case, are sufficiently set forth in the judgment.

The judgment of their Lordships (Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier) was delivered by

SIR MONTAGUE E. SMITH. This was an action of ejectment in the Supreme Court of Queensland, brought by her Majesty to recover an allotment, part of the Crown lands of the colony, which had been leased for eight years to one Meyer, on the ground that the lease was forfeited. The allotment consisted of 320 acres, numbered 196 in the Darling Downs district, and formed part of what is called "agricul-cultural reserves."

The principal questions for consideration are, first, whether the lease was forfeited; and, secondly, if so, whether the forfeiture could be, and was, waived by the Crown.

Several statutes have been passed by the Colonial Legislature regulating the sale and letting of the waste lands of the Crown. The principal enactments relating to the questions raised in this appeal are the following:—

The Agricultural Reserves Act of 1863 (27 Vic. No. 23), after empowering the Governor-in-Council to set apart lands for agricultural purposes, to be denominated agricultural reserves, and to offer them for sale in portions of not more than 320 acres, at a fixed price of 20s. an acre, enacts as follows:—

Section 4.—"Any person desiring to purchase land in an agricultural reserve, after the same has been proclaimed open for sale, may apply to the land agent for the district in which the reserve is situated, and shall point out the particular portion of land, and shall at the same time pay to the land agent the sum of twenty shillings for every acre, together with the amount of deed fee, and he shall, subject to

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the provisions hereinafter contained, be deemed to be the purchaser of said land, and entitled to a grant in fee simple."

Section 7.—"If within twelve months from the date of selection, the selector of land in an agricultural reserve shall make a declaration in the form contained in the schedule to this Act, that he has actually resided on the lands held by him in the said reserve, for a period of not less than six months, and that he has cultivated not less than one-sixth of the land so selected, and shall have fenced in the said selection with a substantial fence of not less than two rails, then a deed of grant shall be issued to such selector: Provided that the Governor or other officer appointed in that behalf may require any reasonable evidence in support of the truth of such declaration."

Section 8.—"If any person selecting lands in an agricultural reserve shall fail to occupy and improve the same, as required by s. 7 of this Act, then the right and interest of such selector to the land selected shall cease and determine, and the amount of the purchase money, less by one-fourth part, shall be refunded to him by the issue of a land order, entitling the holder to the remission of such three-fourths of the same in the purchase of other Crown lands."

The scheme of this Act, which provided only for the sale of agricultural reserves, was that the selector should pay at the time of selection the full purchase money of twenty shillings per acre, and should then, subject to the performance of certain conditions, be deemed to be the purchaser, and entitled to a grant in fee. No present term or estate was conferred upon the selector, but only an inchoate right to a grant, liable to be defeated on failure to perform the conditions, the selector in that case being entitled to have "the amount of his purchase money, less by one-fourth," refunded to him in the manner described.

Three years later *The Leasing Act of 1866* (30 Vic., No. 12), was passed, under which the lease in question was granted. This Act made provision for leasing lands which had been put up for sale by auction and not sold. One year's rent was to be paid in advance by applicants for leases.

It contained the following further enactments:—

Section 5.—"The person declared lessee shall receive from the land agent a lease in such form as the Governor-in-Council shall appoint, and shall sign a duplicate lease, which shall be forwarded by the land agent to the office of the Surveyor-General."

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Section 6.—"Every such lease shall be made subject to the following conditions:—

"(1) The term thereof shall be for eight years inclusive, commencing from the first payment of rent.

"(2) The yearly rent shall be at the rate of two shillings and sixpence per acre when the upset price of the land or the sum for which it is open to purchase by selection is twenty shillings per acre; but if the upset price of such land, or the price at which such land is open to purchase by selection be higher than twenty shillings per acre, then the rent shall be increased in proportion.

"(3) The rent for the second and each succeeding year shall be paid in cash in advance to the Treasury, at Brisbane, on or before the first day of January, and in default of such payment in advance the lease shall be forfeited, and the land and all the improvements thereon shall revert to the Crown. This subsection then provides that the lessee may defeat the forfeiture by paying the rent and a certain amount by way of penalty within ninety days.

"(4) So soon as the lessee shall have made the eighth payment of rent as aforesaid, he shall be entitled to a deed of grant in fee simple, subject, however, to the payment of the fees chargeable on the issue of deeds of grant.

"(5) If at any time during the term of such lease the lessee shall pay in cash or land orders into the Treasury, at Brisbane, the rent for the unexpired portion of such term, he shall be forthwith entitled to a deed of grant in fee simple, subject, however, to the payment of the fees chargeable on the issue of deeds of grant."

The following section brought unselected allotments of the agricultural reserves within the operation of this Act:—

Section 12.—"All lands in agricultural reserves which shall have been or may hereafter be proclaimed as open for selection, and have remained so open and unselected for one calendar month, shall be open to lease by the first applicant under the terms and conditions specified in the seventh clause of this Act: Provided only that if taken up on lease they shall be subject to the same condition and restriction as to cultivation and quantity as if they were selected by purchase."

By s. 17 so much of the seventh clause of *The Agricultural Reserves Act of 1863* as required residence on and fencing of selections was repealed.

This was the state of legislation when Meyer became the applicant

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for a lease of the allotment in question; but before his lease was granted, an Act to consolidate and amend the laws relating to the alienation of Crown lands was passed, viz., *The Crown Lands Alienation Act of 1868* (31 Vic., No. 46). It contains the following enactment:—

"Any selector who, before the passing of this Act, shall have selected land in any agricultural reserve under the 4th and 5th sections of *The Agricultural Reserves Act of 1863*, or *Leasing Act of 1866*, and who shall have proved by two credible witnesses to the satisfaction of the commissioner that he, his heirs, assigns, or lessees is, or at the time of selection was, a resident within the district over which such commissioner may have jurisdiction, is hereby empowered at his option to substitute improvements in lieu of cultivation, the fencing of the said land to be deemed and taken to be part of the said improvements, provided that such improvements shall in the aggregate be equal to the sum of five shillings per acre, on the total number of acres so selected by him as aforesaid. And upon the said selector proving by two credible witnesses to the satisfaction of the commissioner of the district that he has performed the conditions aforesaid, then the said commissioner shall issue a certificate accordingly, and the said selector shall thereupon be entitled to a deed of grant in fee simple, subject, however, to the payment of the fees chargeable in the issue of the said deed of grant and balance of rent due."

The terms and conditions of the leases to be issued under this Act are prescribed by s. 51.

The lease is from Her Majesty, and is dated on the 1st of May, 1868. After reciting that Meyer, in pursuance of *The Agricultural Reserves Act of 1863*, and *Leasing Act of 1866*, had applied to be declared lessee of the allotment, and paid £40 as the first year's rent in advance, Her Majesty, in consideration of the rent so paid in advance, and of the covenants by the lessee, demised the land to Meyer for the term of eight years, from the 23rd of September, 1867, "being the day upon which the first payment of rent was made, and thenceforth fully to be complete and ended with all the rights of purchase and other rights, powers, and privileges, and subject to the terms, conditions, exceptions, reservations, provisoes, penalties, and forfeiture in the said Acts contained."

The reddendum is: "yielding and paying to us, our heirs and successors, yearly, and every year in advance during the continuance of the said lease, the rent or sum named in the second schedule." (This schedule provides for the first payment on the 23rd of September,

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1867, and for subsequent payments on the 1st of January, in the years from 1869 to 1875 inclusive.) The lease contains covenants by the lessee for payment of the rent, and also to cultivate at least one-sixth part of the land within one year from the commencement of the term of the lease, and to observe, perform, and keep the clauses, conditions, and provisoes applicable to the lands demised in the Acts contained.

It appears that two transfers of the lease have been made, viz., one from Meyer to Mr. Davenport (the appellant), and the other from him to Mr. D'Abedyll, and that both were registered by the Surveyor-General, the first on the 14th of June, 1869, and the last on the 28th of June, 1870. The appellant was in possession as tenant to Mr. D'Abedyll when the ejectment was brought.

The forfeiture insisted upon by the Crown is the failure of Meyer to cultivate or improve the allotment within a year from the 23rd of September, 1867, the date of his application to be declared lessee. In point of fact this failure happened, but the appellant contends, on grounds to be presently adverted to, that a forfeiture was not thereby incurred, or if it was, that it has been waived. He relies moreover on a certificate granted by the Commissioner of Crown Lands.

The principal facts are undisputed. The rent payable on the 1st of January, 1869, was duly paid into the Colonial Treasury, but there being no evidence that the Crown was then made aware of the non-improvement, nothing turns upon this payment. However, on the 1st of February in that year the surveyor of the Darling Downs district, who had been directed by the Surveyor-General to examine the allotments which had been leased, made a report in which he stated that no cultivation or improvement had been made, among others, in the allotment in question. A copy of this report was sent in the month of June following by the Surveyor-General to Mr. Taylor, the Minister for Lands of the Colony. Mr. Taylor, who was examined at the trial, deposed that, having made himself acquainted with the report, he laid it before his colleagues in the Ministry, and that the result of their deliberations was a determination not to proceed for the forfeiture of the allotments, but to allow the future rents to be paid. Mr. Taylor says he thereupon told the Surveyor-General to take no action on this report, adding, "we could not afford it."

Accordingly, Mr. D'Abedyll paid the subsequent yearly rents in advance as they became due, viz., on the 1st of January in the years 1870, 1871, and 1872; and on the 31st of May, 1873, he paid in advance

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the whole of the remaining rent accruing under the lease. He paid at the same time the fees chargeable on the issue of deeds of grant.

It is not denied that the Minister for Lands was made acquainted with these payments, nor that they were paid "as rent;" and it cannot be doubted that the Minister knew they were so paid.

Two receipts given by the local land agent were produced, in which the payments are described as "rents."

On the 23rd of December, 1869, a notice headed, "Payment of Rents under *The Leasing Act, 1866*," was published in the *Gazette*. After giving notice to lessees living at a distance from Brisbane that the local land agents had been instructed to receive "the rents," it contains the following note:—

"The accompanying schedule contains all selections made under *The Leasing Act of 1866*, excepting those which have been forfeited for non-payment of rent. Rents which may be received on such of these selections as may have been forfeited by operation of law will be deemed to have been received conditionally, and without prejudice to the right of the Government to deal with the same according to the provisions contained in the Act in that behalf."

The schedule contained the name of the appellant (who was then the assignee of the lease), the allotment No. 196, and the amount due was described as "third year's rent, £40."

Similar notices were published in the *Gazette* on the 18th of November, 1870, and the 31st of October, 1871.

After the rent for the whole term of eight years had been fully paid, and before the term of the lease had expired, and without an offer to refund any part of the money, this ejectment was commenced.

The writ bears date 16th of September, 1874, and alleges the title of the Crown to have accrued on the 3rd of May, 1869, treating the lessee and his transferees as trespassers from that date.

Upon the trial of the action, in which the above facts were admitted or proved, the judge directed the verdict to be entered for the Crown; one question only, which will be hereafter adverted to, having been left to the jury. The principal points were reserved for the consideration of the Court, which, by the judgment under appeal, sustained the verdict.

It was contended on behalf of the appellants that there had been no failure to cultivate or improve the land at the time the ejectment was brought, because it was said the twelve months from the date of

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Sir M. E. Smith.

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selection prescribed by the seventh section of *The Agricultural Reserves Act, 1863*, in the case of sales, was inapplicable to leases, and that lessees had the whole term of eight years to fulfil the condition. It was said that the reason for requiring the cultivation within a year in the case of sales was, that no estate being granted, nor any interest created beyond the right to have a grant in fee on the performance of the condition, it was essential that a definite time should be fixed for that performance; the scheme being, that in the event of non-fulfilment within that time, the inchoate purchase should be at an end, and the selector entitled to a return of three-fourths of the price he had paid. This reason, it was said, did not apply to the case of leases creating a legal interest for a definite term, with a right to a grant in fee on payment of the rent for the entire term; and, therefore, that the proviso in the twelfth section of *The Leasing Act, 1866*, that lands in agricultural reserves, if taken up on lease, should be subject to the same condition as to cultivation as if they were selected by purchase, should be construed to apply to the obligation to cultivate only, and not to the limit of time. It was also pointed out that this limit in the first Act was only fixed by reference to the time within which a declaration was to be made by the selector in order to obtain a grant, and that a declaration was not necessary in the case of leases.

It was further contended that the 68th section of *The Alienation Act of 1868* (which came into operation on the 1st of March of that year, during the currency of the first year of the lease in question), allowing selectors who held leases like the present to substitute improvements of the value of five shillings per acre in lieu of cultivation, gave the whole term of their leases for so improving their lands.

If the above construction of the statutes be correct, this action, brought during the currency of the term, would, no doubt, have been prematurely commenced.

It was further insisted on behalf of the appellant that the proviso in the twelfth section of *The Leasing Act, 1866*, did not make lessees subject to the forfeiture created by the eighth section of *The Agricultural Reserves Act, 1863*, but only to the obligation imposed by the seventh. It was urged that these sections were separable; that the condition for cesser of the interest which was necessary to define and determine the position of a selector at the end of a year in the case of a purchase, was not necessary in the case of a lease creating a definite term, and it was pointed out that the condition for cesser was coupled

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with an equitable provision for the return (in the shape of land orders) of three-fourths of the purchase money, a provision inapplicable to the case of a lessee. It was said that a condition of forfeiture should be imposed in clear terms, and that the vague reference in *The Leasing Act of 1866* to "the condition as to cultivation" in *The Sale Act of 1863* did not subject lessees to the forfeiture prescribed in s. 8 of that Act, and would be satisfied by holding them liable to the obligation to cultivate imposed by the seventh section.

The difficulties of construction, which these arguments undoubtedly present, arise from the inconvenient practice of legislating by means of vague and indistinct reference to the enactments of a former statute, a practice which in this case has been followed, without due regard being had to the distinctions existing between the position of purchasers and that of lessees. Their Lordships, however, do not think it necessary to determine the questions raised by the arguments just referred to, for, assuming that these arguments ought not to prevail, their opinion is in the appellant's favour on the further question arising in the appeal.

In answer to the defence that if a forfeiture had accrued it had been waived by the receipt of rent, it was contended on the part of the Crown that the effect of the proviso in the eighth section of the Act of 1863 was to make the lease absolutely void, and not voidable only. The Supreme Court took this view, and further decided that the Legislature having imposed this condition, the Crown could not dispense with it.

It is unnecessary to decide whether, in the event of a selector by purchase failing to perform the condition, a valid grant could be made to him. Such a selector has no estate vested in him, nor any right to a grant until he has fulfilled the condition precedent as to cultivation. The distinction between the case of such a selector and that of a lessee to whom a lease has been granted, liable though it be to forfeiture, is obvious. The latter has a present estate for a definite term, an estate not created by the statute, but by a demise from the Crown. By the fifth section of the Leasing Act the form of lease is left to the discretion of the Governor-in-Council, and a duplicate of the lease is to be signed by the lessee. This provision shows that a lease by way of contract was contemplated, though based on the provisions of the statute.

In the present case the demise is for a term of years, in the usual form of a lease. Besides being made subject to the terms, conditions, penalties, and forfeitures contained in the Acts, this lease includes

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www.libtool.com.cn covenants by the lessee for the payment of the rent and observance of the clauses, conditions, and provisoes in the Acts, with a distinct covenant to cultivate one-sixth of the land within a year. There seems to their Lordships to be nothing in the form of this lease inconsistent with the Acts. The covenants afford the means of conveniently enforcing the obligations of the lessee.

Does then the proviso of forfeiture in s. 8 of the *Reserves Act*, when read into such a lease as the present, make the term *ipso facto* void, or voidable only upon a breach of the condition? In a long series of decisions the courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. The same rule of construction has been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract. See *Doe* v. *Bancks* (4 B. & A. 401), *Roberts* v. *Davey* (4 B. & Ad. 664), and other cases in the notes to *Dumpor's Case* (1 Smith's Leading Cases 41).

In *Roberts* v. *Davey* the words were that the license "should cease, determine, and be utterly void and of no effect to all intents and purposes." As far, therefore, as language is concerned, it was stronger in that case than in the present.

It is, however, contended that this rule of construction is inapplicable when the Legislature has imposed the condition. But in many cases the language of statutes, even when public interests are affected, has been similarly modified. Thus, where the statute provided that if the purchaser at an auction refused to pay the auction duty his bidding "should be null and void to all intents and purposes," it was decided that the bidding was void only at the option of the seller, though the object of the Act was to protect the revenue. In that case Mr. Justice Coltman said: "It is so contrary to justice that a party should avoid his own contract by his own wrong that, unless constrained, we should not adopt a construction favourable to such a view." *Malins* v. *Freeman* (4 Bing. N.C. 395).

There is no doubt that the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail, but the intention to exclude it should be clearly established.

The question arises in this, as in all similar cases, whether it could have been intended that the lessee should be allowed to take advantage

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of his own breach of condition, or, as it is termed, of his own wrong, as an answer to a claim of the Crown for rent accruing subsequently to the first year of his tenancy. The effect of holding that the lessee himself might insist that his lease was void, would, of course, be to allow him to escape by his own default from a bad bargain, if he had made one. It would deprive the Crown of the right to the future rents, although circumstances might exist in which it would be more to the interest of the Crown, representing the Colony, to obtain the money than to repossess the land, as indeed in the present case it was thought to be.

Again, if the lessee could treat the lease as null on his own default, he would, whilst escaping from his contract and from liability to future rent, forfeit one year's rent only, or one-eighth of what in the end would be purchase money, instead of the one-fourth of the purchase money, which selectors by purchase would in the like case forfeit, the latter, too, being entitled to a return of the other three-fourths only in the shape of land orders. This difference establishes a further distinction between such selectors and lessees.

Having regard to these considerations, the intention of the Legislature to the contrary does not, in their Lordships' view, so clearly appear as to exclude the usual and equitable rule of construction from applying to these leases. It may well have been meant to leave to the Crown, acting by its responsible Ministers, the option which other lessors in the case of similar conditions are entitled to exercise.

If then the Crown could treat the lease as voidable, the further question to be considered is—Has it elected so to treat it and waived the forfeiture?

On this part of the case their Lordships have felt no difficulty. The evidence of waiver seems to them to be clear and overwhelming. Not only was the rent for three successive years accepted in advance, but in 1873 the whole of the remaining rent accruing under the lease was paid up in full. And these rents were received by the officers of the Government, as appears by the evidence before set out, not only with full knowledge of the breach of the condition, but in consequence of the decision of the Ministers of the Crown in the Colony, come to after mature deliberation, that the Government of the Colony wanted the money and could not afford to insist upon the forfeiture.

It was sought to obviate the effect of these receipts by referring to the passage contained in the "notification of rents due," set out above.

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This notification appeared in the *Gazette* in three successive years, the last year being, as far as appears, 1871. After that year the publication was apparently abandoned. It is therefore very doubtful whether this notification can in any way affect the acceptance in the year 1873 of all the rent then remaining due.

But, supposing this notice is to be regarded as pointing to all future rents, their Lordships think it would not prevent the acceptance of these rents from operating as a waiver. The notification itself describes the payments as "rent," and their Lordships have no difficulty, upon the evidence before adverted to, in coming to the conclusion of fact, that the money was not only paid, but received as "rent."

A question of this kind received great consideration in the House of Lords in *Croft* v. *Lumley* (6 H.L. 672). In that case the facts were much more favourable to the contention that there was no waiver than in the present. The tenant tendered and paid the rent due on the lease after the landlord had declared that he would not receive it as rent under an existing lease, but merely as compensation for the occupation of the land. The opinion of all the judges, except Mr. Justice Crompton, was that the receipt of the money under these circumstances operated as a waiver. In the present case, the rent, as already stated, was received as rent, with, at most, a protest that it was received conditionally, and without prejudice to the right to deal with the land as forfeited. Lord Wensleydale, who was disposed to agree with Mr. Justice Crompton in his conclusion of fact in the particular case, appeared to have no doubt that when money is in fact received as rent the waiver is complete. A very learned Judge, Mr. Justice Williams, gave his opinion in the following terms: "It was established as early as *Pennant's Case* (3 Rep. 64A) that if a lessor, after notice of a forfeiture of the lease, accepts rent which accrues after, this is an act which amounts to an affirmance of the lease, and a dispensation of the forfeiture. In the present case, the facts, I think, amount to this: that the lessor accepted the rent, but accompanied the receipt with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion the protest was altogether inoperative, as he had no right at all to take the money unless he took it as rent; he cannot, I think, be allowed to say that he wrongfully took it on some other account, and if he took it as rent, the legal consequences of such an act must follow, however much he may repudiate them."

Without finding it necessary to invoke this opinion to its full extent

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in the present case, it is enough for their Lordships to say that where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally, and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt.

The finding of the jury that there was no waiver appears from the notes of the learned Judge who tried the cause to have been founded on his direction: "That the intention of the party receiving the rent, and not of the party paying it, must be looked at in considering the question of waiver, and that unless the jury were of opinion that the rents were received after the 23rd of May, 1869, unconditionally and unreservedly, they should find no waiver." In their Lordships' view of the law, which has just been stated, this direction is erroneous. They do not, however, deem it necessary to send down the case for a new trial, because the question of waiver really depends on undisputed facts, from which the proper legal inference to be drawn is, in their opinion, clear. Even if the evidence of the receipt of the money as rent had been less convincing than they have found it to be, they would have hesitated to come to the conclusion that the Ministers of the Crown took this money wrongfully, and without any colour of right, as they would have done if it had not been accepted as rent.

Upon a review of the whole case, therefore, they are of opinion that the verdict ought to be entered for the defendant.

After coming to this decision it is unnecessary to determine the effect of the certificate of "fulfilment of conditions" given to the appellant by the Commissioner of Crown Lands. Such a certificate, if it be in proper form, and good and sufficient upon its face, may for some purposes be conclusive. But it was contended that defects both of form and substance were disclosed upon the face of the above certificate which precluded the appellant from relying on it. Without expressing any opinion on these objections, it is enough to say that the appellant is entitled to succeed in the present action without the aid of this certificate.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court, discharging the rule *nisi* of the 11th of December, 1874, and, instead thereof, to direct that such rule be made absolute to set aside the verdict found for the plaintiff, and to enter the verdict for the defendant, with costs.

The defendant (appellant) will also have the costs of this appeal.

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HUNTER *v.* SHIELD.

[In Chambers.]
1878.
4th February.
6th February.

Lutwyche, J.

Attachment—Capias ad respondendum—Common Law Process Act of 1867 (31 Vic., No. 4), s. 48—Requisites of affidavit.

Where an application is made for a writ of *ca. re.*, the affidavit in support of the application must either state that the action will be defeated unless the defendant be forthwith apprehended, or state circumstances from which that result can reasonably and naturally, and not by conjecture merely, be deduced. Where the deponent speaks from information and belief, he must give the name and description of his informant.

Summons calling upon the plaintiff to show cause why a writ of *ca. re.* should not be set aside on the ground that the plaintiff's affidavit upon which the *ca. re.* was granted did not sufficiently show that the action was likely to be defeated.

The plaintiff had sued the defendant on a bill of lading for the value of merchandise shipped at London for Rockhampton in a vessel of which the defendant was master, and had obtained a writ of *capias* against him from the Police Magistrate at Rockhampton, the plaintiff having alleged that instructions had been given to a pilot to take the ship to sea. The facts and arguments appear in the judgment.

Garrick, for the defendant, in support of the summons.

Harding, for the plaintiff, showed cause.

C.A.V.

6th February, 1878.

Lutwyche, J. A summons was heard before me on Monday last, calling upon the plaintiff to show cause why the *ca. re.* issued herein on the 15th day of January last, and all subsequent proceedings, should not be set aside on three separate grounds, of which the first was—that the affidavit of the plaintiff upon which the writ was issued did not sufficiently show that the action was likely to be defeated. It is not necessary to avert to the other two grounds. The defendant was arrested and held to bail on the 15th January last, and an appearance to the action was entered on the 21st January; special bail was put in on the 30th January, on which day also the summons was issued. Mr. Harding, in showing cause, contended among other things that the defect in the affidavit, assuming it to exist, which, however, he denies, amounted to at most an irregularity, which had been waived by the action of the defendant in entering an appearance to the action and by putting in special bail. He cited several

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authorities from the English Courts, which I have since examined. The majority of them refer to the practice which obtained in England at a period antecedent to the passing of the Statute 1 and 2 Vic., c. 110, and the few cases decided since that statute was passed, turn upon facts which showed that an irregularity only had been committed. Even under that statute, however, it has been decided that where the application is founded on a material defect in the affidavit to hold to bail it may be made at any time while the suit is pending (see *Newton* v. *Harland*, 3 Jur. 679; *Walker* v. *Lumb*, 9 D.P.C. 131), and I think that the defect in the affidavit of the plaintiff upon which he obtained an order for the defendant's arrest was a material defect. *Keep* v. *Benjamin* (4 N.S.W.L.R. 321) is in point. It was there held that the affidavit must either state that the action will be defeated, following the words of the second section of 3 Vic., No. 15, which are identical with those contained in s. 48 of *The Common Law Process Act* (31 Vic., No. 4), or must state circumstances from which that result can reasonably and naturally, and not by conjecture merely, be deduced. The plaintiff is precluded from calling in aid the third paragraph of his affidavit, because, although he swears to his belief of a certain fact, he does not state the name of his informant, and, therefore, does not bring himself within the exception affecting hearsay evidence, which was established by *Gibbons* v. *Spalding* (11 M. & W. 173). Apart from that paragraph there is nothing in the whole affidavit from which any reasonable inference can be deduced that the natural and probable result of the defendant's intended departure from Rockhampton would be to defeat the action. The plaintiff does not even say that he believes so, and it is quite consistent with such facts stated in the affidavit as I can notice judicially that the defendant may have manifested an intention to proceed to some place within the limits of the colony, or that he may have sufficient property in the colony to satisfy the judgment in the action if it should go against him. The application is made to set aside the writ, but I can mould the order which I shall make upon the summons so as to assume its proper form. (See *Hopkinson* v. *Salembier*, 7 D.P.C. 493.) The order I make is, that the order to hold the defendant to bail, and all subsequent proceedings incidental thereto, be set aside. The plaintiff to pay the defendant's costs of and occasioned by his arrest, and also the costs of this application.

Solicitor for the plaintiff: *W. J. Brown.*

Solicitors for the defendant: *Daly & Abbott.*

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CHALLINOR *v.* TOWNLEY.

1878.
7th February.

Lilley, J.

Local Government—Municipality—By-law—Ultra vires—Municipal Institutions Act of 1864 (28 Vic., No. 21), ss. 70, 75, 90.

The duty of guarding persons against dangers created by municipalities is, by ss. 75 and 98 of the Act 28 Vic., No. 21, thrown on the municipalities, and the responsibility is one of which the municipality cannot divest itself by its by-laws.

By a municipal by-law it was directed that any owner of land above or below the level of any adjoining pathway within the municipality should protect such land by a good and sufficient fence, so as to prevent damage or accidents.

Held, assuming the by-law *intra vires*, that the owner could only be required to fence, where he could put up the necessary fence, on his own land.

MOTION to make absolute a rule *nisi* calling upon W. Townley, P.M., and others to show cause why a writ of prohibition should not issue restraining them from further proceeding upon an order directing Henry Challinor to pay a fine of £10 for not fencing a footway within the Municipality of Ipswich.

A by-law of the Council of Ipswich made under *The Municipal Institutions Act of 1864*, ss. 70, 74, required that any owner of an open space adjoining any footway or above or below the level of any footway within the Municipality, should protect it with a good and substantial fence so as to prevent damage or accident. The plaintiff was the owner of a piece of land in the Municipality of Ipswich abutting upon a footway. The land was formerly fenced off from the footway, but the Municipal Council had for the purposes of improvement raised the footway to a considerable height above its former level by means of an embankment which partly rested upon the plaintiff's land, and in doing so destroyed the plaintiff's fence. They then required the plaintiff to fence the land "so as to prevent damage or accident." It was impossible for the plaintiff to comply without placing the fence upon the embankment formed by the Municipal Council.

The plaintiff in person in support of the rule, contended that the by-law was *ultra vires* and that under s. 98 of the Act, the Mayor of Ipswich was bound to fence the pathway.

Real, for the Police Magistrate, argued in support of the order.

Chubb, as Mayor, for himself and the Corporation.

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LILLEY, J. On the question whether by-law 40 is *ultra vires*, it is not necessary to decide generally, but so far as it could be construed to throw on an owner of land an obligation imposed by the statute on the municipal authorities, it would be *ultra vires*. I think the duty of guarding persons against dangers created by the Corporation is thrown upon the municipality by ss. 75 and 98 of the Act. A penal omission must be exclusively the nonfeasance of the defendant, and one which he could *alone* obviate or supply. If he must obtain the assistance of the municipality, over which he has no control, he is dispunishable. It is obvious that by-law 40 makes no provision for such cases. Under this by-law the "guard and protection," that is the fence, must be on the defendant's own land. He could not be required to erect it elsewhere. The offence charged seems to be substantially that the Corporation, having encroached several feet on his land by an embankment which creates a danger to persons using the footway along their work, require the defendant to erect a fence, not on his own land, but on their embankment, half way down the slope, under which his land is buried. If he erected the fence on the line of the land they have left him the danger would remain. If he erected it on the super-posed bank along the horizontal line of his original allotment, the danger would not be removed, unless the Corporation contributed filling in. I think, under the by-law, assuming it to be *intra vires* and applicable here, he can only be required to fence when his doing so would give complete protection; this he could not do in this case without the aid of the Corporation, which he is not obliged by any law to seek, and they are not compelled to give; and for the apportionment of which mutual contribution to the public safety no provision has been made. The rule will therefore be absolute.

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SMITH *v.* THE QUEEN.

[PRIVY COUNCIL.]*
1878.
6th February.
7th February.
12th March.

Sir J. W. Colville.
Sir B. Peacock.
Sir M. E. Smith.
Sir R. P. Collier.

The Crown Lands Alienation Act of 1868 (31 Vic., No. 46), ss. 51 (5), 55—Residence — Abandonment — Forfeiture — Judicial inquiry by Commissioners—"Audi alteram partem."

Section 55 of *The Crown Lands Alienation Act of 1868* exempts selectors of additional selections from residence upon them; but *quære* whether a certificate under s. 51 (7) exempts the holder from further residence after the date of it.

In order to prove either non-residence or an abandonment under s. 51 (5), an inquiry thereunder in the nature of a judicial enquiry must be made by the Commissioner, conducted according to the requirements of substantial justice.

APPEAL from an order of the Supreme Court, dated March 11th, 1875, refusing to grant a rule *nisi* to enter a nonsuit, or a verdict for the appellant, or for a new trial.

The action was brought under *The Crown Lands Remedies Act of 1874* (38 Vic., No. 13) by the Attorney-General of Queensland, to recover 871 acres of land in the County of Aubigny. The writ of ejectment, dated the 11th of December, 1874, was directed to one Simpson, as tenant in possession, and claimed the land from the date of the writ. The appellant appeared, by leave of a judge, and defended for the whole of the land, claiming the same under a lease from Her Majesty to him for a term of ten years from the 1st of January, 1871. On the 8th of February, 1875, a verdict was entered for the Crown, after the jury had answered in the affirmative the following questions:

1. Was it proved to the satisfaction of the Commissioner that the lessee had abandoned his selection?

2. Was it proved to the satisfaction of the Commissioner that the lessee had failed to reside during a period of six months?

3. Did the Government declare the lease absolutely forfeited and vacated?

The Full Court refused to set aside the verdict.

The facts and arguments appear sufficiently in the judgment.

* 3 App. Ca. 614.

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SMITH *v.* THE QUEEN.

Sir. R. P. Collier.

THE judgment of their Lordships (Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier) was delivered by

SIR ROBERT P. COLLIER. An action of ejectment was brought by the Crown against the tenant in possession under a statute of the colony of Queensland, entitled *The Crown Remedies Act, 1874*, to recover possession of a plot of land containing 871 acres. The defendant (the appellant) appeared by leave of a judge to defend the action, claiming the land under a lease from her Majesty for a term of ten years from January, 1871. On behalf of the Crown it was contended that the lease had been forfeited. The jury found a verdict for the Crown.

An application was made to the Supreme Court for a rule *nisi* to set aside the verdict and enter a non-suit or verdict for the defendant, or for a new trial, on the ground of the improper admission and rejection of evidence, and misdirection.

This rule was refused by the Supreme Court, and from the order refusing the rule the present appeal is preferred.

It appeared that the defendant, who was the selector under *The Crown Lands Alienation Act, 1868*, of a lot numbered 128, in the Darling Downs district, made an additional selection of land adjoining thereto numbered 198—the plot of land now in dispute—by application in the proper form on the 28th April, 1871, and obtained from the Crown a lease under the provisions of that Act for a term of ten years from the 1st July, 1871, at the rent mentioned in the second schedule to the Act. On the 12th August, 1873, he obtained a certificate from the then commissioner of the district of compliance with the requirements of s. 51 (6, 7) (applying to pastoral and agricultural lands respectively), such as to entitle him to a grant in fee simple on payment of the balance of the ten years' rent. This balance has not been paid.

On the 2nd December, 1874, the then acting commissioner (Mr. Coxen) made a report to the Secretary for Public Lands in the following terms:—

"I have the honour to report that it has been proved to my satisfaction that the lessee of the selection, as per margin, has abandoned the same and failed in regard to the performance of the conditions of residence during a period of six months."

And on the 8th December following the Governor issued a proclamation declaring the lease to be absolutely forfeited and vacated.

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This report and proclamation purported to have been made under *The Crown Lands Alienation Act*, s. 51 (5).

The question in the cause is whether the proclamation was warranted by the statute.

Section 51 provides that after land has been selected, surveyed, and approved by the Minister of Lands, "the Governor" shall issue to the selector a lease of the land subject to the conditions and provisions hereinafter contained.

After provisions relating to the term of the lease (ten years)—the rent, forfeiture for non-payment, and power to defeat that forfeiture, to the erection of boundary marks and other matters—there follows sub-section 5, which is in these terms:—

"The lessee of any agricultural or pastoral land, his agent or bailiff, shall reside on such selection continuously and *bonâ fide* during the term of his lease, provided that if at any time during the currency of a lease it shall be proved to the satisfaction of the commissioner that the lessee has abandoned his selection and failed in regard to the performance of the conditions of residence during a period of six months, it shall be lawful for the Governor to declare the lease absolutely forfeited and vacated."

Sub-section 6 is in these terms:—

"(6.) If within three years from the date of selection by lease of any pastoral land the lessee shall prove by two credible witnesses, to the satisfaction of the commissioner, that he has resided in person or by bailiff on the said land for a period of two years, and that a sum at the rate of not less than 10s. per acre for first-class pastoral land and 5s. per acre for second-class pastoral land has been expended in substantial improvements on the said land, or that he has fenced in the whole of the said land with a good and substantial fence, then the commissioner shall issue a certificate that the conditions aforesaid have been duly performed, and the said lessee shall be entitled to a deed of grant in fee simple on the payment of the balance of the ten years' rent."

Sub-section 7 applies to leases of agricultural land, and is in nearly the same terms. Then follows sub-section 8:—

"(8.) No lease shall be transferred or assigned until the original selector has obtained a certificate from the commissioner that he has duly performed the conditions entitling him to a deed of grant in fee simple on the due payment of the ten years' rent. But after the issue of such certificate the lessee may transfer his lease by appli-

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cation to the Minister for Lands, in the form contained in the schedule G to this Act, and the payment of a fee of 10s. for the registration of every such transfer."

Sub-section 9 contains some further provisions relative to the acquiring a grant not material to the present purpose.

Section 55 of the Act is in these terms:—

"55. It shall be lawful for any selector of any piece of land or his legal alienee to make additional selection of lands adjoining to his first selection or to each other, but not otherwise, and not exceeding in the aggregate, including such first selection, 640 acres of agricultural land, 2,560 acres of first-class pastoral land, and 7,680 acres of second-class pastoral land, and subject to all the conditions applicable to such first selection, except residence: Provided that in the measurement of such aggregate the proportion of frontage to depth shall not exceed the proportion required by the provisions of this Act in the case of an original selection: Provided also that nothing herein contained shall prevent the sale of the adjoining lands to any other person before such additional selection shall have been applied for."

It has been contended on behalf of the appellant:—

1. That he is under no obligation to reside on his selection, because, having taken it as an additional selection under s. 55, residence on it has by that section been dispensed with; and further, because, even if that be not so, the certificate he has obtained under s. 51 dispenses with residence after the date of it.

2. That if residence is not required, sub-section 5 of s. 51 does not apply, inasmuch as under that section proof both of abandonment and of failure to reside must be made to the commissioner as a condition precedent to the power of the Government to declare a forfeiture.

3. That no proper hearing took place before the commissioner which would enable the Crown to assert that there had been proof to the satisfaction of the commissioner, such as is required by the statute, of either abandonment or non-residence.

It has been contended on the part of the Crown that the words of s. 55 enabling a selector to make an additional selection, subject to all the conditions applicable to his first selection, "except residence," must be read with some qualification to this effect: "Provided that he or his transferee shall continue to reside on his first selection," and that the commissioner has in effect found that the defendant did not continue to reside on his first selection.

But their lordships think it would be a departure from all sound

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rules of construction to import into the clause, which is in itself plain, such a qualification unless it is to be collected by necessary implication from some other expressions of the Act, and none such have been brought to their notice. It is not improbable that the intention of the Legislature may have been that contended for by the Crown, but, if so, it has not been expressed. If, on the other hand, the intention was to confer upon an original selector the advantage of exemption from residence on his additional selection, perfectly apt language has been used to express it.

Their lordships hold that s. 55 exempts selectors of additional selections from residence upon them. It therefore becomes unnecessary to decide whether or not the appellant is right in contending that the mere obtaining a certificate under s. 54 (7) exempts the holder from further residence on his selection. They think it, however, well to say that the inclination of their opinion is against the appellant on this question. The selector entitled to a grant is not bound to pay the balance of rent, or apply for the grant, and may transfer his lease, or hold it till the expiration of ten years: until the grant has been obtained, or the ten years have expired, the "currency of the lease" appears to continue, and sub-section 5 to apply.

It has been contended, however, on the part of the Crown, that the words in sub-section 5, "has abandoned his selection and failed in regard to the performance of his conditions of residence during a period of six months," are to be read distributively; that the failure to reside must be taken to apply only to cases where residence is necessary; and that where residence is unnecessary it is enough for the purpose of forfeiture to prove abandonment, and that abandonment was in this case proved.

It becomes necessary, with reference to this contention, to examine the evidence in the cause together with other sections of the statute. The evidence of the Crown, as far as is material to the questions their lordships have to consider, is that Mr. Coxen, who says that in October, 1874, he made an investigation as to the performance of the conditions of his lease by the defendant, and that after beginning it he sent the following notice to the defendant:—

"Public Lands Office,

"November 2, 1874.

"Sir,—I have the honour to acquaint you that evidence has been brought before me to the effect that you have not carried out the conditions of residence, either personally or by your agent or bailiff,

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on the selection, as per margin,* and I have to request that you will show cause at the next Land Court to be held at Dalby on November 11 why I shall not report the abandonment of the said selection, in pursuance of sub-section 5 of s. 51 of *The Crown Lands Alienation Act of 1868;*"

that on the application of the defendant's solicitor he granted an adjournment to November 26; that he was then sitting in the Land Court (that is his expression), and that the defendant's solicitor (Mr. Hart) appeared; that Mr. Hart produced no witnesses, but tendered a statutory declaration by the defendant that he had resided on the land continuously and *bonâ fide* from the date of his selection; that he had not abandoned it, and had performed all the conditions and provisions of the Act. He proceeds:—

"He (Mr. Hart) did not produce anything else. He did not say anything about a certificate. I have no remembrance of anything relative to a certificate being mentioned. I intimated to Mr. Hart that that declaration was insufficient to satisfy me of non-abandonment. (That was in the court room.) I considered all the evidence before me, including the declaration."

And he further says that what he reported was proved to his satisfaction. On cross-examination he says:—

"Mr. Hart, I think, may have said, 'I believe, Mr. Commissioner, you are sitting as a Land Court under the Act of 1868, and I object'— he said words of the same character. I said, 'Pardon me, I am not doing so. I have called upon these gentlemen to satisfy me that they have not abandoned the land and performed the conditions of residence,' or words to that effect. I think I said, 'It is a mere act of courtesy, which I think one gentleman should show to another.' I believe Mr. Hart said, 'Do I understand you are not sitting as a Commissioner's Court under the Act of 1868?' I said, 'Certainly not,' or words to that effect. Mr. Hart then ask for production of the evidence referred to in the notification to defendant. I said, 'I did not consider it a judicial enquiry on my part in this case.' I said, 'Evidence, or a portion of it, had been forwarded, and I could not produce it.' I remember telling Mr. Hart I did not wish him to be in ignorance of the charge, which was non-residence and abandonment, and I was ready to receive any evidence he might produce to prove the contrary. I also remember saying it should have due considera-

* Reg. No. 198. District, Dalby. Lessee, J. D. Smith.

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tion by me if he did so before my reporting. Mr. Hart said he couldn't meet evidence the nature of which he didn't know. Mr. Hart, I believe, said, 'I may remind you that you knew beforehand I should require it.' I have no doubt I said I never intended to produce it—there is nothing in the statute to require it. It was after this he handed me the statutory declaration. I don't remember—but the impression on my mind is I should have told him if he asked the question 'I was not holding a Land Court.' Very likely I might have said, 'I could hold it in my office, as it was simply a Court of Enquiry.' I made no formal announcement in the court, but it was fully understood by all parties."

The learned judge rejected evidence tendered by the defendant that the actual state of facts did not justify Mr. Coxon's report that there had been an abandonment and non-residence, and left to the jury only these questions:—

1. Was it proved to the satisfaction of the commissioner that the lessee had abandoned his selection?

2. Was it proved to the satisfaction of the commissioner that the lessee failed to reside during a period of six months?

3. Did the Governor declare the lease absolutely forfeited and vacated?

All of which were answered by the jury in the affirmative, and a verdict was entered for the Crown.

Section 3 of *The Crown Lands Alienation Act of 1868* provides for the appointment of Commissioners of Crown Lands, who shall have power to exercise the provisions of the Act, and gives the Governor power to declare and define their duties by regulations.

Section 4 is in these terms:—

"Such commissioner shall sit at the Land Office of his district at certain times to be determined by the Governor-in-Council."

Section 5 follows:—

"All questions shall be decided by the commissioner, who shall give his decision in open court, subject to confirmation by the Governor-in-Council."

Sections 6 and 7 prescribe the manner in which applications for lands shall be made to and dealt with by the commissioners.

It has been contended on the part of the Crown that the judicial character given to the decisions of the commissioner by s. 5 applies only to such decisions as he is authorised to come to under the sections immediately following, relating to applications for land, and not to

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such decisions as he may come to under s. 51, upon which forfeiture of these lands may be declared, his decisions on questions relating to forfeiture being purely ministerial. The application of s. 5 is certainly not so limited in terms, nor does it appear to their lordships to be so limited by reasonable intendment.

If an exercise of judgment is required to determine whether or not a man is entitled to lands by reason of compliance with the provisions of the Act, it is difficult to see why less judgment should be required in determining, what concerns him quite as much, whether or not he has forfeited them by non-compliance. Their lordships are of opinion that the enquiry to be made by the commissioners under s. 51 (5) is in the nature of a judicial enquiry.

They do not desire to be understood as laying it down that the commissioner, in conducting such an enquiry, is bound by technical rules relating to the admission of evidence, or by any form of procedure, provided the enquiry is conducted according to the requirements of substantial justice. These requirements are well known to our law, and have been enunciated in many cases bearing some resemblance to, though not identical with, the present.

When a statute enabled a Bishop, if it should appear to his satisfaction, either of his own knowledge, or upon proof by affidavit, that (for various causes) the ecclesiastical duties of a benefice were negligently performed, to require the vicar to nominate a stipendary curate, and the Bishop made a requisition to this effect on the vicar founded on his own knowledge, without hearing the vicar, the Court of Common Pleas held the requisition bad. Lord Lyndhurst, in giving judgment, thus expresses himself:—"Does not this (the statute) import enquiry, and a judgment as a result of that enquiry? He is to form his judgment: it is to appear to him from affidavits laid before him; but is it possible to be said that is to appear to him, and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and his property? that he is to come to that conclusion without giving the party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defence?" Bayley, J., in the course of his judgment, also observes:—"Is it not a common principle in every case which has in itself the character of a judicial proceeding that the party against whom the judgment is to operate shall have an opportunity of being heard?" (*Capel* v. *Child*, 2 Cromp. & Jer., p. 558.)

SMITH v. THE QUEEN.
———
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The same view of the law was expressed by Lord Campbell, who quoted the maxim, "*Qui statuit aliquid, parte inauditâ alterâ, æquum licet statuerit, æquus non fuit,*" in *R.* v. *The Archbishop of Canterbury* (1 Ell. & Ell. p. 559).

The same doctrine, only varied in expression, has been again and again applied to the conduct of trustees in deciding on the dismissal of schoolmasters (see *Phillips' Charity*, 8 Jurist., p. 959; *The Fremington School*, 10 Jurist., p. 512).

This doctrine is, indeed, carried somewhat further in *Cooper* v. *The Board of Works for the Wandsworth District* (14 C.B., p. 180), wherein it was held, that, although the Metropolis Local Management Act empowered the District Board to alter and demolish a house, where the builder had neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation, the board were, nevertheless, unable to execute that power without first giving the person guilty of the omission an opportunity of being heard. Erle, C.J., in his judgment, extends the principle somewhat beyond proceedings strictly judicial. He observes:--"I fully agree that the Legislature intended to give the District Board very large powers indeed, but the qualification I speak of has been recognised to the full extent. It has been said that the principle that no man will be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding. I do not quite agree to that. The law I think has been applied to many exercises of power, which in common understanding would be not at all more judicial proceedings than would be the act of the District Board in ordering the house to be pulled down."

Assuming the contention of the Crown to be correct, that in such a case as this it would be enough that the commissioner should be satisfied of abandonment alone, residence being put out of the question, their lordships would be disposed to say that there does not appear to have been a finding of the commissioner of abandonment apart from non-residence. But they decide the case upon broader grounds. It appears to them that the defendant has not been heard in the sense in which "a hearing" has been used in the cases which have been quoted and in many others, and in the sense required by the elementary principles of natural justice. The commissioner doubtless acted with perfect good faith, but apparently without being aware that he was performing a judicial function, or even a function of a judicial nature.

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He has not stated upon what evidence he formed his opinion, whether written or *vivâ voce*, whether direct or hearsay. He refused to furnish the solicitor of the defendant with any note or memorandum of that evidence, to give him any information as to who the witnesses against his client were, or even what was the general character of their evidence. The defendant could not answer or explain testimony of which he was kept in ignorance, and therefore was not heard in his defence in any proper sense of that term.

It is true he was summoned to answer general charges of non-residence and abandonment, but a summons to answer charges, the evidence in support of which is withheld, appears to their Lordships illusory.

Their Lordships are for these reasons of opinion that the Crown failed to established that there was such a hearing in this case as would enable the Crown to assert that it was proved to the satisfaction of the commissioner within the meaning of the Act, that the defendant had abandoned his selection, or had failed in regard to the performance of the conditions of residence, and that consequently the Governor had no jurisdiction to issue the proclamation of forfeiture. It follows that so much of the rule as prays that the verdict for the Crown be set aside, and a nonsuit or verdict be entered for the defendant, should have been made absolute. It becomes unnecessary to discuss so much of the rule as relates to a new trial.

Their Lordships will therefore humbly advise Her Majesty that the order appealed against be set aside, and that in lieu thereof it be ordered that the verdict for the Crown be set aside, and that a verdict be entered for the defendant, and that the defendant have his costs in the court below, and of this appeal.

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MISKIN *v.* HUTCHISON (No. 1)

[IN BANCO.]
1878.
21st March.

Cockle, C.J.
Lutwyche, J.
Lilley, J.

Practice—Appeal—Extension of time—Order LVII., r. 2—Default—Inadvertence.

Where a defeated party to an action applies to the Court to be allowed to appeal, after the time for appealing has expired, and does not show any other reason for not having brought his appeal within that time except inadvertence, leave to appeal will only be granted, if at all, on very stringent terms.

MOTION for leave to appeal notwithstanding the expiration of time allowed by O. LVII., r. 2.

Harding, for the plaintiff, appeared in support of the motion.

Griffith, A.G., *Pring, Q.C.*, and *Garrick*, for the Australian Joint Stock Bank, showed cause.

A demurrer to the plaintiff's statement of claim was decided in favour of the defendants on 14th December, 1877. The other material facts appear in the judgment of

COCKLE, C.J. This is purely an appeal to the grace and consideration of the Court, and it is only under certain circumstances that the Court has been induced to yield to the application, but it must be, as it was expected to be, upon very stringent terms. A judgment of my brother Lilley was delivered on the last day of the last term of last year. It was in substance this, that the demurrer was allowed unless an amendment—by which, of course, was to be understood a material amendment—were made. Now the vacation ended on the 2nd February, 1878, the Appeal Court sat on the 5th February, and within a certain number of days after that, it behoved the plaintiff to bring his appeal, and his vigilance should have been stimulated by a letter dated 6th February, from the defendants' attorneys, calling upon him to proceed with the appeal. Now, it has been said there was inadvertence, mistake, and surprise. Of course the Court, for the benefit of suitors, would probably under certain circumstances make allowance for inadvertence, that is to say on terms, but I rather regard this application as being made on the ground of mistake and surprise. Well, the only mistake that I can see is this—the very grave and seemingly obvious mistake of thinking that, I will not say

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a frivolous, but a colorable or illusory amendment would satisfy the condition, or even a nugatory amendment; because I take this to be a nugatory amendment because it was struck out by my brother Lilley, and there has been no appeal against his judgment in striking out the supposed amendment. That was the mistake, but it was a grave mistake to think that a colorable amendment would protract the duration of the cause and extend the time for giving notice of appeal. The only ground of surprise that I can see, is surprise at the fact that an illusory or nugatory amendment could be struck out. Mistake or surprise in the proper sense of the word there was none. And it is not merely that this February Court was passed over, although there seems to have been ample time for the plaintiff to have made up his mind whether he intended to appeal against the judgment or not, but the March Appeal Court was also passed over, and there is nothing whatever in this case to render it anything else than an appeal to the grace and, I may say, to the mercy of the Court. However, there are considerations which weigh with me and my colleagues, but which would hardly apply to any other case, to accede to this appeal for mercy and to induce us to think, that perhaps on stringent terms this appeal should be allowed, but only on these terms which, it must be understood, are conditions precedent to our granting the appeal, and will be unaffected by any future contingency in the case. The appeal will be allowed to this Court but only on the following conditions:—Payment of costs already made not to be disturbed; all the defendants' costs from the 14th December last to this day to be paid by the plaintiff; appeal to be heard this term and whatever the result, the questions of fact are to be filed before leave to appeal to the Privy Council is asked for; the defendants to have all necessary leave to answer or otherwise to make defence; judgment of this appeal to be entered as of the day following the judgment on questions of fact; if the plaintiff does not accept these conditions, this application to be dismissed with costs.

Lutwyche, J. The learned Chief Justice has stated the conditions upon which this leave to appeal is granted, and I need only say that I entirely concur with every word which has fallen from him as to mistake and surprise. At first I was strongly inclined to refuse this application as far as my voice went, and I am only induced to agree to the decision at which the Court has arrived, by the consideration that the case is one of first impression arising on an important colonial statute and depending upon a point of very great nicety and very great

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MISKIN v. HUTCHISON (No. 1).

Lutwyche J.

importance. It certainly would have been a hardship upon the plaintiff himself if this leave had been refused in consequence of his taking the advice given him, but that is a hardship which cannot be avoided. As an almost universal rule, certainly as a general rule, the parties must follow the prescribed practice of the Court, and it would take a very strong case indeed to induce me to diverge from the line of practice laid down. I think this is one of those cases and probably I may not live to see another.

Lilley J.

LILLEY, J. I agree with the judgment of the Court. Perhaps I may suggest a very slight modification of the order, which would be this, if the statement of claim contains by admissions between the parties the actual state of facts, there would be no necessity to proceed to trial.

Solicitors for the plaintiff: *Hart & Flower.*

Solicitors for the Australian Joint Stock Bank: *Daly & Abbott.*

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MISKIN *v.* HUTCHISON (No. 2).

1878.
26th March, 27th March, 28th March. 1st April.

Cockle, C.J. Lutwyche, J. Lilley, J.

The Crown Lands Alienation Act of 1868 *(31 Vic., No. 46), s. 54—Conditional purchase—Contract to take effect after the termination of the lease—Partnership—Resulting trust.*

W., K. H., and G. R. H. carried on business in partnership under the style of W. and H. from June, 1873. On 18th September, 1876, W. and K. H. were adjudicated insolvent. On 30th July, 1873, G. R. H. applied for a selection, and obtained a lease, subject to the conditions of *The Crown Lands Alienation Act of 1868.* G. R. H. paid the first instalment under s. 46, and the survey fees, out of his own moneys. In March, 1874, G. R. H. paid the second year's rent out of the moneys of the firm. In March, 1875, the firm paid the third year's rent, solely, as it was alleged, for the purposes of the firm. Improvements had been made by the firm, and the selection had been occupied by the firm in connection with an adjoining station until June, 1875, when the station ceased to be the property of the firm.

On 8th May, 1876, a certificate of fulfilment of conditions was issued to G. R. H. W. paid the fourth year's rent, but out of whose money it did not appear. On 14th July, 1876, a Crown grant for the selection was granted to G. R. H., he having paid the balance of the rent out of his own funds.

On 24th Dec., 1876, G. R. H. transferred the selection to A. R. H., the transfer being executed by W., as attorney for G. R. H., for the benefit of the firm. On 26th June, 1877, the Official Trustee lodged a caveat forbidding the registration of any instrument affecting the selection. Since that date the A.J.S. Bank advanced money to A. R. H. upon the security of the deposit of the certificate. The plaintiff, as Official Trustee, claimed a declaration that A. R. H. was a trustee, as to two-third parts in the selection, for the plaintiff.

Held, affirming the judgment of Lilley J., that the prohibition contained in s. 54 of 31 Vic., No. 46, is absolute, and is not voidable at the option of the Crown or the selector. The prohibition extends to implied agreements as well as to express agreements and trusts; but *held, further,* that there was nothing in this case to show that an illegal agreement within the meaning of s. 54 of the Act had been made, and that there was no trust that the firm or Official Trustee could enforce against those who took under G. R. H. or A. R. H.

APPEAL from the decision of Lilley, J., on a demurrer to the plaintiff's statement of claim by the defendants, the Australian Joint Stock Bank.

Statement of claim:—

2. By an order of the Court made in its Insolvency Jurisdiction, dated the eighteenth day of September, one thousand eight hundred and seventy-six, Frederick John Cobb Wildash and Kenneth Hutchison, theretofore carrying on business together in partnership

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MISKIN v. HUTCHISON (No. 2).

under the style or firm of Wildash and Hutchison, were adjudicated insolvent upon the petition of George Lewis Golden, a creditor of the said insolvents, and by the said order, William Henry Miskin was appointed the official trustee of their estate, and now sues in his official name as above mentioned.

3. At the first meeting of the creditors of the said insolvents no trustee was elected, and the plaintiff continued to be and still is the official trustee of the said estate.

4. George Ronald Hutchison was a partner with the said Frederick John Cobb Wildash and Kenneth Hutchison in the said firm of Wildash and Hutchison in and since the month of June, one thousand eight hundred and seventy-three, till the said insolvency, but has not been adjudicated an insolvent thereunder.

5. The said firm of Wildash and Hutchison were some time prior to the said eighteenth day of September, one thousand eight hundred and seventy-six, carrying on business as graziers at the station or run called Canning Downs, near Warwick, in the colony aforesaid.

6. On the thirtieth day of July, one thousand eight hundred and seventy-three, the land known as selection number 864 in the Warwick reserve, in the colony aforesaid, adjacent to the said station or run, was open to selection under the provisions of *The Crown Lands Alienation Act of 1868*, relating to sales by selection.

7. On the said thirtieth day of July, one thousand eight hundred and seventy-three, the said George Ronald Hutchison duly made application for the said land in the proper form and mode and to the proper officer in that behalf, under and in accordance with the provisions of s. 46 of the said Act.

8. The said land having been duly surveyed and the selection thereof approved by the Secretary for Public Lands, the Governor of the said colony caused to be issued to the said George Ronald Hutchison a lease of the said land subject to the conditions and provisions in the said Act in that behalf contained.

9. The said application was accompanied by a deposit in cash equal to the first instalment payable on the said section under the provisions of s. 46 of the said Act, and at the time of delivering the same to the Land Agent the said George Ronald Hutchison also deposited the survey fees payable in respect of the said selection according to Schedule "H" of the said Act, which said deposit and survey fee amounted together to the sum of sixty-one pounds.

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10. The said sum of sixty-one pounds was paid by the said George Ronald Hutchison out of his own moneys.

11. On the thirtieth day of March, one thousand eight hundred and seventy-four, the said George Ronald Hutchison duly paid to the Land Agent of the district within which the said selection is situated the sum of thirty pounds, being the second year's rent for the said selection.

12. The said rents were paid by the said George Ronald Hutchison out of the moneys of the said firm of Wildash and Hutchison, first had and obtained by the said George Ronald Hutchison from the said firm for that object only and not as a loan by the said firm to him; such last mentioned payment was made for the purposes of the said firm and the carrying on of its business.

13. On the thirtieth day of March, one thousand eight hundred and seventy-five the said firm of Wildash and Hutchison paid out of the moneys of the said firm the sum of forty-five pounds, being the third year's rent of the said selection; such payment was not made as a loan to the said George Ronald Hutchison, but was made solely for the purposes of the said firm and the carrying on of its business.

14. Between the said thirtieth day of July, one thousand eight hundred and seventy-three, and the day next hereinafter mentioned, the said firm of Wildash and Hutchison made and caused to be made certain improvements on the said land, which in all cases were paid for by the said firm out of the moneys of the said firm, and were made or caused to be made for the purposes of the firm solely and for no other purposes whatsoever.

15. The said commissioner upon the eight day of May, one thousand eight hundred and seventy-six, issued to the said George Ronald Hutchison a certificate in respect to the said selection that the conditions aforesaid had been duly performed thereon.

16. The improvements upon the said selections required by the said Act and in respect whereof the said certificate was given were the said improvements and no other.

17. The said selection has ever since the date of the aforesaid application for the same, and during the whole of the time that the said station of Canning Downs remained the property of the said firm of Wildash and Hutchison (that is to say till the month of June, one thousand eight hundred and seventy-five), been devoted by the said George Ronald Hutchison to the use of the said firm of Wildash and Hutchison, and has been used as part of the said station and for the

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purpose of the said firm and the carrying on of its business, and the sheep of the said firm have constantly during the period aforesaid grazed over the said selection, and the same has been used for no other purpose whatever.

18. The said George Ronald Hutchison was a trustee of the land for the said firm of Wildash and Hutchison when the said station ceased to be the property of the said firm, in the said month of June, one thousand eight hundred and seventy-five.

19. On the thirtieth day of March, one thousand eight hundred and seventy-six, the said Frederick John Cobb Wildash duly paid to the said Land Agent the sum of one hundred and ten pounds three shillings and eight pence, being the fourth year's rent for the said selection and other moneys payable in respect thereof.

20. By a Crown grant, number 31,470, dated the fourteenth day of July, one thousand eight hundred and seventy-six, duly registered under the provisions of *The Real Property Act of 1861* and issued thereunder on the nineteenth day of July, one thousand eight hundred and seventy-six, the said selection was granted to the said George Ronald Hutchison and his heirs free from encumbrances.

21. On the twenty-fourth day of December, one thousand eight hundred and seventy-six, the said George Ronald Hutchison by an instrument of transfer of that date, duly registered under the provisions of *The Real Property Act of 1861*, on the thirtieth day of December, one thousand eight hundred and seventy-six, transferred the said selection to his brother, the defendant, Alexander Russell Hutchison, who is now the duly registered proprietor of the same under the provisions of the said Act for an estate in fee-simple free from encumbrances, and a certificate of title, under the said Act, was issued to the defendant, Alexander Russell Hutchison.

22. The defendant, Alexander Russell Hutchison, never gave full or any valuable consideration in money or otherwise for the said transfer to the said George Ronald Hutchison or to the said firm of Wildash and Hutchison, and the said George Ronald Hutchison did not nor did the said firm of Wildash and Hutchison ever receive full or any valuable consideration in money or otherwise for the same, from the defendant, Alexander Russell Hutchison, or any other person.

23. The said transfer was executed by the said Frederick John Cobb Wildash as attorney for the said George Ronald Hutchison, and was made in order that the defendant, Alexander Russell Hutchison, should thereby become and be a trustee for the said firm, and to prevent the

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just creditors of the said firm of Wildash and Hutchison from having the benefit of the said selection.

24. The defendant, Alexander Russell Hutchison, before and at the date of the said transfer and before he in any way contemplated acquiring the selection therein mentioned, had full and actual notice of all and every the facts and circumstances herein set forth, and that the said selection formed part of the property of the said firm of Wildash and Hutchison, and was not the separate property of the said George Ronald Hutchison.

25. On the twenty-sixth day of June, one thousand eight hundred and seventy-seven, the plaintiff duly lodged a caveat of that date under the provisions of the said Act, whereby he forbad the registration of any instrument affecting the said selection.

26. Since the said twenty-sixth day of June, one thousand eight hundred and seventy-seven, the defendants, the Australian Joint Stock Bank, have made advances in money to the defendant, Alexander Russell Hutchison, upon the security of a deposit of the said certificate of title to the said selection.

27. The defendants, the Australian Joint Stock Bank, before and at the time when the said advances were so made as aforesaid, had full and actual notice of all and every the facts and circumstances herein set forth, and that the said selection formed part of the property of the said firm of Wildash and Hutchison at the date of the said adjudication, and was not the property of the defendant, Alexander Russell Hutchison, other than as a trustee for the plaintiff as to two equal undivided third parts or shares thereof.

28. The defendants threaten and intend, unless they shall be restrained by injunction, to transfer or otherwise deal with the said selection.

29. The plaintiff is ready and willing, and hereby offers to make all such payments and do all such acts in the premises as to this Honorable Court may seem meet.

The plaintiff claims:—

1. A declaration that the defendant, Alexander Russell Hutchison is, as to two equal undivided third parts or shares in selection number 864, Warwick district, being all the land in deed of grant, number 31,470, a trustee for the plaintiff.

2. If necessary, an account of what is due to the defendant, Alexander Russell Hutchison, in respect of his said trusteeship.

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3. An order that the defendant, Alexander Russell Hutchison, upon payment of what (if anything) shall be found due to him on the taking of such account, and which payment the plaintiff hereby offers to make, do transfer the said shares to the plaintiff, or

4. A declaration that the defendant, Alexander Russell Hutchison, is a trustee thereof for the plaintiff, within the meaning of *The Trustees and Incapacitated Persons Act of 1867*, and

5. An order that the same be vested in the plaintiff (or the estate of the said defendants therein).

6. An injunction restraining the defendants from transferring or otherwise dealing with the said selection as to the said two shares therein.

7. Payment by the defendant of the costs of this action.

8. Such further or other relief as the nature of the case may require.

The Australian Joint Stock Bank, defendants, demurred to the plaintiff's statement of claim on the grounds:—

1. That the alleged trust by which George Ronald Hutchison became, as is alleged, a trustee of the said land for the firm of Wildash and Hutchison, was in violation of the provisions of *The Crown Lands Alienation Act of 1868*, and was illegal and incapable of being admitted or enforced in a Court of Law.

2. That the rights of the trustee in insolvency of insolvent members of a partnership against the solvent members thereof in respect of partnership assets, held by the latter, are to have an account taken of the partnership transactions, and to have such assets brought into account, but that such a trustee is not entitled without such account to any part of the partnership assets, or any share or interest therein, nor is he entitled to any such share or interest in any of the partnership assets in specie.

3. That as between the trustee of insolvent partners and the solvent partner or his assigns, the solvent partner does not become a trustee of partnership assets held by him until after an account has been taken of the partnership assets, and that no trust is therefore shown which can be enforced against these defendants.

4. That the rights of the plaintiff as trustee in insolvency of the insolvent member of the alleged firm of Wildash and Hutchison, in respect of partnership assets, cannot be declared or enforced in an action to which the solvent member is not a party.

Harding, for the Official Trustee, appellant, cited *Land Act of 1868*, s. 59, Lewin on Trusts (cap. 9, p. 120, s. 11), *Davenport* v.

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The Queen (*ante* p. 55), *Barton* v. *Muir* (L.R. 6 P.C. 134, 1 Wm. Saund. 442, 1 Smith L.C. 35, 39); *Malins* v. *Freeman* (4 Bing. N.C. 395), *Field* v. *Lonsdale* (13 Beav. 78), *Santos* v. *Illidge* (8 C.B. (N.S.) 861), *Osborne* v. *Williams* (18 Ves. 379), *Reynell* v. *Sprye* (1 DeG., M. & G. 660, 679), *Sharp* v. *Taylor* (2 Ph. 801), *Sheppard* v. *Oxenford* (1 Kay & J. 509), *Holman* v. *Johnson* (Cowp. 341), *M'Cormick* v. *Grogan* (L.R. 4 H.L. 82), *Haigh* v. *Kaye* (L.R. 7 Ch. 469), *Holderness* v. *Lamport* (29 Beav. 129), *Ex parte Yallop* (15 Ves. 60), *Ex parte Houghton* (17 Ves. 251), *Ex parte Connell* (3 Deac. 201), *Lewis* v. *Lane* (2 Myl. & Keen. 449), *Howe* v. *Howe* (1 Vern. 415), *Fox* v. *Hanbury* (Cowp. 445), *Barker* v. *Goodair* (11 Ves. 84), *Wilson* v. *Greenwood* (1 Swans. 471), *Fraser* v. *Kershaw* (2 Kay & J. 496), Kerr on Frauds, 313; Maxwell on Statutes, 184, 190; Lindley, pp. 594 to 600.

Griffith, *A.G.*, *Pring*, *Q.C.*, and *Garrick*, for the Australian Joint Stock Bank, respondents, cited *Slater* v. *Willis* (1 Beav. 345 *ad fin.*), Lewin on Trusts, 85, 119-120; *West* v. *Skip* (1 Ves. 456), *Taylor* v. *Fields* (4 Ves. 396), *Holderness* v. *Shackells* (8 B. & C. 612), *Darby* v. *Darby* (25 L.J. Ch. 371, 376), *Barker* v. *Goodair* (11 Ves. 78), *Ellison* v. *Ellison* (6 Ves. 656), *Garrard* v. *Ld. Lauderdale* (3 Sim. 1, 2 Russ. & Myl. 451), *Gibbs* v. *Glamis* (11 Sim. 584), Story on Pleading sec. 155, Lindley 3rd Edition, 209, 664, 668, 681, 1148, 1150.

Harding, in reply, on the construction of s. 68 of *The Insolvency Act*, cited Shelford, 196, 197; *Ex parte Cook* (2 P.W. 499), Robson, 574; *Glegg* v. *Rees* (L.R. 7 Ch. 71), *Jones* v. *Lock* (L.R. 1 Ch. 25).

Cockle, C.J.

COCKLE, C.J. Although our views are not precisely identical, yet we think it better to give a prompt judgment than to delay for the purpose of reconciling differences which after all are but trifling in themselves and do not affect the result at which we have arrived. I think that this appeal should be dismissed with costs, and it is material for me to say that I ground my conclusion on s. 54 of the Act of 1868, the last proviso of which it is important to observe enacts "that all contracts, agreements, and securities made, entered into, or given with the intent or which (if the same were valid) would have the effect of violating all or any of the provisions of this part of the Act, or of any covenant or condition of a lease granted under this part of the Act, and all contracts and agreements relating to land selected under the foregoing provisions made and entered into before, at or after the termination of the lease or completion of conditions shall be and are hereby declared to be illegal and absolutely void

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whether at law or in equity." Now I take it that any agreement which would have the effect of creating a trust of the fee would be void under this proviso. This statement of claim is very singularly drawn, and I cannot help thinking that, in constructing it, the pleader had his eye upon this very proviso. The words "contract" and "agreement" are neither of them used throughout the statement of claim. Their use is avoided, I am almost inclined to say, evaded, and I think that the same evitation of the word "security" is almost obvious, for the provision in paragraph 12 of the statement of claim, that the payment of rent was not to be as a loan, was intended to escape the consequences of a security being deemed to arise. Now it has been suggested that a resulting or constructive trust arose. There is ambiguity, I think, in that word, because here we cannot suppose that this constructive or resulting trust arose as a devolution by death. I can only conceive it to have arisen, if at all, upon acts whereof the motives, intentions, aims, and objects are either withheld from us altogether or left to a mere inference, and so left upon pleadings which are themselves fluctuating in their phraseology, for while in paragraphs 12 and 13 nothing is said as to property—and perhaps that is carefully omitted—in paragraphs 24 and 27 the selection is treated not as something used or occupied by the partnership, but as the property of the partnership. It is said this trust is to arise upon the facts set out in this statement of claims. By suppressing the words "contract" or "agreement" I suppose it is intended that the inference should be drawn from isolated facts. Now, treating the facts in isolation, I for my part say, that no such legal inference as the plaintiff wishes us to draw with respect to the trust in favour of the firm arose upon these facts.

To summarise:—From the facts treated as isolated facts the suggested trust or title does not legally arise; they are to be before the Court in combination; they must be treated in combination, not to be combined arbitrarily, and in fact so far as I am concerned I limit as much as possible the freedom of combination. If it were permitted to me to make what I deem the most probable conjecture as to the legal results of these facts my conjecture would be, that it was agreed between George Hutchison and his co-partners that in consideration that the firm should pay the second year's rent then that George should during the partnership allow the use and occupation of the land for partnership purposes. But if it be necessary to find what was the precise agreement I think it was the duty of the plaintiff, who

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best knew the motives of two of the co-partners, to have laid the necessary grounds before the Court. The least I can suppose from the perusal of paragraph 12 is this, that it was agreed by the co-partners that George should pay the rent out of the partnership money, or that Kenneth Hutchison and Wildash should assist George in paying the rent. It seems to me that such an agreement or some such agreement may be deduced, not as an inference from the facts stated in paragraph 12, but as a mere paraphrase of the words of paragraph 12, and merely paraphrasing the words. I think I am safe in saying that an agreement must have existed, and may legally and properly be inferred to have existed. But if it be an agreement which has the effect of violating all or any of the provisions of this Act or of any covenant or condition, or if it be an agreement relating to land to take effect wholly or in part, after the termination of the lease, then it is to be absolutely illegal and void. Being so, I think that with a minimum amount of conjecture, I may safely come to the conclusion that there was nothing to create a valid trust. Now, being unable to resist the conclusion on the facts stated, that an agreement of some sort must have existed, I say that that agreement, if it affected or tended to affect the fee, was illegal; if it did not—if it related merely to the use and occupation, then it is quite irrelevant. Even more narrowly, was it a resulting trust? I say that if this was contemplated—if there was any understanding between the parties with reference to it, it was illegal. If no such resulting trust was contemplated I do not see that any injury is done to the plaintiff by this decision, because it was never contemplated by anybody except the trustee when he came to look into the matter. I do not say that it was so, I think the resulting trust, which arose first in the mind of Mr. Miskin, is insufficient to sustain this claim. That being so, I confess I cannot help seeing that when the Crown grant was given, George was the absolute owner of the fee, the owner in law and the owner in equity, and having the right to do as he willed with his own, I cannot see any moral censure that can be deservedly passed upon him because he chose to benefit his friends and prevent the creditors of the firm from getting the money; a design to start a connection, or a relation, or even a friend, in life, to give such a person a fresh start, is one which cannot be called immoral or illegal. I think, therefore, that this appeal must be dismissed, and with costs. It is not necessary for the purposes of this decision to say anything about s. 68, but it may be useful to say that the majority of the Court are of opinion that this section was not well pleaded.

MISKIN v. HUTCHISON (No. 2).

Lutwyche, J.

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LUTWYCHE, J. I agree with the learned Chief Justice in thinking that this appeal ought to be dismissed with costs. I cannot help admitting the very great force of the argument with which the learned Chief Justice has fortified his opinion as to the illegality of the agreement which was made between the firm and Hutchison, if such an agreement was really made. As Mr. Justice Lilley said in the judgment he gave when the demurrer was originally allowed—"there is very cogent evidence indeed to induce a conclusion that such an illegal agreement was made, and was therefore void under s. 54 of the *Land Act*." But I prefer resting my own individual judgment in dealing with this case upon the plain, broad, and admitted facts which appear upon the statement of claim. I do not myself decide or give as my opinion, that there was such an illegal agreement made; I think, however, that there was an agreement made between George Hutchison and his partners, Wildash and Kenneth Hutchison, but I think that agreement was a legal one, I think it was capable of being enforced, and I think it was enforced. The contract was executed at the time the occupation of the station of Canning Downs by the firm for pastoral purposes ceased. To my mind the statement of claim clearly shows these facts, that the three members of the firm, Wildash, Kenneth and George Hutchison, were partners in the firm of Wildash and Hutchison, and that George Hutchison having a selection, which is the subject of the claim, and having paid the first year's rent out of his own money, obtained with the consent of the partnership, the money for the second year's rent out of the moneys belonging to the firm, and, following the paragraphs of the statement of claim, I think that the agreement made between them amounted to this, that in consideration of the payments and in consideration of the improvements made on the selection while the firm remained in possession of Canning Downs, they were content to use the selection for the purposes of the firm, that is to say, for the pastoral purpose of grazing sheep. That appears to me to be a very good and certainly a legal agreement. After the occupation had ceased, there is nothing upon the face of the statement of claim to show what was done with the property except this, that the fourth year's rent was paid by Wildash, out of whose money it does not appear (but no inference is to be drawn from that fact), and that George obtained a grant from the Crown, and must therefore have necessarily paid the balance of the 10 years' rent out of his own funds. That being so, and the agreement having been as I say executed, no trust arises in favour of the trustee of the insolvent

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estate of Wildash and Hutchison, and therefore the plaintiff has made out no title to the relief sought in this case. I may add that I think that George Hutchison was not a necessary party to this action.

LILLEY, J. The facts in this statement of claim are so ambiguously set out, that I am not in a position to say that the conclusion to which the majority of the Court have come are not fully warranted by the pleading. It is a question merely of construction, and it may be that the agreement was one merely for the use and occupation of the selection of George Ronald Hutchison by the firm, but I prefer, with the greatest possible deference, to adhere to my own judgment in the Court below. I think when we look at the nature of the title that George Hutchison was holding from the Crown, that it was a lease entitling him to fee simple on the performance of certain conditions, the payment of certain rents, which are treated by the statute as purchase money, and the making of certain improvements which are also included in the purchase money; and I think that if the statute had imposed no prohibition, and if these were merely ordinary circumstances—dealings by members of the firm with partnership money, there would have been a resulting trust in the advantages to be obtained from the lease, and that all the members of the firm would have had an interest in it, in the nature of a resulting trust in the fee. Of course if there was an agreement merely of the kind described by my learned colleagues, there would have been no interest in the fee and no title, and I entirely agree with the conclusions to which they have come upon that construction of the pleading. It may be, however, that on looking more closely into this pleading, that I have put a too favourable construction upon it for the plaintiff. It may be that instead of a trust resulting merely from the action of one of the parties that there was in fact an agreement, express or implied, between them, that the conditions should be performed and the rents paid, and that the firm should afterwards acquire by some act of the selector, an interest in the fee. Looking merely, as I have said, at the facts set out in the paragraphs preceding the 18th, there would be nothing more at the most, than a resulting trust in the fee, but if paragraph 18 is to be treated as something more than a statement of the legal or equitable result of the facts previously stated, it may be, and it has been, contended by Mr. Harding in his argument, that it is more than a mere conclusion of law, that it is a statement of the fact that George Ronald Hutchison was a trustee of the land for the said

MORRIS v. HUTCHISON (No. 2).

Lilley J.

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firm. If I am wrong in my conclusion that the facts set out show a resulting trust, and if this be a statement of a fact, then he could only be a trustee of the land for the firm by means of some agreement. If that were so it was before the issue of the Crown grant, and was a title which could only take effect after the completion of conditions and by means of a grant from the Crown, so that at the time the land would be subject to a contract or agreement relating to land selected under the Act, and made and entered into before, at or after the execution of the lease, and to take effect wholly or in part at or after the termination of the lease or on completion of conditions, and as such it would be illegal and absolutely void. It has been argued by Mr. Harding that this is a proviso for the benefit of the selector, and is only voidable by him: it has also been contended by him that it is for the benefit of the Crown, and voidable at the option of the Crown; his contention is that the selector and the Crown not having avoided it the selection remained untouched and passed on from George to Alexander for the benefit of the creditors. Now, to those who are acquainted with the history and policy of this piece of land legislation, there can be no doubt as to the meaning of this prohibition, that it is an absolute prohibition. Looking at s. 54 alone, it may be seen that every line and word is aimed against secret titles in the land. The object is to secure that the selector shall be the real owner of the land until he has fulfilled the conditions. Then it is his own, and he is in a position to do as he likes with his own. The object of the section is to prevent what is known as the practice of dummying, it is in fact to prevent one man selecting two, three, four, or fifty selections by means of his servants or agents, and of performing the conditions imposed by the statute through them, and then of taking to himself the whole of the selection. The intention is to effect settlement upon the land, to create permanent settlement, and to distribute the land among the settlers in certain proportions fixed by the statute; it is not to deprive the colony of the benefit of three, five, fifty, or one hundred settlers and give it over to only one. That is the policy of the statute undoubtedly, and where the words "absolutely void," and particularly where the words "illegal and absolutely void" are used, and the statute is made to carry out some act of public policy, the narrow construction that the language of the Act means only "voidable and not void," cannot be put upon it. It is an absolute prohibition. Then, if a resulting trust or an implied or expressed agreement existed

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at the time George Ronald Hutchison received the grant from the Crown, such a transaction would be illegal. It was a grant from the Crown to him, and discharged him from any such trust as the pleader has endeavoured to impose upon him. That being so, the transfer from George to Alexander Russell Hutchison that he should thereby become and be a trustee for the said firm, and to prevent the just creditors of the said firm of Wildash and Hutchison from having the benefit of the said selection, such a transaction would certainly not pass on for the benefit of the creditors any interest in the land. He was the owner of the land, he gave it to Alexander and the other members of the firm, but expressly that the creditors of the firm should have no interest whatever in the land. As he was solvent at the time and no claim is shown by the creditors to this land, he had a right to do with it as he thought best, and thus to deprive the creditors of the firm of any benefit in the land. I think it unnecessary to enter any further into that. There was no trust that the firm or Official Trustee could enforce against those who took under George or Alexander. As to the non-joinder of George, I expressed my opinion in the Court below, and it remains unaltered. I think he was not a necessary party to the suit; this is a minor point, the question is title or no title, and the Court are of opinion that there was no title, and the appeal will be dismissed with costs.

Solicitors for the appellant: *Hart & Flower.*

Solicitors for the bank: *Daly & Abbott.*

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ATTORNEY-GENERAL *v.* SIMPSON.

1878.
17th April.

Lilley, J.

Crown Lands Alienation Act of 1868 (31 Vic., No. 46), ss. 54, 57, 127, 128, 129—Practice—Discovery—Answer tending to criminate —Costs.

The object of an information filed by the Attorney-General against S. and others was to obtain a declaration that certain Crown lands were acquired by S. contrary to s. 54 and other provisions of *The Crown Lands Alienation Act of 1868.* Interrogatories having been administered to the defendants, S., by his answer, set up his right to protect himself from pains, penalties, and forfeiture, by refusing to make specific answer to the information and interrogatories.

Held, that as, in order to entitle the plaintiff to the relief claimed, it would be necessary to prove facts by reason of which S would incur a forfeiture of the land under s. 128, and be liable to a prosecution for misdemeanor under ss. 127 and 129 of the Act, S. could not be compelled to make a further and better answer.

Section 57 of *The Crown Lands Alienation Act of 1868* does not create a contract by the lessee to reveal to the Crown the extent of his compliance with the covenants and conditions of his lease.

Even if such a contract were implied by s. 57, it would not amount to a waiver of the right of the contracting party to protect himself from pains, penalties, or forfeiture by refusing to disclose.

The costs of an application for such further and better answers were made costs in the cause.

MOTION on behalf of the Attorney-General that the defendant, George Morris Simpson, might be ordered to put in a further and better answer to an information filed in the suit by the Attorney-General.

In December, 1870, Geo. Simpson, J. Hay, and J. C. Thomson, the defendants, entered into a partnership for the purpose of acquiring land in Queensland, and they mutually agreed that each of them should make application under the provisions of *The Crown Lands Alienation Act of 1868* for as much land as one person might lawfully apply for, and that other persons should be procured to make similar applications for such lands as might be pointed out to them by the said defendants. They further agreed that the land so applied for should form one estate, and that the persons making the other applications should be admitted into the partnership till they had severally acquired deeds of grant of their selections, which should be transferred to the defendants, who agreed to pay the necessary rents and

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purchase money therefor. The object of the proposed scheme was said to be to enable the said defendants to acquire more land than they were entitled to hold under the Act. In pursuance of this plan, the three defendants mentioned applied for and obtained three adjoining selections (selections 126, 127, and 129), consisting of 2,560 acres each; and later, the defendant H. G. Simpson, at their request, took up a selection (No. 149) in the same district, containing 3,875 acres. On the 15th of February, 1871, four applications were lodged by the defendant, John Hay, for adjoining selections in the Dalby district, and subsequently approved. One of these (selection 159) was in his own name, and was for 1,272 acres of agricultural and second-class pastoral land; another (No. 158) was that of the defendant, W. C. Mayne, for 3,778 acres of agricultural and first and second-class pastoral land; the third (No. 145) was on behalf of the defendant, J. P. M'Gregor, and was for 3,776 acres agricultural and first and second-class pastoral; and the fourth (No. 146) was in the name of the defendant, J. Martin, and represented 3,789 acres agricultural and first and second-class pastoral country. This latter selection consisted of twenty-one separate pieces of land, some of which were not conterminous to the others, and were only contiguous to them at their corners. By this means a large quantity of land not taken up was rendered inaccessible to any persons other than the applicant or those with whom he arranged for the purpose of allowing them access to the same. The leases for these lands were delivered to the defendant, George Simpson, who was manager for the said partnership, and have since remained in his custody. On February 17, 1871, three other selections adjoining those just mentioned were applied for as follows, and subsequently granted:—(No. 162), G. M. Simpson, 1,569 acres agricultural and second-class pastoral; (No. 161), J. C. Thomson, 1,253 acres agricultural and second-class pastoral; and (No. 160), C. Thomson, 1,246 acres agricultural and second-class pastoral. Early in the month of April of the same year, the defendant A. S. Garland arrived in the colony, and applied for two selections under the agreement mentioned. These consisted of selection 188, containing 2,414 acres, and embracing all the land lying between the various portions of selection 146 and that selection and selection 160; and selection 189, containing 1,425 acres, and adjoining part of selection 146. The moneys paid in respect of all these selections, as well as for the improvements made thereon, were paid out of the funds of the three defendants G. M. Simpson, Hay, and J. C. Thomson. The defendants

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M'Gregor, Martin, C. Thompson, and Garland were, prior to making the applications, in the employ of G. M. Simpson, and had since remained in such employment; and the lands selected as described have since been used by and as the property of the firm of G. M. Simpson and Co. The defendants refuse to discover the exact terms of the partnership agreement existing between them. All of them, with the exception of G. M. Simpson, Hay, and J. C. Thomson, were, at the time they made their respective applications, agents and servants of the three defendants just mentioned, or some one of them, in respect to the land which they respectively applied to select, and none of them had used the lands selected except as stated, it being understood that the whole of it, as soon as deeds of grant were obtained, was to be conveyed to the three defendants named or to one of them. On the 20th March, deeds of grant were issued to G. M. Simpson in respect of selections 126 and 162, and another to H. G. Simpson for selection 149. In June, 1873, the commissioner for the district, on application of G. M. Simpson, issued certificates of fulfilment of conditions to the defendants Martin and Garland in respect of selections 146, 188, 189 respectively. In the month of September of the same year the balance of the ten years' rent payable in respect of these three selections was paid by G. M. Simpson out of the moneys of the firm, and application made for deeds of grant for the same. Before this payment was made, Martin and Garland each executed a power-of-attorney authorising G. M. Simpson to deal with the lands when deeds of grants should have been issued, these powers being made, it is alleged, in order to enable the last-named defendant to convey the lands to himself. Before November, 1873, the defendants Hay and J. C. Thomson procured the commissioner to issue to them certificates in respect of selections 127, 129, 159, and 161 respectively; and on November 21 following, the balance of the ten years' rent upon these four selections was paid out of the funds of the firm as in the case of the selections before mentioned. In June, 1873, on the application of G. M. Simpson, certificates were also granted to the defendants Mayne, M'Gregor, and Charles Thompson, in respect of selections 158, 146, and 160 respectively. All the certificates issued were applied for on behalf of the firm of G. M. Simpson and Co., and the applications were supported by evidence procured by G. M. Simpson, which induced the commissioner to believe that the conditions of the Act had been complied with, particularly that the several lessees of the lands in question had by themselves or their agents or

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bailiffs resided on the said lands for a period of two years: whereas, in fact, the persons who had so resided were the servants of the said firm of Simpson and Co. The said evidence was procured, it is alleged, for the purpose of evading the provisions of the Act; and it was not until the certificates had been granted that the facts detailed came to the knowledge of the Government. By a proclamation, dated November 11, 1874, the leases of selections 127, 129, 159, 158, 145, 146, 161, 160, 188, and 189, were declared forfeited, on the ground that the lands mentioned therein had been acquired in violation of the provisions of s. 54 of the Act: but the defendants refused to give up possession of the said lands, and claimed the proclamation was of no effect.

The information prayed:—1. That it might be declared that the leases of the several selections mentioned therein—viz., Nos. 127, 129, 159, 145, 146, 161, 162, 188, and 189, in the Dalby district—were acquired in violation of the provisions of s. 54 and other provisions of *The Crown Lands Alienation Act of 1868*. 2. That it might be declared that the certificates of the commissioner of fulfilment of conditions in respect of the same were obtained by fraud, and are void and inoperative. 3. That it might be declared that the terms created by the said several leases have ceased and determined, and that the lands comprised therein have reverted to Her Majesty. 4. That the said several leases and certificates might be delivered up to be cancelled.

The interrogatories required particulars of these selections more in detail than they were given in the information. The answer of G. M. Simpson to the information is to the effect that it appears on the face of the same that it was filed for the purpose of having it declared that he was subject to certain pains, penalties, and forfeitures, enacted by the Act of 1868 in respect of the lands mentioned, by reason of the allegations set forth in such information; that all such allegations, as to which discovery is sought by the interrogatories, would be, if true, links in the chain of proof requisite to entitle the informant to the relief prayed in his said information; and that, by the settled and known rules of the Court, he (Simpson) was not bound to answer such allegations or interrogatories; and that he did not admit any of the matters charged against him.

The suit was commenced before the passing of *The Judicature Act of 1876*.

Griffith, *A.G.*, *Pring*, *Q.C.*, and *Real*, submitted that the answer

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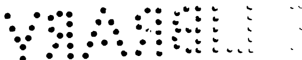
was no answer; that the defendant Simpson by it averred nothing concerning himself; and, in respect of the pains, penalties, and forfeitures mentioned, that the informaton had been filed for the purpose of recovering certain lands which were averred to be, and always to have been, Crown lands, and not for the purpose mentioned in the answer. He contended that the inability of a fraudulent applicant to acquire land was not in the nature of a penalty or forfeiture; that if any question of forfeiture arose as regards the defendant George M. Simpson, it was only a collateral question, and was not a sufficient ground for refusing to answer; that the said defendant, to be relieved from answering on the ground that by so doing he would be subjecting himself to "pains, penalties, and forfeitures," must state on oath that such would be the case; that a selector, under the Act of 1868, was bound by the nature of the transaction into which he entered, to answer any question that might be put to him under s. 57; and that, even if the defendant was not bound to make a discovery as to the criminating portions of the information, it need not be taken as a whole, but answers should be given to those parts which were not of such a nature.

The following authorities were cited:—Kerr on Discovery, p. 156, *Attorney-General* v. *Duplessis* (1 Bro. P.C. 415), *Green* v. *Weaver* (1 Sim. 404), *Chadwick* v. *Chadwick* (22 L.J. Ch. 329), Daniel Ch. Pr. pp. 518, 521, *Dummer* v. *Corporation of Chippenham* (14 Ves. 245), *Scott* v. *Miller* (1 Johns. 328), *Fisher* v. *Ronalds* (12 C.B. 762), *Fisher* v. *Price* (11 Beav. 194).

Harding (Pope Cooper with him) cited *The Crown Lands Alienation Act*, 1868, s. 127, and submitted that as it directly appeared on the face of the information that if the relief thereby prayed were granted, one of the defendants would be liable under the statute for a misdemeanor, the discovery asked for could not be enforced. It could only be by a violation of s. 54 of the Act that this land could have been forfeited; and if the defendants had not been guilty of such violation there could be no forfeiture, and consequently no misdemeanor committed. But if there had been a violation of this section, the Attorney-General must succeed, and if a misdemeanor had been committed, the defendants could not be compelled to discover anything that was criminatory. The informant could not ask them to answer questions as to whether the acts charged against them had been committed or not, because by so doing they would be subjecting themselves to "pains, penalties, and forfeitures." Taking away the criminatory



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matter, there was nothing entitling the informant to relief, and a discovery could not be sought as to the remainder.

He also cited *The Crown Lands Alienation Act, 1868*, ss. 54, 128, 129, Hare on Discovery, pp. 102, 105, *Paxton* v. *Douglas* (19 Ves. 225), *Claridge* v. *Hoare* (14 Ves. 59), *Thorpe* v. *Macauley* (5 Madd. 218), *U.S. of America* v. *McRae* (L.R. 3 Ch. 79), *Sharpe* v. *Carter* (3 P.W. 375), *Honeywood* v. *Selwyn* (3 Atk. 275), *Attorney-General* v. *Lucas* (2 Ha. 566), *Lichfield (Earl of)* v. *Bond* (6 Beav. 88), *Fisher* v. *Price* (11 Beav. 194), *Short* v. *Mercier* (3 Macn. & G. 205), *Lee* v. *Read* (5 Beav. 381).

Lilley, J.

LILLEY, J. In this cause the Attorney-General moved for an order that the defendant, George Morris Simpson, put in a further and better answer to the information and interrogatories. The suit is substantially, and in fact, entirely, for a declaration that certain lands originally Crown lands were acquired in violation of the provisions of s. 54 and other provisions of *The Crown Lands Alienation Act of 1868*. The defendant Simpson has put in an answer by which he claims the benefit of the protection which is given to a defendant in Courts of Equity where by answering he would expose himself, or might expose himself, to pains, penalties, or forfeitures. He submits that the information is filed for the purpose of having it declared that he is subject to certain pains, penalties, and forfeitures by *The Crown Lands Alienation Act*. The Attorney-General pressed upon me that the suit was in effect for the recovery of the lands, and not for the purpose of subjecting the defendant to these pains, penalties, and forfeitures. I have made a very close examination of the pleadings, as I was urged to do by the Attorney-General, with the greatest propriety, of course, and I cannot fail to see that, in order to entitle him to the relief claimed, he must prove in substance that the defendant Simpson has been guilty of some violation of the provisions of the Alienation Act. Now, I cannot also fail to see that in proving that, in order to entitle the Attorney-General to the relief he claims, he must show a transaction that would expose the defendant to a forfeiture of the land to begin with, and possibly to a criminal prosecution for a misdemeanor under other portions of the statute. The Attorney-General, of course, says that the answer must be made either to the whole or part of the information. So far I agree with him if any part of the information can be clearly separated from the whole without laying the defendant under the peril of a prosecution or criminal penalty, or forfeiture, it would of course be answerable, and he would

ATTORNEY-GENERAL v. SIMPSON.

Lilley, J.

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be required to answer. On looking through the information, I cannot see myself that there is any part of it so clearly separable from the rest as to entitle the Attorney-General (assuming that the defendant has protection on the whole of the information) to an answer to that part alone. If we take the very first paragraph of the information, which the Attorney-General pressed upon my attention, I find that, although it would seem not inseparable, on a close examination in connection with the whole of the information, it is not to my mind so clearly separable as to deprive the defendant of the protection which the law gives him. That paragraph 1 states "The several lands hereinafter mentioned were, at the times of the several applications hereinafter stated, open for selection under the provisions of *The Crown Lands Alienation Act of 1868*, relating to conditional purchase." Now, it would be one of the very first steps in a prosecution to prove that these lands were open for selection, and when we note the peculiar language of this paragraph, and connect it with the description of the lands therein mentioned, and the circumstances surrounding the acquisitions, why it is hardly possible, I think, for any man, however ingenious, to run a line of distinction between this paragraph and the other portions of the information. Looking at this paragraph, in connection with paragraphs 2, 3, and 4, in which the scheme of fraud is set out by the pleader, it is impossible to say that it could be in any way separable from the rest of the information; in fact, looking at the paragraphs beginning at 1, and taking 2, 3, and 4, and especially adding to it paragraphs 36, 39, 41, and 42, and the first prayer of the information, I think it is impossible to say that any portion of the information, even that portion which contains a description of the said lands, can be so clearly separable from the rest as to deprive the defendant of his protection, and cast upon him the burden of giving an answer to any part of the information.

I have stated that paragraphs 2, 3, and 4, contain the scheme of fraud; then paragraph 36, which I have already mentioned, distinctly points to the scheme. "The said evidence was procured by the defendant, George Morris Simpson, for the purpose of evading the provisions of the said Act, and in pursuance of the said scheme."

Then again, 39 details the forfeiture of the lands as "having been acquired in violation of the provisions of s. 54 of the said Act."

Then the Attorney-General, in paragraph 41, charges that the "certificates are void and inoperative, inasmuch as they were obtained

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in fraud of the said Act," and in paragraph 42, he further charges that "all the said lands were acquired by the several lessees in violation of the provisions of s. 54 of the said Act," and then there is the prayer number one, to which I have already referred, seeking a declaration "that the leases were acquired in violation of the provisions of s. 54, and other provisions of the said Act." It seems to me that every portion of the information is so interwoven with the other that it is impossible to separate them for the purpose of a further or better answer if the present answer is insufficient. Now, s. 54, upon which this information is mainly framed, I suppose, declares that "No person shall become the lessee or assignee of any such land who is an infant or a married woman, or who is in respect of the land which he applies to select, or any part thereof, an agent or a servant of or a trustee for any other person." In fact, it imposes in the first part certain disabilities, and renders the existence of these disabilities, or a violation of the Act, causes of forfeiture; and it appears in this case from the information, that the Governor has by proclamation declared the lands forfeited, and this suit would merely complete what the Governor has begun. But if we go to the concluding portion of the section, under which these transactions may possibly come, there is an absolute declaration of forfeiture against the defendant George Morris Simpson. But there is a further aspect of the case; not only is he exposed to forfeiture, pains, and penalties, but he is exposed, in fact, to a prosecution for a misdemeanor under ss. 127 and 129 of the statute. Section 127 provides that "any person who shall fraudulently evade or attempt to evade any of the provisions of this Act or otherwise commit any fraud thereon for the acquisition of land or shall aid any such evasion attempt or fraud shall be guilty of a misdemeanor, and on conviction thereof shall be imprisoned and kept to hard labour for a period of not more than two years." Section 128 forfeits certain lands, and s. 129 imposes the penalties of misdemeanor on "any person who shall convey transfer lease or assign any lands acquired or held by any fraud upon the provisions of this Act." Well, looking again at the information upon this branch of the case, it appears to me that the matters in the information, if proved in an ordinary prosecution for misdemeanor, would subject the defendant to punishment under these provisions of the statute. It appears to me on the face of the information that the general rule that a man can protect himself from answering any matter that may subject him to pains, penalties, or forfeiture must apply, unless it can be brought within any one of

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the exceptions argued before me by the Attorney-General. The Attorney-General referred to the old charge of conspiracy on the pleadings, and quoted the case of *Dummer* v. *The Corporation of Chippenham* (14 Ves. 245), but in that case you will find that, although the demurrer was overruled, it was overruled without prejudice to the defendants insisting by their answer against making discovery. The old rule as to conspiracy is laid down by Lord Chancellor Hardwick in *Chetwynd* v. *Linden* (2 Ves. Sen. 450). An argument similar to that addressed to me by the Attorney-General in this case was addressed to him that the defendant was bound to answer. The Lord Chancellor said, "The question is, whether it is so charged, as, if confessed in the answer, it would be a ground for a criminal prosecution in a court of law; for it is not every conspiracy will be a ground for a criminal prosecution. If that was the case, almost all the causes in this court would come within that description. The boundaries are often very nice where a matter is near indictable and a fraud on this Court." The rule then would be if the conspiracy charged in the bill or information would expose the defendant to a criminal prosecution, he may claim the protection which the law gives him in his answer. Unless the Attorney-General has satisfied me that this case falls within one of the exceptions stated by him, I must hold that the answer is so far sufficient. The Attorney-General insisted that, under s. 54, the information was not so much for a forfeiture as for a declaration of the original inability to acquire, that there were certain classes of persons mentioned in s. 54 who could not take up Crown lands, and that, therefore, it was merely a declaration of the title of the Crown against a person who had got the lands, but who was unable to acquire or hold them. The case upon which he rests his argument is *Duplessis* v. *The Attorney-General* (1 Brown's Parliamentary Cases, 415), in which it has been said by the text writers that it was held that an alien could not protect herself from answering whether or not she was an alien. I am doubtful myself whether that was really the decision, for on looking at the judgment of the Lord Chancellor, in *Finch* v. *Finch* (2 Ves. sen. 494), I find that Lord Hardwicke, on referring to that case, said:—"It was the same in the case of Mrs. Duplessis. There it was prayed she should discover whether she was an alien, and where born? I held she was not bound to discover whether she was an alien, but that she was whether her child was an alien, and where born, and obliged her to set it forth." That is within a few months of the decision reported

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in Brown's Parliamentary Cases, and on looking to the head-note to the case in Brown's Parliamentary Cases, I find this stated:—"By the known law of the land, no alien born can take, by grant, devise, or other purchase, any freehold or chattels real for his own benefit; but can and does in such cases take for the benefit of the Crown; yet this disability, being neither a penalty or forfeiture, the alien cannot demur to an information filed for discovering the place of his birth, in order to establish the fact of alienage." The judgment probably referred to the alienage of the child and not of the mother. However, the case is sufficiently distinguishable from the present, for in that case it was held there was no penalty or forfeiture, while in the present case there are pains, penalties, and forfeitures for certain illegal or irregular transactions under the statute. So that even if the case has been reported with perfect accuracy in Brown, it is broadly distinguishable from the present case.

Then with regard to the second exception, or alleged exception, that the defendant had contracted to answer, or that he had entered into some transaction, or had so conducted himself in relation to the Crown that he was compelled to answer, although it might expose him to a penalty. In support of that the Attorney-General quoted *Green* v. *Weaver* (1 Simon 404). It is observable in that case that it was a pecuniary penalty, and there was an express contract between the plaintiff and the defendant for the performance of a certain duty. Now the section of our statute upon which the Attorney-General relied was the 57th, "So soon as a lessee shall have made the last payment of instalments as hereinbefore provided, he shall be entitled to a grant in fee simple of the land leased to him, subject, however, to the payment of the fees chargeable on the issue of deeds of grant, and provided that he shall prove to the Governor-in-Council that he has faithfully complied with all the covenants and conditions contained in or implied by his lease under the provisions of this Act." It seems to me that the whole effect of that section is this: We give you a certain right, you have a title to certain land, but upon these conditions, that you show you have faithfully complied with the conditions upon which you took the lease, and any other terms requisite to be fulfilled before you were entitled to a grant in fee. But I see no contract compelling the defendant to apply for a grant; he might say that ten years' lease is sufficient for my purpose. There is nothing casting upon him any duty to make any disclosures to the Governor. He is not to be entitled unless he performs certain conditions. It

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seems to me, then, that there was no agreement here, and no contract in any way casting upon him any obligation to make any disclosure or discovery. In *Green* v. *Weaver* it was simply for a pecuniary penalty, and in all this class of cases I find the word "penalty" used with reference to a pecuniary penalty, and they are all founded upon express contracts; and in the earliest case of the kind, reported in Mosely, I find the word "penalty" was used, but not in the shape of a criminal prosecution. I think there is nothing to show that he has contracted, and, indeed, I have strong faith in the dictum of Lord Langdale, in *Lee* v. *Read* (5 Beav. 381), that where the matter would subject him to a criminal prosecution, a man cannot contract to waive the right he has to protect himself from a criminal prosecution. Otherwise, where is the limit? Suppose the matter would tend to show him guilty of murder, would he be bound to answer? An extreme case tests the validity of the supposed rule. I think, therefore, that he has not contracted or so conducted himself as to render it obligatory upon him to make discovery. Then, the least material exception, that this was only an incidental matter; that the suit was not for penalties, but only for the land. It seems to me the gist of the suit is to prove an evasion or violation of the Act as the foundation of the recovery. George Morris Simpson is in every paragraph of the information, except paragraph 1, either by name or as one of "the defendants." "George Morris Simpson" and "the said land" and "the said scheme" are all implicated together, and it is impossible to separate them. I think none of the exceptions established, and that the general rule must prevail, and that the Attorney-General is not entitled to any further or better answer, and the motion will be dismissed. On the subject of costs, Courts of Equity do not favour answers of this kind. Whilst, therefore, I dismiss the motion, I leave the costs to be costs in the cause.

Solicitor for the Crown: *R. Little.*

Solicitors for the defendants: *Hart & Flower.*

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HEMPSTED *v.* GARDNER.

Practice—New trial—Mistrial through default of party applying for new trial.

[IN BANCO.]
1878.
9th May.

Cockle, C.J.
Lutwyche, J.
Lilley, J.

A party is not entitled on an application for a new trial to rely upon any ground arising upon his own default.

Where upon the application of the plaintiff for a new trial it appeared that the real question between the parties had, through the default of the plaintiff, not been tried, the Court ordered a judgment of nonsuit to be entered, but directed that it should not operate as a judgment on the merits.

MOTION on behalf of the plaintiff to make absolute a rule *nisi* for a new trial.

In an action for infringing a patent for stopping bottles containing aerated waters, the first question submitted to the jury was whether the bottle and plug produced by the plaintiff consisted of the thing patented, the learned judge directing them that if this was not the patented invention there would be no protection. This question was answered in the negative, and judgment was entered for the defendant on that issue. All the other facts in the case were found for the plaintiff. The evidence showed that the stopper used by the plaintiff was not exactly that described in the specification of his patent, the plaintiff's practice being to put the plug and washer forming the stopper into the bottle separately, and by means of a contrivance made for the purpose, to force the latter on to the plug afterwards. The description in the specification provided that the plug should be so constructed that the washer could be put on it first and both forced into the bottle together.

A rule *nisi* was granted on the motion of the plaintiff for a new trial on the ground that the finding of the jury was against the weight of evidence, and on the ground of surprise.

Harding and *Real*, for the plaintiff, moved the rule absolute.

Griffith, A.G., and *Pring, Q.C.*, for the defendant, showed cause. The first question—viz., whether the bottle and stopper produced by the plaintiff formed the thing patented, was a material issue; and the

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second, whether there was any infringement. It was necessary to show what the patent was before there could be any infringement. The plaintiff had to show user. In the course of his evidence he showed the article he was using was quite different from that described in the specification. The fact that that question was decided against him is no ground for a new trial. *A fortiori* there was no infringement. [LILLEY, J.: The question is: Had the plaintiff without using the article a right to complain of infringement.] There was not a point of resemblance between the article used by the defendant and the plaintiff's patent, except that both stoppers were heavier than water. The patentee stated in his specification "what we claim is the peculiar construction of stopper for bottles containing aerated or gaseous liquids, as hereinbefore described and shown in the accompanying drawings." From this it appeared that the main feature of the invention was not that the stopper was of greater specific gravity than water, but the peculiar construction of the stopper, in which point the contrivances of the plaintiff and defendant in no way resembled each other. The following cases were cited: *Seed* v. *Higgins* (8 H.L.C. 550), *Lewis* v. *Marling* (4 C. & P. 52), *Penn* v. *Bibby* (L.R. 2 Ch. 127), *Neilson* v. *Betts* (L.R. 5 H.L. 1), *Hinks and Son* v. *Safety Lighting Co.* (4 Ch.D. 607).

Harding, in reply: The mode of getting the stopper into the bottle had nothing to do with the patent. In all substantial points the defendant's contrivance was similar to the plaintiff's invention. In the description previously given it was stated that the plug was to be of greater specific gravity than water. In the specification were described both the invention and the mode of carrying it into effect, and an improvement in the latter would not be a departure from the patent. (*Crossley* v. *Beverley*, 3 C. & P. 513).

Cockle, C.J.

COCKLE, C.J. In this case we disposed of the misdirection point upon the rule *nisi*, and at the same time we intimated our opinion that the verdict could not be said to be against the evidence, but that the Court wished the case to be discussed again upon the point of miscarriage or mistrial, and accordingly that was introduced into the rule by the plaintiff, and by way of amendment the ground of quasi-surprise, inasmuch as the question at the trial which the plaintiff desired to have tried being "was there an infringement of the letters of registration," the minds of the jury were directed rather to the question, "was the article used by the plaintiff the article

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described in the letters of registration." Now it might be raising a very dangerous precedent to say that any such ground as this should be sufficient for the grantng of a new trial, otherwise there would hardly be a case in which some misconception on the part of the counsel on one side or the other might not be urged as a ground for disturbing a decision and verdict carefully and accurately arrived at. I think it is well to look at what would be the analogy in a case pleaded under the old practice, and there I think the rule was not to award a repleader on the motion of the party who made the first slip in pleading. That a slip of some kind was made here can scarcely be doubted, and that slip consisted in the introduction of the bottle and the cylindrical stopper as secondary evidence not described in the specification. The jury, on being appealed to, declared that the so-called secondary evidence did not represent the thing described in the specification, and how can one wonder when that non-representing secondary evidence was accompanied by the evidence of the plaintiff himself about the use of that seemingly complicated engine, the line and three-pronged rod, that the jury came to the conclusion that they did. I think therefore it would be very dangerous to grant a new trial on this ground. Still, as there may be some question to be litigated between the parties in the present case, the Court seem to think that it would be right to vacate the judgment and to order that in place thereof a nonsuit be entered, with the direction that that nonsuit shall not operate as a judgment upon the merits.

Lutwyche J

LUTWYCHE, J. I come to the same conclusion as the learned Chief Justice, and for the same reasons. As far as my experience goes, and as far as I can venture to infer any inflexible rule from the books of practice, a rule for a new trial is never granted to a party for any miscarriage of his own; he may have a new trial on account of the default of a witness, or the default of a juror or of his attorney, but—I think I may lay down the rule absolutely—never where the default is traceable to the party himself. In this particular case the plaintiff himself created all the difficulty. If he had held his tongue about No. 2 plug, or, at all events, if being compelled to say that there was such another plug in existence and that he had used it,—if he had not volunteered information about the effect of No. 1 plug, he might possibly have stood in a better position than he did before the jury; but, at the same time, considering the way in which the question of the specification was brought before the jury both by the evidence

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and the summing up of the learned judge, I cannot think that that jury, at all events, would have come to a different conclusion. Therefore the judgment will be vacated and a nonsuit entered.

LILLEY, J., concurred.

Solicitors for the plaintiff: *Thompson & Hellicar.*

Solicitor for the defendant: *W. E. Murphy.*

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NORMANBY COPPER MINING CO., LIMITED v. CORFIELD AND OTHERS.

1878.
22nd May,
23rd May,
27th May,
31st May.

Cockle, C.J.
Lutwyche, J.
Lilley, J.

Demurrer—Company—Insolvent company—Preference—Trustee—Principal and agent—Surety—27 Vic., No. 4, s. 165—38 Vic., No. 5, ss. 107-9.

By the statement of claim of a plaintiff company it was alleged that P., G., S., and Pr. were directors of the company, and were personally liable to the Bank of New South Wales in the sum of £7500; that C., by the request of the directors, advanced sufficient moneys necessary to satisfy the amount due to the Bank, and as security for the repayment of the advance took a mortgage of all the company's property for £3500, and also took the joint promissory notes of P., G., S., Pr., B. and W (B. and W. being sureties only) for the balance; that two months afterwards C., as mortgagee, sold the company's property, and out of the proceeds of the sale discharged his mortgage debt, and by the direction of the directors applied part of the balance in the satisfaction of the debt secured by the promissory notes and interest, amounting altogether to £4164; that the company then was to the knowledge of all the parties in a state of insolvency; and that eighteen months later an order was granted for the winding up of the company, and an official liquidator appointed. The plaintiff company claimed an account and a declaration of the rights of the parties respecting the proceeds of the sale, and that the payment of the £4164 was void.

C.'s statement of defence alleged that, with the knowledge of the directors of the plaintiff company, a banking company advanced to him the money which he lent to the directors of the plaintiff company under an agreement, the terms of which were known to the directors of the plaintiff company, by which he agreed to deposit the mortgage and promissory notes with the Bank; that they were so deposited, and that the sale was effected in accordance with the agreement and the money applied as stated under the direction of the directors, none of it having been received by C., except a commission for his trouble.

The plaintiff company demurred to this part of the statement of defence,

Held, that the allegations demurred to were not demurrable.

Upon demurrer by B. and W. to the statement of claim,

Held, that B. and W. having been merely sureties for C., and there being no suggestion of their having been parties to the alleged preference contained in the statement of claim, they ought not to have been made defendants.

Upon demurrer by P., G., and S. to the statement of claim,

Held, that notwithstanding that it appeared by the statement of claim that the debt paid out of the proceeds of the sale was a debt of the company, and that the petition for winding up the company was not made within six months after the date of the payment and application of the proceeds, the statement of claim was not on that ground demurrable.

CROSS demurrers by the plaintiffs and defendants to the statement of defence and statement of claim in an action for an account of the proceeds of a sale and a declaration of the rights of the parties with respect thereto.

NORMANBY COPPER MINING CO., LIMITED v. CORFIELD AND OTHERS.

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In this action the statement of claim was as follows:—

The Normanby Copper Mining Co., Limited, is a joint stock company, registered in Brisbane on the 10th day of April, 1872, under the provisions of *The Companies Act, 1863.*

2. The said company, from the year 1872 to the end of the year 1874, carried on business under its memorandum and articles of association.

3. It is provided by the 73rd clause of the articles of association that it should be lawful for the directors for the time being, or any three of them, from time to time, as the requirements of the company might in their opinion demand, to borrow for or on account of the company any sum or sums of money they might think fit so that, however, such sum or sums of money did not in the aggregate exceed £4,000; and for securing the repayment of the money so borrowed or any part thereof, with interest, to mortgage the lands, hereditaments, and premises of the said company, either alone or together with plant, stock-in-trade, implements, and other property of the company, and to give the debentures, bonds, or promissory notes of the said company; and the directors, or any three of them, might give a receipt or receipts for any sum or sums of money so borrowed, which receipt or receipts should be a sufficient discharge to the person or persons advancing the same or any part thereof; and such person or persons should not be answerable or accountable for the loss, misapplication, or non-application thereof or any part thereof.

4. At the time next hereinafter mentioned the defendants Henry Palmer, Peter Graham, William Southerden, and James Pringle, were directors of the said company, and together with the defendants James Edwin Brown, Forster Fitzherbert Nixon, and James Ferguson Wood, were personally liable to the Bank of New South Wales for the sum of £7,500, due by the said company to the said bank, and continued so liable until the same was paid off by the defendant Henry Cox Corfield, in manner hereinafter mentioned.

5. Before the time next hereinafter mentioned the last named defendants requested the defendant Henry Cox Corfield to advance and lend to the said company money sufficient in amount to pay off and discharge the said debt of the said company to the said bank, which the defendant Henry Cox Corfield agreed to do upon having as security therefor a bill of mortgage of the land by the said company for £3,500; a promissory note for £4,000, signed by the

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defendants Henry Palmer, James Edwin Brown, Peter Graham, Forster Fitzherbert Nixon, and James Ferguson Wood; a promissory note for £2,000, signed by the defendants Henry Palmer, James Edwin Brown, William Southerden, and James Pringle; and a promissory note for £1,500, signed by the defendants Henry Palmer, James Edwin Brown, Peter Graham, William Southerden, and James Pringle.

6. On the twelfth day of December, 1873, the defendant Henry Cox Corfield, advanced and lent to the said company a sum of £7,500, wherewith was discharged the said debt of the said company to the said Bank.

7. As security for the repayment of the said sum of £7,500 the defendant Henry Cox Corfield received from the said company a bill of mortgage, dated the nineteenth day of December, 1873, duly registered on the twenty-ninth day of December, 1873, under the provisions of *The Real Property Act of 1861*, and duly executed under the seal of the said company, whereby certain pieces or parcels of land situate in the county of Bowen, being the land described in certificates of title, number 26712, register book, volume 189, folio 208; and number 26713, register book, volume 189, folio 209; and being the lands of the said company, were mortgaged by the said company to the defendant Henry Cox Corfield to secure the repayment of the sum of £3,500 on demand, and interest at the rate of £9 per centum per annum in the meantime; and a promissory note signed by the defendants Henry Palmer, James Edwin Brown, Peter Graham, Forster Fitzherbert Nixon, and James Ferguson Wood, for £4,000; a promissory note, signed by the defendants Henry Palmer, James Edwin Brown, William Southerden, and James Pringle, for £2,000; and a promissory note, signed by the defendants Henry Palmer, James Edwin Brown, Peter Graham, William Southerden, and James Pringle, for £1,500.

8. The said bill of mortgage comprised the whole of the assets of the said company except certain chattels, subject to a bill of sale, the equity of redemption whereon was of a nominal value only.

9. The money so advanced and lent by the defendant Henry Cox Corfield, together with interest thereon, remained unpaid at the time next hereinafter mentioned.

10. In the month of February, 1874, the defendant Henry Cox Corfield, in exercise of the power of sale vested in him by virtue of

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the said bill of mortgage, sold the said land comprised in the said bill of mortgage for the sum of £10,500, and received payment of the same, and transferred the said land to the purchasers thereof, who are now the registered proprietors thereof under the provisions of *The Real Property Act of 1861.*

11. The defendant Henry Cox Corfield has received the whole of the said purchase money, and has applied the residue of the same by the direction of the defendants Henry Palmer, Peter Graham, and William Southerden, the then directors of the said company, after discharging his said debt secured by the said bill of mortgage, in payment of his said debt secured by the said promissory notes to the amount of £4,164.

12. At the time of the said sale and thereafter till the date of the order next hereinafter mentioned the said company was insolvent and unable to pay its creditors, as was well known by the defendants at the time of the application of the said residue, and such application was made by such direction as aforesaid in order to prevent the creditors of the said company from having the benefit of the said residue in case of the said company being wound up.

13. If the accounts hereinafter prayed are taken the balance will be found to be in favour of the plaintiffs.

14. By an order of this honorable Court made in its Equitable Jurisdiction under *The Companies Act, 1863*, on the twenty-eighth day of May, 1875, on a petition presented for its winding up on the twelfth day of May, 1875, the said company was ordered to be wound up, and Frederick Bryant, of Maryborough aforesaid, has since been appointed official liquidator thereof.

15. The said Frederick Bryant, as such official liquidator as aforesaid, has disaffirmed and disallowed the said payment and retention of the said sum of £4,164, and has demanded payment of the same with interest at the rate of £——— per centum per annum from the date of the said sale by the defendant Henry Cox Corfield to the said company.

16. The bringing of this action has been sanctioned by this honorable Court.

17. Since the commencement of this action the defendant Forster Fitzherbert Nixon has been duly adjudicated insolvent, and a trustee of his property duly appointed.

18. By an order dated the fifth day of February, 1878, it was

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ordered that the proceedings in this action should be carried on between the continuing parties to the action and the trustee of the property of the said Forster Fitzherbert Nixon.

The plaintiffs claimed:—

1. To have an account taken of what is due to them in respect of the balance of the purchase money received by the defendant Henry Cox Corfield on the sale of the lands and premises comprised in a bill of mortgage made by the plaintiffs, the Normanby Copper Mining Company, Ltd., in favour of the defendant Henry Cox Corfield, produced and registered on the twenty-ninth of December, 1873, numbered 32425, after deducting therefrom the moneys due to the defendant Henry Cox Corfield thereon, for principal, interest, and costs; and for a declaration of the rights of the parties respecting the proceeds of the said sale; and that the payment of £4,164, part thereof, in payment of the debt of the defendants Henry Palmer, Peter Graham, William Southerden, James Edwin Brown, Forster Fitzherbert Nixon, James Ferguson Wood, and James Pringle, was void.

The defendant Corfield by his statement of defence alleged that, before he was requested to advance the money, a similar application had been made to the manager of the Maryborough branch of the Commercial Banking Company of Sydney; and that this company advanced the money to Corfield by way of an overdraft in order that he, on his part, might advance it to the plaintiffs upon the terms, in addition to those mentioned in the statement of claim, that the plaintiffs should pay bank interest for such part of the money as was not secured by mortgage, and should also pay Corfield 1½ per cent. on the whole amount of £7,500 by way of commission for his trouble in procuring the said money for the Normanby Company; that in pursuance of an agreement with the bank—the terms of which agreement were well known to the directors of the Normanby Company—Corfield deposited the mortgage with the bank, and the makers of the promissory-notes handed them to the manager of the bank at Maryborough; that the sale was also effected in accordance with this agreement, and the residue before referred to applied by Corfield as directed by the directors of the Normanby Company, none of it, except the commission previously mentioned, being received by him. The statement of defence did not admit that the company was at the time in a state of insolvency, and denied that Corfield was aware of its inability to pay its debts.

NORMANBY COPPER MINING CO., LIMITED v. CORFIELD AND OTHERS.

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The plaintiffs demurred to so much of this statement of defence as related to the arrangement or agreement between the defendants and the Commercial Bank on the grounds—(1) that the facts alleged therein did not show any ground of defence to the statement of claim, or any part thereof, to which effect could be given as against the plaintiffs; (2) that it was immaterial to the plaintiffs' case that the defendant Corfield was a trustee for the Commercial Bank; and (3) that the Commercial Bank, not being necessary parties to the suit, matters relating to them formed no defence on the part of the defendant Corfield.

The defendants Palmer, Graham, Southerden, and Pringle demurred to the statement of claim so far as it related to them on the ground that it appeared from it that the debt of the company referred to therein at the time of the payment and application by way of payment in satisfaction and discharge thereof was a valid and subsisting debt of the said company, and that the company was liable in respect thereof, and as it did not appear from the statement of claim that the petition for winding-up the company upon which the order for winding-up the same was made was presented within six months after the date of the said payment and application, but, on the contrary, it did appear from the statement of claim that the said petition was not presented within six months after the said payment and application, and was not presented for fifteen months after such payment and application by way of payment, the same was a good and valid payment, and the plaintiffs could not afterwards dispute the validity of the said payment and application, or recover back the money, or any part of it, then paid and applied in satisfaction and discharge of the said debt.

The defendants Brown and Wood also demurred to the plaintiffs' statement of claim on two grounds, the first being—that the statement of claim sought relief against them on the ground of a fraudulent preference under s. 65 of *The Companies Act of 1863* (27 Vic., No. 4) and *The Insolvency Act of 1874*, ss. 107, 108, and 109, whereas in fact no such fraudulent preference as against these defendants was disclosed on the said statement of claim. The second ground was similar to that upon which the demurrer of Palmer, Graham, Southerden, and Pringle was based.

Griffith, A.G., and *Harding*, for the plaintiffs, cited *Gaslight Improvement Co.* v. *Terreet* (L.R. 10 Eq. 168), *Skye's Case* (13 Eq. 255,)

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Marks v. *Feldman* (5 L.R. Q.B. 275), *Allen* v. *Bonnett* (L.R. 5 Ch. 577), *Pullen* v. *Tucker* (4 B. & Ald. 382), *In re The Exhall Coal Mining Co.* (35 Beav. 439), *In re German Mining Co.* (4 DeG. M. & G. 19), Bryce on Ultra Vires, 526.

Pring, Q.C., *Garrick* and *Real*, for the defendants, cited *The Companies Act, 1863*, s. 165, *Insolvency Act of 1874*, ss. 107, 108, and 109, *Insolvency Act of 1864*, s. 72, *Ex parte Blackburn, In re Cheeseborough* (L.R. 12 Eq. 358), *In re Pooley Hall Colliery Co.* (21 L.T. 690).

COCKLE, C.J. In this case, so far as the demurrer by the defendant Corfield is considered, we may I think start with the supposition that there was an unimpeached and unimpeachable debt due to the Bank of New South Wales, and taking first the allegation in the statement of claim that Corfield advanced the money for the purpose of paying off that debt and substituting himself as a creditor, that would undoubtedly, technically and in strictness, and following the words of the statement, be a borrowing of money—a loan of money. But looked at more narrowly, its true nature seems to be this: that it was a paying off of the debt of the Normanby Copper Mining Company, a perfectly good debt, and a placing, on the statement of claim, of Corfield himself in the position of an equitable creditor to the amount. At the time of this transaction—this transfer we will say—there was no other creditor of the company; the existence of such creditor is not stated, at all events, and consequently paragraph 8 of the statement of claim becomes destitute of significance so far as that time is concerned. Moreover, it is not alleged that at the time of this transaction there was any contemplation of winding up the company. That being so, let us see what appears on the statement of defence relative to this transaction. It rather enlarges—it is not inconsistent with what appears on the statement of claim, but it enlarges, expands, and to some extent explains the transaction of the transfer. It might be said, Well, what is that to us? What have we to do with that? It might be so did it not appear on the defence itself that there was a knowledge on the part of the company, or on the part of those who must be taken to represent the company, of the transaction. For in paragraph 4 it is stated, "The directors of the Normanby Copper Mining Company, Limited, and all the other defendants to this suit were at the time when the defendant lent the said money to the said company, and have ever since been, well aware of the matters and things in the last preceding paragraph set out." And on looking back to the last preceding paragraph you see there the explaining circum-

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stances under which the transfer of liability was made. Then surely the parts of the transaction set up by the defence are as important for consideration as that part which is set up by the statement of claim; and it is very possible, though not necessary to go into the point, that different liabilities might arise in respect of the Commercial Bank at Maryborough, the defendant Corfield, and the defendants, the rest of the directors. It might possibly become a question whether even supposing Corfield or one or more of the directors of the company were aware of such a state of things, whether the position of the Commercial Bank would be altered. It is unnecessary to go into that; suffice it to say, and it would sufficiently appear that this sets out material facts tending to show the true nature of the transaction, and consequently cannot be regarded as insignificant. Therefore, the Court cannot in the present state of things, when as yet the facts are untried and unproved—the Court cannot now, at all events, give effect to the demurrer, and the proper course will be to reserve to the plaintiffs the benefit of the demurrer to the hearing. All questions of costs will follow that.

I now proceed to deal with the demurrer by Brown and Wood. Now it distinctly appears upon the face of the claim that Brown and Wood are only actors in this transaction in so far that they are sureties to Corfield, who advanced the money. It is not, at all events, in the present stage of the case the business of this Court to decide upon a question which may arise either between these two sureties *inter se*, or between the two together and Corfield. And moreover, they being sureties to Corfield it is difficult to see what possible order this Court could make against them in this suit. And if we turn to paragraphs 11 and 12 of the statement of claim, we see that while there is an allegation that the then directors of the company directed so and so to be done with the proceeds of the sale, yet as against the defendants Brown and Wood there is no suggestion whatever that they were at all events parties to, or privy of, the actual preference, and certainly no allegation that they ever handled the money or knew of it. By paragraph 12—"At the time of the said sale and thereafter till the date of the order next hereinafter mentioned the said company was insolvent and unable to pay its creditors, as was well known by the defendants at the time of the application of the said residue, and such application was made by such directors as aforesaid," &c.—that is to say, by the direction of the directors who did not include Brown and Wood; and consequently I think that this

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demurrer must be upheld and judgment given for the defendants. There will be leave to amend on usual terms, otherwise judgment for these defendants.

There remains now the demurrer of Palmer, Graham, Southerden, and Pringle. Now in this case there was a suggestion made that the effect of certain clauses in *The Insolvency Act* would be to protect the defendants, but there are facts here which will have to go to the jury. It is sufficient to say that if the alleged unlawful or undue act in the present case took place, it may have taken place under such circumstances that it may defeat, delay, or circumvent. Therefore, I think that no advantage can be taken of that. As to the rest, it appears from paragraph 11 of the statement of claim that the application of the residue of the purchase money was made by the direction of the defendants Palmer, Graham, and Southerden. It is an important circumstance to note that in the 11th paragraph of the statement of claim the name of Pringle does not appear, and it appears that he was only a director at the time of the deed. Then, so far as the three defendants Palmer, Graham, and Southerden are concerned, it appears they gave directions respecting the application of this purchase money, and that at the time it was well known to the three defendants that the company was insolvent, and the thing was done in order to prevent the creditors of the company from sharing fairly in the assets. Under these circumstances, so far as these three directors are concerned, the demurrer must be overruled, while as to the defendant Pringle, the judgment must be for him. Leave to amend on usual terms as to defendant Pringle.

Lutwyche, J. It is unnecessary for me to say anything with regard to the first two cases which have been disposed of by the Chief Justice. With regard to the last one, I need only remark that the position of the four directors is, as it appears now, decidedly different. Pringle is precisely in the same position as to sureties Brown and Wood, and, therefore, entitled to the same advantage. The demurrer with regard to him will be sustained, and with regard to the other three defendants, there must be judgment against them.

Solicitor for the plaintiffs: *Lyons*, Maryborough, by his agents, *Hart & Flower*.

Solicitor for Corfield: *Barnes*, Maryborough, by his agents, *Lyons & Chambers*.

Solicitor for Palmer, Graham, Southerden, and Pringle: *P. Macpherson*.

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In re HUGHES & CO.

1878
22nd July
Lutwyche, A.C.J.

Insolvency Act of 1874 (38 Vic., No. 5), ss.202 (9), (12), 101 (1), 203—Liquidation—Adjudication of insolvency without petition—Procedure—Trustee—Costs.

The Court has power in cases which require its interposition to adjudge a liquidating debtor an insolvent without the presentation of a petition.

One of two or more trustees in a liquidation cannot, without the direction of the creditors at the time of their appointment, act without the other or others unless the creditors, on appointing them, direct that he may.

A creditor appealing to the Court against an act of a trustee in a liquidation, is, as a rule, entitled, if successful, to his costs against the trustee.

MOTION to make absolute an order *nisi* to show cause why R. Hughes & Co., liquidating debtors, should not be adjudged insolvents.

In the year 1876 the estate of the defendants was placed in liquidation by arrangement. Two trustees were appointed by the creditors without any direction concerning the mode in which they were to act. Previously to the 23rd of May, 1878, a notice, signed by only one of the trustees, and convening a meeting on that date, was sent to the creditors. The meeting was held on the 23rd of May, 1878, and a resolution passed by a majority of three-fourths in value, but not a majority in number, of the creditors present and voting, which purported to discharge the debtors and release the trustees.

On the 20th of June, 1878, one of the creditors obtained a rule *nisi* calling upon the debtors and the trustees in the liquidation to show cause why the debtors should not be adjudged insolvent.

Griffith, A.G., moved the rule absolute.

Harding showed cause.

LUTWYCHE, A.C.J. An order *nisi* was obtained on the 20th of June last by James Gulland, a creditor of Richard Hughes and Jotham Blanchard, the members of the firm of Hughes & Co., calling upon them, and also upon Charles Powell and Thomas Edward White, the trustees appointed in proceedings for liquidation by arrangement, to show cause why Hughes and Blanchard should not be adjudged insolvent. A petition for an adjudication of insolvency against them had been previously presented by Gulland, but it was objected, on showing

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cause against the order, that the service of the copy of the petition was insufficient. That objection, however, whatever effect might be given to it in certain cases, falls to the ground when it can be shown to the satisfaction of the Court that the proceedings in liquidation are of a character which require the Court's interposition under the provisions of s. 202 (12) of *The Insolvency Act of 1874*. If that be done, the Court has the power, *mero motu*, without the presentation of any petition, to adjudge a debtor insolvent. (See *In re Ashton*, L.R. 20 Eq. 777). The question for decision in the present case is whether the liquidation by arrangement can proceed without injustice or undue delay to the creditors. It was contended, on behalf of the trustees and of Hughes & Co., that the proceedings were at an end, the debtors having been discharged, and the trustees released by virtue of a resolution passed by the creditors at a general meeting held on the 23rd of May last; the resolution also declaring that the close of the liquidation should date from the 27th day of May. But that resolution had no legal force. In the first place, the meeting at which the resolution was passed was not duly convened. The notice to the creditors was only signed by one of the trustees, and the two trustees were bound to act together, being one trustee in the eye of the Act (s. 101 (1), in the absence of any declaration by the creditors at the time of their appointment that one of them might perform the act in question. But, further, the resolution itself was not a special resolution, as required by s. 202 (9). (See also s. 203, r. 237, and forms 104, 105, and 106.) The report of the trustees set out that the resolution was carried by a majority in value of the creditors, and was in accordance with the terms of the deed of arrangement executed 9th May, 1876. The trustees appear to have mistaken the effect of this clause, which does not contemplate the statutory majority required for the purposes of granting a discharge of a debtor, releasing a trustee, and closing the liquidation. There was in fact an assenting majority of three-fourths in value of the creditors present at the meeting, and voting on the resolution, but not a majority in number. The whole of the proceedings at the meeting were therefore void, and the certificate of the Registrar founded thereon was inoperative. Still, I should not feel called upon to exert the authority given to the court by s. 202 (12) if it were not apparent on the face of the proceedings in liquidation that any further delay in winding up the estate would work injustice to the general body of the creditors.

In re Hughes & Co.

Lutwyche, A.C.J.

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When the estate of Hughes & Co. was placed in liquidation, there can be no doubt that the creditors were led to believe that the whole of the debts due to them, for which the debtors gave their promissory notes, bearing 9 per cent. interest, would be paid in due course, allowance being made for renewals if the firm had time given to them. The estate has been in liquidation two years, and during the whole of that period, as I collect from the affidavits filed in the case, no dividend was paid to any of the creditors before the 23rd May last, and only a very small portion of the interest due on the promissory notes. One of the trustees, Charles Powell, in the seventh paragraph of his affidavit, says:—"One dividend of two shillings and sixpence on a third of the debts proved has been declared and paid by the said trustees during our trusteeship." The last four words of the sentence are somewhat vague, and if it be intended to imply that any dividend was paid before the 23rd May last the suggestion does not appear to be borne out by the other facts in evidence. The seventh paragraph of Mr. Powell's affidavit goes on to say:—"No further profit has been made by the said debtors, all the income of their said estate from time to time having been paid and expended for wages and advances in goods, money, and otherwise, in order to carry on the said business as provided by the terms of the said deed." Taking this statement to be literally exact, the question immediately arises whether a business which has yielded so poor a result to the creditors while under liquidation is worth continuing under the present management. There is evidence of very lax supervision on the part of the trustees during the first half of the year following the execution of the deed of arrangement, and it is shown that Hughes & Co. entered into an agreement with a creditor named Picking, which amounted to a fraudulent preference, and that Powell assented to the agreement, and allowed it to continue in effect until an antecedent debt of £100 due by the firm to Picking had been reduced by instalments of £3 a week by the sum of £82. As the law on the subject is clear, it is not worth while to examine in detail the excuses offered for its violation, but I must say that they fail to impress my mind by their weight. Upon the whole case I have arrived at the conclusion that the estate of Hughes & Co. ought to be wound up in insolvency, and the order *nisi* must be made absolute.

Concerning the question of costs I have not been able to find more than two cases which throw light on the subject, and one of these at

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first sight does not seem to have a direct application. In *Ex parte Royle, In re Johnson* (L.R. 20 Eq. 780), the trustee had paid the costs of the solicitor out of the assets, which were afterwards found to be insufficient to pay the costs of the receiver, who was entitled to them in priority. The Court made an order that the trustee should pay the receiver's costs personally. The principle deducible from this decision seems to be that the trustee becomes personally liable if he fails to carry out strictly the requirements of the Act, even when he is acting *bonâ fide*. The trustees in the present case do not allege that they have complied with the provisions of *The Insolvency Act of 1874*, but plead in justification that what they did was in accordance with the terms of the deed of arrangement executed May 9, 1876, which could not be permitted to override the express enactments of a statute. *Ex parte Angerstein, In re Angerstein* (L.R. 9 Ch. 479), carries the liability of a trustee still further, as it shows that a trustee may render himself personally liable for the payment of costs even when he does an act which he is expressly authorised by the statute to do. Under the terms of s. 127 of the Queensland Act, a trustee may apply to the Court for and obtain its opinion, advice, or direction on any question respecting the management of the insolvent estate or his duty in connection therewith. In the case last cited, the Court, dealing with a corresponding provision of the English Bankruptcy Law, held that applications of this kind are in substitution of actions at law, and if the application be unsuccessful the trustee will, as a rule, be ordered to pay the costs; and if the estate of the bankrupt is insufficient for payment of the costs, the trustee will have to bear the costs personally. By parity of reasoning when a creditor feels aggrieved by any act of the trustee, and appeals to the Court, as he may do under s. 125 of our Insolvency Act, I think he is entitled, as a rule, to his costs if he succeeds, and the trustees being in default, I order them to pay Gulland the costs of this application.

Solicitors for the plaintiff creditor: *Lyons & Chambers.*

Solicitor for the trustees: *P. Macpherson.*

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In re DEVINE.

Insolvency Act of 1874 (38 Vic., No. 5), ss. 102, 105—Execution creditor—Withdrawal of Sheriff—Sum less than £50.

1878.
26th July.

Lutwyche, A.C.J.

Sections 102 and 105 of *The Insolvency Act of 1874* do not apply to a case in which the amount for which the *fi. fa.* is issued is under £50, but in which the costs of possession bring the amount leviable up to more than £50.

Where the costs of possession brought the amount leviable, which was previously under £50, to over that amount, a motion to compel the Sheriff to withdraw from possession was refused.

MOTION to make absolute a rule *nisi* to show cause why the Sheriff should not be directed to withdraw from possession of the goods of William Devine, an insolvent.

The Australian Joint Stock Bank, having signed judgment in an action against Devine, took out a writ of *fi. fa.* against his goods, the sum indorsed upon the writ being £49 18s. 7d. On the 22nd of July, 1878, the Sheriff took possession under the writ, and on the following day the defendant was adjudicated an insolvent. The costs of possession added to the sum indorsed upon the writ raised it above the sum of £50.

Pope Cooper, on behalf of a creditor of the insolvent, moved absolute a rule calling upon the bank to show cause why the Sheriff should not be ordered to withdraw, and the goods given up for the benefit of the insolvent's creditors.

Griffith, A.G., showed cause, and cited *Slater* v. *Pinder* (L.R. 6 Ex. 228).

LUTWYCHE, A.C.J.. I am of opinion that the costs of possession were not necessarily involved in the amount to be levied for. They might be. But as the sum directed to be levied was only £49—being under £50—I think the case does not come within s. 102 of the Act; and although I was at first impressed with the difficulty of the proviso of s. 105, I think, upon looking into the section and after hearing the Attorney-General, that that proviso might be so construed as to be consistent with the terms of s. 102. Then the effect of the Act would be this—that, where the property taken under an execution is not less than £50, the Sheriff is required to hold the proceeds of the sale for fourteen days, and if after that time no

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notice has been served upon him of the presentation of a petition in insolvency against the debtor, he is to pay over the amount to the execution creditor. Then comes in the proviso attached to s. 105, which is to the effect that if the proceeds have been paid over, that payment shall hold good unless at the time of payment the creditor had notice of the presentation of a petition for adjudication. Reading these two portions of the Act together, I think that seems to be the only effect which the proviso has. Consequently it will not apply to cases where the sum levied amounts to less than £50. I think myself that the proviso is out of place, and that it should have followed s. 102. I accordingly discharge the order, but without costs.

Solicitors for the execution creditor: *Little & Browne.*

Solicitor for the plaintiff creditor: *C. Blakeney.*

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In re BELL.

1878.
6th August.

Lutwyche, A.C.J.

Insolvency Act of 1874 (38 Vic., No. 5), s. 150—Proof of debts—Mutual Credits—Dishonoured bills paid by indorser.

A bank being the holders of promissory notes made by P. in B.'s favour, proved in the liquidated estate of P. for the amount of the notes, and received the composition paid in the estate, the balance due on the notes—viz., £337 3s. 1d.—being paid to them by B., by whom the bills had been indorsed to the bank. B. was at the time of such payment indebted to P. in the sum of £126 5s. for accommodation acceptances made by P. in B.'s favour, leaving a balance of £210 18s. 1d. in favour of B. Later proceedings in liquidation were instituted in B.'s estate, and P. sought to prove against the estate for a debt of £181 14s. 6d.

Held, that the trustee was entitled to set off the £210 18s. 1d.

MOTION to make absolute an order *nisi* to vary or reverse the decision of the trustee of A. W. L. Bell's estate in liquidation, rejecting proof of debt sent in by appellant on behalf of himself, as representative of the late firm of Powell & Gardner.

In May, 1876, Powell & Gardner went into liquidation. Prior to the liquidation Bell had indorsed over to the A.J.S. Bank promissory notes to a large amount drawn by Powell & Gardner in his favour. The bank proved against the estate for the amount of the promissory notes and obtained the amount of the composition on them, the balance remaining due—viz., £337 3s. 1d.—being paid by Bell. Bell was at the same time indebted to Powell & Gardner in the sum of £126 5s. for accommodation acceptances made by Powell & Gardner in his favour, thus leaving a balance of £210 18s. 1d. in favour of Bell. In January, 1878, proceedings in liquidation were instituted in Bell's estate, and Powell proved against the estate for the sum of £181 14s. 6d. The trustee rejected the proof on the ground that he was entitled to set off the sum of £210 18s. 1d. against Powell's claim.

Harding moved the rule absolute.

Griffith, A.G., opposed the motion, and cited *Collins* v. *Jones* (10 B. & C. 777).

LUTWYCHE, A.C.J. This was a motion made on behalf of Charles Robert Powell, trading as Powell & Co., to vary or reverse the decision of Carl Harden, the trustee of Bell's estate, rejecting a proof of

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debt sent in by Powell on behalf of himself, as the representative of the late firm of Powell & Gardner. The affidavits filed disclose a disputed account; and not only are the affidavits conflicting, but the authenticity of documentary evidence is impugned. It was contended that the decision of the trustee in rejecting the proof must be upheld, unless the Court could plainly see that he was wrong. But I think that in cases like the present the Court ought to be satisfied that he was right before affirming his decision. As appears from the affidavits, he had the opportunity of inspecting, and did inspect, Bell's trade books, but he had no opportunity of examining the trade books of Powell & Co. Unless, therefore, it can be collected from admissions made, or statements uncontradicted, that there is a complete answer to the claim made by Powell irrespective of the disputed matters of account, it appears to me that the only satisfactory course would be to send the questions of fact to be tried before a jury at the next October sittings of the Circuit Court at Maryborough, where it will be my turn to preside. The books on both sides could then be produced; the authenticity of the documentary evidence could be enquired into, and the witnesses could be cross-examined. (See *Insolvency Act, 1874*, ss. 23 and 24.) I think, however, that the motion before the Court may be disposed of on its merits, without having recourse to so expensive a proceeding. The point to be determined is, whether the trustee of Bell's estate can set off a sum of £210 18s. 1d. against the claim made by Powell for £181 14s. 6d., which the trustee has refused to admit to proof. It is admitted on both sides that there were mutual dealings between the firm of Powell & Gardner and the firm of Bell & Co. prior to the 11th May, 1876, when proceedings for liquidation by arrangement or composition were instituted by Gardner on the behalf of his firm. It further appears from affidavits made by Bell and Harden, and not contradicted by Powell, that at the time of the composition by Powell & Gardner, Bell was a large creditor of the firm, and that he had endorsed over to the Australian Joint Stock Bank certain promissory notes and bills of exchange made and accepted by Powell & Gardner in favour of Bell; that the bank received promissory notes to the amount of £561 8s. 3d. from Powell, who took over the assets and liabilities of the firm in payment of the composition of 12s. 6d. in the £; and that Bell was afterwards compelled to pay to the bank a sum of £337 3s. 1d., thereby making up the full amount of the sums due on the notes and bills endorsed

In re Bell.

Lutwyche, A.C.J.

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by him to the bank. In the beginning of January, 1878, proceedings in liquidation were commenced in Bell's estate, and the trustee now admits that a deduction ought to be made in respect of accommodation acceptances in Bell's favour of £126 5s. from the sum of £337 3s. 1d., which would leave a balance of £210 18s. 1d., which he claims to set-off against the amount of Powell's proof. The Attorney-General, in his argument upon this part of the case, referred to s. 150 of *The Insolvency Act of 1874*, and cited *Collins* v. *Jones* (10 B. & C., p. 777). Under that section it is provided that where there have been mutual credits, mutual debts, or other mutual dealings between the insolvent and any other person proving or claiming to prove a debt under his insolvency, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account and no more shall be claimed or paid on either side respectively. The bank having proved on the bills and notes in Powell & Gardner's estate, Bell's remedy under the composition was barred, as the rule is well established that an estate ought not to pay two dividends in respect of the same debt. (See *In re Oriental Commercial Bank, Ex parte European Bank*, L.R. 7 Ch. 99). But the debt itself was not extinguished. *Boland* v. *Nash* (8 B. & C. 105) shows that a bill which forms an item of credit on one side need not be in the hands of the party claiming it as an item of credit at the time of the bankruptcy. At the time of the composition in Powell & Gardner's estate there were mutual debts subsisting between that firm and Bell, and they had their origin in a mutual credit which had been previously created between them. Powell having only paid a dividend on what was owing by his firm, could not recover in an action the full amount of what was owing *to* his firm, nor can he prove for the full amount against Bell's estate in liquidation. He can only claim for a balance, and as the balance is shown to be in favour of Bell's estate, I am of opinion that the decision of the trustee rejecting Powell's proof ought to be affirmed with costs.

Solicitor for the plaintiff: *P. Macpherson.*

Solicitors for the trustee: *Jones & Brown.*

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SKINNER *v.* CRIBB (No. 1).

Administrator—Executor—Trustee—Breach of trust—Waste—Liability—Accounts—Release.

1878.
2nd July,
3rd July,
7th August.

Lilley, J.

By his will S. gave the profits of his real estate, horses and cattle for the support of M. his wife, and his son T., until the latter arrived at the age of 21 years, when the horses and cattle were to be delivered to T. as his property, and at the death of M. the real estate also was left to T. The will gave the executors power to sell or mortgage any part of his real estate for the support of M. or T., or if they should think it desirable for the more effectual carrying out of his intentions; and appointed H. and C. executors of the will. S. died while T. was still a minor, and from the time of his death until soon after T. attained his majority, the management of the property devised to M. and T. was chiefly conducted by H., C. only taking an active part in two or three matters, but from time to time receiving information from H. concerning the management. During the infancy of T., H. and C. mortgaged a portion of the real estate, but it was alleged by C. that he never knew what became of the money. Another portion was leased to H. at an inadequate rent, and the estate was wasted to a considerable extent by T. with the knowledge of H. and C., neither of whom interfered to prevent it. After T. came of age he and M. executed a release discharging C. from all liability in respect of the trust, but no accounts were produced to them by H. or C. either before or at the time of the execution of the release.

Held, that C., having accepted the duties of executor, was responsible for the waste of the estate. *Held, also*, that the onus lay upon the trustees to show that the property had been lawfully administered; that T. was entitled to a full account in respect of the income and profits of the estate before as well as after the death of M.; and that the release ought to be set aside.

Action to set aside a release and for an account.

All the necessary facts appear in the judgment of the learned judge.

The plaintiff was a legatee under the will of his father, who died, in 1864, during a minority of the plaintiff, and the defendant Cribb and Charles Humber, since deceased (of whose heir the defendant Elizabeth Humber was the widow) were the executors of the will. The statement of claim alleged that the defendant Cribb and Charles Humber had dealt improperly with the property devised to the plaintiff, and claimed that a release executed by the plaintiff and his mother (who had a life interest in a portion of the estate) to the defendant Cribb should be set aside, and the property improperly dealt with restored, accounts taken, and other relief granted.

Harding and *Power* for the plaintiff.

Griffith, A.G., and *Real* for the defendants.

C.A.V.

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7th August.

LILLEY, J. It is conceded in this case that there must be judgment against the defendant Elizabeth Humber. The evidence establishes a sufficient case for judgment against the defendant heir, Charles George Humber; and, as the widow defendant does not admit assets of her deceased husband, the judgment will include an administration of his estate. The matter which remains for decision is, whether judgment should go against the defendant Robert Cribb, and, if so, how far it should extend. Henry Skinner died in September, 1864. By his will, after specific devises to his daughter and his wife, he gave the profits of his real estate and of his horses and cattle for the support of his wife and his son Thomas, the plaintiff, until he arrived at the age of 21 years. At that period all the testator's cattle and horses were to be delivered to his son as his property, and at the death of his wife the remainder of his real estate was left to his son, the surviving plaintiff. He gave power to his executors to sell any part of his real estate, or to borrow money on the same, for the support of his wife or son, or if they, his executors, should think it in their judgment desirable, for the more effectual carrying out of his intentions; and any instrument for conveying the fee simple or for borrowing money by mortgage was to be as valid as if he had executed it in his lifetime. He appointed the defendant Robert Cribb and Charles Humber (since deceased) executors of his will. At the time of his decease Skinner's property, exclusive of specific devises, consisted of cattle, an allotment at the corner of George and Turbot Streets, Brisbane, some stock-in-trade, and, it is alleged, of allotment 50 at Milton. Probate of the will was taken out by the defendant Cribb and Humber. The stock-in-trade was sold, and the money received by Humber. Mr. Cribb alleges that the estate was insolvent, but in the absence of any reliable, or indeed of any accounts of the position of the estate at the time of the death, and of any other proof, I am unable to say whether, as a matter of fact, the estate was insolvent or not. Humber was most active in the administration of the estate, and Mr. Cribb asserts that he interfered in no way as executor except in assisting the administration by giving his promissory notes to Humber with a view of their being discounted at the bank and money raised for the purposes of the estate. It appears, however, that he was cognisant of the letting of the cattle and the allotment at Milton to Stone, a son-in-law of Humber; it appears also from his

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own statement that he afterwards actually assented to and signed a lease of the cattle and premises to Powell; he was aware also of the sale by Davidson, and of the receipt of the money by Humber; he also settled with Dowse, a creditor, in respect of a claim of his against the estate. Humber used to tell him from time to time what he was doing, and he was satisfied. These appear to have been the only acts of his connected with the executorship. He states, however, that he heard the boy—that is, the plaintiff—was selling all the cattle; that he took no steps to prevent it; that he said he (the plaintiff) was only anticipating what he would have by-and-bye; that he knew by the will the plaintiff's mother had a life interest in the cattle; that the mother and son did it together; and that the plaintiff was not of age then. It was the intention of the testator that the cattle with their increase should be managed and preserved for the plaintiff until he became of age, except so far as it might be necessary to dispose of them for the support of his wife and child. Mr. Cribb accepted the duties of the executorship, and it appears to me that he was not entirely passive in that respect. It is the clear duty of a person in his position, under such circumstances, when he hears that the estate is being wasted, even if it be by the *cestui que trust*, to interpose his authority and to take the most active measures to prevent the estate being sacrificed and the intentions of his testator frustrated. It is especially so when, as in this case, the *cestui que trust* to be ultimately benefited is a youth under the age of 21 years. It cannot be doubted that Mr. Cribb knew that he was a young lad with little or no education. His father died when he was about 13 or 14 years old, and the executors seem to have taken no trouble to give him the least measure of education. Under such circumstances I think Mr. Cribb was guilty of a breach of his duty, for which he must be held responsible. The next question which I have to decide is whether the Milton allotment, No. 50, formed a part of the testator's estate. Mr. Cribb claims it as his own property, in support of which contention his evidence is, that some time before the death of the testator there was a considerable debt owing to Cribb by him, that he (Cribb) bought the allotment in satisfaction of his debt, which was the consideration for the purchase; that he sold portions of it before it had been conveyed to him; that in the June preceding the death of the testator an application to bring the George Street allotment and the Milton allotment under *The Real Property Act*—the first in his own

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name, and the latter in the name of the defendant Cribb—was made by Skinner. A certificate of title was issued to Cribb in respect of the Milton allotment, and upon that he claims to be the registered proprietor. He asserts also that at the time the cattle and the allotment were let to Stone, Stone was told that the land belonged to him (Cribb); also, that at the time the cattle and land were leased to Powell, the lease contained a recital that the property belonged to Cribb; he also says that at the time of the purchase it was arranged that he should allow Skinner to occupy the land until he, the defendant, wanted it, and that after the death he permitted the widow to continue in occupation of it as a matter of charity. It is incumbent then upon the plaintiff to show that the certificate of title can be impeached on the ground of fraud. If the plaintiff has shown that the transaction was in fact not a sale, but that the land was placed in the name of Cribb either as mortgagee, as security for a subsisting debt, or as a trustee, and that Cribb is now asserting a title tc a part of his testator's estate, which does not rightfully belong to him, then the plaintiff must succeed. In support of the plaintiff's case it is shown that six or seven weeks before the death of the testator, which would be after the time when he had signed the application to bring the land under *The Real Property Act* in Cribb's name, the testator sold a portion of allotment 50 to Richard Wynn, that he put him into possession of it, and that Wynn put up a house upon it and some fencing, and that Wynn was dispossessed of the land by the executor Humber. The plaintiff also relies on the fact that the cattle and land were leased by Cribb and Humber to Stone—also to Powell. In reply to these facts Mr. Cribb has asserted that these parties were told that the land was his. Stone confirms this, but Powell says he was told that the land was Mrs. Skinner's and that there was no lease in writing to him. The plaintiff also relies upon the continued occupation by his father, and by his mother and himself until her death since the commencement of this action, nearly thirteen years' possession, and on the receipt of rents from the tenants during the brief intervals when that occupation had temporarily ceased. The plaintiff has also deposed that he heard from Humber of some agreement between his father and Cribb relating to land; that Humber told him he found a paper among those he got in his father's house, saying that Mr. Cribb would transfer him the land back when he paid him; he also said that in

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a letter from Humber to him, at Bowen, Humber wrote that he wanted him (the plaintiff) to come down, and said that he held a paper from Mr. Cribb, and that he found this paper from Mr. Cribb among the other papers. That paper is not found in the possession of the widow of Humber. We are left to infer that it was the paper referred to by Humber in his conversation with the plaintiff. Mr. Cribb has denied that there was any such arrangement. He admits, however, that he would have been willing to retransfer to Skinner on payment of his debt. No release, receipt, or discharge for the debt was given by Cribb to Skinner, and indeed the defendant Cribb describes the liability as "an unascertained total of dealings." In 1867, Cribb became insolvent, and did not return allotment 50 as part of his real estate. His official assignee entered transmissions on the registry, but not apparently from any information given by Mr. Cribb. Putting aside all the evidence, which is merely hearsay, or the saying of the parties themselves, we have two instruments in evidence inconsistent with each other—the certificate of title in the name of Cribb, and the schedule of his real estate filed in his insolvency in August, 1867. That schedule is verified by an affidavit that it contained "a true and complete statement and list of all real and personal property whatsoever and wheresoever, in possession or contingency, which he then had or was entitled to, and the value of the same." This property (allotment 50) is entirely omitted from that list. At that time Mr. Cribb was under a moral and legal obligation to make a full disclosure and discovery of his estate upon oath. He made the necessary affidavit duly sworn, and made no claim of ownership in allotment 50. There are facts in this case consistent with that omission, and I must take his oath made only three years after the testator's death to be true in substance and in fact. I must, however, take it to be probable as against the testator and those claiming under him that there may be some money due to the defendant on the security of the allotment. I have no evidence to rebut the probability that the certificate was issued to Mr. Cribb to secure what might be ascertained to be due to him. I think, therefore, that the certificate has been displaced as an absolute conveyance by the plaintiff's evidence, and must stand as a security. Allotment 50 then must be held to have formed a part of the testator's estate at his death. Mr. Cribb will stand in the position of mortgagee of that allotment for such sum as he can prove to have been due to him at the time

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of the application to bring the land in his name under the Act, with interest at current rates from that date until the commencement of this action, when he first made an adverse claim to be owner and not mortgagee.

After obtaining probate, the defendants Cribb and Humber assumed the duties of trustees of the realty under the will, and caused a transmission of the estate to them to be registered under the Real Property Act. They jointly mortgaged the allotment in George Street on two occasions, although Mr. Cribb alleges that the mortgage moneys were received and dealt with by Humber alone. As we have no accounts from these trustees showing either the receipt or disposal of the whole of the mortgage moneys, or indeed of the disposal of any of those moneys, I am unable to say whether, as a matter of fact, this statement is true. It is sufficient, however, that they jointly acted, and I think the circumstances show that a joint responsibility arose in respect of the receipt and application of the mortgage moneys. So far as the advances from Mr. Darvall and Miss Connah are concerned, I think this is beyond question. There was also by Cribb and Humber a clear breach of trust in granting a lease of the George Street property to Humber himself at what I think, from the evidence, was an inadequate rent. Mr. Cribb rests his defence finally on a release executed by Mary Skinner, the widow, and the plaintiff Thomas Henry Skinner, dated the 10th June, 1874. That instrument recites that Cribb is desirous of being discharged from the trusts of the will of which he was trustee and executor jointly with Humber, and further that the accounts of the estate had been kept by Humber, Robert Cribb not having actively interfered therein, as the parties thereto admitted, and having examined the same accounts, declare them satisfactory. It appears to me that the recital, so far as it relates to the examination of the accounts by the parties to the instrument, is wholly untrue. The only account which appears to have been kept was the book No. 3, and that is in some respects untrue, in other respects inaccurate, entirely deficient as an account, and at no period of the trust does it appear to me that the position of the estate could have been ascertained from that book. Beyond a statement by Mrs. Humber that on one occasion sometime before the execution of the release, but when, we are not told, Mrs. Skinner and Charles Humber were conversing together, and that there were accounts on the table before them, but what accounts she could not say, there is not the

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slightest evidence that at any time before the execution of the instrument, and certainly not at the time it was signed, any one of the parties—either Cribb, Mary Skinner the plaintiff Thomas Skinner, or even Charles Humber himself—had examined the accounts and declared them to be satisfactory, or that there were any materials before them from which such accounts could have been constructed. Mr. Cribb never saw an account, either perfect or imperfect, of the state of the trust, and the plaintiff has declared the same. Now I find that at the date of the execution of the alleged release there had been a waste of the entire *corpus* of the testator's estate so far as it consisted of cattle and horses; there had also been a breach of trust by the granting of the lease of the George Street property to Humber. I find thus that the plaintiff had no opportunity afforded him of ascertaining in what way the executors and trustees had discharged their duty, nor had he any reason to believe then that defendant Cribb intended to assert an absolute right of property in allotment 50; he had no means of knowing to what extent his interest in the realty had been affected by their exercise of the power of borrowing; he was aware, of course, of the waste of the cattle; he was aware also of the lease of the George Street property to Humber, but he had no independent legal advice either at the time of confirming the lease or of the execution of the release, and there is not the slightest evidence that he had any knowledge of his rights in respect of these breaches of trust; he was, and I think it is clear it was known to his trustees, a young man of dissipated habits—indeed, his trustee, Humber, seems rather to have encouraged than restrained him in his dissipation—he was merely able to write his name, he was unable to read writing, and it seems to me no explanation whatever was given to him of the real nature and effect of the instrument he was executing on the 10th June. The instrument was prepared apparently on instructions given by Humber, Mr. Cribb was satisfied with the form of it, and neither Humber nor he appear to have given any information to their *cestui que trust*, the plaintiff. It was executed by all parties in the presence of witnesses unskilled in the law and, so far as I can see, incapable of giving any explanation of the instrument. Indeed, the only witness called described it as a release from Humber to Cribb, and it was executed by plaintiff and his mother, not in a place of business, but in a public-house, and in the presence of the son-in-law of one of the trustees. Mr. Cribb made no enquiry as to how the agreement to release

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him had been obtained. Of the probable degree of openness and fairness with which the plaintiff was treated by his trustees, and of the likelihood of his receiving full information of the state of the trust, we may form some idea from the observations of defendant Cribb to his co-trustee Humber after the execution of the release just as his release was signed:—" I said to him " (Humber) " I have just been crucified about another estate by two boys. Take my advice; Tom is of age, has been of age some years, his mother is very old, by the two joining together you can come to a settlement with them without any trouble. *Pay them what they want*, or what is reasonable, and have done with it." I think it is impossible to avoid the belief that Cribb felt or suspected, if he did not know, that the dealings of his co-trustee with the trust property were not perfectly clear and correct. It is not the language of a trustee who knew that the parties most deeply interested had " examined the accounts and declared them to be satisfactory." The release, therefore, will be set aside. The release did not operate as a transfer of the legal estate under the Act by Cribb to Humber, but subsequently Mr. Cribb executed a nomination of trust, making Humber the sole trustee. By this act, combined with the words of conveyance in the release, he placed the entire management and disposal of the realty in the hands of Humber. This appears to me to have been a breach of trust, looking at all the circumstances of the case. It placed the estate in peril, as we shall see from the acts of Humber immediately after he had obtained this power. For on the 20th August, 1874—that is, in little more than two months after the execution of the release, he mortgaged the George Street property to Mr. Garrick for £700, depriving himself, as mortgagor, of the protection given by s. 57 of *The Real Property Act of 1861* by declaring that the mortgagee might exercise the power of sale immediately or at any time after default without giving any notice whatever; and on the 31st March, 1876, he further mortgaged the same property, jointly with other property of his own, for £500, declaring that the power of sale might be exercised after default by giving one day's notice in writing to him as mortgagor. How or in what way the trustee Humber disposed of these sums, amounting to £1200, there is no evidence to show. Had the request of the plaintiff and his mother been complied with, the addition to the existing mortgage sum would at that time have made the total mortgage moneys only £500. The Attorney-General has contended

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that there is no evidence of a misapplication of the mortgage moneys. This can be easily understood, because the parties liable to account furnish none, and appear to have kept none, and the disposition of the money, its application or misapplication, would be best known to themselves; it was clearly impossible that the plaintiff could afford any evidence on this point. But when persons who pledge the estate which they hold in trust fail to render any account, or to show a lawful disposal of the money, they must be held liable to make good the money that they are unable to show they have properly used. Whether there has been a misapplication of these mortgage moneys will depend upon the proof the trustees may be able to give of their having disbursed them for the benefit of the trust, but it cannot be held that the absence of any proof of misappropriation can relieve them from their duty to account and show a lawful application of the funds, or from the consequences of the breach of trust if they have misapplied the funds. One of the reasons which defendant Cribb has given for desiring to be released from the trust in June, 1874, is that, having been requested by the plaintiff and Mrs. Skinner to borrow a further sum of £100 on the mortgage of their property in George Street, he had refused to accede to that, saying "I will not do it at all; if you want this done, release me, and then you can do as you like;" he has also said that he did not consider it prudent to join in raising more money. He, knowingly, therefore, gave power to his co-trustee to commit any breach of trust he liked. Whether the mortgage by Humber to J. G. Cribb was to raise money for his own purposes or for the benefit of the estate, it is impossible upon the evidence to say, but the probability is that it was for his own use, inasmuch as he pledged his own property jointly with the trust estate. No separate account of the trust estate or moneys seems to have been kept by Humber, and no separate account of capital as distinguished from income—in fact, no account whatever seems to have been kept from which either the *cestui que trust* or his legal adviser, if he had had one, could have known the state of the trust. It has been contended for the defendants that in respect of income or profits of the estate during the lifetime of Mrs. Skinner, the plaintiff has no right to complain, and indeed is not entitled to either enquiry or account. I disagree entirely with this. Looking at the terms of the will and the power given to the trustees to use the capital if necessary for the support of Mrs. Skinner and her son, the plaintiff, and looking to the

SKINNER v. CRIBB (No. 1).

Lilley, J.

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fact that the trustees have actually encumbered the *corpus* of the realty, and dissipated the personalty, and used or permitted the proceeds to be used in some way unknown, I think the plaintiff is entitled to a full account in order to show in what way their conduct in dealing with the *corpus* of the estate to which he was entitled at the age of 21 in respect of the cattle, and at the death of his mother in respect of the realty, has reduced the quantity and value of his estate under the will—if their conduct did really result in any loss to him. As to that of course there must be an enquiry. There will be interest allowed on all sums retained or misapplied, or not shown to have been lawfully applied. And with regard to costs, I see no reason why the estate of Henry Skinner should bear the costs of this protracted and expensive litigation. The costs of this suit, therefore, must be paid by the defendants. Judgment will, therefore, be given for the plaintiff for his claim, modified where necessary by the conclusions I have herein stated.

Solicitors for the plaintiff: *Roberts, Liddle & Roberts.*

Solicitor for the defendant: *P. Macpherson.*

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SKINNER *v.* CRIBB (No. 2).

[FULL COURT.]
1878.
10th September.
11th September.

Lutwyche, A.C.J.
Lilley, J.

Practice—Appeal—Security for costs—Discretion— O. LIV., rr. 1, 2.

The Court has full discretion to direct security for the costs of an appeal to be given.

APPEAL by the defendants from the decision of Lilley, J., *ante* p. 131.

Harding and *Miller*, for the plaintiff, applied for an order that the defendants should give security for the costs of the appeal.

Griffith, A.G., and *Real*, for the defendants, opposed the application.

Lutwyche A.C.J.

LUTWYCHE, A.C.J. I think that in this case the application made by Mr. Harding that the defendants should give security for the costs of the appeal ought to be allowed. The terms of O. LIV., rr. 1 and 2, seem to me to give the Court a discretion as to costs in all the proceedings of the Court. The words of r. 1 are: "Subject to the provisions of this Act the costs of and incident to all proceedings in the Court shall be in the discretion of the Court." No words can be wider, and I see no reason why we should be called upon to limit them further than the limit contained in the rule itself. Then, if there is a discretion in the case, the second rule says: "In any cause or matter in which security for costs is required, the security shall be of such amount and be given at such time or times and in such manner and form as the Court or a judge shall direct." Now, what is the meaning of "in any cause of matter in which security for costs is required." The Attorney-General argued that these words only applied to cases where by the previous practice of the Court security for costs was required, and that, he contended, was confined to the case of a plaintiff, but the words of the first section sweep away, it seems to me, all the law on the subject of giving security for costs, and leave the power in the discretion of the Court. Then, if the Court in its discretion requires security before the appeal shall be proceeded with, the security is to be of such amount and is to be given at such time or times as the Court or a judge shall direct, no absolute amount being fixed. As it seems to me the Court has discretion, the question arises whether this is or is not a case in which

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Lutwyche, A.C.J.

there should be security in favour of the applicant. I think there are special circumstances which justify the Court in directing that security should be given. In the first place there is the language used by the defendant stating he would do all he could to get out of the judgment. In the judgment given by the learned judge on the motion for the stay of proceedings, it appears, as a part of his order, that two releases which were produced in the course of the cause were ordered to be impounded because they had been fraudulently obtained. And if a defendant is by the judgment of a Court of competent jurisdiction, yet of force, declared to be guilty of fraud, I think it is the bounden duty of the Court of Appeal to take care that no further injury is done to the party who is the victim of the fraud of which the defendant has been guilty. Then this is virtually a second appeal, bringing it still further within the authority of *Clarke* v. *Roche* (46 L.J. Ch. 372). First the defendant appealed to the learned judge himself, and tried to stop any further prosecution of the cause, and when the motion had been heard, and the matter had been decided against him, then he appeals against, not only the judgment given at the hearing, but also, as I understand, against the order in respect of the motion for staying the proceedings. Under all these circumstances I think the Court is bound to take proper precautions, and to see that the plaintiff is no further damnified than he has been already by the conduct of the defendant in this cause. I am, therefore, of opinion that an order should be made requiring the defendant to give security for £200 costs before he be allowed to proceed with the appeal, or that he pay that amount into Court.

Lilley, J.

LILLEY, J. I agree with the judgment which has been given by the Acting Chief Justice. Another special circumstance which ought not to be lost sight of by the Court is that these are trustees who have been found by the judgment of the Court to have been defaulters and non-accounters for a period of fourteen years. I think, therefore, it is time they should be required to give some security that in the event of failure the costs will be paid. With regard to the difference between our statute and the rule in the English *Judicature Act*, I think that arises from the fact that the English draftsman was a little more minute and careful in the preparation of his rule—I mean that proviso in the rules which refers to the deposit the Court may require.

Solicitors for the plaintiff: *Roberts, Liddle & Roberts.*

Solicitor for the defendant: *P. Macpherson.*

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WHITEHEAD *v.* SUNLEY.

Lien—Continuous possession—Possession of agent—Warehousekeeper.

[FULL COURT.]
1878.
13th September.

Lutwyche, A.C.J.
Lilley, J.

The entrusting goods over which a lien is claimed to an agent destroys the lien, unless the agent is shown to be a gratuitous bailee.

DEMURRER.

Plaintiffs' statement of claim claimed the recovery of goods carried to Rockhampton in the defendant's ship, and alleged by the plaintiffs to be wrongfully detained from them by the defendant. It alleged *inter alia* that the goods had been given up to the plaintiffs' agent by the master of the ship, but had afterwards been retaken by the defendant. The statement of defence set up a right of lien over the goods in the defendant for general average and freight. It denied that the alleged agent of the plaintiffs was their agent, and stated that he was the agent of the defendant, to receive the goods and warehouse them in his warehouse for the defendant.

The plaintiffs demurred to the statement of defence on the ground that by giving his agent possession of the goods the defendant had lost his lien.

Griffith, A.G., *Pring, Q.C.*, and *Garrick*, for the defendant.

Harding in support of the demurrer.

C.A.V.

Lutwyche, A.C.J.

LUTWYCHE, A.C.J. This is an action to recover damages for the detention of goods belonging to the plaintiffs, and the defendant put in a statement of defence which was demurred to, and on the argument on the demurrer before his Honor Mr. Justice Lilley, he intimated his opinion that the demurrer ought to be sustained, but gave the defendant leave to amend. He has, therefore, amended his statement of defence, and to the amended statement plaintiffs have again demurred. The portion of the statement of defence which is the subject of the demurrer lies in the 15th paragraph, where the defendant denies "that George Barnsley Shaw, in the statement of claim mentioned, by means of the bills of lading and moneys therein mentioned, or by any other means, obtained delivery of the said goods from the defendant." Then it goes on to allege that "the

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defendant employed the said George Barnsley Shaw (who is a warehousekeeper) as his agent to receive and warehouse the said goods for safe custody, and the said George Barnsley Shaw received and had the goods for safe custody as the defendant's agent, and not otherwise." The demurrer to that portion of the statement of defence sets out that the averment in the 15th paragraph is bad in law on the ground "that by such receipt of the said goods by the said George Barnsley Shaw, the master and the defendant, the owner of the said vessel, lost their absolute and entire dominion over the said goods." The question in this case is really very simple. Of course it was never contended, and could not be contended, that there could be two liens on the same property co-existing at the same time: and the question is whether the statement in the 15th paragraph of the defendant's statement of defence shows that the delivery was made to Shaw as a gratuitous bailee. Unless it can be successfully contended that the delivery was made to him as a gratuitous bailee the defendant's case fails. It certainly is stated in the 15th paragraph that the goods were delivered by defendant to Shaw as his agent, but unless that allegation necessarily leads to the conclusion that he received the goods without any engagement, express or implied, to receive rent for warehousing them, then he would not be made out to be a gratuitous bailee, and the defendant having parted with the possession of the goods voluntarily, gives up his own lien and transfers the goods to the possession of a warehouseman who had, by virtue of his employment, a lien on the goods. Now it seems to me that the language of the paragraph does not necessarily lead to the conclusion that the words "as his agent" mean that Shaw received the goods as a gratuitous bailee of the defendant. It is quite consistent with the statement in the defence that he received them in the ordinary way of practice in warehousing goods—that is, to hold them in his custody for the party depositing them with him and to receive rent for his trouble and risk in taking care of them; and if there were any doubt on the subject the statement which was introduced by way of parenthesis, "who is a warehousekeeper," may I think be fairly called in aid to determine the question of interpretation. If these words stood alone, not being used parenthetically, they would be, I think, as a description mere surplusage, but as assisting in the interpretation of a passage which may be doubtful, then these words I think may be referred to. It seems to me that the only construction the Court can put upon the

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defence is that the goods were delivered by Sunley to Shaw to be kept for him upon the usual terms of warehousekeepers—that is, by paying rent for their deposit. That being so, I think that the demurrer must be allowed.

Lilley, J. In this case it is probable the pleader has fallen into error from the misquotation of *Wilson* v. *Kymer* (1 M. & S. 157), which is digested in Tudor's Leading Cases on Mercantile Law. "A lien will not be lost by the goods being put into the possession of a depositary or bailee for safe custody, as in the case of goods put into the possession of a warehouseman or wharfinger for those purposes." Now the essential omission there is this, that when the party having the right of lien is compelled "in obedience to revenue regulations" to place them in a warehouse for safe custody, then his lien will not be lost; but that is omitted in the digest of the case. However that may be, the defence is an attempt to set up a common law right of lien which has no connection with the mercantile law or any law relating to sufferance wharves. To that right of lien it is well known possession is essential, and it must be such a possession in the person asserting the right of lien that he is enabled immediately on the discharge of the amount of the lien to transfer his possession to the person entitled. The question has never been decided, but it would seem to be reasonable that a master or shipowner should be allowed to leave goods under certain circumstances, at a port where there is no sufferance wharf, in the hands of an agent without losing his right of lien; for instance, the holder may not be ready to accept delivery. It seems to me that the master should be enabled, at all events, to place the goods in the hands of his agent under such circumstances that he may retain his lien, and that appears to have been the opinion of all the judges in *Mors-Le-Blanch* v. *Wilson* (L.R. 8 C.P. 227). This then would appear to be the result of the best opinion on the subject—the question has never been decided, interesting as it is—that the goods must be left under such circumstances that the person entitled to them could immediately have the possession of them on satisfying the lien, or, in other words, the bill of lading must "be a symbol of possession, and practically the key of the warehouse," I am using the language of Mr. Justice Willes, in *Meyerstein* v. *Barber* (L.R. 2 C.P. 50). Now, the judges seem to be of opinion that if, by the intervention of a new lien to which possession would be essential, an inconsistent title is raised that is a new possession and a new

WHITEHEAD v. SUNLEY.

Lilley, J.

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lien, then the original lien is lost. The question is—What does this pleading show? Does it show that there was a continuous possession of the master, or in the hands of his agent, under such circumstances that the bill of lading was practically the key of the warehouse, and that the party holding the bill of lading could obtain immediate delivery of the goods on payment of the amount of the lien? The pleading fails to show affirmatively that the goods were placed in the hands of an agent under such circumstances as to prevent the master or owner losing his lien, but the language, it seems to me, shows an entirely contrary state of things. It shows that it was a deposit in the hands of a warehousekeeper; the law immediately gave him a right of lien for his rent. There is nothing to show that they were deposited there to be free from that right of lien; the law must be attached to the pleading, and the right immediately arose. If it had been averred that they were left for safe custody, free from all charges except those due on the master's or owner's lien, and to be delivered immediately on the production of the bill of lading to the party entitled to the goods, then the pleading, it seems to me, would have been complete and sufficient. Great stress was laid upon the inconvenience which would arise to the master or shipowner who might have to remain for months in port to enable him to deliver the goods. That may be so, but the law has not left the party entirely without remedy. The master must so far preserve his control over the goods that on the payment of the lien the party entitled can obtain immediate possession. But as I have said, the law has not left the master or owner without a remedy. It may not be a sufficient remedy, but if, by the misconduct or wilful default of the party who ought to be there to receive the goods the master is obliged to warehouse them, and pay rent, he can recover in an action as damages the amount of the rent or charges paid out on leaving the goods for safe custody, but he could not attach the amount of the rent to the lien. In the same way by analogy to the action in the case where there is no provision as to demurrage in the bill of lading, and there is detention beyond a reasonable time, the master or owner may have damages for the detention. I think, therefore, that there must be judgment for the plaintiff on this demurrer.

Griffith, A.G., applied for leave to amend.

LUTWYCHE, A.C.J. If we allow you to amend, the affidavit should

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be very full and precise, and to this effect: That the defendant Shaw received the goods as gratuitous bailee, to warehouse for the defendant without any agreement, either express or implied, to receive rent for warehousing them, and that immediately after the delivery to him he would be ready on presentation of the bill of lading to deliver the goods to the party presenting it on payment of freight and other charges.

Whitehead v. Sunley.

Lutwyche, A.C.J.

Solicitors: *Rees R. & Sydney Jones; Daly & Abbott.*

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In re GRAY & CO.

1878.
25th September.
Lilley, J.

Insolvency—Liquidation by arrangement—Special resolution—Ultra vires—Trustees—Delay—Adjudication without petition—Insolvency Act of 1874 (38 Vic., No. 5), ss. 127, 202 (12).

The creditors of G. & Co., liquidating debtors, resolved that the affairs of the firm should be liquidated by arrangement, that all debts over £50 should be represented by bills, and that the trustees should have power to grant renewals of the bills, so that the entire liquidation should be completed within twelve months. Upwards of two years afterwards, the liquidation not having been completed but a dividend of 17s. 6d. in the £ having been paid, the following resolutions were passed at a meeting of the creditors :—

1. "That the trustees herein be instructed to wind up the estate,"

2. "That they be empowered to pay the new liabilities of the trust estate in full."

***Held*, on an application by the trustee for directions, that the resolutions were not *ultra vires*.**

An application for the adjudication as insolvents of the liquidating debtors was refused.

APPLICATION by trustees in a liquidation by arrangement for directions.

Messrs. Gray & Co. having called a meeting of their creditors, the following resolutions were passed at a meeting of creditors on the 27th March, 1876 :—

1. That the affairs of the said Allan Gray and David Tait the younger shall be liquidated by arrangement and not in insolvency.

2. That Messrs. T. E. White, of Alfred Shaw & Co., and J. S. Turner, of Geo. Raff & Co., be appointed trustees.

3. That the trustees be and are hereby empowered to arrange with Messrs. Gray & Co. for the liquidation of their liabilities as follows :—Debts under £50 to be paid in cash, and all other debts to be represented by bills at one to nine months bearing bank interest, the trustees having the right to grant renewals if they think it advisable, so that the entire liquidation of the liabilities shall be completed within twelve months from 27th March, 1876.

The trustees proceeded with the liquidation and paid a dividend amounting to seventeen shillings and sixpence in the pound, but had not completed the liquidation on the 2nd September, 1878. At a

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meeting of the creditors, held on that day, the following resolutions were passed:—

"That the trustees herein be instructed to wind up the estate," and

"That they be empowered to pay the new liabilities of the trust estate in full."

A portion of the creditors dissented from the resolutions, and the trustees, being in doubt whether the meeting had power to pass them, applied to the Court for directions.

Griffith, A.G., for the trustees, cited *The Insolvency Act of 1874*, ss. 127, 132 (2), 202 (9), rr. 95, 211, 218, 229, 236, 238.

Harding, for Fraser & Co. and Connell, Hogarth & Co., creditors, cited *The Insolvency Act of 1874*, ss. 132 (2), (4), (5), (7), r. 187; *Ex parte Marland* (L.R. 20 Eq. 777), *Ex parte Charlton* (6 Ch.D. 45), *Ex parte Burrell, In re Robinson* (1 Ch.D. 537), *Ex parte Sydney* (L.R. 10 Ch. 208), *Ex parte Browning* (L.R. 9 Ch. 583), *In re* Hatton (L.R. 7 Ch. 723).

LILLEY, J. In this case an application has been made to me by the trustees of the estate of Gray & Co. for my opinion or advice under the section of *The Insolvency Act* empowering them to apply to the Court for assistance in that form. It appears that the estate of Gray & Co. has been in course of liquidation by arrangement under resolutions passed some two years ago. It was contended before me that these resolutions amounted to a composition; that they were altogether *ultra vires*, or that a portion of them were beyond the scope of the section relating to liquidation by arrangement; and that they ought not to be registered. There is a great distinction between the procedure for composition and that for liquidation by arrangement. In the case of composition it may be for the creditors to accept either a smaller sum of money, or, for anything I can see in the Act, the composition may take a form different from the payment of money. In that case it is clear the estate would remain vested in the debtor, and perhaps that is the cardinal distinction between the two. Under liquidation by arrangement the property is at once vested in trustees appointed by the creditors. However, in this case no question of that kind arises, because here the creditors agreed to liquidate by arrangement, and the estate was at once vested in the trustees who were appointed by the first set of resolutions. Now a liquidation by arrangement has been said to be a mere equivalent for insolvency. I

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am disposed to think it has a larger meaning. It seems to me that a liquidation by arrangement is much more largely under the control of the creditors than probably it would be if the estate were brought into Court upon an adjudication—certainly as to time, and probably even as to the method of winding up. The trustees under liquidation would have much more power, subject of course to the control of the creditors and the Court, than they would have under the adjudication: and where no committee of inspection is appointed the section gives them their own discretion. The trustees in this case, with the acquiescence of all the creditors except one (Bennison & Co.), carried on the business of the estate, and, probably under the direct control of the liquidating debtors, the business was carried on up to the time of passing the resolutions which are submitted to me; and so far as I can see, the whole matter was satisfactorily conducted by the trustees and the insolvents. I have been invited to make an adjudication of insolvency against the debtors, the grounds being that there are legal difficulties and delays in winding up. I am not disposed to take that view of the matter. The original resolutions enabled the creditors to continue the winding up for twelve months, and it is observable that all the creditors with the exception of those that I have named (Bennison & Co.) have acquiesced in the whole of the proceedings under the original resolutions and have received the whole of the dividends. I must take it that this was done with full knowledge of the acts of the trustees; if it was known that the trustees were doing wrong they could have complained, and I must take it that they made no complaint, and were assenting parties to the management of the estate up to the present time. And Bennison & Co. having assented to this last resolution, I must take it that they did so with full knowledge of the previous circumstances. Well then, the result is this, that upon the resolutions which were originally agreed to, the creditors have allowed the trustees and the insolvents to wind up the estate so far and have received a dividend of 17s. 6d., and from the facts submitted to me there is a prospect of the original debts being liquidated in full. That being the position of affairs on the 13th April, 1878, and a dividend of 17s. 6d. having been paid with interest, the creditors held a meeting and passed the resolutions submitted to me for my opinion and advice. There was assent by all the creditors except Connell, Hogarth & Co., and John Fraser & Co. I may say I think there is no appeal before me from the decision of the Registrar,

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but I think it would be unnecessary for the Registrar to register them. Here are debtors who, with the consent of the body of the creditors, for two years have gone on dealing with the estate, and have paid such a dividend as to form almost a complete payment of the debts of the creditors, and I think I should be acting wrongly in allowing the debtors to be adjudicated insolvents, or in disturbing the work already done with the consent practically of all the creditors at one time or other. I advise and direct the trustees that they do wind up the estate forthwith, speedily and diligently. Then, as to the second resolution, looking at the matter and assuming them to have done nothing forbidden in their relation to the estate amounting to breach of trust, it seems to me to be but natural justice that the liabilities incurred in winding up the estate should be discharged in the first place, and with that caution I think this resolution amounts to nothing more than an act of natural justice, and that they be advised to discharge the new liabilities of the estate before paying a dividend on the old.

The costs of Fraser & Co., Connell, Hogarth & Co., and the trustees, will be paid out of the estate.

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MAIDEN *v.* MARWEDEL.

[IN CHAMBERS.]
1878.
25th September.

Lutwyche, A.C.J.

Foreign judgment—Judgment by default against person not within the jurisdiction—The Common Law Practice Act of 1867 (31 Vic., No. 17), ss. 20, 21, 22.

The Supreme Court of Queensland will not enforce in this colony the judgment of a foreign Court, which has been obtained in default of appearance against a defendant, who at the time the suit was commenced was not resident within the jurisdiction of the Court in which the judgment obtained.

***Brisbane Oyster Co.* v. *Emerson** (Knox 80) followed.**

SUMMONS, calling upon the defendant to show cause why execution should not issue upon a judgment recovered by the plaintiffs against him in the Supreme Court of New South Wales.

Real for the plaintiffs.

Pope Cooper for the defendant.

C.A.V.

Lutwyche, A.C.J.

LUTWYCHE, A.C.J. This was a summons calling upon the defendant to show cause why execution should not issue upon a judgment recovered by the plaintiffs against him in the Supreme Court of New South Wales, a memorial of which judgment had been filed in accordance with the Act 31 Vic., No. 17, s. 20. Sections 20, 21, and 22 of the Act 31 Vic., No. 17, are transcripts of the corresponding sections of the Act 19 Vic., No. 12, which became a part of the statute law of this colony on its separation from the parent colony of New South Wales, and which is still in force there. The action upon which the judgment was founded was brought in New South Wales against a defendant who, at the time the cause of action arose, was resident in Queensland, and who has ever since continued to reside there. He was not within the jurisdiction of the Supreme Court of New South Wales at the time the proceedings in the suit were instituted, or at any time while such proceedings in the suit continued, and, though served with process, he did not appear to the writ. The question now raised is, whether the judgment which was

* Followed in *Permanent Building and Investment Association* v. *Hudson* (7 Q.L.J. 23).

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MAIDEN v. MARWEDEL.

Lutwyche, A.C.J.

afterwards signed against him in the Supreme Court of New South Wales, and subsequently made a record of this Court by filing the memorial, can be enforced against the defendant by the Supreme Court of Queensland. The question has been raised for the first time in this colony, and it undoubtedly is a question of very great importance, but it will be unnecessary to discuss at any length the principles upon which my decision must be based, as the very same question was raised in the *Brisbane Oyster Fishery Co.* v. *Emerson* (Knox's Supreme Court Cases, p. 80), and I entirely concur in the reasoning of the carefully considered judgment delivered by the Judges of the Supreme Court of New South Wales in that case. The authorities on the subject are there fully reviewed, and the result of them, so far as it applies to the facts of the present case, may be stated as follows—namely, that where a judgment of a foreign court has been obtained in default of appearance against a defendant, who at the time the suit was commenced was not resident in the country in which the judgment was obtained, such a judgment cannot be enforced here. See *Schibsby* v. *Westenholz* (L.R. 6 Q.B. 155). If the defendant had either expressly, or by implication, agreed to be sued in the Supreme Court of the colony of New South Wales the case would have assumed a different complexion, but there is nothing in the facts disclosed which imposed on the defendant a duty to obey the judgment of this foreign tribunal. He was not bound to take notice of its process, but if he had appeared and had had an opportunity of defending himself the judgment would not have been examinable here, except upon the ground of fraud or irregularity. As it appears that the judgment was obtained behind his back, I think I am bound, both on principle and on authority, to refuse assistance in enforcing it, and I accordingly dismiss the summons, but as the point has arisen here for the first time, I make no order as to costs.

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McGHIE, LUYA & CO. v. GILLIS.

[IN INSOLVENCY.]
1878.
25th September.
Lilley, J.

Insolvency Act of 1874 (38 Vic., No. 5), s. 49—Debtor's summons—Disputed debt—Stay of proceedings—Trial of question—Security—Balance of probability of result of action.

Where a debtor's summons was ordered to stand over pending the decision of an action, and the Court was of opinion that the probability was as much in favour of the success of the alleged debtor as of the creditor, the Court refused to order security to be given.

***Ex parte Turner* (L.R. 10 Ch. 175) followed.**

APPLICATION to dismiss a debtor's summons.

Harding in support of application.

Griffith, A.G., for the plaintiffs.

The facts are set out in the judgment.

C.A.V.

LILLEY, J. This was an application under s. 49 of *The Insolvency Act of 1874* made by a person who had been served with a debtor's summons at the instance of McGhie, Luya & Co., to dismiss such summons on the ground that he was not indebted to the creditors serving such summons, or that he was not indebted to such amount as would justify such creditor in presenting an insolvency petition against him. The summons was based on a dishonoured promissory note, dated 19th October, 1877, and made by John Gillis, in favour of McGhie, Luya & Co., for £66, payable four months after date at the Queensland National Bank, Brisbane; and the summons claimed a further sum of £2 6s. 8d. for interest from the date of dishonour of the note. The question is, whether or not the affidavits disclosed a petitioner's debt sufficient to support an adjudication in insolvency? The decision of that question must rest on the sufficiency of the consideration given for the promissory note, for all the statements in the affidavits before me, which relate to an open and unsettled account between the parties, are foreign to the point at issue. On the nature of the consideration there is a direct conflict of evidence. Gillis, in paragraph 7 of his affidavit, refers to a conversation between himself and A. F. Luya, which took place on the 19th of October, 1877, from which, if it can be taken to be an accurate

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McGHIE, LUYA & v. GILES.

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report of what was said, the inference must necessarily be drawn that the note was made for the accommodation of the firm of McGhie, Luya & Co. On the other hand, A. F. Luya states in the 6th paragraph of his affidavit that the note was really made as an acknowledgment of the balance due by Gillis on the open account between the parties, and that it was to be held as a collateral security for the payment of such account. In such a conflict of testimony the only course which is open to me appears to be to direct that all proceedings on the summons be stayed for such time as will be required for the trial of the question relating to the promissory note. It was argued that if a stay of proceedings should be ordered, the debtor should be required to give security for the payment of the debt, and the cost of establishing it. But I think that *Ex parte Turner* (L.R. 10 Ch. 175) is a safe authority to follow in declining to make an order that such security should be given. I wish to avoid prejudicing the trial of the action, and, therefore, I express no opinion on the probability of success of either party; it is enough that there is a direct conflict of evidence. The order I make is that the proceedings on the summons be stayed until further order, and that the question relating to the alleged debt, arising out of the promissory note, be tried before a judge of the Supreme Court at the civil sittings appointed to be held at Brisbane on Monday, the 11th of November next. Costs of the present application are reserved.

Solicitors: *Wilson & Wilson; Lyons & Chambers.*

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RICHARDSON *v.* MACDONALD.

[FULL COURT.]
1878.
3rd December,
13th December.

Lutwyche, A.C.J.
Lilley, J.

Specific performance—Sale of station—Deficiency of area—Possession by purchaser—Confirmation of agreement.

In pursuance of an agreement between M. & R. for the sale of a station containing about 700 square miles of pastoral country, R. took possession of about 300 square miles of the said station. M., however, proved unable to transfer the remainder of the 700 miles, and refused to transfer any part of the run unless R. would accept the 300 square miles in full performance of the agreement and pay the purchase money agreed upon for the whole run.

***Held*, that R. had not by taking possession of part of the run confirmed the agreement as relating to the part only.**

DEMURRER to statement of claim for specific performance of an agreement for the sale of a station.

The facts appear in the judgment.

Griffith, A.G., and *Real* in support of the demurrer.

Harding and *Swanwick* for the plaintiff.

Lutwyche, A.C.J.

LUTWYCHE, A.C.J. This was an action for the specific performance of an agreement by the defendant to sell the Moorinish station, in the Gregory district, containing an area of nearly 700 square miles of pastoral country, and claiming an abatement in the purchase moneys of £5000, in proportion to any deficiency in the area delivered and transferred. The statement of claim sets out that the defendant was the holder, under *The Pastoral Leases Act*, of nine runs or blocks of country, to the whole of which runs, or blocks, together with certain others which the defendant claimed on June 1, 1877, but had not then or since obtained on lease from the Crown, the defendant applied the general name of the Moorinish runs or station. The statement of claim proceeds to set out an offer from the defendant of the Moorinish runs, containing nearly 700 square miles of the best pastoral country in the Gregory district, for the sum of £5000. The statement of claim also sets out the plaintiff's acceptance of the offer, his receipt of a sale note from the defendant's agents of the Moorinish stations, and the plaintiff's entry in September, 1877, upon six of the blocks in question, containing an area of about 319 square miles, of which he took possession and stocked as part of the Moorinish station.

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The statement of claim further alleges the refusal of the defendant to transfer any part of the country or runs unless the plaintiff consents to accept the runs of which he is already in possession, containing an area of 319 square miles, in full performance of the defendant's contract of the 1st of June, 1877, and pays to the defendant the full sum of £5000, without any allowance by way of compensation or abatement in purchase money on account of deficiency in area. The defendant has demurred, but confines his demurrer to so much of the plaintiff's statement of claim as seeks specific performance of the agreement of June 1, 1877, including more than the first six runs already in the possession of the plaintiff, on the ground that having taken such possession he has thereby put it out of the power of the Court to place the defendant in the same position in which he was before, and that he has elected not to avoid the contract, and has confirmed it as relating to the first six runs only. The general rule relating to specific performance, as laid down in *Hill* v. *Buckley* (17 Ves. 394) is that the purchaser shall have what the vendor can give, with an abatement out of the purchase money when the quantity falls short of the representation. Cases may occur when it may become necessary to engraft exceptions on this rule, and some were cited at the bar by way of illustration, but on examination none of them appear to go to the extent which is required to support the grounds of the defendant's demurrer. *Price* v. *North* (2 Y. and Coll. 620) was decided on the ground of acquiescence in the sale for four years by the only one of the purchasers who was afterwards dissatisfied. In *Wheatley* v. *Slade* (4 Sim. 126), the Court refused to decree a specific performance where the title of a large portion of the estate contracted to be sold could not be made good, as there was a lien on the property which would exhaust nearly the whole of the purchase money. Lord St. Leonards has expressed disapproval of the decision, in *Maw* v. *Topham* (19 Beav. 576), which however, as pointed out in Dart's work, 3rd Ed., p. 576, appears to have turned on the investment of trust money on the security of the vendor's interest to an amount exceeding what would have been payable by the purchaser if successful in his claim for an abatement. *The Earl of Durham* v. *Legard* (34 L.J. Ch. 589) was a clear case of mutual mistake; and in *Davis* v. *Shepherd* (L.R. 1 Ch. 410) it was obvious that at the time of making the contract neither party to it contemplated the additional area which was the subject of contention. In the case now before the Court no mistake of any kind has been made. The parties to the

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RICHARDSON v. MACDONALD.

Lutwyche, A.C.J.

agreement have entered into it with their eyes open, and upon the facts admitted by the demurrer the defendant has failed to show that the plaintiff may not be entitled to relief. The nature and extent of the relief will be determined bv the Court in the exercise of its discretion at the hearing; at present, all that can be done is to overrule the demurrer, with costs.

Solicitor for the plaintiff: *G. V. Hellicar.*

Solicitors for the defendant: *Macalister & Mein.*

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HUNTER *v.* SUNLEY.

Lien—Continuous possession—Warehouseman—Agent—Argumentative pleading—Costs.

[FULL COURT.]
1878.
11th December,
13th December.

Lutwyche, A.C.J.
Lilley, J.

An allegation that a person received goods as a warehouseman to warehouse them raises the presumption that he was to be paid for receiving them, as it is usual for a warehouseman to receive special payment for warehousing goods; but an allegation that a person received goods as an agent does not raise such a presumption. Consequently, a pleading setting up a right of lien and alleging that after the right accrued the person claiming the right delivered the goods to a warehouseman to warehouse without averring that the bailment was gratuitous, is bad; but if the character of the bailee be stated to be that of an agent merely, such an averment is not essential.

If a party plead argumentatively, and the pleading be demurred to, he will probably not be allowed his costs on the argument of the demurrer, though successful.

DEMURRER to statement of defence.

Harding in support of the demurrer.

Griffith, A.G., *Pring, Q.C.*, and *Garrick*, for the defendant.

The facts appear in the judgment.

Lutwyche, A.C.J.

LUTWYCHE, A.C.J. This case came before the Court on Wednesday, the 11th instant, upon a demurrer by the plaintiff's to the defendant's amended statement of defence. The action was brought for return of certain goods, or their value, and damages for their detention. The plaintiff claimed the property of the goods in question, which had arrived in the ship *Rockhampton*, by virtue of a bill of lading, of which the plaintiff was the holder and assignee. Besides the goods described in the plaintiff's bill of lading, other goods, belonging to other owners, had been put on board the *Rockhampton*, and during the voyage, owing to distress of weather, large portions of the cargo, the property of such persons, were jettisoned. After setting out these facts in the statement of defence, the defendant alleged that he had a right to detain the plaintiff's bill of lading until a general average contribution was duly adjusted and satisfied, and that the plaintiff had prevented the general average contribution from being ascertained and adjusted; and on this ground he justified the detainer of plaintiff's goods until such general average contribution had been adjusted and satisfied. This ground of defence was not adverted to

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in argument at the bar, but as the facts are admitted by the demurrer, the defence is good in law. The defendant in his statement of defence claims, in addition to his right of detainer for general average, a lien upon the goods for freight, which he alleges has not been paid; and he further says, in his statement of defence, that after the arrival of the goods in question, they were delivered to one G. B. Shaw, for safe custody, as the defendant's agent, and that they have always since their arrival remained in the possession and under the sole control of the defendant. Although this part of the defendant's statement of defence cannot be regarded as an example of skilful pleading, we think that upon the whole it may be gathered by necessary implication that the defendant meant to deny the plaintiff's right to the delivery of the goods under the bill of lading, but though such a denial may be collected from the words used, they amount to an argumentative denial, which under the old rule of pleading would have been held to be a bad plea, and which, though now permissible, does not invite encouragement from the Court. The defendant has remained in the continuous possession of the goods since their arrival, for the custody of the agent is the possession of the principal. The custody in this case appears to amount to the first sort of bailment described by Lord Holt in *Coggs* v. *Bernard* (1 Smith L.C. 199), viz.:—a bare naked bailment of goods delivered by one man to another to keep for the use of the bailor. *Scott* v. *Newington* (1 M. & Rob. 252), which was so much relied upon by the counsel for the plaintiff, has no application here. If the defendant had abused his lien by pledging his goods, the case cited would have been in point. And there is no ground for the contention which was argued by the plaintiff's counsel, that the custodian of the goods was entitled to remuneration for his services. In deciding *Whitehead* v. *Sunley* (*ante* p. 143), the judgment of the Court proceeded upon the ground that Shaw was employed not only to receive but to warehouse the goods as defendant's agent and that consequently they were to be kept for him upon the usual terms of paying rent for their deposit. We adhere to that decision, although doubts have been expressed at the bar whether a warehousekeeper is by law entitled to a lien upon goods deposited with him as a warehouseman. The doubts have properly arisen from some degree of confusion about the extent of a warehouseman's particular lien and a general lien, which depends upon custom or agreement. We have yet to dispose of the question of costs. That is now entirely a question for the discretion of the Court. We

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Lutwyche A.C.J.

quite concur with several eminent English judges in thinking that it is necessary to observe great strictness in carrying out the new system of pleading introduced by the *Judicature Act.* Now, the 14th paragraph of the defendant's statement of defence, which purports to be amended pursuant to an order of the Court, dated the 30th October last, appears to us to present merely a colourable amendment, and to retain the same objectionable features which it had before the amendment was ordered to be made. Although, therefore, it is our duty to order judgment upon the whole record, each party will pay his own costs of the demurrer.

Solicitors for plaintiff: *Rees R. Jones & Brown.*

Solicitor for defendant: *Daly.*

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ATTORNEY-GENERAL *v.* BALMAIN.

[In Equity.]
1876.
28th April, 16th October.
Lilley, J.

The Crown Lands Alienation Act of 1868 (31 Vic., No. 46), ss. 21, 22, 23, 86, 128—Land proclaimed for school—Failure to issue deed of grant through inadvertence—Sale by error—Fraud—Cancellation of grant—Vesting order.*

An allotment of land was set apart by the Government in 1863 for erecting a primary school thereon, but inadvertently a deed of grant was not issued. In 1865 a school and teacher's residence was erected thereon. B. was appointed principal teacher in the school, and went into occupation of the residence. A few months afterwards the allotment was advertised for sale by public auction, but withdrawn on a protest from B.'s son. A further sale was advertised without result.

B. was dismissed from the service of the Board of Education in 1873, and in the following year applied to select the land in question, and a deed of grant was issued to him. The Board of Education was not aware the land had ever been submitted for sale, and the Department of Public Lands was unaware of the erection of the buildings.

Held, on an information by the Attorney-General, that the deed of grant to B. must be cancelled; and on B.'s failure to execute a transfer and deliver up the deed of grant, a vesting order in favour of the Crown was made.

Information filed by the Attorney-General against John Balmain.

In pursuance of an application made by the Board of Education on June 28, 1863, the Government set apart for the purpose of erecting a primary school thereon an allotment of land situated in the County of March, Parish and Town of Goondiwindi, containing 2 roods, and being allotment 10 of section 23; but, through inadvertence, a deed of grant was not issued to the Board. In 1865 the Board erected on the allotment, at a cost of about £600, a school and teacher's residence,

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* 31 Vic., No. 46, s. 21.—It shall be lawful for the Governor from time to time to grant in trust or by proclamation to reserve either temporarily or permanently any Crown lands which in his opinion are or may be required for . . . . the sites of . . . . schools established under the supervision of the Government according to any Acts for the time being in force . . . .

31 Vic., No. 46, s. 22.—Where before the commencement of this Act any Crown lands have been promised and set apart for any of the purposes hereinbefore mentioned if possession thereof have been given or if trustees thereof have been appointed . . . . The Governor on behalf of Her Majesty may lawfully grant such lands in fee to trustees for such purpose.

31 Vic., No. 46, s. 23.—After any land has been temporarily reserved the same shall not be sold until such temporary reservation be revoked by the Governor and after any land has been permanently reserved every conveyance or alienation thereof except for the purpose for which such reservation has been made shall be absolutely void against all persons whomsoever except as against the Crown.

31 Vic., No. 46, s. 128.—Lands acquired by any evasion of or fraud upon the provisions of this Act shall be forfeited to the Crown and the Crown bailiffs or one of them shall re-enter such lands on behalf of the Crown and if necessary shall maintain an action of ejectment for recovery thereof in the name and on behalf of Her Majesty.

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ATTORNEY-GENERAL v. BALMAIN.

and the building and land have ever since and still are being used for the purposes of the school. Shortly after the erection of the buildings the defendant was appointed principal teacher in the school, and as such resided for a long time in the residence built for the purpose. During the time the defendant was acting as such teacher the allotment was, in consequence of an error on the part of certain officers in the Department for Lands, and without the Governor-in-Council being aware that the same had been set apart as a school, proclaimed open for sale by public auction (31 Vic., No. 46, s. 86), and the land was on March 2, 1866, submitted for sale at Goondiwindi by the Clerk of Petty Sessions at that place. The defendant's son, Henry David Balmain, acting under instructions from his father, attended the sale, and protested against the allotment being offered for sale by auction, the consequence being that it was withdrawn. The land was, in the following month, in consequence of the same error, again submitted for sale, but was not sold. In the year 1873 the defendant was dismissed for misconduct. The fact that the land had been offered for sale at auction was never communicated to the Board, nor had the Department of Public Lands been acquainted by the land agent at Goondiwindi of the erection of the buildings thereon; and, in consequence of this omission, the allotment was, in the year 1873, proclaimed opened for sale by public auction under *The Crown Lands Alienation Act of 1868*, at the upset price of £4, and it was declared that the allotment, being town land, it should, in the event of its not being sold, be open for selection at the upset price. The allotment was described as unimproved. The land (with others mentioned in the proclamation) was accordingly submitted for sale; but in consequence of all persons in the town being aware that it was set apart and used as aforesaid, and that it was proclaimed for sale in error, no bids were made for it, and it consequently remained unsold. On August 8, 1874, the defendant went to the Land Office at Goondiwindi and made an application to select the land in question at the price of £4, which sum, together with the necessary fees, was paid by him. The land agent, being busily engaged in consequence of his having received orders to remove to another place, did not observe that the land was the allotment on which the school stood, and on October 14, 1874, a deed of grant for the land was signed and afterwards issued to the defendant. On the discovery of the mistake the Government applied to the defendant to reconvey the land, but he refused to do so.

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The information concluded with the following prayer :—

1. That it may be declared that the said deed of grant was obtained by fraud, and the same is void and inoperative.
2. That the said deed of grant may be recalled and delivered up to be cancelled.
3. Or otherwise, that the defendant may be decreed to do and concur in all such acts and things as may be necessary for the purpose of reconveying the said land to Her Majesty.
4. That Her Majesty may have such further and other relief as the nature of the case may require.

Griffith A.G. and *Harding* in support of the information.

Defendant, in person, asked for leave to examine a witness.

[Lilley, J. No. The information is virtually *pro confesso.* No answer has been filed.]

The defendant then made a statement denying most of the allegations, and affirming he was not aware that he had purchased the particular allotment in question until some time after the sale. Illness and absence of professional assistance had prevented his filing an answer. There was no intent to defraud.

Griffith A.G. said he would accept the statement of defendant's honesty, and admit there was a mutual mistake, and forego any claim to costs, provided defendant reconveyed the land to the Crown and gave up the deed of grant.

The defendant ultimately consented to this proposition.

Lilley, J. Decree in accordance with the prayer of the information. If the grant be delivered up within a fortnight no costs to be charged against defendant, and no allegation of fraud.

16th October, 1876.

Griffith A.G. stated that the deed had not been so given up, and produced affidavits to show that the transfer of the land had been tendered to the defendant, and that he had refused to execute it, but had given up the deed of grant. He therefore petitioned the Court that it might be declared that the defendant was a trustee of the said land within the meaning of *The Trustees and Incapacitated Persons Act of 1867* (31 Vic., No. 19) ; and, secondly, that the said land might be vested in the Crown for the estate of the said defendant therein.

Lilley, J. The order will be as prayed.

Solicitor for Crown : *R. Little.*

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CLARKSON v. MUTUAL LIFE ASSOCIATION OF AUSTRALASIA.

[IN CHAMBERS.]
1879.
21st March.
2nd April.

Lilley, J.

Detinue—Real Property Acts (25 Vic., No. 14; 41 Vic., No. 18)—Mortgage—Certificate of title — Remoteness of damage—Striking out pleadings.

In an action for special damages for detention of certificates of title by a mortgagee, paragraphs in the Statement of Claim, alleging that in consequence of such detention the mortgagor was unable to pledge them or otherwise deposit them by way of equitable mortgage for a sum which would have enabled him to pay the interest, and so lost his property; and that, in consequence of such detention, he was unable to meet a promissory note upon which judgment had been signed and execution issued against the lands, were ordered to be struck out as being too remote.

Under the *Real Property Acts* a mortgagee is not entitled to the custody of the certificate of title.

A mortgagor can effect a second mortgage, although he may not be in possession of the certificate of title.

SUMMONS to strike out portion of a statement of claim.

In an action of detinue for the recovery of certain certificates of title and for £5000 damages for their detention, the Statement of Claim alleged that the plaintiff was the registered proprietor of two allotments of land in the parish of North Brisbane, described respectively in certificates of title Nos. 30,278 and 30,279. Upon the security of these two allotments the defendants agreed to lend the plaintiff £3500, and, in pursuance of this agreement, a bill of mortgage was, on the 21st day of December, 1877, executed by the plaintiff and duly registered on 17th January, 1878. The bill of mortgage contained no special covenant that the defendants should be empowered to receive or retain the certificates of title of the property mortgaged. On the date last mentioned the defendant's solicitors took out of the Real Property Office the duplicate mortgage and the two certificates of title. The plaintiff was not aware that this had been done until the following September, when he required the certificates for the purpose of lodging them with his bankers as security for a temporary overdraft. After several demands for the deeds the defendant's secretary wrote to plaintiff's solicitors to the effect that "my directors hold the certificates of title as part of the Association's security, and decline to part with the custody of the same." The

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plaintiff alleged that by reason of the detention of these certificates he was unable to obtain an advance by way of overdraft, or as a second mortgage, and that, consequently, being unable to pay the interest due to the defendants on September 24th, he made default, and defendants sold the property under their mortgage. The plaintiff also alleged that, owing to the detention, and his consequent inability to obtain an advance, he was compelled to dishonour a promissory note for £200, and the Union Bank—the holders of such note—obtained judgment against him, and the said lands were taken in execution on that judgment and advertised for sale.

The summons called upon the plaintiff to show cause why so much of the Statement of Claim as was unnecessary to support the action as an action of detinue for the recovery of the certificates of title mentioned, and nominal damages only, should not be struck out; why, upon payment to the plaintiff of a nominal sum for damages and (if necessary), the full value of the certificates of title, with the costs of the action, all further proceedings should not be stayed; or why, in the event of the plaintiff's refusing to accept these terms, and the defendants paying into Court such sum, and the plaintiff proceed to trial for damages, he should not be subject to the costs of the action subsequent to this application, unless he recover more than nominal damages.

Harding, for defendant, in support of the summons.

Griffith, Q.C., for the plaintiff, opposed.

LILLEY, J. This case stands for judgment upon a summons to strike out several paragraphs in the plaintiff's statement of claim, and more particularly the 16th and 17th, which relate to the nature of the damages alleged to have been sustained. The first question before me was whether special damage could be recovered in an action of detinue. There is no question that special damage may be recovered if alleged and properly proved. The latest authorities, English and American, show that the ordinary judgment is that the plaintiff recover the article or property detained, or alternatively its value, with damages for its detention, which, if no special damage be alleged, would be nominal damages above the value, or perhaps in some cases interest upon the value. Now in this case, so far as the nature of the claim for damages can be distinctly ascertained from the 16th and 17th paragraphs, the first, the 16th claims the value of the property which the plaintiff says he lost. He

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says the defendant detained his certificate of title, in consequence of which he was unable to pledge it or otherwise to deposit it by way of equitable mortgage for a sum which would have enabled him to pay his interest, and in consequence of such detention he says he was unable to get that money and pay the interest, and so lost his property. It seems to me that the rule which applies to all damage applies to special damage; it must be the natural, immediate, and legal consequence of the wrongful act done. Now the damage alleged here is that he lost his property. It seems to me altogether too speculative and remote. He alleges that he was deprived of the use of the certificate, and in consequence he was not able to pay the interest (but it is clear that he might never have been able to pay the principal). The 16th paragraph therefore must go. Then we come to the 17th paragraph, which, I think is still more hopelessly speculative and remote. If that kind of damage were to be recoverable in an action of this kind any other use to which he might have applied the money might be recovered as special damage. I am clearly of opinion that it is too remote, and these two paragraphs must be struck out. Perhaps it would be better for me to extend my judgment to the damage claimed during the argument; it seems to lie immediately before me, and may underlie paragraph 16. It was alleged that he lost his equity of redemption, and that the damages would be the highest value of the equity of redemption at any time during the detention of the certificate of title. Well, now, under the old system the mortgagee would be entitled to the possession of the deeds, and no such claim could possibly arise, the mortgagee having possession of the deeds. Still the mortgagor could have mortgaged his equity of redemption, but under our Act the mortgagee is not entitled to the possession of the certificate of title. The only effect of the mortgage under the statute is to encumber the land, not to pass the estate. The mortgagor's title is held by the register, and not by the certificate of title. Here he is the registered proprietor, and there was nothing to hinder him from effecting a second mortgage under this statute, although he might not be in possession of the certificate of title. The only use he could have made of it, the most he could have done, would have been to call for the certificate of title in order that the second mortgagee might have his mortgage endorsed upon it. It seems to me that the most he could recover would be the amount it might have cost him to call in, and get the certificate of title for that purpose, under the compulsory

CLARKSON v. MUTUAL LIFE ASSOCIATION OF AUSTRALASIA.

Lilley, J.

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powers of the Act. That disposes of almost all the paragraphs which have been attacked, and the claim must be reduced to a claim for the detention of the certificate. There is a second part of the summons which asks me to restrain the plaintiff. In fact, by the effect of my judgment I am to deal with the costs by anticipation. I am asked to order that if the plaintiff recovers nothing more than nominal damages he shall have no costs after this date. I decline. I think I have no power to anticipate or hamper the judge at the trial, in whose discretion the statute has left the question of costs. That will be struck out. Order to strike out all the paragraphs objected to; defendant to have twenty-four hours to render certificate of title to the plaintiff or his solicitor, with costs, and a sum for nominal damages, otherwise plaintiff to have leave to amend. Costs of this summons allowed—plaintiff allowed costs of that part of the summons decided in his favour.

Solicitors for plaintiff: *Wilson & Wilson.*

Solicitors for defendant: *Little, Browne & Rüthning.*

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HARTLEY *v.* SALMOND.

[IN CHAMBERS.]
1879.
10th October, 20th October.
Lutwyche, J.

Practice—Judgment for the recovery of money—Attachment—O. XLI., rr. 1-5—O. XLIII., r. 1.*

A writ of attachment will not be issued against a defendant who has failed to satisfy a judgment for the recovery of money.

MOTION for attachment.

The facts and arguments appear from the judgment.

Chambers for plaintiff.

Chubb for defendant.

C.A.V.

LUTWYCHE, J. This was a motion for leave to issue a writ of attachment against the defendant, on account of his having failed to pay to the plaintiff the amount of damages and costs recovered by him under a judgment in an action signed on 12th of September last. The motion was argued on the 10th instant by Mr. Chambers for the plaintiff, and by Mr. C. E. Chubb for the defendant, and the decision on the motion was reserved. The application was founded on O. XLI., r. 1, it being contended that under the first rule a judgment at law might be enforced, in the same manner as a decree in equity. The words of the rule run thus: " A judgment for the recovery by, or payment to, any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money might have been enforced at the time of the commencement of this Act." The occurrence of the word " decree " was chiefly relied upon to show that a writ of attachment was contemplated as one of the modes of enforcing a judgment, but I think that on the principle of construction contained in the words *reddendo singula singulis*, a judgment for the recovery of money can only be enforced by the issuing of such process as was applicable to the case at the time of the commencement of the Act. The ordinary form of a decree under O. XXIII., r. 9, of our General Rules in Equity, at the time this Act commenced, would have contained a statement of the time within

* *See* now O. XLVII., r. 3.

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which the defendant was required to pay the money, and the copy of the decree served upon him would have been endorsed with a memorandum in the words, or to the effect, following—namely, "If you, the within-named A. B., neglect to obey this decree by the time therein limited, you will be liable to be arrested under a writ of attachment issued out of the Supreme Court of Queensland in Equity, or by the sheriff, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same decree." Under a decree, therefore, the defendant would have had full notice of the consequences which would result from his neglect to comply with the order of the Court, and it is now sought to make him amenable to the same consequences by serving on him a copy of the judgment, which might have been enforced by a writ of *fieri facias*, and in the event of a return of *nulla bona* by a writ of *ca. sa.* I do not think that it was intended by O. XLI., r. 1, that the the defendant should, without warning, be subjected to an attachment as for contempt of Court. Rules 2-5 of O. XLI. appear to bear out this view of the case, as they point out in direct terms in what cases a writ of attachment may be issued. If this application were successful it would have the effect, as was pointed out by Mr. Chubb in the course of the argument, of reviving the old practice of imprisonment for debt, against which the Legislature has stedfastly set its face. The motion must be dismissed, and with costs.

Motion dismissed.

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SMITH *v.* GIBBS.

The Fencing Act of 1861 (25 Vic., No. 12), ss. 2, 9, 10—Jurisdiction—Dividing Fence — Selection — Unalienated Crown Land—The Crown Lands Alienation Act of 1868 (31 Vic., No. 46), s. 17—Costs.*

[Civil Court.]
1879.
18th November, 19th November.
Lilley, C.J.

The Supreme Court has jurisdiction to entertain a claim for the cost of a dividing fence under 25 Vic., No. 12, but as the case may be decided by justices, the plaintiff's costs may be disallowed.

The fact that at the time of service of notice to fence a selection had not been confirmed by the Minister is no bar to the claim.

Action by George Smith against Timothy James Gibbs for one-half the cost of a dividing fence, erected by the plaintiff between two selections of his and an adjoining selection owned by the defendant.

Pring, A.G., and *Miller* for the plaintiff.

Griffith, Q.C., and *Prior*, for the defendant, objected that at the time of service of the notice to fence the defendant's selection had not been confirmed, and was virtually unalienated land (s. 9), and so the plaintiff had not brought himself within *The Crown Lands Alienation Act of 1868* (31 Vic., No. 46), s. 17; and that the fence was not completed.

Lilley, C.J., overruled the objection.

Evidence of the value of the fencing was given.

Lilley, C.J. I think there is nothing in the statute which precludes the plaintiff in this case from recovering. I give judgment for the plaintiff for 560½ rods at 4s. 3d. per rod, giving the defendant credit for £9 10s. value of material belonging to defendant and used by the plaintiff, and also for £47 2s. paid into Court. As I consider the case might have been decided before justices, I allow costs on the lowest scale. If a fencing case is brought before me again I shall give no costs.

Solicitor for plaintiff: *Norris.*

Solicitors for defendant: *Thompson, Havard & Foxton.*

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* See *New Zealand and Australian Land Co.* v. *McIntyre* (11 Q.L.J. 68).

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TAVARES v. HOLLAND.

[FULL COURT.]
1880.
3rd February,
4th February,
5th February,
6th February,
9th February,
13th February.

Lilley, C.J.
Lutwyche, J.
Harding, J.

Lease—Covenant not to assign—Liability of trustee—Agent—Purchase of creditors' claims at a discount.

A lessee, who was in fact a trustee for another person, committed a breach of covenant by assigning the lease without the sanction of the lessor, who took possession of the premises. The *cestui que trust* sued the lessee for damages for loss of possession and for rent.

Held, that when trust property has apparently been lost or surrendered, or has disappeared, the trustee in whom it was vested must either explain its loss, surrender, or disappearance, so as to exonerate himself, or must make it good. It is no answer to the person for whom he was trustee to say that he has made an instrument which would pass it from him to such person who ought to possess it. It is his duty not only to execute the instrument, but to place his *cestui que trust* in actual possession of the estate.

Held, also, that an agent is not allowed to intervene between his principal and creditors to buy up at a discount their claims for his own benefit.

APPEAL from a judgment of Harding J. sitting without a jury on 16th December, 1879.

The plaintiff, Morton Tavares, sued the defendant, Alfred Holland, for breach of duty as his agent or trustee in connection with the Victoria Theatre, and claimed (1) That an account might be taken of the rents and profits received by the defendant from the trust property, or otherwise, as such agent or trustee, or which, but for the agent's neglect or default, might have been so received by him, as well as an account of the moneys paid by the defendant on account of the plaintiff, the defendant to be decreed to pay to the plaintiff the balance which should be found to be due by him ; (2) £150 for money received by the defendant to the use of the plaintiff, with interest from the date of the receipt of the same until judgment ; and (3) £1000 for damages suffered by the plaintiff from defendant's breach and neglect of duty as trustee and agent for him.

The facts appear in the judgments.

HARDING J. (after reciting the facts), gave judgment as follows :—Direction to amend the pleadings according to the evidence and judgment, and the same being so amended, declare that the defendant is liable to make good to the plaintiff the loss occasioned by his dealings with the premises in the statement of claim mentioned. Adjudge the

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sum of £524 17s. 1d. to be the amount of such loss, being £11 a week for forty-seven weeks and five days, from the 2nd July, 1879, to the 29th May, 1880. Declare that the defendant was not entitled to receive for his own benefit, and is not entitled to retain, any profits for or in respect of the purchase by him of the promissory notes mentioned in exhibit No. 15, being Forsyth's promissory note for £25 and Reynold's promissory note for £25 5s. 1d. An account of all moneys received and all payments made by the defendant on account of the plaintiff as plaintiff's agent, as in the pleadings mentioned, from the commencement of the dealings between them, beginning from the time of the endorsement of the promissory notes by the plaintiff; and in taking such account the defendant is to be charged with the profits, emoluments, and allowances made or received by him over and above his commission, with interest at the rate of 8 per cent. per annum, and is only to be credited with such sums as he has actually paid. Let so much of action as relates to claim of £150 for money received by defendant for the use of plaintiff, with interest from date of receipt to judgment, stand dismissed; plaintiff to get costs of action up to and including hearing. Reserve further consideration, with leave to apply.

From this judgment the defendant appealed.

Pring, A.G., and *Garrick*, for the appellant.

Griffith, Q.C., and *Power*, for the respondent.

C.A.V.

Lilley, C.J. The facts necessary for our decision in this case are within a very narrow compass. On the 29th May, 1875, Mrs. Allison leased the Victoria Hotel and theatre to Bennett and Chester for a term of five years at a weekly rental of £8, payable in advance. The lease contained a proviso for re-entry on non-payment of rent or upon assignment, under-letting, or parting with the possession of the premises by the lessees, their executors, administrators, or assigns, without the license in writing of the lessor, her heirs, or assigns, or upon a breach of any of the covenants by the lessees, their heirs, executors, administrators, or assigns. Subsequently she licensed the making of an under-lease to J. and G. Harris. That under-lease was made by Bennett and Chester on the 17th July, 1875, for the residue of the term then remaining, except for the last ten days. On the 7th July, 1876, J. and G. Harris, with a like consent, assigned by endorsement

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on their lease, all their right, title, and interest therein to the defendant, Alfred Holland. Holland was not the beneficial owner of the term so assigned. There had been negotiations between J. and G. Harris and the plaintiff Tavares, which had resulted in the purchase of J. and G. Harris' interest in the leasehold premises by him for the sum of £600, payable by promissory notes bearing the defendant's endorsement. The defendant received from the plaintiff £50 for his assistance in this matter. The term had been, in fact, so assigned to Holland as trustee for Tavares, and the lease was deposited with him. Looking at all the circumstances, it seems to us that the defendant thereupon became possessed of the term as trustee for Tavares for two purposes—first, to secure the payment of the £600 promissory notes and to protect his own endorsement or guarantee; and, secondly, to preserve the term for Tarvares' benefit. Tavares occupied the theatre and hotel until March, 1876, when he left the colony. Up to that time he had paid to the defendant £12 per week, which, with an overdraft at the bank, had extinguished the original debt of £600. On leaving the colony Tavares appointed Holland his agent, and from that time until the 16th June, 1879, the defendant received the rents of the theatre and hotel, and made all the payments in respect of the premises, including the ground rent to Mrs. Allison. He also made various remittances from time to time to the plaintiff Tavares. Subsequent to the plaintiff leaving the colony the theatre was under-let to F. M. Bates on the 31st May, 1877, at a rental of £15 per week. On the 28th of February, 1878, Bates assigned his interest to Dillon and Thynne, and Thynne continued to pay weekly £15 in respect of the theatre and £4 for the hotel. On the 2nd July, 1879, the defendant, having received a telegram from the plaintiff which he considered offensive, despatched to the plaintiff a telegram in which he said, "I decline to act any further for you." Tavares thereupon, by telegram, authorised Mr. Keogh to receive £11 per week, and requested Thynne to pay £8 per week to Holland and the balance (£11) to Keogh, the two sums making altogether the £19 per week payable by Thynne for rent. Thynne declined to pay the £11 to Keogh; he also refused to pay the £8 ground rent to Mrs. Allison. It appears that Holland had ceased to collect the rent after the 16th June. On the 14th July, however, Thynne paid to Mr. Markwell, as Mrs. Allison's agent, the sum of £32 for ground rent up to that date, Mr. Holland being present and recommending the payment. Thynne says there were taxes

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in arrear at that time for which the bailiffs might have entered. In the first week in August the plaintiff returned to the colony. On the 9th of August, at the request of Murphy & Paterson (the plaintiff's solicitors), the defendant signed an endorsement under seal upon the lease admitting his trusteeship and assigning all his right, title, and interest in the lease to the plaintiff. On the same day he gave Murphy & Paterson a letter to Thynne requiring him to recognise Tavares as his landlord in his stead. This letter was written at the request of the plaintiff's solicitors for the purpose of enabling the plaintiff to obtain possession of the term. On the 12th of August, Mrs. Allison wrote the following letter to the defendant :—

"Breakfast Creek, 12th August, 1879.

"Mr. HOLLAND.—Dear Sir,—You requested me to get my rent from Mr. Thynne for the future, to save trouble. That gentleman now refuses to pay me, and there are four weeks due—namely, £32. Please attend to this at once, and oblige, Yours truly, E. ALLISON."

On the 13th of August he replied as follows :—

"Mrs. ALLISON.—Dear Madam,—I have nothing whatever to do with rents and hotel, having transferred all rights of mine to Morton Tavares.—Yours truly, A. HOLLAND."

On the same day Mrs. Allison wrote the following letter in reply :—

"SIR,—In answer to yours, I beg to inform you that, as you have committed a breach of covenant in transferring without my sanction, I consider the tenancy at an end, and demand from you immediate possession, failing which I shall proceed in the matter myself.—Yours faithfully, E. ALLISON."

This correspondence was never communicated by the defendant to the plaintiff. It is alleged that Mrs. Allison thereupon took possession of the premises. Either at that time or some time in the month of July or August she had undoubtedly re-entered on the premises. On the 1st of September, 1879, Murphy & Paterson, plaintiff's solicitors, wrote the following letter to Holland :—

"A. HOLLAND, ESQ.—Dear Sir,—Mr. M. Tavares and Queensland Theatre.—It seems that when you executed transfer of lease to Mr. Tavares, and gave him letter to Mr. Thynne requesting the latter in future to recognise Mr. Tavares as his landlord instead of yourself, the lease had, in fact, been forfeited, and Mrs. Allison had taken possession.

This appears by letter from Mrs. Allison's solicitor to the writer, of which the following is a copy :—

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TAVARES v. HOLLAND.

Lilley, C.J.

20th August, 1879.

'MY DEAR SIR,—In *re* interview *re* theatre, I beg to inform you, as requested, that Mrs. Allison, in consequences of breaches of covenants by the late lessee, took possession thereof in conformity with the terms of the clause giving her right of re-entry in case of breach by lessee.—Yours faithfully (signed), GEORGE E. MARKWELL.

T. MACDONALD-PATERSON, ESQ.'

Upon this state of facts Mr. Tavares has instructed us to ask for an explanation of the circumstances, and whether you are willing to take the necessary steps to reinstate him in possession of the premises.—We remain, dear sir, Yours very faithfully, W. E. MURPHY & PATERSON."

No answer seems to have been given by Holland, either verbally or otherwise, to that communication. He had rendered some accounts, but they do not contain a complete accounting between him and the plaintiff in respect of all the transactions between them on the trusteeship and agency, and he has refused an application to furnish any further accounts. Tavares has never received possession of the premises, nor the benefit of the term since July, 1879. Where the trust property has apparently been lost or surrendered, or has disappeared, it is clear that the trustee in whom it was vested must either explain its loss, surrender, or disappearance, so as to exonerate himself, or must make it good. It is no answer to the person for whom he was trustee to say that he has made an instrument which would pass it from him to such person who ought to possess it. It is his duty, not only to execute the instrument, but to place his *cestui que trust* in actual possession of the estate. Various causes have been alleged on behalf of the plaintiff for the loss of the term, all imputing breach of duty to the defendant. It is said there was a forfeiture of the term by non-repair of the premises, by non-payment of the rates, by assignment without leave on the 9th of August, by a deliberate surrender of the term, by a loss of the term in some way as to which the defendant will give no information. With respect to the alleged causes of forfeiture (if any), we shall refrain from any comments upon the evidence which may prejudice future litigation; it is enough for us to say that a *primâ facie* case was made before the judge at the trial sufficient to support his judgment against the trustee. The lessor had re-entered and taken possession of the premises presumably upon some act or omission of the defendant, which he refused to explain or defend. It is possible, however, that the trustee (the defendant), if further opportunity be

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given to him, may recover the term or its equivalent, as against Mrs. Allison, and the rent, as against Thynne. Upon the conditions which we shall name, the opportunity will be given to him. A relaxation of that portion of that judgment below relating to the damages for loss of the term may re-enable him to reinstate the whole or a portion of the plaintiff's interest in the premises if it has not been entirely lost by the trustee's action or default. The dealings of the defendant in respect of the two promissory notes of Forsyth and Reynolds, we think, cannot be allowed to stand; he cannot be allowed to receive or retain for his own benefit any profit made on these transactions. It seems clear to us, looking at the whole of the correspondence and the circumstances of the agency, that the defendant could not be allowed, as agent, to intervene between his principal and his creditors, to buy up at a discount their claims for his own benefit. It seems to us that he had undoubtedly authority to pay them so soon as he received money on the plaintiff's account. It appears also that he had money in his hands belonging to the plaintiff which he could have applied in payment of these promissory notes; but in any event it would be contrary to sound principle to permit an agent, who has obtained a knowledge of his principal's circumstances in the course of his agency, to use it for his own advantage by depreciating the credit of his principal. The decree appealed against will therefore be affirmed upon all the points, including the costs, except upon the question of damages. As to this portion of the judgment, the damages will be reduced by £40 14s. 2d., which includes the following sum, namely:—£25 for rates, and £15 14s. 2d. for ten days of the residue of the term, in respect of which the under-lease did not run. The defendant must pay into Court within fourteen days the reduced amount of damages to abide the further order of the Court, which order may be applied for by the plaintiff, if the defendant shall not within one month commence and duly prosecute an action or actions for recovering the residue of the term or its equivalent, and for the loss of rent sustained by the plaintiff; such actions to be brought to trial within six months from the date of this judgment. If the plaintiff's name be used in such actions, which the defendant has leave to do if necessary, the defendant is to give a bond of indemnity to the plaintiff against his costs in such actions, with sufficient sureties, to be approved by the Registrar. The defendant being entirely in default both in respect of his duty as trustee and agent, and the judgment below having been substantially affirmed

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upon all points against him, he must pay the costs of this appeal. To the extent to which the trustee succeeds in reinstating the plaintiff's interest, the damages may be further reduced on his application to the judge. The plaintiff will have interest at £8 per centum per annum upon the amount of damages ultimately payable to him by the defendant, as from the date of the judgment below.

Appeal dismissed.

Solicitors for plaintiff: *Murphy and Paterson.*
Solicitor for defendant: *Macpherson.*

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SCHAFFENBERG *v.* UNMACK.

Life Insurance—Breach of trust — Protection — Australian Mutual Provident Society Act, 1857 (20 Vic.), ss. 14, 16.

[FULL COURT.]
1880.
2nd March.

Lilley, C.J.
Lutwyche, J.
Harding, J.

The protection from debts given by s. 14 of *The Australian Mutual Provident Society Act, 1857,* to moneys arising from policies of insurance does not extend to liabilities arising from a breach of trust on the part of the assured.

DEMURRER to the Statement of Claim, which set out that J. A. Schaffenberg died intestate at Charters Towers on the 8th June, 1876, leaving the plaintiffs next-of-kin. Letters of administration were granted to S. Berens, as attorney for the plaintiffs, and £1200 remained in his hands for distribution. Berens, it was alleged, misapplied this sum, and mixed it with his own moneys, so that it ultimately became wholly lost to the plaintiffs. Berens died, the firm of which he was a member being, at the time of his death, insolvent, and he himself being in debt to several persons. Prior to his death he made a will, the defendants, T. Unmack and T. Bird, being executors. The only separate personal estate of Berens was a policy of life insurance for £1000 in the Australian Mutual Provident Society, and the plaintiffs asked that the proceeds of this policy should be applied in liquidation of the debt due to them. The Statement of Claim asked for a declaration that this policy, and the moneys payable thereunder, were assets in the hands of the defendants for the payment of the debts of the said S. Berens. The defendants demurred upon the ground that such policy and moneys were protected by the provisions of s. 14 of *The Australian Mutual Provident Society Act, 1857* (20 Vic.), from liability to be applied in payment of such debt.

LILLEY, C.J., referred to s. 16.

Romilly, for the defendants, in support of the demurrer.

Griffith, Q.C., and *Cooper*, for the plaintiffs, were not called upon.

Lilley, C.J.

LILLEY, C.J. We are unanimously of opinion that the proceeds of the policy are not so protected. In our opinion the effect of the statute is to give protection to the representatives of the deceased under a policy of insurance against creditors in insolvency and execution credi-

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SCHAFFENBERG v. UNMACK.

Lilley, C.J.

tors, but it does not affect trusts. The Act was in no wise intended to protect the funds of a defaulting trustee against the parties complaining of his breach. A very strong reason given why this should be so was that, if it were otherwise, the trustee might apply the funds of the estate under his care to the payment of the premiums on his policy, the proceeds of which would go to his own personal representatives instead of to those whose money he had used for the purpose of securing such policy. There must be judgment for the plaintiffs without costs.

Demurrer overruled.

Solicitor for plaintiffs : *Macpherson.*
Solicitor for defendants : *Bruce.*

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R. *v.* WELLS.

[Full Court.]
1880.
19th March.

Lilley, C.J.
Lutwyche, J.
Harding, J.

Criminal law—Crown case reserved—Error—Larceny Act of 1865 (29 Vic., No. 6), s. 44—Robbery under arms—Wounding.*

To support a conviction under s. 44 of the *Larceny Act of 1865* (29 Vic., No. 6 it is not necessary that the wounding and robbery should be committed on the same person.

On a Crown case reserved, counsel are not allowed to refer to matters outside the case as stated.

Crown case reserved by Lilley C.J.

Joseph Wells was tried at Toowoomba for robbery under arms and wounding. The information was laid under s. 44 of the Larceny Act (29 Vic., No. 6), and in the first count alleged that, on the 26th of January, 1880, the prisoner, at Cunnamulla, being then armed with a loaded revolver, "in and upon one Joseph Berry, feloniously did make an assault; and him, the said Joseph Berry, in bodily fear and danger of his life feloniously did put, and certain money . . . the property of the said Joseph Berry, from the person, in the presence and against the will of the said Joseph Berry, feloniously and violently did steal, take, and carry away. And the said Joseph Wells, immediately after he robbed the said Joseph Berry as aforesaid, did, by discharging said pistol so loaded as aforesaid, one William Murphy feloniously and unlawfully wound." The words of the second count followed those of the first, except that the money stolen was alleged to be that of the corporation of the Queensland National Bank, Limited, instead of that of Joseph Berry, as stated in the first count. Upon this information the prisoner was found guilty and sentenced to death. After sentence, and before it was carried into effect, application was made to the Chief Justice to state a special case for the opinion of the Full Court, which he did as follows :—The following matters alleged to be errors on the record have been submitted to me, and I have been requested to solicit the opinion of the Supreme Court thereon. The matters are apparent on the information, and, of course, arose before me at the trial. They

* *See* Criminal Code, s. 411.

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R. *v.* WELLS.

are as follows:—(1) That the first count of the information is bad, because it charges the prisoner Joseph Wells with having feloniously made an assault upon one Joseph Berry, and with having put the said Joseph Berry in bodily fear and danger of his life, and with having feloniously and violently stolen certain property of the said Joseph Berry, and with having, immediately after he so robbed the said Joseph Berry as aforesaid, feloniously and unlawfully wounded one William Murphy. (2) The second count is bad, because it charges the prisoner (as in the first count), and with having . . . stolen certain property of the corporation of the Queensland National Bank, Limited, from the person, and in the presence, and against the will of the said Joseph Berry, and with having immediately after (as in the first count). (3) That the prisoner was improperly indicted under s. 44 of the *Larceny Act of 1865.* (4) That the Queensland National Bank, Limited, is not a "person" within the meaning of s. 44 of that Act. (5) That both counts of the indictment are bad for duplicity in stating two offences in the one count. (6) That the indictment and the matter contained therein are not sufficient in law to warrant the judgment against the said Joseph Wells. (7) That a general judgment having been given on the whole indictment, one count at least of which was bad in substance, the judgment ought to be reversed. The question is, Are all or any of the matters errors in law? I submit them, therefore, to the Court in virtue of my powers of the statute."

Garrick (with him *Chubb* and *Rutledge*), for the prisoner, asked how many counsel the Court would hear on behalf of the prisoner.

LILLEY, C.J. In matters of error, only one is usually heard on each side. The Court will hear the whole number if they wish.

LILLEY, C.J. There was a verdict on both counts, and a general judgment was given. This must be treated as a matter of error.

Garrick asked whether it was open to the prisoner's counsel to refer to anything beyond the indictment.

HARDING J. My feeling is that they should be allowed to argue anything that was tenable. If it were shown there was error, it could be rectified on the special case.

LUTWYCHE J. The Court has never allowed counsel to travel outside the special case as stated.

LILLEY, C.J. The constitutional tribunal has disposed of all matters of fact. The Court must deal with the information and say whether the law allowed the Attorney-General to file it, and whether it was sufficient.

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Garrick. The objection to the first count is the robbing of one person and the wounding of another. The prisoner's contention is that they must be of the same person. (29 Vic., No. 6, ss. 44, 48 ; 24 and 25 Vic., c. 96, s. 43). The intention was that where there was robbery, death should be inflicted when the person robbed was wounded. (*R.* v. *Thomas*, 1 Leach 330.) As to the second count, the property is laid in the Bank. (*R.* v. *Rudick*, 8 C. & P. 237.) As to error, *Gregory* v. *Regina*, 15 Q.B. 957 ; *Holloway* v. *Regina*, 17 Q.B. 317, were cited ; Dwarris 685.

Chubb and *Rutledge* followed.

Pring, A.G., and *Griffith, Q.C.*, for the Crown, cited, as to error, *O'Connell* v. *Reg* , 1 Cox 531 ; *Nash* v. *Reg.*, 33 L.J. M.C. 94. Where the crime is capital, no difference how many counts, there is no other punishment. The offence is compounded of two other offences. (7 Wm. IV. and 1 Vic., c. 87 ; 7 and 8 Geo. IV., c. 29 ; 9 Geo. IV., c. 55 ; 2 Russell, 115) The statute should have used words showing that the Legislature meant the same person. The section was passed to meet the mischief in *R.* v. *Thomas (supra.)*

Griffith, Q.C., followed.

Lutwyche, J. I think it best to confine myself to the pure questions of law which arise on the record. The first and most important question is that which was expressed in the first count of the indictment, and to say whether there was any error of law stated in that, one must look at s. 44 of the *Larceny Act of 1865* and see what its fair meaning is. In looking at a section of an Act of Parliament with a view to give it its true construction, one must, in the first place, look to the language of the section itself, and if that is clear and plain, so that "he who runs may read," there will be no occasion to travel further. But if there be any ambiguity the Court may with propriety look to other sections of the same statute, or to sections of any other statutes which are *in pari materia*. It is an elementary rule, and one consistently enforced by the Courts in giving their opinion on the meaning of statutes, that where the grammatical meaning is plain and clear that should be followed, unless some manifest inconvenience, absurdity, or injustice would result. Looking at the terms of s. 44, it seems to me that the words are exceedingly plain and clear. I consider that the first ingredient in the offence, which was provided for in that section, and which, I believe, was created by it, refers to the intent with which the robbery was committed, and that the whole of it refers to an offence compounded of robbery and wounding, the latter of which

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might be either before or after the robbery. The contention of the counsel who have addressed the Court on behalf of the prisoner was the word "any," in the latter part of the section, must mean "the same." They might, of course. They might be confined to the same person who was robbed and wounded; but, as was admitted by one of the counsel, the word "any" might embrace a different person from the one who was either robbed or wounded; and it appears to me that is really the meaning we are to put upon that part of the statute. I see no manifest inconvenience, absurdity, or injustice likely to follow from our coming to such a conclusion. On the contrary, I think there would be a manifest inconvenience, a manifest absurdity, and a manifest injustice from holding the reverse opinion. A case I put in course of the argument appears to me in a simple way to point out the policy of the Legislature and to assist in explaining the meaning of the words which are used in s. 44. Supposing an aged and feeble man on a journey, and accompanied by another whom he had taken with him for his assistance, were considered by an evil-disposed person to be a desirable person to rob, and the latter were, in order to effect his purpose, to wound the strong man and immediately afterwards rob the other, it seems to me that the Legislature has very prudently provided for occurrences of that kind, and has provided for it in no other part of the statute. If the word "any" did not embrace the person who was robbed as well as his companion who was wounded, very great evils might result. The Legislature has chosen that the punishment for these two offences together shall be much more severe than they considered necessary where the robbery and wounding are separate, and it seems to me that in passing the Act they proceeded with care, circumspection, and astuteness, when they made this section refer to more than one case. I am therefore of opinion that the first count of the information was good, and that there was no error in that count. The second count, as far as I can see, only differs from the first in the fact that the property which was alleged to have been stolen was laid in the corporation of the Queensland National Bank, Limited, instead of in Berry. To make it a good count the property must have been laid in some person, and it might well have been either in Berry, as in the first count, or in the bank. I can see no error there. The other points raised will be more or less decided by the construction the Court puts on the first and second objections. It was objected that a corporation was not a person, but it was not

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Lutwyche, J.

alleged in the information to be such, so that there is nothing in that point Both counts, I think, are good; and even if one of them were bad, as the punishment annexed by the Legislature is the same, I think the case of *O'Connell* v. *The Queen*, which was cited, disposes of that matter. Upon the whole, therefore, I am of opinion that the judgment ought to be affirmed.

Harding, J.

HARDING J. I think that a judge has power to state a special case, even though the points raised had not been taken at the trial. I concur with the views expressed by Lutwyche J.

Lilley, C.J.

LILLEY, C.J. I assent entirely to the conclusion at which my brother judges have arrived—that there was no error on this record, and that the judgment ought to be affirmed. I considered the points raised, and directed the jury that it was not necessary that the person wounded should be the same person who was robbed. I also directed them that there must be an immediate connection between the robbery and the wounding, that, in fact, the wounding must be either at the beginning for the purpose of getting hold of the plunder, or for the purpose of securing his escape with the booty. I most carefully directed them as to the immediateness, so that the prisoner has not suffered from the absence of any averment on this point. I also express the opinion that s. 44, upon its plain interpretation, is especially applicable to the circumstances of this colony. I think the course I have taken in stating a special case is far preferable to a writ of error, in which latter event the prisoner would have been dragged to the Court to listen to the whole of the argument and receive judgment.

LUTWYCHE, J. I am in favour of the course taken.

Conviction affirmed.

Solicitor for prisoner: *Bunton.*

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R. *v.* HIGHFIELD.

[Full Court.]
1880.
6th April.

Lilley, C.J.
Lutwyche, J.
Harding, J.

Criminal law—Misapplication of moneys by public servant—Audit Act of 1874 (38 Vic., No. 12), s. 49.*

On an information under s. 49 of *The Audit Act of 1874* it is not necessary to prove that the misapplication of public money was fraudulent, or that it was misapplied or improperly disposed of with any intent whatever.

Crown case reserved by Lutwyche J.

Wm. Highfield was tried before me at the last Criminal Sittings of the Supreme Court, held at Brisbane, under s. 49 of *The Audit Act of 1874*, for that, while he was employed in the public service as Engineer of Waterworks, a certain sum of money amounting to £83 12s. 8d. came into his possession and control by virtue of such employment, for the use and benefit of certain other persons, and that he feloniously misapplied £67 15s. of the same, contrary to the provisions of that statute. A second count in the information charged him with improperly disposing of the same; and there were two other counts charging him with the misapplication and improper disposal of the same, he being a person liable to account for the receipt and expenditure of public moneys. It appeared from the evidence given that in November, 1879, the prisoner was in the public service as Engineer of Waterworks, and that in that month he applied to Edward Deighton, Under-Secretary of the Department of Works, Brisbane, for authority to draw on the Q.N. Bank at Ipswich for the sum of £83 12s. 8d., to meet a corresponding amount due for wages at Warwick for the month of October to men employed in the Works Department. Mr. Deighton gave the required authority to draw on the Bank, and the prisoner drew for the amount, which was placed by the Bank to his credit in an account which he then had at the Bank, headed "William Highfield's Public Account." In the month of November the prisoner had no more than that one account at the Bank, his private account having been closed in October, 1878. The draft for £83 12s. 8d. drawn by

* *See* Criminal Code, s. 641.

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the prisoner was presented at the Office of Works, and Mr. Deighton gave his official cheque on November 24 in exchange for it, and got a disbursement of that sum. On November 19 the prisoner had drawn a cheque against the amount placed to his credit at the Bank under the authority given by Mr. Deighton. That cheque was made specially payable to the order of Mr. Rodgers, who was then engineer of the Warwick Waterworks. Mr. Rodgers endorsed the cheque, and got it cashed at the Warwick branch of the Q.N. Bank, and with the proceeds paid the wages of the men in the Works Department, for whose benefit the prisoner was authorised to draw on the Q.N. Bank at Ipswich. On November 19 the prisoner drew against the same amount two cheques to pay private creditors—one for £27 and one for £15--and up to November 28 inclusive he had drawn against the amount cheques in favour of his private creditors, all of which were duly paid, amounting to £67 15s. The prisoner's cheque drawn to the order of Rodgers was afterwards presented at the Ipswich branch of the Bank and came back dishonoured, and at the time of the trial stood to the debit of Rodgers in the books of the Warwick branch. The prisoner had no authority from the Government to open a public account at any bank, and never accounted in any way for the application of the money which had been placed to his credit. In summing up I directed the jury that it was not enough for the prisoner to show that the person for whose benefit the money paid into the prisoner's credit was intended had been paid by another person and from a different source; that the offence charged was not embezzlement, but was created by the provisions of s. 49 of the Audit Act; that under that statute it was not necessary to prove any felonious intent, the act of misapplication or improper disposal being sufficient to satisfy the statute; that upon this information they had only to be satisfied that by virtue of such employment the sum of £83 12s. 8d. came into his possession for the benefit and use of other persons, and that while it was in his possession he unlawfully misapplied or improperly disposed of a portion of it. Mr. Chubb, who defended the prisoner, objected to my direction, and at his request I reserve for the consideration of the Full Court the following question:—"Was I right or wrong in my direction to the jury on the matters of law contained in it?" The prisoner was convicted and sentenced to imprisonment, with hard labour, in Brisbane Gaol, where he now remains.

Chubb, for the prisoner. There must be a traudulent misapplica-

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R. v. HIGHFIELD.

Lilley, C.J.

tion. In ss. 75, 76, 77 of *The Larceny Act of 1865* (29 Vic., No. 6), the word "fraudulent" is used.

Griffith, Q.C., for the Crown, cited *R.* v. *Wynn*, 1 Den. 365.

LUTWYCHE, J., mentioned *R.* v. *Dodwell*, 4 S.C.R. 171.

HARDING, J., mentioned *R.* v. *Prince*, L.R. 2 C.C.R. 154.

LILLEY, C.J. The Court is of opinion that it is unnecessary to allege that the misapplication was fraudulent, or that it was misapplied or improperly disposed of with any intent whatever.

Conviction affirmed.

Solicitor for prisoner: *C. F. Chubb.*

HAMILTON v. BOYETT.

[IN CHAMBERS.]
1880.
12th April.

Lilley, C.J.

Practice—Pleading—O. XXVII., r. 1—Embarassing allegation.

A paragraph in a Statement of Claim in an action for libel brought by a member of Parliament against the printer of a newspaper, containing an allegation to the effect that shortly before the publication of the libel the plaintiff, in the discharge of his Parliamentary duties, took part in a debate in the Assembly touching the amount to be proposed to be voted for the maintenance of the Police Force of the colony, was struck out on the grounds (1) that it was embarassing, as it could not be gone into in evidence on the trial; and (2) that it was merely a matter of evidence, and not a material fact.

SUMMONS to strike out a paragraph in a Statement of Claim.

The facts appear in the headnote.

Miller for the defendant.

Rutledge for plaintiff. The paragraph was necessary for identification.

LILLEY, C.J. The paragraph must be struck out. The plaintiff is to be at liberty to make amendments necessary by the alteration upon the payment of the costs of the motion.

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R. *v.* GOMEZ.

[Full Court.]
1880.
1st June.

Lilley, C.J.
Harding, J.

Criminal law—Jurisdiction—Torres Straits—Annexation of Islands—18 and 19 Vic., c. 54, s. 46—24 and 25 Vic., s. 44—43 Vic., No. 1, s. 1—Prerogative of the Crown—Letters Patent—Murder.

The Supreme Court has jurisdiction over islands in Torres Straits included in the area described in the Schedule to 43 Vic., No. 1, annexed pursuant to Letters Patent issued by Her Majesty in 1872 and 1878, and the proclamation in the *Government Gazette* of 21st July, 1879.

Crown case reserved by Sheppard J.

Maximo Gomez, *alias* Pedro, was tried at Cooktown on the 30th April for the murder of William Clarke at Possession Island on the 24th December, 1879. The jury found the prisoner guilty, and sentence of death was passed upon him, but the sentence was respited, certain points of law being reserved. The island where the offence was committed was situated, according to the evidence of a witness, in Torres Straits, and was distant about a mile and a-half from the mainland. It appeared to the learned judge that the jurisdiction of the Court depended on (1) the validity of the Letters Patent issued by Her Majesty the Queen, dated 10th October, 1878 (upon which *The Queensland Coast Islands Act of 1879* was founded), and (2) whether the islands, being situate within a marine league of the mainland of Australia, the Court had jurisdiction to try the prisoner independently of the Letters Patent, the Act of Parliament 43 Vic., No. 1, and the subsequent proclamation of His Excellency the Governor published in the *Government Gazette* of 21st July, 1879. His Honor stated in the case that s 2 of 3 and 4 Vic., c. 62, gave power to Her Majesty by Letters Patent to erect into a separate colony, or colonies, any islands which were, or which thereafter might be, comprised within, and dependencies of the colony of New South Wales. By s. 7 of 18 and 19 Vic., c. 54, Her Majesty had also power to erect into a separate colony or colonies any territories which might be separated from New South Wales by alteration of the northern boundary thereof; and by s. 2 of 24 and 25 Vic., c. 44, she could, by Letters Patent, annex to any colony on the continent of Australia any territories which in the

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exercise of the powers therein mentioned might have been erected into a separate colony. The difficulty which his Honor felt was as to the legal effect of the Letters Patent of 10th October, 1878. The islands in Torres Straits lying between the continent of Australia and the island of New Guinea were never dependencies of or reputed to be within the colony of New South Wales, and there was no Imperial Act giving power to Her Majesty to annex to this colony any islands which were not dependencies of New South Wales. He was not aware that the islands in Torres Straits had ever been taken possession of on behalf of the British Crown, nor did the Letters Patent recite that such possession had been taken; and it appeared to him that as the boundaries had been defined by Acts of the Imperial Parliament, or under their authority, those boundaries could only be altered by an Act of the Imperial Parliament or by the exercise of some power conferred by the same authority. The question for the decision of the Court was whether, under the circumstances, the Circuit Court at Cooktown had jurisdiction to try the prisoner.

Pring, *A.G.*, for the Crown, referred to the Proclamation, 22nd August, 1872, in 13 *Government Gazette* 1324, based on Letters Patent, dated 30th May, 1872, with regard to islands within sixty miles off the coast; Letters Patent, 10th October, 1878; Proclamation, 21st July, 1879; 43 Vic., No. 1.

HARDING, J., referred to 18 and 19 Vic., c. 54, s. 46 (1 Pring 230.)

Griffith, *Q.C.*, for the prisoner, referred to the Letters Patent of 1862 (1 Pring 234), 3 and 4 Wm. IV., c. 62 (1 Pring 189); and submitted the questions to be considered were (1) whether the island in question was affected by the Letters Patent of 1872 (*ante*); and (2) whether the boundaries of the colony should be altered by Act or prerogative. (Chitty on Prerogative, p. 29; *R.* v. *Jimmy*, 4 S C.R. 130; *Damodhar Gordham* v. *Deoram Kanji*, 1 App. Cas. 332.)

LILLEY, C.J. The matter appears to me to be perfectly clear, and I should be very sorry for it to go forth that there is any doubt as to the jurisdiction of the courts of the colony over the islands annexed to the colony by the Letters Patent of 1872 and 1878. It might be taken as a conclusion of fact that these islands, up to the time Her Majesty assumed dominion over them, were not under the dominion of any other power, nor within the territories of any of the Australian colonies; that, in fact, they were islands which Her Majesty had power and was free to exercise dominion over. Nothing can be clearer

Lilley, C.J.

from a long chain of history and practice that the Queen has the prerogative, by Letters Patent, to erect unoccupied lands into colonies. She may revoke those Letters Patent, or extend or limit the jurisdiction of the colony so erected; in fact, she has absolute power to alter in any way the limit of the colony. These islands are in that condition. Her Majesty had power to assume control over them. She has done so, and it is not a matter which the Court is at liberty to dispute that in issuing these Letters Patent she has assumed lawful dominion over the islands therein mentioned. The only question as to the validity of the proceeding appears to be this: Can Her Majesty, without the assent of the Legislature, annex these lands to an existing colony with representative institutions? Caution had been observed in the matter, and the islands were not annexed without the consent of the Queensland Legislature. The last of the Letters Patent, at all events, were issued upon the condition that a statute should be passed by the colonial Legislature. Her Majesty's assumption of dominion is perfectly clear. In 1872 she created the Governor of this colony the Governor of these islands, making provision at the same time for becoming a part of the territory of the colony. The islands are therefore within the colony of Queensland, subject to the jurisdiction of the Supreme Court of this colony, and the conviction must be upheld.

Harding, J.

Harding, J. From the statutes cited it is seen that power had been given to annex certain islands; but we find nothing enacted which would prevent Her Majesty adding other islands to a colony with the assent of the local Legislature. Under these circumstances it appears to me that Her Majesty had the power to annex these islands, and that that power has been properly exercised. I do not find it necessary for the purposes of the present decision to deal with the other point in the case. I concur with the Chief Justice in the formal judgment he has delivered.

Conviction affirmed.

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MACDONALD *v.* TULLY.

[FULL COURT.]
1880.
13th May,
7th September.

Lilley, C.J.
Harding, J.
Pring, J.

Crown lessee—Wrongful eviction—Measure of damages.

Where a tenant of the Crown has been wrongfully evicted from lands leased by him for pastoral purposes, their value for those uses when lost to him is the true measure of damages.

MOTION for judgment.

A new trial had been granted for re-assessment of damages, and the further hearing was reserved. (1 Q.L.J., Supplement 21.) The re-assessment took place at Rockhampton before Harding J. and a jury.

The findings and arguments appear in the judgment.

Griffith, Q.C., and *Real* for plaintiff.

Pring, A.G., and *Garrick* for defendant.

C.A.V.

LILLEY, C.J. On the 15th July, 1879, the Court decided that there was a binding contract between the plaintiff and the Crown; that there had been an eviction of the plaintiff; that unliquidated damages for the breach of the contract might be recovered against the Crown, and a re-assessment of damages was ordered for the purpose of submitting questions for determination by the jury on the several bases of damages laid down respectively by counsel for the plaintiff and defendant. The re-assessment has been made upon the following questions, to which the several answers of the jury are subjoined, namely:—(1) Assuming that the plaintiff is entitled to recover as damages the value of that of which he was deprived by reason of grievances complained of, estimated upon the footing of the value of the runs of Ludwig, Dura, and Kilmore, in the pleadings mentioned, together with the stock upon them at the date of the grievances complained of, and the value of what remained to him after the commission of such grievances, what is the amount of such damages?—£13,600. (2) Assuming that the plaintiff is entitled to recover as damages the difference between the aggregate value of the runs Ludwig, Dura, and Kilmore, together with the stock upon them, as a going concern, at the date of the grievances complained of, and the value of what remained to him after the commission of such grievances, what is the

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amount of such damages ?—£13,600. (3) Taking the aggregate value of the runs of Ludwig, Dura, and Kilmore, with the stock upon them at the date of the grievance complained of, and apportioning such aggregate value between the runs and the stock, and assuming that the plaintiff is entitled to recover as damages the proportion of the aggregate value which was assignable to the runs as distinguished from the stock, what is the amount of such damages ?—£13,500. (4) What special damage did the plaintiff sustain by reason of the compulsory removal of this stock from the runs he was dispossessed of in respect of the cost of removal and deterioration of stock ?—£100, costs of removal. (5) What was the value of the plaintiff's interest in the runs of Ludwig, Dura, and Kilmore, considered as grazing country unstocked, and having regard to the probability of an extension of the lease at the termination, with or without variations in the tenure ?—£5500, by consent. (6) What was the value of the unexpired residue of the term, without sheep, of the runs Ludwig, Dura, and Kilmore as grazing country, assuming that unexpired residue to be nine years ?—£5000, by consent. (7) What do you find to be the annual rental the plaintiff could have obtained for the said runs Ludwig, Dura, and Kilmore, capitalised, for the whole residue of the term, taking the term at nine years ?—£5000, by consent. (8) What annual rent was payable by the plaintiff to the Crown during the period of nine years ?—£1115. (9) What was the capital value of such rental for the period of nine years ?—£921. (10) What was the value of one year's possession by the plaintiff of the said runs after notice of the leases to Richards & Co. by the Government, less the rent the plaintiff was paying to the Crown ?—£1000, by consent. (11) Do you award any, and what, damages to the plaintiff as compensation for the delay in indemnifying him against the loss which he sustained by reason of the grievances complained of ?"—Six per cent. on the amount awarded by the Court from the 5th October, 1869, the date of the first trial of the case ?*

From the evidence and the arguments it appears that the plaintiff estimated his general damages on the basis of speculative prices for the runs, treating them as subjects of speculation much upon the footing of similar dealings with stock or shares upon the Stock Exchange in England. He claimed also special damage for the cost of removing his sheep when evicted, and also interest from the time of the breach of contract for delay in compensating him. In my former

* 2 S.C.R. 99.

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judgment, which I desire to be read as part of this decision, I gave my reasons for declining to accede to the plaintiff's mode of estimating his general damage, and also for rejecting his claim for interest upon a sum not then ascertained. On the part of the Crown it was contended that the principle in *Flureau* v. *Thornhill* (2 Wm. Bl. 1078) was applicable, and that the plaintiff was not entitled to substantial damages for the breach of contract, or that he was entitled merely to the value of the residue of the term, considering the country as grazing country and unstocked—that is, without sheep on it—or that he was entitled to no more than the value of one year's possession of the run, treating the eviction as a resumption by the Crown. Whilst I decline to concede the plaintiff's speculative rule of damage, I am equally unable to allow any one of the narrower measures laid down by the defendant. The rule in *Flureau* v. *Thornhill* obviously does not apply; the Crown had a title to give, and they granted it to other persons when they should have given it to the plaintiff. That there was some difficulty in identifying the country or in adjusting adverse claims, it may be allowed; but the agents of the Crown, instead of leaving the various claimants to contest their disputes between themselves, assumed the responsibility of settling them, and issued the leases, and the jury have found they were wrong. But the matter still remains thus: that the country could be identified, and the jury have decided that it was the country of which the plaintiff was dispossessed. *Flureau* v. *Thornhill*, then, does not apply to the circumstances of this case, although it might not be unreasonable to apply some such rule in dealing with disputes about country described according to natural features without survey by intending lessees. But in this case the country had been visited by the Commissioner of the Crown, and the original description had by him been amended. The contention that the Crown had resumed the runs came late in the discussion of the case. was—in fact, suggested by me for argument—and I thought the right of the Crown to resume should be placed before the jury as an element in estimating the damage to the plaintiff. It was not strenuously pressed by the defendant that the plaintiff was only entitled to damages as upon a resumption, and I think the position was untenable. There was no intention to resume the runs; there was a steady refusal to acknowledge the plaintiff's title and a grant of it to other persons. Nor do I think that the full measure of the plaintiff's damage is to be found in the value of his interest in the residue of the

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term considered as grazing country unstocked. This has been fixed by consent at from £5000 to £5500 (Questions 5-6). It does not represent the actual condition of the plaintiff's possession and enjoyment at the date of the eviction. The plaintiff has sworn that the value of the runs was, without the sheep, £18,000, and with them, £22,000, but these sums are founded on what I call speculative prices on speculative sales. I think the true measure of damage is to be found in a mean between the wide rule submitted by the plaintiff and the narrow one insisted on by the defendant. When the re-assessment of damages was ordered I thought, and said, and I still think, that, having regard to the whole of the circumstances of this contest, and to the state and policy of the law under which the contract was broken, the true measure of damage would be so much as would give to the plaintiff compensation for his real or actual loss, having regard to the precise nature and extent of his possession and enjoyment included in the residue of the term. I think the parties, if they ever thought of a breach of the contract as possible, would naturally contemplate, at least, this extent of responsibility. It is drawn from the rule laid down by all the courts, with many varieties of expression, but with undeviating identity of substance from *Hadley* v. *Baxendale* (9 Ex. 341) to *Spedding* v. *Nevell* (L.R. 4 C.P. 212), and *Bain* v. *Fothergill* (L.R. 7 H.L. 158.) The plaintiff was, in fact, using the runs for the very purpose for which they had been leased to him—that is, for pastoral purposes. Their value for their uses when lost to him was the fair measure of his damage. The jury must determine the amount. Looking at the questions and answers, I think the first, second, and third are within the rule, and the jury have assessed the plaintiff's damage at £13,600. For that sum I think he is entitled to have judgment. It may be a perfectly just and reasonable assessment, or it may be excessive. On this motion I am bound by it. All the facts were before the jury, and, as I understand, the nature of his tenure, and all the qualifying incidents attached to it, such as the right of resumption and the possibility that there might or might not be a renewal of his term, etc., were also before them, and they have decided that he is entitled to that sum. The Attorney-General admitted that the plaintiff would be entitled to £100 for the cost of removing his sheep. I reject the claim for damages for delay in compensating the plaintiff for the unascertained damage (Question 11). See *Newton* v. *Grand Junction Railway Co.* (16 M. & W. 139). I think

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there is no foundation for such a claim. It is not to be forgotten either that the delay for at least eight or nine years, if not more, was the plaintiff's own default, and that the remainder of the time has been occupied in litigation. The judgment will, therefore, be for £18,700, and the plaintiff will have his costs, as well as those on which our decision was reserved, as those which it is our duty now to award.

HARDING and PRING JJ. concurred.

Solicitors for plaintiff: *Murphy & Paterson.*

Solicitors for defendant: *R. Little*, Crown Solicitor.

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COMPTON v. MacDONNELL.

Police Act (19 Vic., No. 24), s. 10—Delivery of goods—Value—Jurisdiction of justices.

[Full Court.]
1874.
10th March.

Cockle, C.J.
Lilley, J.

In order that a justice may have jurisdiction to make an order for delivery of goods, there must be evidence that the value of such goods is not greater than £20. It is not sufficient to state that the value is *about* that amount.

Rule *nisi* for a prohibition to restrain F. Rawlins (Police Magistrate) and E. MacDonnell from further proceeding with respect to an order for the return of a piano.

The only evidence as to value was that of MacDonnell, who swore the piano was of the value of about £20. A supplementary affidavit was made after the initiation of these proceedings in which he stated the true value of the piano was £18 The Court held the affidavit inadmissible.

Pring moved the rule absolute on the ground of want of jurisdiction.

Hely (*Garrick* with him) showed cause. There could be no better evidence than that of MacDonnell, as it remained uncontradicted. He was an expert in the trade, and gave the closest possible estimate. If evidence of that kind were not considered satisfactory, the only test would have been to submit the piano for sale in open market.

Lilley, J. The Court is satisfied that there was no evidence before the Magistrate to found his jurisdiction. In cases of this kind it must be shown that the property was not of greater value than £20. The rule will, therefore, be made absolute, but as the point is purely technical we will not grant costs.

Rule absolute.

Solicitor for plaintiff: *Macpherson.*
Solicitor for defendant: *Wilson.*

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In re DEKINS.

[IN INSOLVENCY.]
1877.
19th February.
Cockle C.J.

The Insolvency Act of 1874 (38 Vic., No. 5), s. 76—Discharge of an insolvent from custody—Notice to Official Trustee—Form of order.

On an application by an insolvent for his discharge from custody, a copy of the rule *nisi* must be served both on the Official Trustee and the arresting creditor.

RULE *nisi* for discharge from custody.

John James Dekins, an insolvent, had been arrested at the instance of Messrs. Digby and Elliott, creditors. From an affidavit by a clerk in their employ, it appeared that the insolvent had twice, before being arrested, stated his intention of leaving the colony, and that he had collected such of his debts as were easily procurable.

Pring, Q.C., moved the rule absolute.

Liddle, for creditors, showed cause, and asked that substantial security should be imposed for the guarantee of the insolvent's presence to answer all that was required of him under the Insolvency Act.

COCKLE, C.J. This is not entirely a new point of practice, and is, I think, to a great extent settled already I have had the advantage of consulting my brother Lilley, and find he has already made orders, the wording of which will assist in determining this case. I think that a copy of this order ought to have been served not only upon the detaining creditor, but upon the Official Trustee. Still, that officer being present, I should be reluctant to inflict unnecessary vexation upon the parties. I wish it to be understood, however, that in all such cases as this, it will be necessary to give the Official Trustee notice. The practice followed in previous cases I shall follow in this, and it will probably be the practice adopted in all subsequent cases. The order will be: "That upon filing his statement, and on giving substantial bail until he passes his last examination, the insolvent may be discharged, such bail to be in half the amount of the debts shown in his statement, and in one or two sureties, to be approved by the Registrar; the condition to be void upon the insolvent passing his last examination, or on the trustee certifying to the Court that he is satisfied that the insolvent has given up all his property."

Solicitor for insolvent: *Godfrey.*

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In re HENDRY AND ROGERS' ARBITRATION.

Arbitration—Award—Mistake—Amendment of order of judge.

[IN CHAMBERS.]
1877.
8th June.
Lutwyche, J.

An award was varied where a mistake had been made by the umpire in a submission to arbitration in the expression of his intention, such mistake being regarded as clerical.

SUMMONS to vary an order made on an award in an arbitration. The facts appear in the judgment.

C.A.V.

LUTWYCHE J. This was a summons calling upon Daniel Hendry to show cause why an order made herein by me on the 2nd day of May last should not be amended or varied, upon the grounds stated in the affidavits filed herein. It is to be regretted that this application should have been rendered necessary by the imperfect information supplied to the town agents of the solicitors for the respective parties when the original order was made. It was then assumed that a certain promissory note, which it now appears had been paid before the submission to arbitration, was still unsatisfied. That assumption was certainly justified in the absence of other evidence on the point by the language used in that portion of the umpire's award, by which he decided that the deeds in dispute must be delivered up to Rogers according to agreement by Hendry upon payment of the amount due by promissory note. The umpire, however, has made an affidavit that he had in effect awarded that Hendry should transfer to Rogers unconditionally the allotment to which the deeds related. The present case, therefore, appears to fall exactly within the limits of *In re Hall and Hinds* (2 M. & G., p. 847). Lord Chief Justice Tindal, in delivering the judgment of the Court, said: "We consider the mistake in the present case to be a mere clerical mistake, by which the arbitrators have expressed on the copy of the award delivered out, not the intention of their own minds, but one widely different. At the same time the mistake and act of carelessness is so gross as to amount, though not in a moral point of view, yet in the judicial sense of that term, to misconduct on the part of the arbitrators; and we think we do not extend the jurisdiction of the Court beyond its proper limits when we give

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relief in a case under these very peculiar circumstances." The umpire states in his affidavit that it had been admitted that the promissory note had been paid in full, and that he found that Hendry had no right whatever to refuse to re-convey the allotment. There was no question of any other promissory note, and yet the terms of his award annexed as a condition to the delivery of the deeds by Hendry to Rogers the payment of a promissory note which had been paid already. I shall vary my order of the 2nd May last by striking out all the words intervening between the words "and I do further order that" and the words "the said Daniel Hendry." No order as to the costs of this application.

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In re STRICKLAND.

[NORTHERN SUPREME COURT.]
1877.
25th June.
Sheppard, J.

The Brands Act of 1872 (35 Vic., No. 4), s. 9—Unlawful possession of a brand—"Knowingly"—Information not disclosing an offence.

S. was charged upon an information with having in his possession one brand—to wit, W5U, the same not being the brand he was entitled to use, and was convicted and fined. The conviction followed the words of the information.

Held, that, as the information disclosed no offence within s. 9 of 35 Vic., No. 4, the conviction was wrong, and a prohibition must be granted.

Held, also, that the word "knowingly" applies to all the offences following that word in that section.

RULE *nisi* for a prohibition.

An information was laid by Mr. Brook, District Inspector of Brands, against Hugh Strickland, charging him with having in his possession one brand—to wit, W5U, the same not being the brand that he was entitled to use. The defendant was convicted by the police magistrate at Bowen, and fined £25, with costs. The conviction, as drawn up, followed the words of the information. A rule *nisi* was granted for a writ of prohibition to set aside the conviction on the grounds (1) that the information disclosed no offence under *The Brands Act of 1872;* (2) that there was no evidence of any offence under the said Act; and (3) that certain evidence was not taken down on the depositions.

The facts appear in the judgment.

SHEPPARD J. The question in this case depends upon the construction to be given to s. 9 of *The Brands Act of 1872.* I am of opinion that the word "knowingly," which precedes the words "permit to be used," is common to and forms a portion of each of the three collocations of words which comes after it, and that the proper construction of this portion of the section is as follows:—Any person who shall knowingly permit to be used—any person who shall knowingly have in his possession—any person who shall knowingly have at his yard—any branding instrument other than the one he is entitled to use, which may be impressed upon stock, shall be liable to be fined £50. If the word "knowingly" is not to be taken as preceding the words "have in his possession," neither should it be considered as preceding

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the words "have at his yard;" and the result of such a reading would seem to be that a man would be liable to fine or imprisonment because a branding iron was found in his yard, he being entirely ignorant that the instrument was there. It may perhaps be said that a man cannot have a thing in his possession or have a thing at his yard without knowledge that he possesses it or that it is at his yard, but the same remark would be more strongly applicable to the words "permit to be used." Permission to use a thing can hardly be given without knowledge that such permission is given. The Legislature, to prevent any obscurity as to this, has placed the word "knowingly" before "permit to be used," and the word knowingly governs or explains the words "have in his possession" and "at his yard" equally as it does the words "permit to be used."

It was forcibly argued by the learned counsel for the applicant that knowingly having the possession of a branding iron belonging to some one else, without any intention of unlawfully using it, could not have been intended to be an offence; that it one man left his branding iron at another man's station, and the latter person allowed the branding iron to remain without any intention of using it, it was most unreasonable to suppose that the Legislature intended such circumstances to constitute an offence under the Act. I am unable to accede to this view of the statute. The Court can only give a reasonable construction to the words used according to their ordinary signification; and to read the clause as if the words "with the intent unlawfully to use the same" were inserted after the words "at his yard" would be, in my opinion, to legislate not to interpret the Act of Parliament. Had the Legislature intended the offence to be the having such a branding iron in a man's possession with the intention of unlawfully using it, apt words to express such an intention would doubtless have been used.

In this case the offence of knowingly having in his possession a branding instrument by which any brand which the defendant was entitled to use and which might be impressed upon stock has not been charged in the information. Mr. Gregory, who appeared for the defendant when the case was before the police magistrate, swears that he took an objection to the information on the ground that it disclosed no offence, but that the police magistrate held that it was sufficient. Mr. Gregory is contradicted as to this by the Clerk of Petty Sessions. From the course of the proceedings I think an objection must have been taken. It is clear, from the evidence, that the defendant had in

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his possession a branding iron by which a brand other than the one which he is entitled to use might be impressed, and that he knew he had it. A young man named Neal, who was the owner of the branding iron in question, had lived with the defendant, and had been in the habit of sleeping in a "humpy," as it was termed; this building, 50 yards from the defendant's house, and in his paddock, was in the occupation of the defendant and used by him. Neal had gone to Cooktown, and, according to the evidence, the branding iron was found in the hut of the defendant's wife, and it was afterwards kept there with the defendant's knowledge and consent. Although I have no doubt that the police magistrate was satisfied that the defendant knew the branding iron was in the hut, his adjudication has been made on the allegations stated in the information, and the conviction does not set forth as having been proved the ingredients necessary to constitute an offence under the Brands Act. The information and conviction are imperfect and bad in law, not only with regard to the *scienter*, but also that it is not stated that the branding iron (or "brand," as it is written in the information and conviction), was one by which a brand might be impressed upon stock.

A case similar in principle to the present was heard before the Supreme Court of New South Wales on the 8th December, 1865. There the defendant was charged with concealing a deserter from H.M.S. Curacoa. The information did not allege that the defendant knew that the person he concealed was a deserter, and the conviction followed the words set out in the information. The offence created by the Act 10 and 11 Vic., c. 62, s. 11, is concealing a person who is a deserter from Her Majesty's navy. knowing such person to be a deserter. There was ample evidence before the magistrates of this offence having been committed. The Court refused to amend the information and conviction, even if they possessed the power, and granted the prohibition without costs. In another case a prohibition was granted, a conviction having been made on an information alleging that the defendant had sold rum, he not being the holder of a publican's general license, and against the Act of the Governor and Legislative Council. By the Act of Parliament in force in New South Wales a person might legally sell rum under a license other than a publican's general license, and there was no such Act in force passed by the Governor and Legislative Council. The conviction was set aside on both grounds without costs, amendment having been refused. (*Ex*

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parte Dudley,* before the late Mr. Justice Wise, May 8th, 1862, after consultation with the Chief Justice.) These two cases are clear authorities, if any were necessary, that this conviction cannot be supported; and, as a heavy penalty has been imposed for what, so far as appears by the evidence, is a trival offence, I shall not amend the information and conviction, although I may have the power to do so. As to the first ground on which the rule *nisi* was granted, I am, for the reasons given, of opinion that the information discloses no offence under the Brands Act, and that the defects are not remedied by a correctly drawn conviction. As to the second ground, I am of opinion that there is evidence of an offence under the s. 9 of the Brands Act having been committed; and, with reference to the third ground, that certain evidence was not taken down, the affidavits are contradicting, and it is not necessary for me to give any opinion on the matter. It is to be observed that by the rule *nisi* the objections are taken to the defects in the information, not to those in the conviction. Had objections been taken to the latter, the police magistrate might have had an amended conviction drawn up in accordance with the facts, which no doubt he found proved—namely, that the defendant knew that he had in his possession the branding iron, and that it was such a one that could be impressed upon stock; and then it would, I think, have been immaterial that the information was defective. That being so, and the defendant having in fact committed the offence, the rule for the writ of prohibition is made absolute, but without costs.

Rule absolute.

* 1 S.C.R. (N.S.W.) 63.

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IN THE ESTATE OF KENNEDY, DE FRAINE & CO.

The Insolvency Act of 1874 (38 Vic., No. 5), ss. 98, 101 (13), r. 103—Removal of committee of inspection—Creditors assenting to a resolution—Motion to set aside a resolution—Estoppel—Creditor not entitled to vote—Statutory majority—Ignorance of other creditors.

[In Insolvency.]
1878.
10th July.
Lutwyche, A.C.J.

At a meeting of creditors, A., a creditor, who was not entitled to vote, but who claimed and was allowed to vote in respect of debts exceeding all the other debts in the estate, voted in favour of a resolution for the appointment of a committee of inspection, for which a statutory majority of the other creditors also voted.

Held, that there being, without A's. vote, a majority in favour of the resolution, it should not be set aside by reason of the ignorance of the other creditors that A. had no right to vote on the resolution.

Held, also, that the creditors having signified their assent by signing the minutes of the meeting were estopped from impeaching the validity of the resolution.

Motion to make absolute a rule *nisi* to set aside an appointment of a committee of inspection, consisting of E. B. Forrest, J. S. Turner, and A. B. Webster, elected at the first meeting of creditors who had proved in the estate.

Pope Cooper, for John Frazer & Co., creditors, moved the rule absolute.

Griffith A.G. and *Harding* showed cause on behalf of the committee and J. S. Turner, the trustee.

From the affidavits filed in support of the order *nisi* it appeared that, at the meeting of creditors at which the appointment was made, the manager of the Bank of Australasia held a certificate of proof of a debt of £19,000, and the ground on which the order was asked for was that this was a contingent debt, in respect of which the Act did not allow a creditor to vote. Affidavits were now read, in opposing the motion, showing that the debt of the Bank of Australasia had not been expunged or reduced by the trustee, who was appointed by the committee of inspection; that creditors, whose debts amounted in all to £4797, exclusive of those of the Bank of Australasia and Messrs. Frazer & Co., assented to the proceedings by signing the minutes of the meeting; and that the total amount of the debts proved in the estate, exclusive of that of the bank, was £8035 15s. 6d. Amongst those signing the minutes was James Charles Couzens, the duly constituted

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attorney of Messrs. Frazer & Co , but he stated in his affidavit that he did so not knowing that the claim of the Bank of Australasia was a contingent debt, and believing it was useless to offer any opposition in the face of a creditor who had proved for such a large amount.

Lutwyche A.C.J. It seems to me this order cannot be made absolute without proof—which it appears to me the applicant has failed to make out—that the committee of inspection would not have been elected without the vote of the Bank of Australasia. It appears clear that the majority of the creditors, independently of the bank, voted for the election of the committee of inspection, who afterwards appointed Mr. J. S. Turner as trustee. It appears from the affidavits filed that there were creditors present, or represented at the meeting, whose debts amounted in all to £4797, exclusive of those of Frazer & Co. and the Bank of Australasia, and that was a majority in number and value—at all events in value—of the debts proved in the estate, irrespective of the bank. That being so, it appears to me that Mr. Cooper has failed to show that the committee of inspection would not have been elected without the vote of the Bank of Australasia Unless that can be proved, and it seems to me to be disproved, the Court cannot order a fresh meeting to be held for any purpose. It appears to me also that, by s. 98 of *The Insolvency Act*, the power of the Court to order a meeting to be held for the election of a trustee is limited, and that it has no power to interfere with any proceedings which relate to the removal of any member or members of a committee of inspection, such power being given by paragraph 13 of s. 101 to the creditors. Even if the application had been made for a fresh meeting of creditors to be held for the election of a new trustee, I do not think I would have been able to grant the application, because the committee of inspection, who appointed the present trustee, were appointed by a majority in value of the creditors, irrespective of the Bank of Australasia. I also think the applicants, in having signed the minutes, are estopped by their own act from making an application of this kind. The motion will therefore be dismissed, with costs.

Rule nisi dismissed.

Solicitors: *Roberts, Liddle & Roberts; Hart & Flower.*

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In re JOHN CLUNE.

The Insolvency Act of 1874 (38 Vic., No. 5), s. 167 (2), r. 123—Certificate of discharge—Special resolution of creditors at first meeting consenting thereto.

[In Insolvency.]
1880.
26th April,
3rd May.
Lilley, C.J.

The sufficiency of a consent to the discharge of an insolvent given on the mere motion of the creditors present at the first meeting was considered on an application for a certificate of discharge, when the Court allowed the application to be withdrawn, with the right of renewal after the proper procedure had been taken.

Application for certificate of discharge.

Thynne, for the insolvent, applied for a certificate of discharge, a resolution having been passed by the creditors to the effect that the insolvency had arisen from circumstances for which the insolvent could not justly be held responsible, and recommending that the certificate be granted. The report of the Official Trustee stated that at the first meeting of creditors it was resolved unanimously to recommend that a certificate of discharge be granted to the insolvent prior to his passing his last examination, on the ground that the insolvency had arisen from circumstances for which he could not justly be held responsible; and that a doubt having arisen in the mind of the trustee as to whether the creditors had power to pass such a resolution at the first meeting, he desired to call the attention of the Judge to the point.

C.A.V.

May 3rd.

Lilley, C.J. The question is whether a consent given on the mere motion of the creditors present at the first meeting, as far as appears from the documents in the estate, without any notice to the other creditors that such a matter as the recommending of the certificate would be dealt with at the first meeting, is a sufficient consent under s. 167 of *The Insolvency Act*. It is perfectly clear, upon a consideration of the general policy, at all events, that at a first meeting at which the particular business is expressly mentioned, when the creditors proceed to dispose of so important a matter as a certificate of discharge—when there has been no appointment of a trustee, no investigations, no delivery by the insolvent of his books, papers, or documents to either the Official Trustee or to the creditors' trustee—that a man who has committed

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In re JOHN CLUNE.

Lilley, C.J.

a great fraud (which I do not for a moment say has been done here) might get a resolution of this kind passed through a meeting of creditors who might be in no way parties to the fraud, and thus escape any future investigation of his affairs. General policy would, therefore, be against any such proceeding at a first meeting without notice; and it then becomes important to know what the statute provides. It is clear that there is no section which gives the creditors, on their own mere motion, the right to consent to anything of the kind. The statute, in dealing with the certificate of discharge, seems to contemplate that the insolvent should apply for it. Whether express notice be given of a meeting for the purpose of consenting, stating that that is to be the business of the meeting, it is not necessary for me to decide. It is possible the Court might consider that as a proper course of procedure. But here nothing of the kind has been done. Both under s. 167 and r. 128 the insolvent is required to take the initiative; and it is clear he cannot do that until after the appointment of a trustee, which is a proceeding to be taken at the first meeting. The insolvent might very probably, if he attended the first meeting, request the trustee to summon a meeting of his creditors for the purpose of consenting to the granting of his certificate, and if notice had been given it is possible the creditors might then deal with the matter, or he might perhaps ask the Official Trustee in the first instance to summon a meeting for the purpose, taking the chance that no creditor's trustee would be appointed. Nothing of the kind has been done in this instance, and I think there has been a failure to take the proper procedure on which to found the application for a certificate. It seems to me that there must be a substantive application, of which notice must be given. If that notice could be given at the first meeting, well and good; if not, it could only be done on the application of the insolvent to the trustee to call a meeting for the purpose. I shall therefore allow the present application to be withdrawn, to be renewed without payment of fresh fees. Mr. Justice Lutwyche, whom I have consulted, also agrees with the view I take upon this point.

Application withdrawn.

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THE NEW ZEALAND INSURANCE CO. *v.* THE SOUTH BRITISH FIRE AND MARINE INSURANCE CO. OF NEW ZEALAND.

[FULL COURT.]
1880.
9th September.
10th September.

Lilley, C.J.
Harding, J.
Pring, J.

Practice—Payment into Court—Interest—Common Law Practice Act of 1867 (31 Vic., No. 17), s. 73 -Costs—O. XXX., r. 4—O. LIV.

In an action for damages arising under a policy of fire insurance, the defendants paid into Court £69 in satisfaction as their proportion. The jury found this sufficient, but allowed £2 6s. for interest. Judgment was entered for the plaintiffs for £71 6s., with costs up to the date of payment into Court, each party to pay their own costs of subsequent proceedings.

An appeal from this judgment was dismissed with costs.

APPEAL from a judgment of Pring J., on 23rd August, in favour of the plaintiffs for £69, with £2 6s. for interest; and from an order directing the defendants to pay the plaintiffs' costs up to 30th April, the date of payment into Court, and that each party pay their own costs of all subsequent proceedings.

An action was brought by the plaintiffs upon a policy of insurance issued by the defendants in favour of the plaintiffs in respect of a building in Queen Street, owned and occupied by the plaintiffs, claiming £2700 damages. The defendants paid into Court £69. The jury found that the insured building was damaged by fire on 16th September, 1879; that £115 would be required to reinstate the building; that the building was deteriorated in value by the fire to that amount; that the rateable portion of the plaintiff's loss was three-fifths; and they allowed interest at the rate of 8 per cent. from 1st December, allowing sixty clear days to settle the claim.

Pope Cooper and *Garrick*, for the defendants. The plaintiffs claimed £2700 and interest, and that the north-eastern wall of the building was damaged by fire; that the wall was perfectly sound before the fire, and was so damaged that it had to be totally reinstated. Estimates of the cost for reinstating varied from £300 to £950. The defendants stated that if the damage was caused by the fire, the damage was £115, and they paid into Court £69, being their proportion (three-fifths), the plaintiffs being insured in another company, from whom they had received £350 by way of compromise, so that they had been overpaid.

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[PRING, J. That came out in cross-examination, and was not part of this case.]

Bruce v. *Jones* (32 L.J. Ex. 132); Roscoe's Evidence, 404.

[LILLEY, C.J. referred to Phillips on Insurance, s. 1648, and *Lucas* v. *Jefferson Insurance Co.*, 6 Cow. N.Y. 635.]

Interest was improperly allowed by the jury. The jury having found that £69 was sufficient, the judgment should be reversed. As to costs, *Langridge* v. *Campbell* (2 Ex. D. 281), *Harris* v. *Petherick* (4 Q.B.D. 611), *Garnett* v. *Bradley* (3 App. Cas. 944) were cited.

[HARDING, J., mentioned *Buckton* v. *Higgs* (4 Ex. D. 174), *Earp* v. *Henderson* (45 L.J. Ch. 738).]

If the judgment is not reversed, the defendants should have their costs after payment into Court.

Griffith, Q.C., and *Real*, for the plaintiffs. Costs were in the discretion of the Court below, and should not be interfered with.

LILLEY, C.J. We are all of opinion that there is nothing before us on which, with clear justice, we can say the verdict ought to be reversed. The appeal is dismissed, with costs.

Solicitors: *Roberts, Roberts & Bernays; Murphy & Paterson.*

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MACKIE *v.* WIENHOLT.

[IN COURT.]
1880.
28th October,
29th October.

Pring, J.

Master and servant—Implied contract—Wrongful dismissal—Custom—Knowledge.

A. agreed to pay B.'s passage-money and expenses to Queensland, and B. agreed to serve A. as cook for a period of not less than three years at a yearly wage. A. discharged B. for refusing to do dairy work.

Held, that there was an implied contract on the part of A. to retain B.'s services during such term, and that the dismissal was unjustifiable, as there was no evidence that it was ever intended that B. should do the additional work required, and the defendant failed to prove any custom of the colony to that effect or that the plaintiff knew of any such custom.

ACTION for damages for wrongful dismissal and arrears of wages, tried before Pring J. without a jury.

The facts are set out in the judgment.

Chubb, for plaintiff.

Griffith, *Q.C.*, and *Cooper*, for defendant.

C.A.V.

PRING, J. The plaintiff in this action seeks to recover from the defendant damages for an alleged wrongful dismissal by the defendant from his service into which she had entered, and also wages earned. The plaintiff claims £100 damages for the wrongful dismissal, and £29 12s. 10d. for arrears of wages. The defendant, by his statement of defence, justifies the dismissal, which is admitted, and was also proved at the trial, on the ground that "the plaintiff did not serve the defendant diligently or faithfully in accordance with her agreement, but misconducted herself by wilfully disobeying the reasonable orders of the defendant, and neglected her duties and failed to perform the same." The defendant also raises a defence by way of set-off and counterclaim alleging that the sum of £28 15s., the amount of the plaintiff's passage-money, has been lost to the defendant, and claims that amount. It appeared from the evidence of the plaintiff that on the 30th of August, 1879, at the office of Messrs. Cobb & Co., in London, she signed a letter addressed to Messrs. A. B. Cobb & Co., 34 Great St. Helens, E.C., agents of Mr. Edward Wienholt, Goomburra, Queensland, and left this letter with Mr. Cobb. The letter was to the

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effect that in consideration of defendant's agents paying plaintiff's passage-money to Brisbane she would serve Mr. Wienholt as cook for three years at £50 per annum. The defendant, through Messrs. Cobb & Co., verbally accepted the terms contained in this letter. No question was raised as to the Statute of Frauds. I find as a fact that the letter and the verbal acceptance constituted the contract between the plaintiff and defendant. The legal effect of this contract appears to me to be that in consideration of the defendant paying the plaintiff's passage-money and expenses from England to Goomburra the plaintiff agreed to serve the defendant as cook for a period of not less than three years at the yearly wages of £50, and that the defendant, by assenting to this agreement, agreed not only to pay the passage-money, etc., but also to pay the wages when earned. I am of opinion that under this agreement there is an implied contract on the part of the defendant to retain the plaintiff in his service during the term agreed upon. In *Emmens* v. *Elderton* (4 H.L.C. 668 and 13 C.B., at p. 531), Baron Parke, in his judgment, says: "I think there is clearly implied on the part of the person who contracts to pay a salary for services for a term, a contract to permit those services to be performed in order that the stipulated reward may be earned, besides an agreement to pay the salary at the end of the term." This ruling disposes of Mr. Griffith's objection, that "there was nothing in the contract to bind the defendant to retain the plaintiff in his service; and that he could discharge her at any time by paying the amount of wages then earned by the plaintiff;" and also of Mr. Griffith's further objection, that "if the contract had been signed by the defendant, there is no undertaking implied that the defendant would retain plaintiff in his service." I find that the petitioner arrived at Goomburra in the month of November, 1879, and continued in the service of defendant until the 5th of June, 1880, when she was discharged by the defendant for refusing to churn and make butter and to take sole charge of the dairy. It appears that she had attended to the dairy about a month after she arrived to oblige Mrs. Wienholt, and at her express request to do so until she could get a woman to do it. At no time does it appear that Mrs. Wienholt required her to attend to the dairy as part of her duties as cook under her agreement, nor was any custom or usage in the colony referred to; neither had the plaintiff at the time she signed the letter of the 30th of August, 1879, any knowledge of any such custom or usage as was alleged by Mr. Griffith to exist in the colony; neither can I find from

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the evidence that the plaintiff at the time of her refusal to continue to perform the dairy work and of her dismissal was informed of any custom or usage affecting her duties as cook. No other ground for her dismissal has been given in evidence, and I find as a fact that this refusal was the only breach of duty alleged against the plaintiff either at the time of her discharge or at the trial, and was, in fact, the only ground of dismissal proved. I now come to the question whether the defendant was justified on the above grounds in dismissing the plaintiff from his service. Construing the contract by itself, I hold that the plaintiff was not bound to perform the additional duty of attending to the dairy, which she was required to do by the defendant. Construing the contract and taking into consideration the evidence which I have received, I think it was not the intention of the plaintiff and defendant when entering into the contract that the plaintiff should perform such additional duty as she was required to do. I am not satisfied from the evidence given by the defendant as to the existence of the custom in the colony that dairy work is included in the duties of cook, and especially in the case of a professed cook. I may here state that I have not taken into consideration the evidence given by the plaintiff and objected to by Mr. Griffith as to the inquiries made by her of Mr. Cobb before she signed the letter. I think the defendant has failed to prove his defence, and that the plaintiff is entitled to my verdict. Verdict for the plaintiff—damages, £69 12s. 10d. (which includes the arrears of wages due at the time of her dismissal). All necessary amendments are allowed.

Solicitors: *Thynne; Little, Browne & Ruthning.*

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O'MEARA *v.* ROYAL INSURANCE COMPANY.

[FULL COURT.]
1881.
9th February.

Lilley, C.J.
Harding, J.
Pring, J.

Fire insurance—Insolvency of assured—Notice—Liability of insurer—Insurable interest.

A person who had effected a policy of insurance against fire was adjudicated insolvent, and repurchased his property, part of which was insured, from his trustee. He continued to pay the premiums, and while the policy was in existence part of his goods were destroyed by fire.

Held, that the fact that he had been adjudicated insolvent and had not obtained his certificate of discharge, and that the insurance company had no notice of these circumstances, was immaterial on an action of the policy, the plaintiff having an insurable interest in the property insured.

Held, further, that even if the trustee had interfered it would have been immaterial.

DEMURRER to statement of defence.

The plaintiff effected a policy of insurance in August, 1877, on his stock in trade for £300, subject to the usual conditions endorsed on the policy, and paid the yearly premiums as they became due, and provided for insurance up to 8th of July, 1880. For the last payment a receipt was duly given to the plaintiff by the defendants. On the 6th of September, 1878, the plaintiff was adjudicated insolvent, and Reuben Nicklin appointed trustee in the estate, the plaintiff's property, including the insured stock, then becoming vested in such trustee. On the 26th of the same month the plaintiff repurchased from the trustee the property and other assets in the estate. On the 14th of March, 1880, while the policy was still in existence, the plaintiff's premises and nearly all the insured stock were destroyed by fire. The plaintiff alleged that he was the owner of the insured property both at the time the last premium was paid and when the insured goods were destroyed, and claimed £240 and interest.

The defendants alleged in the first paragraph of their statement of defence that the plaintiff had not obtained his certificate of discharge; in the second paragraph denied the purchase by the plaintiff; in the third paragraph they alleged that the receipt for payment of the premium dated 9th of July, 1879, was signed by them without knowledge of the plaintiff's insolvency, or that he had not obtained his certificate. They also denied that any of the insured property, except a very small portion, was destroyed by fire, or that the plaintiff was, at the time of paying the last premium, the owner of such property. They alleged that the plaintiff failed to carry out the conditions of the

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policy, inasmuch as he did not, within fourteen days after the fire, deliver to them as true and paticular account of his loss as the nature of the case admitted; that he forfeited all benefit which he might otherwise have been entitled under the policy by making a false and fraudulent declaration regarding his loss; and that he failed, when required to do so under the conditions of the policy, to furnish reasonable proof of his loss.

The plaintiff demurred to paragraph 1, and said it was bad in law on the grounds (1) that the obtaining of a certificate of discharge was not a condition precedent to his right to sue; (2) that notwithstanding the plaintiff had not obtained his certificate of discharge, he had, at the time of paying the last premium and when his stock was destroyed, an insurable interest in such stock in respect of which he could maintain the action; and (3) that the plaintiff's cause of action and right to sue in respect thereof were in no way affected by his not having obtained his certificate. The plaintiff also demurred to paragraph 3 on the ground that his insolvency, or his not having obtained his certificate, was not a fact material to the risk, or a fact necessary to be communicated by the plaintiff to the defendants.

Thompson and *Prior*, for the plaintiff, in support of the demurrer: An insolvent may sue unless the trustee interferes. (*Herbert* v. *Sayer*, 5 Q.B. 965; *Jameson* v. *Brick and Stone Co.*, 4 Q.B.D. 208.) The insolvent has an insurable interest. (*Marks* v. *Hamilton*, 7 Ex. 323, 21 L.J. Ex. 109.) An insolvent can acquire property and transmit it after death. (*Fyson* v. *Chambers*, 9 M. & W. 460; *Morgan* v. *Knight*, 33 L.J. C.P. 168; *Fowler* v. *Down*, 1 B. & P. 44.) As to the third paragraph of the defence, *Ex parte Whittaker* (L.R. 10 Ch. 446) was cited.

Cooper, *A.G.*, and *Noel*, for the defendants, raised the question whether the portions of the statement of defence demurred to were proper subjects of demurrer, or whether an application should not have been made in Chambers to strike them out as embarrassing. The trustee alone can sue. (*Willis* v. *Hallett*, 5 Bing. N C. 465.) If there was an insurable interest by reason of surplus the insolvent could sue by permission of the trustee.

Harding, J., referred to *Hole* v. *Hole* (13 Jur. N.S. 1089), *Shipley* v. *Marshall* (32 L.J. C.P. 258).

Lilley, C.J. Whether this is a matter of substance, or in the nature of a defence, or whether it is simply irrelevant matter, the

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presence of which on the record might embarrass the plaintiff on the trial, is really only the subject matter of costs. The Court are disposed to think that the defendants intended to make both paragraphs 1 and 2 substantive defences, and they were, in the first instance, argued as such. Our opinion is that the two paragraphs are substantial, and properly the subject of demurrer. The allegations of the plaintiff are that, having an interest in certain property, he insured it with the defendants; that he became insolvent; that the policy was still running when the property was vested in the trustee of the estate; that the trustee sold the property to the plaintiff; that the policy being about to expire, the company renewed the contract with him, and not with the trustee; and that he thereby acquired a new right, which would constitute an insurable interest in the property in question. In reply, the defendants said the plaintiff had not obtained a certificate of discharge in the insolvency. I have not been able to see from the first how that altered the plaintiff's position, or deprived him of the right—which the trustee had not taken from him—of dealing with the property as owner, until the trustee might interfere and stop his right. I think this first paragraph formed no defence, and no possible change of the circumstances mentioned in the record can I see which could constitute it a defence. Even if the trustee interfered, it would be immaterial matter. In the third paragraph of the statement of defence it is averred that the receipt or renewal of the policy was made by defendants without the knowledge of the insolvency, or of plaintiff not having obtained a certificate. If he had the right, which I may say he had given to him by the trustee, it is quite immaterial whether the defendants knew of the insolvency or not, or whether they knew or not that he had not obtained a certificate in the insolvency. All that was material for the defendants to know would be that the plaintiff had an insurable interest in the property. There seems to have been that. He had an insurable interest. Therefore there was nothing to affect the risk in any way. There was no interference by the trustee. The plaintiff's right seems to be complete; and, in fact, the absence of notice is totally immaterial. That being so, I think the demurrer should be allowed, with costs.

HARDING J. and PRING J. concurred.

Demurrer allowed.

Solicitors: *Foxton & Cardew; Hart & Flower.*

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PAYNE *v.* CONROY'S TRUSTEE.

[IN CHAMBERS.]
1881.
25th February.

Lilley C.J.

Insolvency Act of 1874 (38 Vic., No. 5), s. 23—"Parties"—Action against trustee.

The word "parties" in s. 23 of 38 Vic., No. 5, means parties to the litigation, as distinguished from parties to the insolvency.

Claims against a trustee of an insolvent should be brought in the Supreme Court in its Insolvency jurisdiction by way of motion.

APPLICATION for an order for a stay of proceedings on an action instituted by the plaintiff to recover the value of cattle and waggons seized by the defendant as trustee in an insolvent estate, and damages for detention.

The trustee had, at the commencement of the insolvency, seized the property in question as being in the order and disposition of the insolvent. The plaintiff commenced an action.

Malbon Thompson, for the defendant. The matter is one peculiarly within the jurisdiction of the Insolvent Court, and it is improper that the trustee should be subjected to the vexation of an action at law.

Real, for the plaintiff. The matter is one entirely within the discretion of the judge. The plaintiff will consent to a transfer of the proceedings to the Insolvency jurisdiction.

LILLEY, C.J. As a Judge in Insolvency I have jurisdiction in the matter. It is not convenient that it should be dealt with outside the insolvency. The state of the English decisions is unsatisfactory. It is a question of procedure, and it will be well to have it understood here that in cases of this sort the Court in Insolvency is the proper tribunal. I make an order transferring the matter to that Court, the matter to be brought on by motion before me on the 21st March next.

Section 23 of *The Insolvency Act*, in my opinion, gives jurisdiction to the Insolvent Court in respect of third persons or strangers to the insolvency, the word "parties" in that section meaning parties to the litigation as distinguished from parties to the insolvency.

Solicitors: *Foxton & Cardew*; *Roberts, Roberts & Bernays.*

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BRANDS ACT—*35 Vic., No. 4, s. 9—Unlawful possession of a brand—"Knowingly"—Information not disclosing an offence.* S. was charged upon an information with having in his possession one brand—to wit, W5U, the same not being the brand he was entitled to use, and was convicted and fined. The conviction followed the words of the information.
Held, that, as the information disclosed no offence within s. 9 of 35 Vic., No. 4, the conviction was wrong, and a prohibition must be granted.
Held, also, that the word "knowingly" applies to all the offences following that word in that section.
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COMPANY—*Insolvent company—Preference—Trustee—Principal and agent—Surety—27 Vic., No. 4, s. 165—38 Vic., No. 5, ss. 107-9.* By the statement of claim of a plaintiff company it was alleged that P., G., S., and Pr. were directors of the company, and were personally liable to the Bank of New South Wales in the sum of £7500; that C., by the request of the directors, advanced sufficient moneys necessary to satisfy the amount due to the Bank, and as security for the repayment of the advance took a mortgage of all the company's property for £3500, and also took the joint promissory notes of P., G., S., Pr., B. and W. (B. and W. being sureties only) for the balance; that two months afterwards C., as mortgagee, sold the company's property, and out of the proceeds of the sale discharge his mortgage debt, and by the direction of the directors applied part of the balance in the satisfaction of the debts secured by the promissory notes and interest, amounting altogether to £4164; that the company then was to the knowledge of all the parties in a state of insolvency; and that eighteen months later an order was granted for the winding up of the company, and an official liquidator appointed. The plaintiff company claimed an account and a declaration of the rights of the parties respecting the proceeds of the sale, and that the payment of the £4164 was void.

C.'s statement of defence alleged that, with the knowledge of the directors of the plaintiff company, a banking company advanced to him the money which he lent to the directors of the plaintiff company under an agreement, the terms of which were known to the directors of the plaintiff company, by which he agreed to deposit the mortgage and promissory notes with the Bank; that they were so deposited, and that the sale was effected in accordance with the agreement and the money applied as stated under the direction of the directors, none of it having been receved by C., except a commission for his trouble.

The plaintiff company demurred to this part of the statement of defence.

Held, that the allegations demurred to were not demurrable.

Upon demurrer by B. and W. to the statement of claim,

Held, that B. and W. having been merely sureties for C., and there being no suggestion of their having been parties to the alleged preference contained in the statement of claim, they ought not to have been made defendants.

Upon demurrer by P., G., and S. to the statement of claim,

Held, that notwithstanding that it appeared by the statement of claim that the debt paid out of the proceeds of the sale was a debt of the company, and that the petition for winding up the company was not made within six months after the date of the payment and application of the proceeds, the statement of claim was not on that ground demurrable.

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CRIMINAL LAW—*Illegally using cattle—Prohibition—17 Vic., No. 3, s.* 6. In order to support a conviction under s. 6 of 17 Vic., No. 3, for illegally using an animal, it must be shown that the animal was used for the profit, convenience, or pleasure of the party using it.

Emmerson v. *Clarke* (3 S.C.R. 76) followed.

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Jurisdiction—Torres Straits—Annexation of Islands—18 and 19 Vic., c. 54, s. 46—24 and 25 Vic., s. 44—43 Vic., No. 1, s. 1—Prerogative of the Crown—Letters Patent—Murder. The Supreme Court has jurisdiction over islands in Torres Straits included in the area described in the Schedule to 43 Vic., No. 1, annexed pursuant to Letters Patent issued by Her Majesty in 1872 and 1878, and the proclamation in the *Governmeut Gazette* of 21st July, 1879.

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Misapplication of moneys by public servant—Audit Act of 1874 (38 Vic., No. 12), s. 49. On an information under s. 49 of *The Audit Act of 1874* it is not necessary to prove that the misapplication of public money was fraudulent, or that it was misapplied or improperly disposed of with any intent whatever.

R. *v.* HIGHFIELD (Lilley, C.J., Lutwyche and Harding, JJ.) 186

Crown case reserved—Error—Larceny Act of 1865 (29 Vic., No. 6), s. 44—Robbery under arms—Wounding. To support a conviction under s. 44 of the *Larceny Act of 1865* (29 Vic., No. 6) it is not necessary that the wounding and robbery should be committed on the same person.

On a Crown case reserved, counsel are not allowed to refer to matters outside the case as stated.

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Agricultural Reserves Act of 1863 (27 Vic., No. 23), s. 8—The Leasing Act of 1866 (30 Vic., No. 12), ss. 5, 6, 12, 17—The Crown Lands Alienation Act of 1868 (31 Vic., No. 46), ss. 51 (9), 68—Lease—Forfeiture—Waiver—Rent received under protest—Ejectment. A lease of Crown lands for eight years having been granted by the respondent under 31 Vic., No. 46, subject to the terms and conditions contained in *The Agricultural Reserves Act of 1863* and *The Leasing Act of 1866*, the lessee failed to perform his covenant to cultivate one-sixth of the said lands within a year from the allotment thereof. Rent, however, for the whole term of years was subsequently received by the Government, the latest being in 1873, with full knowledge of the above breach of covenant, but after notification in the *Gazettes* of 1869, 1870, and 1871, that the same would be received conditionally, and without prejudice to the rights of the Government.

Held (reversing the Full Court), in ejectment brought by the respondent, that whether or not a valid grant could be made to a selector failing to perform the condition, under s. 8 of *The Agricultural Reserves Act*, the same section read into the above lease does not render it void, but voidable at the option of the lessor on breach of conditions by the lessee.

Held, further, that assuming a forfeiture had accrued, it was waived by the receipt of rent, notwithstanding the notifications. Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such receipt.

DAVENPORT *v.* THE QUEEN (Privy Council) 55

The Crown Lands Alienation Act of 1868 (31 Vic., No. 46), ss. 51 (5), 55—Residence—Abandonment—Forfeiture—Judicial inquiry by Commissioners—"Audi alteram partem." Section 55 of *The Crown Lands Alienation Act of 1868* exempts selectors of additional selections from residence upon them; but *quære* whether a certificate under s. 51 (7) exempts the holder from further residence after the date of it.

In order to prove either non-residence or an abandonmnt under s. 51 (5), an inquiry thereunder in the nature of a judicial enquiry must be made by the Commissioner, conducted according to the requirements of substantial justice.

SMITH *v.* THE QUEEN (Privy Council) 72

The Crown Lands Alienation Act of 1868 (31 Vic., No. 46), ss. 54, 57, 127, 128, 129—Practice—Discovery—Answer tending to criminate—Costs. The object of an information filed by the Attorney-General against S. and others was to obtain a declaration that certain Crown lands were acquired by S. contrary to s. 54 and other provisions of *The Crown Lands Alienation Act of 1868.* Interrogatories having been administered to the defendants, S., by his answer, set up his right to protect himself from pains, penalties, and forfeiture, by refusing to make specific answer to the information and interrogatories.

Held, that as, in order to entitle the plaintiff to the relief claimed, it would be necessary to prove facts by reason of which S. would incur a forfeiture of the land under s. 128, and be liable to a prosecution for misdemeanour under ss. 127 and 129 of the Act, S. could not be compelled to make a further and better answer.

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Section 57 of *The Crown Lands Alienation Act of 1868* does not create a contract by the lessee to reveal to the Crown the extent of his compliance with the covenants and conditions of his lease.

Even if such a contract were implied by s. 57, it would not amount to a waiver of the right of the contracting party to protect himself from pains, penalties, or forfeiture by refusing to disclose.

The costs of an application for such further and better answers were made costs in the cause.

ATTORNEY-GENERAL *v.* SIMPSON (Lilley, J.) 98

The Crown Lands Alienation Act of 1868 (31 Vic., No. 46) ss. 21, 22, 23, 86, 128—Land proclaimed for school—Failure to issue deed of grant through inadvertence—Sale by error—Fraud—Cancellation of grant—Vesting order. An allotment of land was set apart by the Government in 1863 for erecting a primary school thereon, but inadvertently a deed of grant was not issued. In 1865 a school and teacher's residence was erected thereon. B. was appointed principal teacher in the school, and went into occupation of the residence. A few months afterwards the allotment was advertised for sale by public auction, but withdrawn on a protest from B.'s son. A further sale was advertised without result.

B. was dismissed from the service of the Board of Education in 1873, and in the following year applied to select the land in question, and a deed of grant was issued to him. The Board of Education was not aware the land had ever been submitted for sale, and the Department of Public Lands was unaware of the erection of the buildings.

Held, on an information by the Attorney-General, that the deed of grant to B. must be cancelled; and on B.'s failure to execute a transfer and deliver up the deed of grant, a vesting order in favour of the Crown was made.

ATTORNEY-GENERAL *v.* BALMAIN (Lilley, J.) 162

The Crown Lands Alienation Act of 1868 (31 Vic., No. 46), s. 54—Conditional purchase—Contract to take effect after the termination of the lease—Partnership—Resulting trust. W., K. H., and G. R. H. carried on business in partnership under the style of W. and H. from June, 1873. On 18th September, 1876, W. and K. H. were adjudicated insolvent. On 30th July, 1873, G. R. H. applied for a selection, and obtained a lease, subject to the conditions of *The Crown Lands Alienation Act of 1868*. G. R. H. paid the first instalment under s. 46, and the survey fees, out of his own moneys. In March, 1874, G. R. H. paid the second year's rent out of the moneys of the firm. In March, 1875, the firm paid the third year's rent, solely, as it was alleged, for the purposes of the firm. Improvements had been made by the firm, and the selection had been occupied by the firm in connection with an adjoining station until June, 1875, when the station ceased to be the property of the firm.

On 8th May, 1876, a certificate of fulfilment of conditions was issued to G. R. H. W. paid the fourth year's rent, but out of whose money it did not appear. On 14th July, 1876 a Crown grant for the selection was granted to G. R. H., he having paid the balance of the rent out of his own funds.

On 24th December, 1876, G. R. H. transferred the selection to A. R. H., the transfer being executed by W., as attorney for G. R. H., for the benefit of the firm. On 26th June, 1877, the Official Trustee lodged a caveat

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CROWN LANDS—*Continued.*

forbidding the registration of any instrument affecting the selection. Since that date the A.J.S. Bank advanced money to A. R. H. upon the security of the deposit of the certificate. The plaintiff, as Official Trustee, claimed a declaration that A. R. H. was a trustee, as to two-third parts in the selection, for the plaintiff.

Held, affirming the judgment of Lilley J., that the prohibition contained in s. 54 of 31 Vic., No. 46, is absolute, and is not voidable at the option of the Crown or the selector. The prohibition extends to implied agreements as well as to express agreements and trusts; but *held, further*, that there was nothing in this case to show that an illegal agreement within the meaning of s. 54 of the Act had been made, and that there was no trust that the firm or Official Trustee could enforce against those who took under G. R. H. or A. H. R.

MISKIN *v.* HUTCHISON (No. 2) (Cockle, C.J., Lutwyche and Lilley, JJ.) .. 85

CROWN LESSEE—*Wrongful eviction—Measure of damages.* Where a tenant of the Crown has been wrongfully evicted from lands leased by him for pastoral purposes, their value for those uses when lost to him is the true measure of damages.

MACDONALD *v.* TULLY (Lilley, C.J., Harding and Pring, JJ.) 192

CURATOR—*Intestacy*
See PROBATE AND ADMINISTRATION 33

CUSTOM—
See MASTER AND SERVANT 211

CUSTODY—*Discharge of insolvent from*
See INSOLVENCY 198

DAMAGES—*Remoteness of*
See REAL PROPERTY 165

Eviction from Crown Lands
See CROWN LANDS 192
See WRONGFUL DISMISSAL 211

DEBTOR'S SUMMONS—
See INSOLVENCY 1, 154

DEFAMATION—*Striking out pleadings in*
See PRACTICE 188

DEFAULT—*Appeal*
See PRACTICE 109
See FOREIGN JUDGMENT 152

DELIVERY OF GOODS—*Police Act (19 Vic., No. 24), s. 10—Value—Jurisdiction of justices.* In order that a justice may have jurisdiction to make an order for delivery of goods, there must be evidence that the value of such goods is not greater than £20. It is not sufficient to state that the value is *about* that amount.

COMPTON *v.* MACDONNELL (Cockle, C.J., Lilley, J.) 197

DESERTION—
See HUSBAND AND WIFE 3

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DETINUE—
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DISCHARGE—
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DISCOVERY—
See Crown Lands 98

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See Insolvency 46

ESTOPPEL—
See Insolvency 205

EVICTION—*Crown Lessee—Damages*
See Crown Lands 192

EVIDENCE—*Of marriage*
See Husband and Wife 3

EXECUTION CREDITOR—
See Insolvency 126

EXECUTOR—*Liability of*
See Trusts and Trustees 131

Transfer by
See Specific Performance 30

EXTENSION OF TIME—
See Practice 82

FENCING—*The Fencing Act of 1861 (25 Vic., No. 12), ss. 8, 9, 10—Jurisdiction—Dividing Fence—Selection—Unalienated Crown Lands—The Crown Lands Alienation Act of 1868 (31 Vic., No. 46), s. 17—Costs.* The Supreme Court has jurisdiction to entertain a claim for the cost of a dividing fence under 25 Vic., No. 12, but as the case may be decided by justices, the plaintiff's costs may be disallowed.
The fact that at the time of service of notice to fence a selection had not been confirmed by the Minister is no bar to the claim.
Smith *v.* Gibbs (Lilley, C.J.) 171

FIRE INSURANCE—
See Insurance 214

FIRST MEETING—
See Insolvency 207

FOREIGN COURT—
See Probate and Administration 21

FOREIGN JUDGMENT—*Judgment by default against person not within the jurisdiction—The Common Law Practice Act of 1867 (31 Vic., No. 17), ss. 20, 21, 22.* The Supreme Court of Queensland will not enforce in this colony the judgment of a foreign Court, which has been obtained

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FOREIGN JUDGMENT—*Continued*,

in default of appearance against a defendant, who at the time the suit was commenced was not resident within the jurisdiction of the Court in which the judgment obtained.

Brisbane Oyster Co. v. *Emerson* (Knox 80) followed.

MAIDEN *v.* MARWEDEL (Lutwyche, A.C.J.) 152

FORFEITURE—
See CROWN LANDS 55, 72

FRAUD—
See CROWN LANDS 162

FRAUDULENT PREFERENCE—
See INSOLVENCY 46

GOLD FIELDS ACT, 1874—Proof that s. 73 has been complied with is not *primâ facie* proof that s. 71 has been complied with.

BYERS *v.* ROLLS (Cockle, C.J., Lutwyche and Lilley, JJ.) 34

HEARING—
See JUSTICES 8

HUSBAND AND WIFE—*Deserted Wives and Children Act (4 Vic., No. 5), s. 4—Maintenance—Desertion—Evidence of marriage—Means of support —22 Vic., No. 6, ss. 6, 12.* Where a wife was called at the hearing, made a statement on oath as to her marriage, signed it, and the statement was also signed by the magistrates:

Held, there was evidence on affidavit of marriage within the meaning of s. 4 of 4 Vic., No. 5.

An offer of maintenance, conditional on the wife's return to the husband's house, is some evidence of a refusal to maintain.

Quære, whether justices are obliged to presume that a wife has means of support, in the absence of any evidence to that effect.

In re HANSFORD (Cockle, C.J.) 3

IGNORANCE—
See INSOLVENCY 205

ILLEGALLY USING CATTLE—
See CRIMINAL LAW 53

IMPLIED CONTRACT—
See MASTER AND SERVANT 211

INADVERTENCE—*Appeal*
See CROWN LANDS 162
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See PRACTICE 6

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INSOLVENCY—

ADJUDICATION.
COMMITTEE OF INSPECTION.
DEBTOR'S SUMMONS.
DISCHARGE.
EXECUTION CREDITOR.
FRAUDULENT PREFERENCE.
PROOF OF DEBT.
TRUSTEE.
GENERALLY.

ADJUDICATION.

Insolvency Act of 1874 (38 Vic., No. 5), ss. 101 (1), 202 (9), (12), 203—Liquidation—Adjudication of insolvency without petition—Procedure—Trustee—Costs. The Court has power in cases which require its interposition to adjudge a liquidating debtor an insolvent without the presentation of a petition.

One of two or more trustees in a liquidation cannot, without the direction of the creditors at the time of their appointment, act without the other or of the creditors at the time of their appointment, act without the other or others unless the creditors, on appointing them, direct that he may.

A creditor appealing to the Court against an act of a trustee in a liquidation, is, as a rule, entitled, if successful, to his costs against the trustee.

In re HUGHES & Co. (Lutwyche, A.C.J.) 122

Liquidation by arrangement—Special resolution—Ultra vires—Trustees—Delay—Adjudication without petition—38 Vic., No. 5, ss. 127, 202 (12). The crediors of G. & Co., liquidating debtors, resolved that the affairs of the firm should be liquidated by arrangement, that all debts over £50 should be represented by bills, and that the trustees should have power to grant renewals of the bills, so that the entire liquidation should be completed within tweve months. Upwards of two years afterwards, the liquidation not having been completed but a dividend of 17s. 6d. in the £ having been paid, the following resolutions were passed at a meeting of the creditors:—

1. "That the trustees herein be instructed to wind up the estate."
2. "That they be empowered to pay the new liabilities of the trust estate in full."

Held, on an application by the trustee for directions, that the resolutions were not *ultra vires.*

An application for the adjudication as insolvent of the liquidating debtors was refused.

In re GRAY & Co. (Lilley, J.) 148

COMMITTEE OF INSPECTION.

Removal of—38 Vic., No. 5, ss. 98, 101 (13), r. 103—Creditors assenting to a resolution—Motion to set aside a resolution—Estoppel—Creditor not entitled to vote—Statutory majority—Ignorance of other creditors. At a meeting of creditors, A., a creditor, who was not entitled to vote, but who claimed and was allowed to vote in respect of debts exceeding all the other debts in the estate, voted in favour of a resolution for the appointment of a committee of inspection, for which a statutory majority of the other creditors also voted.

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INSOLVENCY—*Continued.*

Held, that there being, without A's. vote, a majority in favour for the resolution, it should not be set aside by reason of the ignorance of the other creditors that A. had no right to vote on the resolution.

Held also, that the creditors having signified their assent by signing the minutes of the meeting were estopped from impeaching the validity of the resolution.

IN THE ESTATE OF KENNEDY, DE FRAINE & Co. (Lutwyche, A.C.J.) .. 205

DEBTOR'S SUMMONS.

Dismissal of petition—38 Vic., No. 5, ss. 44 (9), 48, rr. 18-20, 29, 30. Where a debtor's summons has ben granted, and a petition thereon dismissed, no further proceedings can be had on that summons.

In re SPARKES (Cockle, C.J.) 1

38 Vic., No. 5, s. 49—Debtor's summons—Disputed debt—Stay of proceedings—Trial of question—Security—Balance of probability of result of action. Where a debtor's summons was ordered to stand over pending the decision of an action, and the Court was of opinion that the probability was as much in favour of the success of the alleged debtor as of the creditor, the Court refused to order security to be given

Ex parte Turner (L.R. 10 Ch. 175) followed.

MCGHIE, LUYA & Co. *v.* GILLIS (Lilley, J.) 154

DISCHARGE.

38 Vic., No. 5, s. 76—Discharge of an insolvent from custody—Notice to Official Trustee—Form of order. On an application by an insolvent for his discharge from custody, a copy of the rule *nisi* must be served both on the Official Trustee and the arresting creditor.

In re DEKINS (Cockle, C.J.) 198

38 Vic., No. 5, s. 167 (2), r. 123—Certificate of discharge—Special resolution of creditors at first meeting consenting thereto. The sufficiency of a consent to the discharge of an insolvent given on the mere motion of the creditors present at the first meeting was considered on an application for a certificate of discharge, when the Court allowed the application to be withdrawn, with the right of renewal after the proper procedure had been taken.

In re JOHN CLUNE (Lilley, C.J.) 207

EXECUTION CREDITOR.

38 Vic., No. 5, ss. 102, 105—Execution creditor—Withdrawal of Sheriff—Sum less than £50. Sections 102 and 105 of *The Insolvency Act of 1874* do not apply to a case in which the amount for which the *fi. fa.* is issued is under £50, but in which the costs of possession bring the amount leviable up to more than £50.

Where the costs of possession brought the amount leviable, which was previously under £50, to over that amount, a motion to compel the Sheriff to withdraw from possession was refused.

In re DEVINE (Lutwyche, A.C.J.) 126

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FRAUDULENT PREFERENCE.

38 Vic., No. 5, ss. 87, 107, 108, 109—Real Property Act of 1861 (25 Vic., No. 14), ss. 9, 43, 44, 56, 99, 101, 102—Equitable mortgage—Priorities—Fraudulent preference—Caveat. In 1875, W. and K. H., then owners and conditional lessees of certain lands in Queensland, transferred their lease to G. H., the latter being unaware of the transfer, W. acting for him under a general power of attorney. The balance of the rents having been subsequently paid, Crown grants of the lands were issued to G. H. In April, 1876, the lands were transferred from G. H. to A. H. without the knowledge of either of them, W. acting for G. H., and the solicitor for all the parties acting under a general power of attorney for A. H. No evidence was given of any consideration for the transfer. In September, 1876, W. and K. H. became insolvent, and in January, 1877, obtained certificates of discharge. On June 5th, 1877. A. H.'s attorney deposited the deeds relating to the lands with a Bank to cover an advance to W. and K. H. On June 16th, 1877, the Official Trustee in Insolvency lodged a caveat in the Real Property Office, against any dealings with the land. The bank made no advance until June 25th.

Held that the transfer to G. H. and subsequent dealings with the land were fraudulent and void under ss. 107, 108, 109 of *The Insolvency Act of 1874.*

Held, also, that *The Real Property Act of 1861* does not invalidate equitable mortgages by deposit.

Held also, that the trustee having lodged a caveat, had protected his claim against all subsequent transactions, and that his claim had therefore priority over that of the bank.

In re WILDASH AND KENNETH HUTCHISON, *Ex parte* MISKIN (Lilley, J.) 46

PROOF OF DEBT.

38 Vic., No. 5, s. 150—Proof of debts—Mutual Credits—Dishonoured bills paid by indorser. A bank being the holders of promissory notes made by P. in B.'s favour, proved in the liquidated estate of P. for the amount of the notes, and received the composition paid in the estate, the balance due on the notes—viz., £337 3s. 1d.—being paid to them by B., by whom the bills had been indorsed to the bank. B. was at the time of such payment indebted to P. in the sum of £126 5s. for accommodation acceptances made by P. in B.'s favour, leaving a balance of £210 18s. 1d. in favour of B. Later proceedings in liquidation were instituted in B.'s estate, and P. sought to prove against the estate for a debt of £181 14s. 6d.

Held, that the trustee was entitled to set off the £210 18s. 1d.

In re BELL (Lutwyche, A.C.J.) 128

TRUSTEE.

38 Vic., No. 5, s. 23—"Parties"—Action aginst trustee. The word "parties" in s. 23 of 38 Vic., No. 5, means parties to the litigation, as distinguished from parties to the insolvency.

Claims against a trustee of an insolvent should be brought in the Supreme Court in its Insolvency jurisdiction by way of motion.

PAYNE *v.* CONROY'S TRUSTEE (Lilley, C.J.) 217

28 Vic., No. 25, ss. 6, 88, 89, 90—Mortgage—Redemption—Mortgagee in possession—Official and Creditors' Assignees—Costs. *Held*, that the

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INSOLVENCY—*Continued.*

Official and Creditors' Assignees under *The Insolvency Act, 1864*, were not joint tenants, and *held further*, that neither of them could separately transfer that part of the insolvent estate of which they were assignees.

An Assignee under *The Insolvency Act, 1864*, cannot delegate his general authority.

C. mortgaged lands to J., and, in August, 1866, assigned the equity of redemption to M., by way of mortgage, with a proviso for redemption. A month afterwards C. became insolvent. R. later became official assignee of his estate, and F. was thereafter appointed creditors' assignee. J. then took possession of the mortgaged land as mortgagee, and remained in possession and in receipt of the rents and profits till the year 1877. M. proved in the insolvency for the difference between his debt and the value of his security. The assets, including C.'s equity of redemption, were sold by one of the assignees without the concurrence of the other.

Held, that the sale was invalid as to the whole of C.'s interest; that M. did not, by proving for the difference between his debt and the value of his security, become a purchaser of the equity of redemption, and that the security remained a pledge redeemable by the assignees; and that the case was not one in which the Court would oblige the mortgagee to account for the rents received by him while in possession.

In a suit for redemption of mortgaged lands, the mortgagee is entitled to his costs, where his refusal to reconvey upon tender of the amount due for principal and interest is funded upon a reasonable and *bonâ fide* doubt of the title of the person claiming to redeem.

RAFF *v.* JONES (Lilley, J.) 37

GENERALLY.

See COMPANY 113
See INSURANCE 214

IRREGULARITY—

See JUSTICES 8
See PRACTICE 6

INSURABLE INTEREST—

See INSURANCE 214

INSURANCE—

FIRE.
LIFE.

FIRE.

Insolvency of assured—Notice—Liability of insurer—Insurable interest. A person who had effected a policy of insurance against fire was adjudicated insolvent, and repurchased the property, part of which was insured, from his trustee. He continued to pay the premiums, and while the policy was in existence part of his goods were destroyed by fire.

Held, that the fact that he had been adjudicated insolvent and had not obtained his certificate of discharge, and that the insurance company had no notice of these circumstances, was immaterial on an action of the policy, the plaintiff having an insurable interest in the property insured.

Held, further, that even if the trustee had interfered it would have been immaterial.

O'MEARA *v.* ROYAL INSURANCE COMPANY (Lilley, C.J., Harding and Pring, JJ.) 214

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INSURANCE—*Continued.*

Payment into Court—Interest
See PRACTICE 209

LIFE.

Breach of trust—Protection—Australian Mutual Provident Society Act, 1857 (20 Vic.), ss. 14, 16. The protection from debts given by s. 14 of *The Australian Mutual Provident Society Act, 1857*, to moneys arising from policies of insurance does not extend to liabilities arising from a breach of trust on the part of the assured.

SCHAFFENBERG *v.* UNMACK (Lilley, C.J., Lutwyche and Harding, JJ.) .. 179

INTEREST—*Where money paid into Court*
See PRACTICE 209
See INSURANCE 214

INTESTACY—
See PROBATE AND ADMINISTRATION 21, 33

JUDGE'S MINUTE—
See PRACTICE 6

JUDICIAL INQUIRY—
See CROWN LANDS 72

JURISDICTION—
See CRIMINAL LAW 188
See DELIVERY OF GOODS 197
See FENCING 171
See FOREIGN JUDGMENT 152
See JUSTICES 197

JUSTICES—
See LOCAL GOVERNMENT 17
See SMALL DEBTS COURT 26

Prohibition—Police Magistrate—Hearing of case. A Police Magistrate, who was engaged in hearing a case, left the bench in order to give evidence. His place was taken by a Justice of the Peace. After giving his evidence he returned to the bench, and continued the hearing of the case, and made an order.

Held, that the proceedings were irregular, the case not having been heard either by a Police Magistrate or by two Justices of the Peace as required by the Act under which the proceedings were being had.

PAUL *v.* BUTTENSHAW (Cockle, C.J., Lutwyche and Lilley, JJ.) 8

Jurisdiction under Police Act (19 Vic., No. 24)
See DELIVERY OF GOODS 197

KNOWLEDGE—*Of Custom*
See MASTER AND SERVANT 211

LARCENY—
See CRIMINAL LAW 181

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LEASE—

See Crown Lands 55

Covenant not to assign—Liability of trustee—Agent—Purchase of creditors' claims at a discount. A lessee, who was in fact a trustee for another person, committed a breach of covenant by assigning the lease without the sanction of the lessor, who took possession of the premises. The *cestui que trust* sued the lessee for damages for loss of possession and for rent.

Held, that when trust property has apparently been lost or surrendered, or has disappeared, the trustee in whom it was vested must either explain its loss, surrender, or disappearance, so as to exonerate himself, or must make it good. It is no answer to the person for whom he was trustee to say that he has made an instrument which would pass it from him to such person who ought to possess it. It is his duty not only to execute the instrument, but to place his *cestui que trust* in actual possession of the estate.

Held, also, that an agent is not allowed to intervene between his principal and creditors to buy up at a discount their claims for his own benefit.

Tavares *v.* Holland (Lilley, C.J., Lutwyche and Harding, JJ.).. .. 172

LETTERS PATENT—

See Criminal Law 188

LIEN—*Continuous possession—Warehouseman—Agent—Argumentative pleading—Costs.* An allegation that a person received goods as a warehouseman to warehouse them raises the presumption that he was to be paid for receiving them, as it is usual for a warehouseman to receive special payment for warehousing goods; but an allegation that a person received goods as an agent does not raise such a presumption. Consequently, a pleading setting up a right of lien and alleging that after the right accrued the person claiming the right delivered the goods to a warehouseman to warehouse without averring that the bailment was gratuitous, is bad; but if the character of the bailee be stated to be that of an agent merely, such an averment is not essential.

If a party plead argumentatively, and the pleading be demurred to, he will probably not be allowed his costs on the argument of the demurrer, though successful.

Hunter *v.* Sunley (Lutwyche, A.C.J., Lilley, J.) 159

Continuous possession—Possession of agent. The entrusting goods over which a lien is claimed to an agent destroys the lien, unless the agent is shown to be a gratuitous bailee.

Whitehead *v.* Sunley (Lutwyche, A.J.C., Lilley, J.) 143

LIQUIDATION—

See Insolvency 122, 148

LOCAL GOVERNMENT — *Mandamus — Justices — Appeal — Rating—The Municipal Institution Act of 1864 (28 Vic., No. 21), s. 79.* Rateable property in a municipality was assessed by the Municipal Council at a certain sum, and the assessment entered in the Council's assessment book. Afterwards, without the authority of the Council, this amount was altered, and a notice of assessment at the substituted amount was served upon the owner. The owner appealed against the assessment, and the evidence

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LOCAL GOVERNMENT—*Continued.*

before the justices disclosing the above facts, they decided that the assessment—notice of which was served upon the owner—was not the assessment of the Council, and declined to proceed any further on the appeal.

Held, that there was no ground for a mandamus to compel the justices to hear and determine the appeal

THE QUEEN *v.* TOWNLEY AND OTHERS (Cockle, C.J., Lutwyche and Lilley, JJ.) 17

Municipality—By-law—Ultra vires—Municipal Institutions Act of 1864 (28 Vic., No. 21), ss. 70, 75, 90. The duty of guarding persons against dangers created by municipalities is, by ss. 75 and 98 of the Act 28 Vic., No. 21, thrown on the municipalities, and the responsibility is one of which the municipality cannot divest itself by its by-laws.

By a municipal by-law it was directed that any owner of land above or below the level of any adjoining pathway within the municipality should protect such land by a good and sufficient fence, so as to prevent damage or accidents.

Held, assuming the by-law *intra vires*, that the owner could only be required to fence, where he could put up the necessary fence, on his own land.

CHALLINOR *v.* TOWNLEY (Lilley, J.) 70

MAINTENANCE—
See HUSBAND AND WIFE 3

MAJORITY OF CREDITORS—
See INSOLVENCY 205

MANDAMUS—
See LOCAL GOVERNMENT 17

MASTER AND SERVANT—*Implied contract—Wrongful dismissal—Custom—Knowledge.* A. agreed to pay B.'s passage-money and expenses to Queensland, and B. agreed to serve A. as cook for a period of not less than three years at a yearly wage. A. discharged B. for refusing to do dairy work.

Held, that there was an implied contract on the part of A. to retain B.'s services during such term, and that the dismissal was unjustifiable, as there was no evidence that it was ever intended that B. should do the additional work required, and the defendant failed to prove any custom of the colony to that effect or that the plaintiff knew of any such custom.

MACKIE *v.* WIENHOLT (Pring, J.) 211

MAXIM—*Audi alteram partem*
See CROWN LANDS 72

MISTAKE—
See ARBITRATION 199

MONEY—*Judgment for recovery of*
See ATTACHMENT 169

MORTGAGE—
See REAL PROPERTY 165
See TRUSTS AND TRUSTEES 10

Redemption—Costs
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Practice—*Continued.*

Appeal.

Extension of time—Order LVII., r. 2—Default—Inadvertence. Where a defeated party to an action applies to the Court to be allowed to appeal, after the time for appealing has expired, and does not show any reason for not having brought his appeal within that time except inadvertence, leave to appeal will only be granted, if at all, on very stringent terms.

Miskin *v.* Hutchison (No. 1) (Cockle, C.J., Lutwyche and Lilley, JJ.) .. 82

Security for costs—Discretion—Order LIV., rr. 1, 2. The Court has full discretion to direct security for the costs of an appeal to be given.

Skinner *v.* Cribb (No. 2) (Lutwyche, A.C.J., Lilley, J.) 141

New trial—Mistrial through default of party applying for new trial. A party is not entitled on an application for a new trial to rely upon any ground arising upon his own default.

Where upon the application of the plaintiff for a new trial it appeared that the real question between the parties had, through the default of the plaintiff, not been tried, the Court ordered a judgment of nonsuit to be entered, but directed that it should not operate as a judgment on the merits.

Hempsted *v.* Gardner (Cockle, C.J., Lutwyche and Lilley, JJ.) .. 109

Special case—Form of questions 34

Payment into Court.

Interest—Common Law Practice Act of 1867 (31 Vic., No. 17), s. 73—Costs—Order XXX., r. 4—Order LIV. In an action for damages arising under a policy of fire insurance, the defendants paid into Court £69 in satisfacton as their proportion. The jury found this sufficient, but allowed £2 6s. for interest. Judgment was entered for the plaintiffs for £71 6s., with costs up to the date of payment into Court, each party to pay their own costs of subsequent proceedings.

An appeal from this judgment was dismissed with costs.

The New Zealand Insurance Co. *v.* The South British Fire and Marine Insurance Co. of New Zealand (Lilley, C.J. Harding and Pring, JJ.) 209

Pleading.

Order XXVII., r. 1—Embarassing allegation. A paragraph in a Statement of Claim in an action for libel brought by a member of Parliament against the printer of a newspaper, containing an allegation to the effect that shortly before the publication of the libel the plaintiff, in the discharge of his Parliamentary duties, took part in a debate in the Assembly touching the amount to be proposed to be voted for the maintenance of the Police Force of the colony, was struck out on the grounds (1) that it was embarassing, as it could not be gone into in evidence on the trial; and (2) that it was merely a matter of evidence, and not a material fact.

Hamilton *v.* Boyett (Lilley, C.J.) 188

Argumentative—Costs

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Injunction—Order—Effect of a judge's minute. The minute made by the judge of the decision of the Court was that, upon payment into Court of the amount due on certain mortgages and a bill of sale, and on the plaintiff undertaking to abide by the order of the Court as to damages, an injunction should issue forthwith to restrain defendants from selling certain real estate. The plaintiff did not take out an order embodying this decision, but an injunction was issued upon the terms therein set out.

Held, that the injunction was liable to be dissolved on the ground of irregularity.

WOOD *v.* CORSER (Cockle, C.J.) 6

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PRINCIPAL AND AGENT—
See COMPANY 113
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PRIORITY—*Notice of*
See INSOLVENCY 46
See SHERIFF 13

PROBATE AND ADMINISTRATION—*Intestate—Administration—Foreign Court. The Judicature Act* does not necessarily require that all contentious proceedings in probate should be by way of action. The Court may, without the institution of an action upon a motion, direct issues to be tried.

Where a plaintiff has obtained in a foreign court a decree for an account against a defendant who has since died intestate, leaving property in Queensland, he is entitled to have an administrator appointed in that colony.

Semble, if the personal representative of an intestate refuses administration, the applicant will not be appointed administrator, but the Curator of Intestate Estates and not the applicant will be appointed.

In re THOMAS PERKINS, DECEASED (Lilley, C.J.) 21

Intestacy—Personal representative of debtor—Curator of Intestate Estates

WATSON *v.* BECKERLEG (Lutwyche, J.) 33

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REAL PROPERTY—*Detinue—Real Property Acts (25 Vic., No. 14; 41 Vic., No. 18)—Mortgage—Certificate of title—Remoteness of damage—Striking out pleadings.* In an action for special damages for detention of certificates of title by a mortgagee, paragraphs in the Statement of Claim, alleging that in consequence of such detention the mortgagor was unable to pledge them or otherwise deposit them by way of equitable mortgage for a sum which would have enabled him to pay the interest, and so lost his property; and that, in consequence of such detention, he was unable to meet a promissory note upon which judgment had been signed and execution issued against the lands, were ordered to be struck out as being too remote.

Under the *Real Property Acts* a mortgagee is not entitled to the custody of the certificate of title.

A mortgagor can effect a second mortgage, although he may not be in possession of the certificate of title.

Clarkson *v.* Mutual Life Association of Australasia (Lilley, J.) .. 165

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SHERIFF—*Sale by—Prior purchaser—Notice of prior purchase—Pastoral Leases Act of 1869 (33 Vic., No. 10).* L., the licensee under *The Pastoral Leases Act, 1869,* of certain pastoral holdings, agreed with F. for the sale of them to him at a price to be paid partly in cash and partly by promissory notes, payment of which was to be secured by a mortgage over the holdings and over lands held by L. F. paid to L. the cash and delivered the promissory notes, and executed the mortgage and entered into possession and continued in possession of the holdings. L. executed letters of transfer of them to F., and deposited the letters with his banker, to be handed to F. upon payment of the promissory notes, L.'s name remaining in the records of the Lands Office as the licensee of the runs. A writ of *fi. fa.* having been afterwards issued against the goods and lands of L., subsequent to a judgment given against him in an action for divorce, all his right, &c., to the runs were sold at a Sheriff's sale under the *fi. fa.*, and bought by H., and a deed in the usual form, conveying all L.'s right, title, and interest (if any) in the runs to H., was executed by the Sheriff.

Held, that knowledge of the possession and interest of F. must be imputed to H.

Held, also, that H. was not entitled to have his name substituted for that of L., in the books of the Lands Office, by virtue of his purchase at the Sheriff's sale.

Quære, whether the words in the Sheriff's deed, limiting the sale to all the right, title, and interest (if any) of L., were not alone sufficient to render notice to H. of F.'s previous purchase unnecessary.

FRASER *v.* HARDEN AND LOMAX (Cockle, C.J.) 13

Withdrawal of
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SMALL DEBTS COURT—*Prohibition—Justices—Petty Sessions—Costs—17 Vic., No. 39, s. 5—Small Debts Act of 1867 (31 Vic., No. 29), ss. 1, 3, 9 —33 Vic., No. 4, ss. 2, 3.* A writ of prohibition will issue to the justices of a Court of Petty Sessions whenever they have decided without jurisdiction, or have exceeded their jurisdiction.

A Court of Petty Sessions cannot allow more than £2 2s. for professional costs to either party in any Small Debts cause decided by it.

PETTIGREW *v.* TOWNLEY (Lutwyche, J.) 26

SPECIAL CASE—
See APPEAL 34

SPECIFIC PERFORMANCE—*Sale of station—Deficiency of area—Possession by purchaser—Confirmation of agreement.* In pursuance of an agreement between M. and R. for the sale of a station containing about 700 square miles of pastoral country, R. took possession of about 300 square miles of the said station. M., however, proved unable to transfer the

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SPECIFIC PERFORMANCE—*Continued.*

remainder of the 700 miles, and refused to transfer any part of the run unless R. would accept the 300 square miles in full performance of the agreement and pay the purchase money agreed upon for the whole run.

Held, that R. had not by taking possession of part of the run confirmed the agreement as relating to the part only.

RICHARDSON *v.* MACDONALD (Lutwyche, A.C.J., Lilley, J.) 156

Sale of land—Transfer by executor. It was a condition of sale of certain land by auction that the balance of the purchase money above £100 should be paid by a promissory note at four months, and that, upon payment in full of the purchase money, the vendor should execute a conveyance of the land. A purchaser gave his promissory note for the balance of his purchase money, and before it became due paid the amount into the bank at which it was due, to the credit of the auctioneer by whom the land was sold. The promissory note was not met, and no conveyance was executed. The vendor died, leaving a will, by which he appointed executors, and which was duly proved. On a suit being brought against the executors by the purchaser for the specific performance of the agreement for sale: Cockle, C.J., directed that the defendants should execute a transfer of the land to the plaintiff on payment of the balance of the purchase money, and that the plaintiff should pay the costs of the suit; or, if the defendants decline to execute a transfer, that damages should be assessed, and each party pay his own costs.

BEARKLEY *v.* PURTILL (Cockle, C.J.) 30

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TRUSTS AND TRUSTEES—*Administrator—Executor—Breach of trust—Waste—Liability—Accounts—Release.* By his will S. gave the profits of real estate, horses and cattle for the support of M. his wife, and his son T., until the latter arrived at the age of 21 years, when the horses and cattle were to be delivered to T. as his property, and at the death of M. the real estate also was left to T. The will gave the executors power to sell or mortgage any part of his real estate for the support of M. or T., or if they should think it desirable for the more effectual carrying out of his intentions; and appointed H. and C. executors of the will. S. died while T. was still a minor, and from the time of his death until soon after T. attained his majority, the management of the property devised to M. and T. was chiefly conducted by H., C. only taking an active part in two or three matters, but from time to time receiving information from H. concerning the management. During the infancy of T., H. and C. mortgaged a portion of the real estate, but it was alleged by C. that he never knew what became of the money. Another portion was leased to H. at an inadequate rent, and the estate was wasted to a considerable extent by T.

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TRUSTS AND TRUSTEES—*Continued.*

with the knowledge of H. and C., neither of whom interfered to prevent it. After T. came of age he and M. executed a release discharging C. from all liability in respect of the trust, but no accounts were produced to them by H. or C. either before or at the time of the execution of the release.

Held, that C., having accepted the duties of executor was responsible for the waste of the estate. *Held, also,* that the onus lay upon the trustees to show that the property had been lawfully administered; that T. was entitled to a full account in respect of the income and profits of the estate before as well as after the death of M.; and that the release ought to be set aside.

SKINNER *v.* CRIBB (No. 1) (Lilley, J.) 131

Trustees and Incapacitated Persons Act of 1867 (31 Vic., No. 19), s. 6—Petition for advice—Will—Substitution of mortgage at lower interest on devised estates. A testator being at the time of his death possessed of a station consisting partly of freehold land and partly of leasehold, and of the stock, by his will directed that it should be carried on and managed under the direction of his executrix until his youngest child should come of age; but at the time of the testator's death the station was mortgaged for a large sum at a high rate of interest, but the will contained no power for the executrix to mortgage.

The Court directed that the executrix should be at liberty to substitute for the existing mortgage a mortgage for a sum not exceeding the liability of the station under the previous mortgage at a lower rate of interest.

The provisions of 31 Vic., No. 19, s. 6, instead of being restricted, should be beneficially interpreted and applied. As there is no appeal from the advice or direction given by the Court, the interpretation should be restricted where there are conflicting interests to be decided. A short affidavit should be filed verifying the allegations in the petition.

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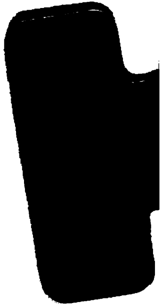

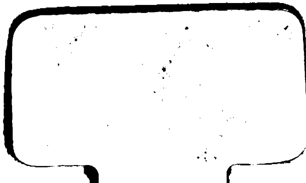

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