THE FIRST YEAR OF THE COURT OF JUDICATURE OF PRINCE OF WALES' ISLAND 1808 - 9

The establishment of the Court of Judicature and the granting of the first Charter of Justice was an event of major importance in the legal history of Malaysia. The purpose of this article is to make available the text of the documents relevant to that event and to make avaliable some hitherto unreported judgments delivered by the Recorder in the first year of the court's existence.[1].

It was on 28 May 1808 that Sir Edmond Stanley landed at Penang bringing with him His Majesty's Royal Letters Patent establishing the Court of Judicature, the charter being dated 25 March 1807. On 30 May 1808 that the court first assembled, James Carnegy being appointed the first Sheriff of Prince of Wales' Island. Having been appointed his first duty appears to have been to read in open court the following Proclamation:

Proclama

George the Third by Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, and so forth. Whereas his Most Gracious Majesty by his Royal Letters Patent, bearing date at Westminister, the twenty-fifth day of March, in the Forty-seventh year of his Reign, did by his especial grace think fit to direct & ordain, that a Court of Judicature, should be established for the Settlement of Prince of Wales Island, in the East Indies, and the Places and Territories subordinate and annexed thereto, and dependant thereon, which should be called, THE COURT OF JUDICATURE OF PRINCE OF WALES ISLAND, and should be holden by and before the Governor and Council for the time being of Prince of Wales Island and before one principal Judge, who should be called the Recorder of Prince of Wales Island; and His Majesty in and by the same Letters Patent, was graciously pleased to constitute and appoint Sir EDMOND STANLEY, Knight, to be the first Recorder of Prince of Wales Island; and whereas the said Governor, Recorder, and Council, in pursuance of his Majesty's said Letters Patent, have this day assembled themselves in the Court at the Government House, in George Town, Prince of Wales Island, and having caused the same Letters Patent to be read and published, have proceeded to qualify themselves for the execution of the several Powers and Authorities thereby vested in them, by taking the Oaths, and subscribing the declarations therein directed to be taken and sub-

1. All the material reprinted here has been transcribed from a microfilm copy of the *Prince of Wales' Island Gazette* in the University of Singapore. Both the state of the microfilm copy and the reading facilities available were such that the present transcription cannot be regarded as completely accurate.

scribed: This is therefore to proclaim and publish, that the COURT OF JUDICATURE OF PRINCE OF WALES ISLAND, is in due manner constituted and established, pursuant to the provisions of the said Letters Patent, and that all Civil, Criminal, and Ecclesiastical Jurisdiction, will from henceforth be exercised in the said COURT OF JUDICATURE OF PRINCE OF WALES ISLAND, in the manner and to the extent, by the said Letters Patent directed and prescribed, of which all persons are hereby commanded and enjoined to take notice.

The new Recorder then delivered the following speech explaining the purport and intent of the Charter:

Recorder's speech

It is with the most cordial satisfaction that I avail myself of this opportunity, of presenting to you, Sir, (for the purpose of being deposited among the records of this rising and valuable settlement), His Majesty's Royal Charter for erecting a Court of Judicature within the Island, and the territories thereunto belonging, and which I trust will remain an everlasting monument of His Majesty's goodness and parental solicitude for the welfare and prosperity of the Island, and the happiness of all his subjects residing under its Government. For myself, I can never sufficiently express the deep and unfeigned sense of gratitude I feel to my Sovereign, for his having been graciously pleased to select me as the instrument to introduce the inestimable blessings of British law, and British Judicature, into a more remote part of the eastern world, than those great advantages ever yet had reached; and I shall consider the present as one of the proudest and most gratifying days of my life, if I shall be so fortunate as to execute this high commission in such a manner as may effectuate the great and noble object for which it was granted.

Permit me also to assure you that this Charter is as liberal and tolerant in its principles and provisions, as it is effectual and extensive in its Jurisdiction; in as much as it communicates to all His Majesty's Asiatic, as well as British subjects, the full enjoyment of personal security, personal liberty, and private property; at the same time that it secures to all the native subjects, the free exercise of their religion, indulges them in all their prejudices, and pays the most scrupulous attention to all their ancient customs, usages, and habits — a generous principle of Government adopted by Great Britain towards her Indian Empire, which has contributed much to her own honor and glory, as well as the happiness of her subjects in these remote territories.

The due and impartial administration of justice, which secures our lives and properties, is the grand end of Civil Society; and it is in truth the real source and only sure foundation of the strength and power of all governments. The history of the whole civilized world establishes this important truth, that no society or government can flourish, or indeed long subsist, without a due and wholesome system of laws; without a superior tribunal to which all the members of it can resort, for the establishment of their several rights, and the vindication of their several wrongs. Deprived of these advantages, Commerce the nurse of Arts and parent of Wealth, would soon languish and die away, and all the great and noble incentives to industry, exertion,

and enterprise, which heretofore raised and elevated infant Colonies into great Commercial States, would receive a fatal check, and in the end be utterly extinguished. It was well observed by Mr. Locke, that great philosopher and writer on Government, that

"where there is no law, there is no freedom;"

and in truth by the British Law, we possess as much of it as is consistent with the good of Civil Society: we have a right to do every thing that a good man would wish to do and are only restrained from doing that which would be injurious to our fellow citizens and destructive of our own happiness.

The great and rapid progress which this Settlement appears to have made, in commerce, population, and cultivation, since its formation, notwithstanding the great disadvantages it had to struggle with, has naturally attracted the attention of the parent state, and excited its cares, as well as raised its hopes for its future prosperity and advancement. Influenced by these considerations, His Majesty, in whom the supreme sovereignty of the island resides, and to whom alone it belongs, as the fountain of justice, to erect Courts, and to prescribe by what laws and process they shall proceed (in settlements ceded to the British empire), has by his Royal Charter, created this Court, with jurisdiction and powers over the Island and its dependencies, co-equal with his Superior Courts of Common Law and Equity at Westminister; to take cognizance of and administer redress for all possible Injuries, that can be committed against the personal security, personal liberty, or private property, of any of his Subjects, Asiatic or British, Native or European — and as all are entitled to its protection, so all are subject to its jurisdiction and coercion: and in order to secure the enjoyment of those blessings, His Majesty's Court will be always open, ready to administer redress, and to pronounce in the words of the great Charter — *nulli negabimus*, *nulli vendemus, aut differemus rectum vel justitiam.*

As this Court is vested with full powers to guard the rights of the living, so it has jurisdiction to take care of and protect the assets of the Dead, and for that purpose as an Ecclesiastical Court to grant Probates and Administrations, and compel the just distribution of their property among their legal Representatives, Creditors, and Legatees, in whatever part of the globe they may reside; so this Court is vested with powers to appoint Guardians of Infants and Committees of Idiots and Lunatics, and to preserve their Estates for the use of those who shall be entitled. As a Criminal Court, its jurisdiction extends to all offences, from High Treason and Murder down to the most trivial Misdemeanor, and it secures to all the King's Subjects, without distinction, the privilege of trial by JURY, that Grand Palladium of British Freedom and Security, by which no man can be affected in Life or Limb, or banished for any criminal Offence, but by the Verdict of his Fellow Citizens, and the lawful judgment of the Court. But as it is my intention, as soon as circumstances will allow it, to hold a Session of Oyer and Terminor and General Goal Delivery, for this Island and its dependencies, and for that purpose to issue a Precept to the High Sheriff to summon a Grand Jury, I shall not now anticipate the Address which I may feel it my duty to make to that Grand Jury, upon the

principles of Criminal Law, the best means of preventing offences, & curing the Moral Diseases that may appear to prevail in the Community instrusted to my care; and therefore I shall only now add, that those Laws are to be administered by a Judge, who is bound by his Oath as well as by his honor and conscience to pronounce his judgments, not according to his private discretion, but according to the known and established Law. And as all human tribunals are liable to error, so it is a great consolation to me that my judgments in all Civil Cases of moment, will be subject to the revision of the King in Council, upon an Appeal; (which will keep the rule of Justice uniform and steady), that Court being composed of the most experienced Members of His Majesty's Council, and some of the high Judicial Characters in England, — men interested by their property, formed by their education, and bound by their duty to be skilled in the Laws of their country.

Such are the great outlines of the Juridical Constitution of the Court. — But whilst I am bound to express my gratitude, to my Sovereign, for his having been pleased to appoint me to establish and administer this Jurisdiction, permit me to assure you, Sir, that I am not at all insensible to the arduous and delicate trust that I have undertaken, that of administering Justice amongst a great and growing population, composed of various classes of Inhabitants, differing from each other as much in manners and habits, as in religion and language; yet I indulge myself with the hope that I shall be able to encounter any such apparent difficulties, and I trust that by adverting to and weighing the great principles of universal justice, that existed antecedent to any municipal institutions, and which are the best & most authentic foundations of all human laws, by adopting the just and benevolent system of the common and statute law of England, so far as they are applicable to the state circumstances and condition of an infant settlement; by investigating and discovering the local customs of the different classes of the Native Inhabitants wherever they arise, or may become at all material to the due administration of Justice, that I shall be able to build a system of Jurisprudence and Jurisdiction upon sound and rational foundations to reduce the practise of the Court into some thing like a regular form; and upon the whole that I may so deport myself in the discharge of this great duty, that the injured shall never leave this tribunal unredressed, that the innocent may always approach it with confidence, and the guilty depart from it without reason to complain of injustice. — In the delicate trust of administering the Criminal Law, — (due attention being always paid to the public interest), I shall always endeavor to have present to my mind and to engrave on my heart that noble principal of the British constitution enforced and sanctioned by His Majesty's Coronation Oath "to cause Law and Justice (in mercy) to be executed in all his Judgments." This I [trust] I shall be able to maintain the honor and [lustre] of the British character and Judicature ([ever] famed in all ages and in all countries for [its] clemency as well as Justice) untarnished and undiminished in this remote region of the world and furnish an additional proof of the inestimable benefits which British Dominion confers on its Asiatic subjects.

I cannot omit this opportunity, Sir, of making my best acknowledgments for the attention I have received since my arrival in this

settlement, and also of expressing my confidence that the Executive Government will (if ever occasion should require it) be ready to forward (and co-operate in carrying into effect) the most gracious intentions of His Majesty, as manifested by his Royal Charter.

After a brief reply by the Governor the Court then adjourned until 3 June.

On 3 June 1808 notice was given of the first of many applications for letters of administration, by one Phoebe Cartwright. Such applications were so numerous that they are not further listed in this paper.

The first case fully reported in the Prince of Wales' Island Gazette, Murray v. Burn, came before the Recorder on 21 June, judgment being pronounced on 27 June. The report runs as follows:

Murray v. Burn

It was an action of trover and conversion, brought by the Plaintiff, merchant of Madras, against the Defendant, late master of the ship General Wellesley, but now resident at Prince of Wales Island, to recover damages against him, for detaining and converting to his use, a cargo of goods consisting of twenty-one bales of Cloth, Plaintiff's property at Sooloo, on the 18th of May 1806. The Plaintiff laid his damage for the loss of his goods and the market of Sooloo at Ten Thousand and Eighty-two Spanish Dollars, — and Defendant having been arrested upon a writ, and held to special bail, appeared and pleaded Not Guilty; and issue having been joined, the material facts as they were collected from the parol and written evidence, were shortly these:

In the month of March 1806, the ship General Wellesley, of which the Defendant and Capt. David Dalrymple, were part owners, was fitted out at Madras for a trading Malay voyage; a considerable cargo of Cloth, and other articles destined for the market of Sooloo and other eastern markets, were shipped on board that ship, on account of the owners, by Messrs Parry & Lane of Madras, who had a mortgage on the ship and cargo; that Defendant Joseph Burn, then acted as Master and Commander, and in that character gave an order that the Plaintiff's goods, which were destined for the Sooloo market, should be received on board and carried without freight; in consequence of which, Plaintiff on 7th March 1806, shipped on board the General Wellesley, the cargo in question, consisting of twenty-one bales of Cloth, his property, value as per invoice at Madras 2825 Star Pagodas; — that the ship sailed from Madras for Sooloo in March 1806, — Plaintiff being a passenger on board; that she arrived in Sooloo roads, on the 18th of May 1806, upon which the plaintiff, demanded his goods from the Defendant, offering to pay the freight for them, but the Defendant refused to deliver them, alledging that by the usage of the Malay trade, no part of the cargo of passengers or other persons could be disposed of at any Malay port or market, until the cargo of the owner was first sold; that upon this refusal the Plaintiff quitted the ship leaving his goods in it, & embarked on board another ship; — that the General Wellesley sailed in two months after from Sooloo to Pointiana, with a part of the cargo of the Owners unsold; — that she arrived at Pointiana in September, where the Defendant was left to dispose of his cargo, that the ship returned to

Prince of Wales Island in October 1806, under the sole command of Captain Dalrymple, (who sometimes acted as joint master) who landed the Plaintiff's goods, and lodged them in the stores of Mr. George Seton, for the use of, and to be delivered to Defendant Burn on his arrival; and that upon Defendant's arrival in August 1807, Mr. Seton offered to deliver them to him, but Defendant by letter, 25th August 1807, directed Mr. Seton, to dispose of the cargo of goods (Plaintiff's property) to the use of or to the order of Captain Dalrymple, from whom he received them; that accordingly in March 1808, Capt. Dalrymple sold the Plaintiff's goods to Messrs. Carroll & Scott, Auctioneers at Prince of Wales Island, for 4970 Spanish Dollars, which they paid to Capt. Dalrymple, who applied the money and proceeds of the goods in fitting out the ship for another voyage to the South Seas, on which voyage she has proceeded; — That the cargo was resold by Messrs. Carroll & Scott, in a few days after, for 5474 Spanish Dollars; and that those sales were without the knowledge or consent of the Plaintiff.

Upon those facts Sir Edmond Stanley delivered his judgment as follows: two general questions were made for the opinion of the Court.

1st. — Whether upon the evidence, the Defendant is in point of fact, or in point of law, at all liable to the Plaintiff's action.

2nd. — If he is, what the extent or measure of the damages ought to be.

Defendant insisted that he was not at all liable upon three grounds.

1st. — That he never had possession of the Plaintiff's goods, not having signed a bill of lading for them.

2nd. — That by the usage of the Malay trade, he had a right to detain them at Sooloo, and the other eastern markets, until the owners cargo was sold.

3rd. — That the sale and conversion, or in other words, the tort and wrong, was committed by Captain David Dalrymple, and that he only was liable to the plaintiff's action.

This Defence necessarily involves three considerations.

1st. — How far the Defendant has (in point of law) by his own acts rendered himself responsible in this action, which makes it necessary for the Court to advert to the principles of the action of trover, and the ingredients necessary to be proved to support such an action.

2nd. — How far the Defendant is in point of law responsible for the acts of Captain David Dalrymple, which involves the consideration of the question, how far one partner, or part owner, or joint master of a ship, is liable for a Tort committed by another in an action brought by third persons for the conversion of their goods.

3rd. — How far a bailee of goods, or a gratuitous depository of such goods, who has undertaken to carry them without reward, is answerable for the loss or embezzlement of those goods:

Sir Edmond Stanley said that he was most clearly and decidedly of opinion, that the defendant is liable to the Plaintiff's action, upon each and every of those grounds.

1st. — That his own acts, independent of Dalrymple's, amount to an actual conversion.

2nd. — That he is responsible for the acts of Dalrymple, and that upon principles and authority an action of trover will lie by a stranger, against one partner, or part owner, or joint master of a ship for a tort, or wrong, committed by another in the usual course of their business, or dealing; — that they, and each of them, are answerable civilly, that is in civil damages, though not criminally, for the acts of the other; that the possession of one of the goods of a third person (intrusted to them or their servants) is the possession of both; the unlawful conversion of one is the conversion of both; so as to render both, or either, liable to the actions of third persons for such injurious acts; that they need not both be joined in the action, at least that it could only be pleaded in abatement, and that it is a matter of contribution and adjustment among themselves, how far one of them is to be reimbursed who is mulct in damages for a tort, committed by another.

3d. — That there is sufficient evidence in this case of gross negligence, and indeed fraud in the Defendant, to subject him in the present, or at least in an action of a different form, for the loss of the goods, supposing that neither the acts of the Defendant, or of Dalrymple, amounted strictly to a conversion of them.

In order to support the action of trover three things are necessary to be proved.

1st. — Property in the Plaintiff.

2d. — Possession in the Defendant, and a tortious conversion by him, of the Plaintiff's property to his own use, or to the use of any other.

3d. — The value and amount of the damages.

The ground of the action is the conversion, which may be proved in three ways. — 1st, by an original unlawful taking of goods. — 2nd, if the goods came to the hands of the Defendant by delivery, finding, bailment, or other lawful means, an actual demand and refusal ought to be proved, and such refusal is sufficient evidence of a conversion, unless the Defendant can justify the detainer under some lawful process, or for some lien he had on the goods; as a mortgagee or pawnee of goods for the money lent, a common carrier for his hire, an inn keeper for the keeping of a horse, or in consequence of some other legal lien, without the payment or tender of which, an action of trover cannot be maintained.

3d. — By proving an actual conversion in Defendant by sale or otherwise, and as where there is an original wrongful taking of goods no other proof of conversion is necessary; so where actual conversion is established, neither an actual taking, nor a demand and refusal, are necessary to be proved; now if a tortious conversion *is* established in any of those ways, it matters not to the Plaintiff what becomes of the goods afterwards, if they were unlawfully taken from the Defendant by another, or if the Defendant had been robbed of them by Dalrymple, or any other, he indeed might have his remedy over against such wrong doer by action or prosecution, but it never could discharge him from his original responsibility; — nay so sacred a regard has the law of

England for the security of private property that it will not suffer any person to intermeddle with that of another with impunity. — If a man takes, or uses, or detains my goods, without my consent, and afterwards delivers them to me, an action of trover and conversion will lie; the Plaintiff may recover damages for the detention, and the re-delivery of the goods will only go in mitigation of damages:- so it has been determined, that if a man takes the Horse of another without his consent and rides him, and leaves him at an inn, that is conversion;- so if one man who is entrusted with the goods of another, puts them into the hands of a third person, without, or contrary to orders, that has been held a conversion, and in the case of *Syeds and Hay,* 4th Durnford and East Reports 260 — trover was brought by the owner for certain goods against the captain of a vessel in which they had been shipped, and the only question was whether there was evidence of a conversion to maintain the action, the goods having been left by the Defendant in the hands of a wharfinger for the Plaintiff's use who detained them for a charge of wharfage fees, upon the ground of a usage which appeared to be an unfounded one, and the Court of King's Bench, were unanimously of opinion that (though the Plaintiff might have had his goods at any time, by sending for them, and paying the wharfage) this was a conversion by the Captain, so a conversion by a servant or a partner, provided they act in the usual course of their business, would be a conversion by the master or other partner, as was the case of the jeweller, whose apprentice took a diamond out of the socket offered in the shop for sale, this was held a conversion in the master, so was the case of a party who left a box of plate at his bankers, in whose house there were several partners, and one of them broke open the box and pawned the plate, the other partners were held liable in trover; and civilly answerable in damages, though each would have been only criminally answerable for his own acts:- Now to apply those principles to the present case.

As to the property in the Plaintiff and possession in the Defendant, it has been proved that the cargo of twenty one bales of cloth, with the initials of the Plaintiff's name D.M. were delivered on board the Gen. Wellesley, of which Defendant was master and joint owner at Madras. Delivery to a servant whose usual business is to receive goods, is a delivery to the master, (and though no bill of lading was signed, which might make the proof more easy, and is a convenient commercial document for the consignment of goods) yet it does not follow that a party may not prove the delivery of his goods in any other way. — As to the conversion by the Defendant, the demand and refusal is evidence of that: but Defendant attempts to justify the detainer under a usage in the Malay trade, that the goods of passengers or others should not be disposed of at any of the Malay ports, until the sales of the owner's cargoes are first completed: — Now without wishing to dispute the reasonableness of such a usage, it may be sufficient to say, that if the Plaintiff had in breach of such usage or agreement, injured the market by underselling (or in any way prejudiced the sales of) the owner's cargo they might perhaps have maintained an action on the case against him, but neither the evidence proves, nor could the usage extend in point of law to authorize the owners or masters to seize or detain the cargoes of passengers or other persons for an indefinite period of time, until they were either able, or willing to dispose of their own cargoes.

Such a usage (if it had been proved) would be unreasonable and illegal, and therefore he was clearly of opinion that the detention of the Plaintiff's goods at Sooloo was unjustifiable, and that Defendant's refusal to deliver them is sufficient evidence of a conversion in him, to render him liable in this action; it was not incumbent on the Plaintiff to look after his goods further.

But he said he would suppose for argument sake that the Defendant's refusal to deliver the Plaintiff's goods at Sooloo was justifiable, and that he was warranted in detaining them there, and at all the other eastern markets, until the sales of the owner's cargoes were completed. — Yet Defendant's subsequent conduct, and the subsequent acts of himself and Dalrymple, in October 1806, August 1807, and March 1808 at this Island, render the Defendant clearly liable in this action. The Plaintiff's goods are carried without his consent in the General Wellesley by Captain Dalrymple, from Pointiana to Prince of Wales Island in October 1806, and lodged by him in the stores of Mr. Seton, for the use of the Defendant Burn; in several months after, they are offered to Defendant, who by letter refuses to receive them, *and desires Mr. Seton to account for them to the order of Captain Dalrymple:* those acts and this letter, I consider to be an actual conversion of the Plaintiff's goods by the Defendant, and indeed in both of them, they were both tort feasors; and in torts, the assentor as well as the actor are principals ; and the subsequent sales and receipt of the proceeds by Dalrymple, is in truth a conversion by the Defendant — there is also another ground upon which Defendant would be responsible supposing no act of conversion proved against him, and that is *gross negligence,* by which the Plaintiff has lost his goods, the proceeds of which are now embarked by Dalrymple without plaintiff's consent in a speculation on to the South Seas, Defendant having undertaken to carry them though *without a reward* the law imposed upon him a responsibility and [charge as] a common carrier on the land or on the seas for [hire], is answerable for all accidents and losses which may happen to the goods, except for the act of God or the King's enemies, — they are in fact *Insurers;* even robbery, or piracy would not excuse them; and the law is so strict to prevent collusion and fraud, that the master may contrive to be robbed on purpose and share the spoil. — Proprietors of Waggons, and owners or masters of ships, are common carriers within this description, & the 7th Geo. II. Chap. 15 and the 26th Geo. III. Chap. 86, which exempts the owners of ships from liability in cases of embezzlement, robbery, or dishonesty of the master or mariners or others, beyond the amount of the value of the ship and freight, and exempts them from losses occasioned by fire, or by robbery of gold, money, or jewels without a specification in writing of them, proves their general liability in all other cases; indeed when goods are taken on board of ship to carry *without freight or reward* (which is this case) and is called a naked bailment, the owners or masters are only liable for any gross neglect by which the goods are lost or embezzled, and they are bound only to take the same care of them that they would of their own goods. — Now Defendant's own conduct with respect to the Plaintiff's goods, which were put on board his ship and in his care at Madras in March 1806, in having suffered them to be brought in his ship from Sooloo to Prince of Wales Island without Plaintiff's consent; and his

afterwards having when he found them here in August 1807, in Mr. Seton's stores, refused to receive them, and preserve them for the Plaintiff's use, as it was his duty to do, were sufficient acts of negligence and breaches of [trust] on his part, to render him liable for the loss of the goods, even supposing no other acts done by him; indeed there were so many grounds upon which Defendant was liable, that he was only at a loss to know which was the strongest to rest upon. — The variety of Defences which the Defendant has made and [the] different characters he wishes to assume, would [place] the Plaintiff in rather a whimsical predicament [and] furnished an instance of eastern ingenuity such as he had not met with — says the Defendant, I am not liable to your action because though I took or detained your goods I did not sell them, neither am I responsible says Captain Dalrymple because though I sold your goods I did not take them — and with [more colour] of justice Messrs Carroll and Scott would say we are not subject to your claim, because we bought your goods in market overt and neither took nor sold them — so the upshot of the argument is, that the Plaintiff has redress against nobody, which is repugnant to the principles of the British Law, which says there can exist no right or wrong for which the Law will not furnish an adequate remedy.

It would be a discredit to the justice of the Court and of this Island if the sort of game which has been attempted to be played in this case could be practised with success, or if the arm of the law was not long enough to reach frauds of this sort;- he would not turn the Plaintiff round to go to look after Captain Dalrymple in the South Seas, but would fix the Defendant with the damages which the Plaintiff has sustained, and leave him to seek redress against Dalrymple, or others, as well as he could. He had also gone more at large into the Law, than he would have thought it necessary to do, if it had not been the first case of consequence which had been brought before the Court, since its establishment; and he wished (as far as his humble talents would allow him) that the British law should be fully explained and well understood by the Inhabitants of this Island, whenever cases occured which required an explanation of it; because he was sure the more it was examined and understood the more it's wisdom and equity would be admired and revered, and the more they would have reason to feel a deep sense of gratitude to his Majesty for the gracious Charter of Justice which he had been pleased to grant, and which has rescued this Island from the state of confusion in which it had so long been involved; and the removal of which he trusted would raise [its] credit and respectability in all parts of the civilized and commercial world.

With respect to the damages, the Plaintiff has certainly failed to prove that part of his case which relates to the injuries he alleged to have sustained *by the loss of the market of Sooloo,* and negative evidence has been given by the Defendant, that the whole of the voyage turned out a bad speculation, as a considerable quantity of the owner's cargo, was brought back unsold owing to the markets that year being overstocked:- nor has the Plaintiff given evidence of any other special damages.- But he was of opinion the Plaintiff in this case had a right to recover, not merely the amount of the proceeds of the sale to Messrs Carroll and Scott, but the full value of his goods, and in estimating

that value he should adopt the principle which was laid down by Lord Chief Justice Pratt, in the case of *Armory* v. *Delamire,* in Strange's Report's in the case of the jewel which was detained from the possessor of it and which as it was not produced by the Defendant he directed the Jury to presume it was of the very highest value of any jewel that would fit the socket. The only standard (he had) to go by was the amount of the resale of the Plaintiff's goods by Carroll & Scott, and therefore a verdict must be entered for the Plaintiff for 5474 Span. Dollars, with Costs, and (he should) not allow the defendant any freight, nor the carriage of the goods, not only because it was agreed that none should be paid, but because in his opinion Defendant had by the mis-application and embezzlement of them, forfeited any claim he could have had upon that ground.

The next reported event in the history of the Court of Judicature was the delivery on 5 September 1808 by the Recorder of his Charge to the Grand Jury at the first session of Oyer and Terminer and General Goal Delivery. This was a long speech and is reproduced below:

Charge to the Grand Jury

If ancient usage, and the long established forms of judicial practice, have sanctioned propriety and wisdom of Judges addressing the Grand Juries, by a charge, upon the various articles of their enquiry; the exercise of such a duty is more particularly called for, and rendered more indispensibly necessary, upon the opening of this Session of Oyer and Terminer and General Goal Delivery. When we are now for the first time assembled, under His Majesty's Gracious Charter, in order to carry into execution, and reduce into practice, the noblest as well as the most effectual system of Criminal Jurisprudence, that ever yet was devised by the wisdom of man, for securing to the public the blessings and advantages of civil society; for the establishment and preservation of peace and good order; for the punishment of the guilty and dissolute; and the protection of the innocent and industrious part of the community. More Imperiously do I feel that duty demanded of me by the Calender which I hold in my hand; which I am sorry to say, exhibits the most distressing and melancholy picture of human delinquency, and moral depravity, that I believe ever yet was presented to any Judge, or produced in any Court. A Calender stained with blood, and marked with murder in every line of it, and which in truth comprizes within itself, almost every crime that can be committed against public order, or against the persons, habitations and properties of His Majesty's subjects. — I do declare, that it has often fallen to my lot to be placed in situations, that were thought by myself, and by others, to be arduous and difficult, but it has at length been reserved to me to preside in one, which calls more loudly than any other that I have ever yet experienced, for the employment of all the powers of the human mind, and the exertion of all the intellectual faculties of the human soul, destitute of all legal assistance as I am.... To reform this disordered and distracted state of Society, to vindicate the insulted authority of the Laws, to stop that system of murder, rapine and depredation, which is now carried on with as much facility, and with as little interruption, as if it was a part of the daily traffick of the Island; & which, if not checked by some wise and salutary measures (not of

cruel or sanguinary extirpation), but by a due, temperate, and vigorous execution of the Law;.. .by an active, lively energetic and vigilant system of police, calculated to prevent and obstruct the progress of Crimes. .. by establishing a well ordered nightly watch and ward, under the statute of Winchester, to guard the habitations and properties of the peaceful Inhabitants;... by providing proper places for the real correction and punishment, as well as for the reformation of offenders; and lastly, by a general and cordial co-operation of all orders and degrees of the state, to improve the Morals, and amend the Vices of the lower classes of the People, whom it is our Lot to govern; and who, I lament to say, are from a combination of causes inherent in the original formation of the Settlement, and almost inseperable from the nature of its mixed population, and the singular state in which the Government has been placed, for the last twenty years, vicious and depraved in the extreme. I say, if a stop is not put to this career of iniquity, and if the evils which now afflict society are not checked by some or all of those measures, they seem to me to threaten the dissolution of all the bonds of social order, and the annihilation of every thing that is most valuable and most sacred in a state.

You, Gentlemen, in your collective capacity, form a most important branch of that wise system — the grand inquest of the island — an institution upon which the British nation have always most valued themselves; — the antiquity of which may be traced to the earliest ages of the Saxon Monarchy, — and the practical excellence of which, as the best instrument to bring the guilty to condign punishment, as well as to shield the innocent from unjust accusation, has been proved by such long experience, and is so universally felt and acknowledged, not only in England, but in those Indian provinces — in the West Indies, and in all the distant Settlements of the World, which have the happiness to be governed by British Laws; that no time, no change of Government, or revolution, — no presumed inconvenience or trouble, that might be occasioned to individuals, could ever prevail to extinguish or abolish it. — I am happy, therefore, to observe, that the High Sheriff has upon this occasion returned Gentlemen, who from their local knowledge, and long residence, seem the most competent to exercise this important function; who will never be prevailed upon, by any human consideration, to accuse the innocent, or to conceal the guilty — men into whose bosoms the mean or ignoble passions of malice or dislike, partiality or hatred, will never be allowed to enter; but who will consider themselves, as they are, selected into that box from the mass of their fellow citizens, and consecrated as it were to the great purpose of public justice.

Gentlemen, it was with a view, of accomplishing those great and valuable objects, of promoting the commerce and population of the Island, by a strict and equal distribution of justice; — of giving confidence to the inhabitants, and security to the enjoyment of their persons, possessions and acquisitions; as well as for the punishment of offences, and the repression of vice within the Island, that His Majesty, at the instance and desire of that most Honourable and respectable Body, to whom the Government of the British territories in India is committed (and to whom on that account great gratitude is due by the Inhabitants of this Island) has sent out his Gracious Charter; — the most liberal in

its principles, the most effectual in its jurisdiction, armed with powers the most extensive and summary, for the administration of Civil and Criminal Justice, that the wisdom of man could devise — calculated to meet every exigency — to adapt and accommodate itself to all the local circumstances of the Island, — and to provide for every emergency that the place itself, or the state and condition of its Inhabitants might require; for which purpose it makes the wise and benevolent system of British Law, in a qualified and restricted manner, the rule of justice within the Island, for the various and numerous descriptions of Inhabitants, who have settled here, under the British Government, blended with a proper and due attention to the local customs, religious prejudicies and manners of the natives of the country. — It is now too late, and unnecessary, to enter into the question, whether the body of British subjects who originally settled and formed themselves into a state of civil society under a British Government, in this then uninhabited and uncultivated island, which was obtained by cession from a native Prince, (and where no previous law existed) did or did not carry with them so much of the British law as was necessary to protect the inhabitants against personal injuries, and to enforce the moral duties of man; for the effect of the present charter is that it communicates the civil and criminal law of England, qualified as I have stated, to this island, down to the date of this charter, as it then stood;. .. but no British statute passed since that period can be received in or will extend to this island, unless it is expressly named, or included under a general description, and the British law so received, is to be understood under another restriction, that so much of it only is communicated to this island as is necessary and convenient to its own local situation, and the condition of an infant colony; much of it certainly would be inapplicable — what shall be admitted, and what rejected; at what times and under what restrictions must in case of dispute be decided; in the first instance by our own judicature, subject to the revision and control of the King in Council, the whole of the constitution being at all times liable to be new-modelled by the superintending power of the legislature of the parent country.

For the purpose of administering this List in Criminal Cases, which may affect the life of man, — it has provided this High Court of Criminal Jurisdiction, and has adopted the principle of the Great Charter of British freedom, that no subject of His Majesty, whether British or native, shall be punished capitally or transported for any crime without being brought to answer, by due course of Law; that he shall not be brought to trial until a Grand Jury shall first, upon their oaths, present him as a fit object for public prosecution; neither shall he be put to death or exiled, until a Petty Jury shall, after a full examination of the charge, find him, upon their Oaths, to be a fit subject for public punishment.

In arbitrary states, where the life of man is of little value, this would be considered as a very troublesome provision; there, a man is despatched, chained, tortured, or banished, at the arbitrary and capricious will of the Prince, or the minister, by an instant declaration that such is his will and pleasure. — All rules of evidence are laid aside as inconvenient; the accused never sees his Judges, or hears the witnesses; and

death to him is a relief from a more wretched existence, but such is not the spirit and temper of British Judicature; all our accusations are public, and our trials in the face of the world; with us, torture is unknown, and the accused has a right to cross-examine the witnesses produced against him, as well as to contradict their evidence by opposite testimony; and in the end his fate is decided by a Jury of his fellow citizens, against whom he can form no exception or even personal dislike. — Subject to the superintendence of a Judge who is bound to be so far of council with the prisoner, as to see that the proceedings against him, are legal and regular. — The present Charter has also, in order to meet the local circumstances of the Island, and the state of its Inhabitants, provided a summary Court of Session, without the intervention of a Jury, to sit as often as the exigencies of the Island may require, to try and punish all inferior misdemeanors, against the public peace, Police and good order, in the most expeditious and effectual manner. — A jurisdiction which indeed was absolutely necessary for this Island, as from an examination of such records as I have been able to find, I am sorry to see that the number of offences committed within it exceeds beyond all proportion the measure of human guilt in any other, or in all the other settlements in India, or I believe in any other colony of the same extent and population in the known world. I observe by my Calendar, that there are twenty-seven murders upon it; seven of which are charged to have been committed within the last year; and (besides many small inferior offences) no less than nineteen thefts and felonies within the compass of the last five weeks; — no doubt this disordered state of society may be in some measure accounted for, by causes which have produced effects nearly the same in all new colonies and plantations, composed of similar materials before the manners of the lower [classes] were softened and humanized by habits of industry, social intercourse, and friendly commerce. — Before regular courts were established to administer the laws, or magistrates to carry them into execution; and really instead of being discouraged at such a state of things, I cannot but express my surprise, that the island which was a desolate wilderness twenty years ago, and in the recollection of so many that hear me, should (notwithstanding all these disadvantages) now exhibit such considerable marks of improvement, in cultivation and population — should have become an important marine port and station for the refreshment and supply of the British navy — for facilitating the [trade] between England and China; and perhaps may be made an important depot for providing shipping; but at all events, by its central situation, is likely to become the major mart and emporium between Eastern and Western India for the sale and exchange of [both] European and Indian produce and manufactures — I confess, when I reflect upon the [past], and contemplate the rising prospects of [this] Island, and the great advantages it has received by the present Charter, I have the most sanguine hopes, that the general affairs and situation of the island, will soon wear a more imposing aspect; and that the dawn of future prosperity will soon become visible.

Gentlemen, the end of the criminal law, a most important branch of this juridical system, is to prevent crimes by punishment; that the pain of it, as the sublime Roman orator expresses himself, *may be felt by a few,* and *the dread of it* may be extended *to all;* and in general, I

agree with those who think, that punishment of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful and moderate in general; and that crimes are more effectually prevented by the certainty, than by the severity of punishment. .. .Yet I shudder to think, that the state of society here is so depraved, at least with respect to one branch of its population; (for, as to the Chinese inhabitants, my observations do not apply to them; they seem to be most industrious and useful subjects) but as to those who have emigrated here from countries ferocious and uncivilized, I fear that the doctrine to which I have alluded, would, as applied to them in general, be rather the language of benevolent speculation, than of attentive observation and experience; for, as long as a body of men exist in a state, who, without fearing a Supreme Being, dread the law; and, without feeling any horror crime, tremble at the idea of punishment; so long it is necessary, that great and enormous crimes, should be certainly and severely punished... not by way of vindictive atonement or expiation for the crime itself, but as a precaution against future offenders of the same kind, and by setting a dreadful example to deter others,... and in truth, when crimes of deep malignity, such as murder, are so frequent, and have passed so long with impunity, general mercy and indemnity to the guilty, would become an act of cruelty to the public; although in most cases of guilt, I think that well arranged houses of correction, and penitentiary establishments, are more effectual to produce reformation among the lower classes of mankind, than capital punishments.

Having said so much upon the general objects of the charter, and the principles of criminal justice; as I presume it may not have fallen to the lot of many of you Gentlemen, to have acted in your present capacities, you may require some guide to lead you in this untrodden path; some rules to direct you in the exercise of this unusual duty: — I shall now, therefore, endeavour to explain to you very shortly, what ought to be the demeanour of the Grand Inquest, in relation to their presentments; or, in other words, the office and duty of grand juries,— the mode in which they are to conduct their enquiries and exercise their powers; and secondly, I shall point your attention to the various classes of prisoners upon the Calendar; and shall explain the law, as it arises upon each of the offences contained within it, in order to assist your judgments, in finding or rejecting the bills which will be brought before you. The first step towards the punishment of offenders is their formal accusation by a Grand Jury; for which purpose the High Sheriff, by virtue of a precept, directed to him, returns twenty-four of the principal inhabitants to the Court of Goal Delivery, selected from each district; and who, from their local knowledge, and observation, are supposed to be best acquainted with every thing that is passing in it; and that no crime can escape their notice; and therefore, in some of the old books, they are called *Inquirors;* in modern ones, the *Solemn Grand Inquest;* and they, on the part of the Crown, are to enquire of, and present, all offences happening within their jurisdiction.

The great qualities necessary for the grand Inquest, are attention and diligence to enquire after truth, sagacity and discretion to discover

it, and integrity and firmness to present it.... This power of inquiry and accusation may be exercised in two ways: first, by indictment, which is a written technical accusation against a person, of any crime preferred to and presented upon Oath by a Grand Jury, and which is framed by the officers of the Court, and laid before them, together with evidence on the part of the crown;. .. secondly, by a presentment, which is a more comprehensive term, and is an accusation founded upon the notice taken by a Grand Jury, of any offence, from their knowledge, without any bill of indictment laid before them at the suit of the King; upon which the officer of the Court must afterwards frame an indictment, before the party presented can be put to answer it;. . .so that a Grand Jury may present, either upon evidence, or upon their own knowledge; which the law esteems as authentic a ground for prosecution as an accusation founded upon the testimony of others; and it presumes, that, in one way or the other, all offenders will be brought to trial, and that no innocent man will be forced to submit to the disgrace and experience of a public prosecution;... For the greater regularity of your proceedings, your Foreman presides, reads all bills, puts the question whether they shall pass or not; which is to be decided by the majority... and he certifies the bill either found or ignored. If, by ill health, or other accident, your Foreman should at any time be absent, the next in seniority takes his place, or the Grand Jury may elect a new one.

The leading features of your duty are emphatically pointed out to you in the great constitutional oath which you have just now taken; by that you learn, that diligence in your inquiries, secrecy in your councils, and justice and impartiality in your presentments, are the sacred obligations imposed upon you. — The diligence required of you is, that degree of industry to search after truth, and to investigate crimes, which every man who enjoys the protection of Government, and the advantages of the due administration of justice, is bound by his duty, and engaged by his interest to bestow, upon matters in which the interests of society are so deeply involved: — and here it may be proper for me to inform you, that your jurisdiction extends to enquire of all public wrongs or crimes, but not of civil injuries to individuals, or matters of dispute about property, or private rights, which do not concern the public peace; such private contests are to be determined by another forum; but the Charter and the law authorizes you to inquire and present all treasons, murders, and other felonies and offences *heretofore* committed, or which may hereafter be committed during this session; and there is no doubt, that all crimes of a public nature, all disturbances of the peace, oppressions and other misdemeanours of notoriously evil example, as well as all attempts to commit crimes, though not actually perpetrated, are indictable at the suit of the King. — Your jurisdiction at the present session is confined o offences committed within the island, and the territory belonging thereto; and, in general, you cannot inquire of any fact done out of that jurisdiction, unless enabled to do so by the King's Charter or commission, or by act of parliament. — *Secrecy* with respect to the King's Council, your own and your fellow jurors, is particularly enjoined by your oath, and commanded by the law, as of the greatest consequence to public justice; as the disclosing the evidence and proceedings before a grand jury may give great offenders an opportunity of escaping, or of defeating

public justice by counteracting the evidence for the Crown, by subornation of perjury; and it is certain that a grand jury who does so is guilty of a misprison, and liable to be fined and imprisoned; — and he should neither disclose his own acts or opinions, or those of his fellows who may have dissented from him; which is not only dangerous to the public, but illiberal towards the individual, as it may expose him to the malice and ill-will of the parties.

I must inform you, that it is your duty to inquire only, and not to *try;* and therefore, you are to hear evidence only on the part of the prosecution, and by no means to hear any on the part of the accused:... It was formerly a matter of some dispute among great and learned men, what degree of evidence is sufficient to warrant a Grand Jury to find a bill; but it is not settled by great authority, that as an indictment is merely an accusation, and the party is afterwards to undergo a full trial, they ought upon *probable evidence* only, to find a bill; but it ought not to be a remote probability; but that degree of it, which approaches the confines of certainty:... It cannot be expected that the Grand Jury, who hear evidence only on one side, should have the same persuasion of guilt of the party as the Petty Jury, or Coroner's Inquest, who hear the evidence on both sides: and therefore I think it is a good rule to go by, in finding a bill, that the evidence should be so strong on the part of the Crown as (supposing it uncontradicted by witnesses before the Petty Jury) would be sufficient to convict; it is not necessary that the evidence should be positive; strong presumption, and circumstances which necessarily and usually attend the fact, will be sufficient; as if a man be found suddenly dead in a room, and another is seen running out in haste with a bloody sword; this is a violent presumption that he is the murderer; for the blood, the weapon, and the hasty flight, are all the necessary concomitants of such horrid facts, and in foul and secret cases, no other evidence is possible to be obtained; so the finding of goods proved to be stolen, upon a party, recently after the fact of felony, is evidence, accompanied with other suspicious conduct of the party, that he was the person who stole them, unless he is able to account for the possession, but if the Grand Inquest, upon hearing the King's evidence, or upon their own knowledge of the incredibility of the witnesses, are dissatisfied, they should reject the bill.

In general, it is recommended by great lawyers, that if a bill be presented for murder, and it is clear that the prisoner committed the homicide, but circumstances may appear to them to extenuate the offence, that they ought to find the bill for the greater offence, as murder, and not for manslaughter, or any lesser species; otherwise great crimes may be smothered; and when the party comes upon his trial, the whole fact will be examined before the Court and Petty Jury; and he will have the full benefit of the law, if entitled to it, and, in many cases, the contrary practice would be a disadvantage to the accused; for, if the Grand Inquest ignored the bill, whereby the prisoner is dismissed, yet he may be indicated again for the murder many years after, when perhaps all his witnesses may be dead; whereas, if they had found the bill for murder, and left it to the Court, whose province it is to determine the law, and direct the Petty Jury to find it man-

slaughter, or to acquit the party; he might plead that conviction or acquittal in bar to any further indictment for the same fact. It is right for me to observe to you, that except in high treason, there is no limit of time to the prosecution of offenders; in all treasons, except such as may affect the sacred person of the King an indictment must be found within three years after the offence committed; but an indictment for murder, or any other offence, may be found at any distance of time after the fact; indeed, when offenders fly from justice, that is reasonable; but when they are in prison, they ought to be brought to trial as recently after the fact as possible; otherwise the punishment loses much of its effect; and it may in many cases be a great hardship upon the accused; however, if there is sufficient evidence to warrant the Grand Jury to find the bill in general they should do so, leaving such circumstances to the future consideration of the Court.

With respect to the various offences, and the different classes of prisoners, appearing upon the Calendar; it would be impossible, in any one charge, to go through the whole circle of crimes and misdemeanours, with the punishments annexed to each, cognizable by the laws of England: I shall therefore content myself, for the present, with taking notice of such as *must* become the subjects of your inquiry:... and first, with respect to the crime of homicide, which is so familiar among a certain portion of the lower classes on this island: this offence, by the law of England, is of various kinds; it is either justificable, excusable or felonious, of which the most atrocious is the crime of wilful murder, which I believe is punished universally; in every civilized nation on earth, with death.... In some barbarous and ferocious nations, this crime may perhaps be considered rather as a private injury, to be avenged by private retaliation, than as a crime against the public; but the law of God and the voice of nature unite in proclaiming "that whoso sheddeth man's blood, by man shall his blood be shed; and that the land must continue polluted, 'till cleansed by the blood of those who shed it".. .. The right of punishing murder, and the like crimes against the law of nature, was in a state of mere nature, vested in every individual, whereof the *first* murderer, Cain, was so sensible, that we find him declaring his apprehensions, that whoever would meet him, would put him to death.... In a state of society, this right is transferred from individuals, to the Sovereign Power, whereby men are prevented from becoming judges in their own causes, which is one of the evils Civil Government was intended to remedy; Whatever power, therefore, individuals had of punishing such offences against the law of nature, is now vested in the Supreme Magistrate; and upon this principle it is, that many persons who are not subject to the municipal law of England, and are not triable for any other crime, as foreign ambassadors and their suite, are yet liable to be tried and put to death for the crime of murder, as an offence, not against the particular law of England, but against the law of nature, and the universal law of all civilized societies; of which several instances are mentioned by my Lord Hale.

Murder, by our law, is defined to be the killing another, of any country or religion, whether native or foreigner, under the King's peace, with malice prepense, either express or implied:... but many persons have fallen into a fatal error, as to import of the term *malice*

aforethought, which certainly is an essential ingredient to constitute murder; and some have fallen into a great mistake, as to what shall be said a provocation which in point of law is sufficient to extenuate or alleviate a killing, from murder to manslaughter:... to which two points I shall now direct your attention.... When the law makes use of the word malice, as descriptive of the crime of murder, it is not to be understood according to the vulgar acceptation of the word:... "A malevolence, or rancour of mind, lodged in the person killing, for some considerable time before the commission of the fact. .. the law by the term malice means, that the fact hath been attended with such circumstances as shew a wicked and malignant heart; and it is not so properly spite, or malevolence, to the deceased in particular, as any evil design in general; and therefore, if a man kills another, suddenly, without any, or without a considerable provocation, the law will imply malice; so, if a person kills another in consequence of such a wilful act as shows him to be an enemy to all mankind in general, as discharging a loaded gun among a multitude of people; or if a man resolved to kill the next man he meets, and does kill him, it is murder, it is murder though he knew him not; for such a man is called *hostis humani generis."*

Now, as to what shall be a sufficient provocation, or under what circumstances heat of blood will avail, to extenuate a killing from murder to manslaughter, it is certain that no words of reproach or infamy, how grievous soever they may be, are a provocation sufficient to free the party who kills another with a deadly weapon, or in such a way as shows an intention to kill or do some great bodily harm, from the guilt of murder; nor are indecent, [provoking] actions or gestures, expressive of contempt or reproach;. .. and homicide upon such provocations, has been always ruled to be murder; so if a man, upon a trespass done to his land or goods, kills a person with a mortal or deadly weapon, or beats him in a cruel or unusual manner, it would be murder;... and some judges have held, that even a slight [blow] would not excuse the party who kills another *in a brutal and cruel manner,* and with a [mortal] weapon from the crime of murder; but it [must] be laid down as a general rule, that in every [case] of homicide, upon provocation, however great soever it may be, if there is sufficient cooling [time] for passion to subside, and reason to interpose [such] homicide will be murder; and therefore, if a man, an adulterer, deliberately and upon revenge, [after] *the fact* and sufficient cooling time or [...] the idea of jealousy, it is undoubtedly murder, though if he had found the party in the [...] it would be no more than manslaughter; [and] in this the law of all countries agrees with [our own]:... and in all possible cases, deliberate homicide, upon a principle of revenge, is murder.... No man who is under the protection of the law is to be the avenger of his own wrongs — if they are of such a nature, for which the laws of society can give him redress, thither he ought to resort; but be they of what nature soever vengence belongs not to man.

Here it may be proper that I should observe to you that in cases of murder, the law admits evidence of the declarations of the deceased after [a] mortal wound given, against the offender; [but it] must

appear, that the party making them [is then] sensible of approaching dissolution; [or in] such a state that he must have felt the hand of death. The law considers a declaration made by a person in that state; when all hopes of this world are gone, and no human temptations could be supposed to induce the party to [. ..] a falsehood, as equal in solemnity to an [oath]; so, the examination of a prisoner, or the examination of witnesses before a coroner or magistrate, are, in case of the death of the [witnesses], and, in some other cases, evidence; [provided] they are taken according to the directions of the statute of 1st and 2d, and 2d & 3d, William and Mary c. 10... .Murder is death by the law of England, both in the principals [and] accessories, before the fact.

Burglarly is also a very high offence, by the British law, being an invasion of that right of [...] which every man might acquire in a [state] of nature; and on that account, and by [...] of the terror which it causes to the owner and his family, is punishable by our law [by] death... .A burglar is he that by night breaketh and entereth a mansion house, with intent to commit a felony, and it is of two [kinds] 1st simple; 2d, compound burglary.... In order to complete the crime, four things are necessary; 1st, that it should be committed by [night],... 2dly, it must be in a dwelling house; [as to] distant outhouse or wharehouse, unless it [be parcel] of the mansion house, or connected [with it] by a common fence, it is entitled to the privilege;... 3dly, there must be a breaking and entry; but both need not be done at once; for if a hole be broken in a house one night, and the breakers enter the next night through the same, they are burglars.... Opening a window, picking a lock, lifting the latch of a door, or unloosening any other fastening, which the owner has provided, is a breaking in point of law; and if a servant who lives in the house, conspires with a robber, and lets him in at night, this is a burglary in both;... the least entry with any part of the body, or with an instrument held in the hand, to draw out goods; or a pistol, to demand money, they are all burglarious entries ;- and if one of a party enters, and the rest keep watch at convenient distances, they are all equally guilty;. ..but the entry must be with intent to commit a felony; and if so, it is burglary, whether the thing be done or not; and if a person makes a hole in the wall of a house, or breaks house in any other manner, and sends a child (not of years of discretion) to enter therein, and commit a felony, which is accordingly done; and the person sending the child, stays away, to avoid detection; yet he, though absent, is the principal, and as guilty as if he himself had entered;... for such a child is not capable of crime.

The next offence on the calendar is the offence of larceny, or theft, which, when the goods stolen are above the value of one shilling, is grand larceny; when goods of that value, or under, it is called petty larceny: Simple grand larceny, though excused the pains of death for the first offence, is punishable with transportation or imprisonment, and being sent to hard labour in the house of correction, or on the public works: Petty larceny is punished by imprisonment and whipping, and being sent to the house of correction; and in some cases by transportation for seven years....The ingredients necessary to constitute larceny, are three; there must be, 1st, a taking; 2d, a carrying away;

and, 3d, a felonious intent to steal; the latter is the essence of the crime, and is evidenced by a variety of circumstances, demonstrating a guilty mind; as, if the goods were take clandestinely, or the party denies the fact afterwards; or flies, or gives false and contradictory accounts of the act; obtaining goods by delivery of the owner, by such fraudulent pretences as shew an original intention to steal; or a servant converting his master's goods committed to his charge, would be felonious larcencies; but if a man takes goods as a trespasser, or under a claim of right; as, where a landlord distrains goods for rent, when none is due; or a party takes goods, in such a manner as shews that he intended only to commit a civil injury, and not to steal, such acts do not amount to felonious larcencies, though they are a ground for an action.

The offence of robbery from the person, is an aggrevated species of larceny, punishable by the law of England with death, on account of the violation of personal security; for which reason, in order to constitute this offence, there must be a previous violence, forceable taking of property from the person, by previous putting in fear; but it is sufficient if it appear to have been attended with such circumstances of violence or terror, which in common experience are likely to induce a man to part with his property against his consent, for the safety of his person; but it is immaterial what the value of the thing taken is, provided it is taken forcibly from the person. I observe, by the calendar, that a robbery was committed three days ago, by a band of ruffians on the opposite shore; where I understand no person can venture at present, without the hazard, or certainty, of being assassinated or plundered; and therefore, it is incumbent on the Police to establish proper watches and guards on that station, as well as in every part of the island; to prevent the commission of those outrageous offences; otherwise, the crimes will become so numerous, that this court can attend to nothing else, but criminal trials; and the civil business of the island, which is very heavy, must be neglected or postponed.

We find the learned Chief Justice of Calcutta lately congratulating his Grand Jury, upon the orderly state of that great capital; where, from a town, in which the population is near one million, and composed of persons differing in customs, manners and country, there were but two crimes for the calendar ! after an interval of six months; which the learned Chief Justice inputes principally to the exertion of the magistrates, and the admirable system of police established by Government for that capital: and therefore, it would be well to follow that useful example; and by activity, exertion, and vigilance, to throw such embarrassments, and difficulties in the way of public plunderers, as will prevent the commission of crimes, and shew them, that they cannot carry on their depredations, without the greatest hazard, or certainty of detection; — all suspicious night-walkers, and disorderly persons, should be apprehended, and by those measures, they will either be induced to give up their criminal deliquency altogether; or, at all events, the evils which at present exist, will be very much diminished.

With respect to the number of offenders on the calendar, which amounts to sixty-seven, the Charter empowers you to enquire of all treasons, murders, and other felonies, *theretofore,* (that is, previous to

the 25th of March, 1807, the day the Charter passed) had, done, or committed, or which should *thereafter* be committed within this island or its subordinate territories; but general as the words in this retrospective clause appear to be, they must be limited in their construction, within the rules of law and justice; and this clause must be compared with and construed by other clauses in the Charter, relating to the same matter. — The commission of goal delivery, though it confers very extensive powers, has certain limits fixed for the exercise of its jurisdiction; it is confined merely to that class of prisoners who lie in goal for their deliverance — and who are entitled to be tried by it;... it is true, the Court will take care, that no man shall be detained in goal, without a legal charge; but it does not extend to such as are attached, or who have been tried by former competant jurisdictions.

Now, the Charter takes notice, that although no regular judicature could be created, without the King's authority; yet, that certain courts, and persons exercising the powers of judicature in civil and criminal cases, did in point of fact exist in this Island before the Charter; — it provides that their powers shall cease: but, nevertheless, that all their acts, judgments and proceedings, in civil and criminal cases, should remain in full force; unless varied and avoided by the new Court, upon proper proceedings instituted for the purpose.

The prisoners of the Calendar may be divided into three classes:- the first class of prisoners consists of about eighteen persons, heretofore tried by the Police Magistrate, and sentenced by the Governor and Council, to imprisonment and corporal punishment, for robberies and other offences; for which, perhaps, if they had been tried in this Court, they would have been subject to a higher punishment:... to that class of prisoners your enquiries are not to extend; as no man who has received the slightest punishment, can be again tried by this Court, for the same offence — The second class of prisoners consists of eighteen of the twenty seven persons who are returned upon the Calendar as charged with murders committed some years before the present Charter passed:... Now, although I think, that no principle of British law, or natural justice would be violated by giving the retrospective clause its operation upon the crime of murder, which existed by the law of nature, antecedent to any municipal institutions; and for which crime, a mode of trial is given by the Charter, more favourable to a prisoner than that which prevails in any other country in the world, not governed by the British constitution;... yet it appears to me, that those eighteen prisoners have been heretofore tried for those murders, before another criminal court, which then in fact sat and exercised jurisdiction under certain authorities derived from the then Supreme Government of Bengal:. ..the records of which trials are now before me; by which it appears that all except one or two of those persons who were found guilty, after long and formal trial, and examination of witnesses on both sides, by their judges, of murder;... although no sentences were passed upon them;... but it seems, the verdicts were referred to the former Calcutta Governments, for their direction; and the parties have remained ever since in goal.

I find, also, by the same records, that many other persons were at the same time, and by the same tribunal, tried and acquitted, of

murders, and discharged; now, whatever doubt might heretofore have been entertained, of the competency of those jurisdictions; yet now, as the present Charter recognizes their acts, I think, that under the circumstances, I could not, without a violation of the rules of law and justice, construe that retrospective clause, as authorizing me to try, or you to inquire, of the merits of such cases; when the witnesses on both sides are probably dead, and the parties in custody might plead their former convictions; as well as those acquitted, their former acquittals: — In truth, such a construction would open the door to many mischiefs; and indeed, it does not appear, that there are now any prosecutors or witnesses in those cases, if the Court could re-try prisoners so circumstanced.

The third class of prisoners consists of eight or nine persons, charged with Murders, recently committed, since the passing of the Charter; and some of them within the last few months: — to these cases your jurisdiction certainly extends, and your inquiries should be directed; as well to that class of prisoners, consisting of about twenty men who are charged with felonies and thefts within a few days past, and some of them during the sitting of the last quarter session; — which was an additional outrage upon public justice; — and the calendar of offences for the last month is carried on periodically from day to day; and quantities of cumbrous goods have been carried through the streets, without obstruction or interruption; as if those faithless guardians of the night where accomplices in the plunder of those whom they are paid to protect.

Of all those offences you are to enquire, and true presentment make; — but you are only to inquire, whether the party accused is charged with such probable circumstances as to justify you in sending him to another jury who are appointed by law to hear the evidence on both sides; and to say, whether the person charged be guilty or not of the crime imputed to him; and, if upon such trial, any advantage can be derived from the nicety and caution of the law; or any favourable circumstances appear, it will be as much my inclination, as it will be my duty, to pay due attention to such circumstances; — and, if the law declares them guilty, the offender may still have recourse to that Fountain of Mercy, the Royal Breast, where justice is always tempered with clemency:— such is the inestimable blessing of a Government founded in law, that it extends its benefits to all alike — to the guilty and the innocent: to the latter, the law is a protection and safeguard; to the former; it is not a protection indeed; but it may be considered as a house of refuge; indeed there cannot be a greater proof of the excellence of the British constitution, than by administering its benefits to all men indifferently.

I cannot dismiss you, Gentlemen, without saying something on the state of the goal of this island, which I have visited and examined in person, as I thought it my duty to do; and I am very sorry to say, that considering it, either as a place of detention for the accused, or for the debtor, or as a place of punishment for those who are convicted of crimes, it seems to be very unfit for the purpose; both in situation, and in the arrangements made for the comfort of those confined within

it. — A prison ought to be so constructed, as to prevent the loss of liberty from being aggrevated by any unnecessary severities; nor will the law allow anything like torture or cruelty, towards prisoners confined therein; — they should be treated by their goaler, with all possibility humanity, consistent with their safe keeping.

The High Sheriff has, by his report, which I have in my hand, complained of its insecurity, and being totally unfit for prisoners.... As to its being in a healthy situation, I cannot form any opinion except from the Coroners' inquisitions; by which I see, that numbers have died in it — Those considerations have made me think it my bounden duty, to attract your notice to this subject; and to request, that you will go and examine the prison, and state your opinion thereon before the session closes.

Thus the Recorder closed his first charge to the Grand Jury in Penang.

The following session of Oyer and Tenminer and General Coal Delivery dealt with many cases which are unreported save for a list of the result of the prosecution and the sentence. The first hanging appears to have occurred on 27 September 1808.

The next civil case to arrive appears to have been Carrapit v. Douglas, the Recorder's judgment, delivered on 11 November 1808, being reported as follows:

Carrapit v. *Douglas*

This was an action on the case, bought by the Plaintiff against the Defendant, master of the ship Europa, to recover the sum of 379 dollars, being the value of a certain bale of piece goods which the Defendant had undertaken to carry for freight from Calcutta to Prince of Wales Island, and which, with several other bales of goods, were shipped on board the Defendant's ship, and consigned to the Plaintiff; — but which, by the negligence of the Defendant or his officers, had never been delivered, and was wholly lost to the Plaintiff.

It appeared, by the bills of lading, that a large cargo of different bales of goods had been shipped at Calcutta, on board the Defendant's ship, in the month of March last — certain parcels of which had been consigned to the Plaintiff, and certain other parcels to Mr. Johannes Narcis, of this island; — that Defendant was to have been paid freight at the rate of 9 dollars per bale, on delivery of the cargo here. It appeared that some of the bales, which had been consigned to the Plaintiff, were marked with the same mark with those consigned to Mr. Johannes Narcis, — and that, on the arrival of the ship at this island, in the month of May last, several bales of goods consigned to Mr. Johannes Narcis, were delivered by the Chief Officer to a servant of Mr. Johannes Narcis, who brought a boat alongside the ship, to receive them; and, on receipt, delivered up to Defendant the bill of lading of the bales consigned to him; and that all the Plaintiff's parcels, save the one in question, were delivered to the Plaintiff; — who, however, retained his bill of lading, until the bale of goods which was missing should be delivered to him; — but, after strict search, it could not be

found, and was supposed to have been delivered by mistake into Mr. Johannes Narcis's boat, or to some other person; so that in effect it was lost to the Plaintiff.

Sir E. Stanley was clearly of opinion, that the Plaintiff had a right to recover. — By law, a carrier who undertakes to carry goods for hire, either by land or by sea, is bound to make good all losses of goods entrusted to him to carry, except such losses as arise by the act of God — (which includes lightning, storms, or tempests) or of the King's enemies, or capture at sea. — A Bailee of that description becomes a sort of insurer, in consideration of the premium or reward he receives; — and, though a gratuitous depository of goods is only answerable in case of gross neglect,. .. yet a carrier in most cases is liable, without any degree of neglect;. .. upon principles of public policy, he is answerable, if he is even robbed of the goods;... and this to prevent collusion,. .. and for any other loss which does not happen by the act of God; that is, without human agency or [by] the King's enemies;... and until the statute [*viz*.] Geo. III. c. 86, the owners of ships were liable even for a loss occasioned by fire;...here, indeed, there was clear neglect in the officer of the ship, whose duty it was to deliver the different bales to the consignees, pursuant to the bills of lading;... and if he, even by mistake delivered the Plaintiff's bale to a wrong person, in consequence of which it was lost, it was negligence on the part of the officer;. .. for which the Defendant is clearly answerable in this action.... Verdict for the Plaintiff, for 311 Spanish dollars, with costs.

Subsequently a number of mortgage cases appear to have come before the Recorder, the only evidence for which, however, is the publication of Sheriff's Sale notices in the Gazette. The notice of sale in Tate v. Tandarien being dated 21 October 1808; that in Cordell v. Armohun being dated 27 October 1808; that in Persuad Sing v. Parbuttee being dated 27 October 1808 and that in Phillips & McQuoid v. Chuan Khan being dated 1 November 1808.

On 11 November 1808 the Recorder delivered the following long judgment in the case of Chiene v. Douglas:

Chiene v. Douglas

The question for the opinion of the Court was, whether, under the circumstances of this case, the following words, underwritten upon a bill of exchange, viz. "6th of May 1808, *non accepted,* J. Douglas" — amounted in point of law to an acceptance of it, so as to charge the defendant in this action.

The Honourable Sir Edmond Stanley, the Recorder, on this day delivered his opinion to the following effect.

This was an action brought by the Plaintiff, as Indorsee of a foreign bill of exchange, for the sum of one thousand Star Pagodas, against the Defendant, as Acceptor. — The bill was drawn by O.W. Fermie, upon the Defendant, a resident of this Island, and dated Negapatam, 16th September, 1807, in favour of John Hunt Esq. or order, payable at thirty days sight, and appears to have been endorsed by the Payee

to Messrs. Dalrymple and Greig, and by them to Alexander Woodcock, and by him to the Plaintiff — The Plaintiff proved, that the name J. Douglas, subscribed at the foot of the bill, *and the date,* were *of the Defendant's hand writing;* and the hand writing of the Payee, the first indorser, was admitted; — but upon production of the Bill itself, the words *non-accepted* appeared on the face of the bill written over the name, in a different hand writing: upon the first view of the bill, Sir E. Stanley said, he confessed he was inclined in favour of the Plaintiff:- It struck him, on seeing it, that this bill had originally been actually accepted by the Defendant, in the usual way, by writing the date and his name; and that the words *non accepted* had been written afterwards, at a different time, and by a different hand, without the privity of the Plaintiff, with a view to revoke, cancel, or retract that acceptance; or for the purpose of deceiving the Plaintiff, and endeavouring to give it a different import from that which it originally conveyed; and, if the fact had been so, he should have thought that an acceptance once made and delivered to the bearer, could not be revoked, or cancelled, after, by any act of the Defendant's, or by any other acting by his orders; and that nothing could discharge the Defendant from his liability, but payment or some act of waiver or exoneration by the holder:—this ambiguous and doubtful state in which the bill appeared made it necessary to go into extrinsic evidence of explanation; to see, how, under what circumstances, at what time, and for what reasons this writing had been so made; accordingly three or four witnesses were examined on the part of the Plaintiff, from whose testimony the following facts and special circumstances appeared in evidence.

That in the month of April last, the Plaintiff, who resides in this island, for the first time presented this bill for acceptance here, to Edward Essex Capes, the agent or clerk of the Defendant, who transacted his business during his absence at Calcutta; and that he absolutely refused to accept it, — on the ground of the Defendant's not having any effects of the Drawer's: — that the Defendant having soon after returned to this island, the Plaintiff's clerk, Philip Jeremy, brought this bill again to the house of the Defendant, for acceptance, and presented it to him, in the presence of Edward William Horne, the Defendant's clerk :- that the Defendant refused to accept it, and did not keep it for consideration, but returned it without delay to the Plaintiff's clerk, dishonoured; and intimated to him, that if he wished it, he would even write his refusal upon it; — however, nothing was the written upon it; but Plaintiff's clerk took it away, considering that the Defendant had refused to accept it; — which he communicated to the Plaintiff, and returned the bill to him, — observing to him, at the same time, that the Defendant had said he would write his refusal to accept upon it, if it was desired; upon which the Plaintiff immediately sent his clerk back to the Defendant, with a request from him, that *if he did not intend to accept the bill, he would mention it upon the bill, or write upon it what he wished or liked:* — that the clerk immediately returned a second time to the Defendant's house, with the bill, and delivered this message to the Defendant; in consequence of which, Edward William Horne, the Defendant's clerk, by the Defendant's direction, wrote the words *non accepted* upon the bill, in presence of Plaintiff's clerk; — and that Philip Jeremy, the Plaintiff's clerk conceiving that the Plaintiff

would not be satisfied with this certificate of non acceptance written by Defendant's clerk, unless Defendant signed his own name under it, the Defendant consented to do so, and wrote J. Douglas, with his own hand under the words *non accepted.* Philip Jeremy then said, "that [is] all Mr. Chiene wanted", — and he took away the bill; understanding that by this writing it was completely dishonoured; as Defendant himself did; but upon shewing them bill, with this writing upon it to the Plaintiff, upon his return, he sent him back a third time to the Defendant, with a request from him, that he would write the date on the bill; which the Defendant accordingly did with his own hand; — Plaintiff's clerk still understanding that [the] bill was dishonoured; that the Defendant when he desired his clerk to write non acceptance seemed disinclined to write anything [himself] upon the bill, but signed his name and the date under the words *non accepted* with his own hand at the instance of the Plaintiff's clerk. It appeared, that the Defendant had no effects of the Drawer's in his hands, either at the time the bill was drawn, or when it was presented for acceptance, or since; that there had been some dealings between the Drawer and the Defendant relative to a ship which the Defendant repaired for him in August 1807 [for] which the Drawer had been indebted to him [for] 1600 dollars, and for which he gave the Defendant a bill on Calcutta; and that, in a letter of advice the Drawer promised to send some goods to the Defendant, which he never sent; and that no provision for this bill ever came to the Defendant's hands. It appeared the bill was protested for non payment on the 17th September last. The question made for the opinion of the Court is, whether the Plaintiff has a right to recover the amount of this bill of exchange from the Defendant.

Sir E. Stanley said, he thought that two facts might fairly be deduced from this evidence: — 1st, that the Defendant did not mean or intend, by this writing, to accept this bill, or to induce the Plaintiff to think that he had accepted it; and 2d, that the Plaintiff knew, and was perfectly approved of, the Defendant's intention to dishonour the bill in the most explicit and authentic manner. — But still, it is insisted by the Plaintiff, that there is a stubborn and inflexible rule of law and custom of merchants, that if the Drawee underwrites any thing upon a bill of exchange, be it what it may, (or defaces or obliterates it) that this shall amount to an acceptance, and bind him to pay the bill to the holder; — nay, that this rule is so strong and cogent, that even a refusal to accept, which would be a sufficient dishonour of the bill if expressed by words, shall yet, if declared by writing upon the bill, under any circumstances, bind the Drawee so writing as acceptor of it; now, as certainty is so desirable in all commercial transactions, and particularly with respect to bills of exchange, the free negotiation of which are of so much consequence to the commercial world; if such a rule does exist, by the law of England, of which the law and custom of merchants forms a part, — the rule ought not to be relaxed in favour of the Defendant; although, in his particular case, it may seem to impose a hardship upon him, to be compelled to pay a bill for which he has received no value from the Drawer: — to be sure, if he has once accepted the bill, that would be no defence for him as against the Plaintiff; but he insists he never did; he said, that this case appeared to him to have more a case of novelty than difficulty in it; and, like

all other points of law, must be determined upon principle and on authorities; wherefore, in order to elucidate this question, it will be proper to consider; 1st, what a bill of exchange is, and the nature and use of that commercial security; — 2dly, what an acceptance of such bill is, and the nature and ground of the liability and obligation which it imposes upon the acceptor as between him and the other parties to the bill; — 3rdly, the authorities and adjudged cases in the law of England, and the law of merchants, as applicable to this case; and 1st, a bill of exchange is a security originally invented among merchants in different countries, for the more easy remittance of money, from the one to the other; it is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person, on his account; and may be considered as an assignment to the Payee, of a debt due from the Drawee to the Drawer, or of certain funds supposed to be in his hands; by which means a man at the most distant part of the world may have money remitted to him from any trading country. There are generally three parties, the Drawer, the Payee or Negotiator, and the Drawee; — and as bills of exchange are the great medium by which commerce is carried on, they are to be expounded in such a manner as, if possible, to give effect to the intention of the parties; and our Courts, sensible how peculiarly conducive the negotiability of these securities are to the ease and increase of trade, adopt a still more liberal mode of construing them than other instruments; — the Drawer, the moment he draws and delivers the bill enters into a contract (which the law implies) with the Payee and the several indorsees of the bill, that if it is not duly accepted, and paid, according to its tenor, that he will be responsible to them for the amount, if due notice is given to him; the law raises a similar contract between each Indorsor and his respective Indorsee; and the bill travels through the commercial world with all those credits and advantages, until at last it finds its way in the course of negotiation, and is presented to the Drawee for acceptance, and a reasonable time is allowed to him to determine whether he will accept it or not; — for, like all other contracts unto which a man is called upon to enter, he has *an option,* either to enter into it or refuse it, and this may be done either by parol or word of mouth, or by *writing;* for it has been solemnly resolved, that a *parol* acceptance of either a foreign or inland bill of exchange is as good to bind the Acceptor, as a written one: formerly all acceptance were by parol; but, as men often denied their acceptances, merchants adopted written acceptances, as more easy and capable of proof; and, as a parol refusal to accept is good to dishonour a bill, I do not see why a written refusal should not have the same effect. What shall or shall not amount to an acceptance, is a question of law, and not of opinion. — There may indeed be some questions depending upon customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet, that is only when the law remains doubtful; — and even then, the custom must be proved by facts, and not by opinion only, and it must also be subject to the control of law; — and so was the case of *Edie against the East India Company,* 2d Burrows' Reports p. 1222, where Lord Mansfield *blamed* himself for having admitted evidence of the particular usage of merchants in a case relative to the indorsement of a note, where the law was already settled, and set

aside the verdict on that ground; — now, it is material to consider, what an acceptance is, and the obligation which it imposes on the Acceptor.- Mr. Justice Blackstone, 2d vol. p. 468, says, if the Drawee accepts the bill, either verbally or in writing, he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgement that the Drawee has effects in his hands, or at least credit sufficient to warrant the payment of it: — but, if the Drawee refuses to accept, the Payee may protest it for non-acceptance.... An acceptance is defined by Mr. Chitty, in his Treatise upon Bills of Exchange, p. 71, to be an act by which the Drawee evinces his consent and intention to comply with, and to be bound by, the request contained in the bill;... and the Holder is entitled to insist on such an acceptance by the Drawee, as will subject him at all events to the payment of the bill, according to the tenor of it, or he may treat the bill as dishonoured.... Mr. Bayley, in his Treatise on Bills of Exchange, p. 42, calls acceptance, an engagement to pay a bill according to the tenor of the acceptance, and a general acceptance, an engagement to pay it according to the tenor of the bill; and such acceptance may be either *verbally* or *in writing,— absolute* or *conditional* or *partial.* — My Lord Chief Baron Gilbert, in his Law of Evidence, p. 101, defines acceptance to be a *giving credit* to the bill so far as to make himself liable, and to trust for repayment to his correspondent; — and Bacon, in the 3d vol. of his Abridgment of the Law, title Merchant and Merchandize, p. 611 says, that acceptance is the party's *assent* or agreement to pay the bill; and that, if he once accepts it he cannot afterwards revoke it.

Mr. Molloy, in his Treatise of Maritime Affairs and Commerce, a book of great authority on those subjects, 2d vol. p. 100 and 101, calls acceptance an acknowledgment of the bill; and adds, that a small matter will amount to an acceptance, *so if there be a right understanding between both the parties; — as leave your bill with me and I will accept it;* or, call for it tomorrow, and it shall be accepted; this would bind by the custom of merchants, and according to law as fully as if the party had signed it; and he says, any underwriting on the bill, such as *accepted, presented, seen,* would be a sufficient acknowledgement of the bill to constitute an acceptance but, if there be anything ambiguous in the expression, *as leave your bill with me and I shall look over the accounts between the Drawer and me,* and then will accept, this is not an acceptance. It appears by all the authorities, that there may be either *an absolute, an implied or virtual acceptance,* or *a conditional or partial one:* the Holder, indeed, may in all cases *insist* on an absolute acceptance, or in default thereof, may treat the bill as dishonoured: if, however, he is satisfied with a conditional or partial acceptance, varying from the tenor of the bill, it will bind the acceptor according to the tenor of his obligation, but no further: and if notice is given to the other parties to the bill, they will not be discharged.

An absolute acceptance is an engagement to pay the bill according to its tenor, which is usually done by writing the word Accepted, and the Drawee's name, and, when it is after sight; as, however, in general no formal act is required to constitute a simple contract, and any mode which demonstrates an *intention* to become bound by, it will have an obligatory force on the contracting party, any act of the Drawee which

evinces a *consent* to comply with the request of the Drawer, will constitute an acceptance; thus the word, *seen, presented, the day of the* month, written on the bill, are prima facie evidence of an acceptance; so a direction written on the bill by the Drawee to a third person to pay it, was held, in *Moor against Withy,* Buller p. 270, to be a sufficient acceptance, or an agent to give credit to the bill written thereon, or in a letter before or after the bill is drawn, were held to bind the party as Acceptor in *Pillans against Van Mierop,* p. 3; Burrows, p. 1663, and *Powell against Monier,* 1st Atkins, p. 611.

An acceptance also may be *implied* or *virtual,* as well as *express;* thus it may be *inferred* from the *Drawee's keeping the bill a great length of time,* or by any other act *which gives credit to* the bill and *induces the holder not to protest it;* or from any act intended *as* [a *surpise]* upon him; or to induce him to consider the bill as accepted; so when a merchant, *by letter* wrote to the drawer, "your bill shall be duly honoured and placed to your debit";- this was held a sufficient acceptance by Lord Hardwick, in 1st Atkins, p. 612; — so in *Wilkinson against Lutwitch,* 1st Strange, p. 648, when the Drawer in a letter wrote, — "I will pay the bill, if the owners of the Queen Ann do not: — I will write to them, but rest satisfied of the payment;" this was held an *absolute* acceptance at all events to pay the bill; but an acceptance may be *conditional,* as to pay when a ship and cargo consigned "to the Drawee shall arrive," or when provision is in cash, or it may be partial; as to pay a part only of the money drawn for, or to pay half in money and half in bills; or to pay at a more distant day; and such underwritings would not bind the Drawee *beyond the tenor of the writing;* and yet there would be stronger cases to bind a Drawee, as absolute acceptor, by such underwritings, than by a written denial of the bill altogether. .. .In the case of *Sprout against Mathews,* 1st Durnford and East's Reports, p. 182, when the bill was presented, the Drawee undertook to pay the bill, if the ship and cargo consigned to him should arrive in London, or even if it was lost; and an action having been brought against him as Acceptor, Justice Buller said, whatever may have been doubted formerly, as to what amounted to an acceptance, I conceive it is the sole province of the Court to decide, whether this is a conditional or an absolute acceptance, and it is material how the parties understood it at the time: — It is evident, said he, from what passed, that Defendant *did not intend to accept* unless he has wherewithal in his hands to reimburse himself, which he would have had in this case, if the ship had arrived, by the sale of the cargo; or, if she was lost, by the policy of insurance; and the Court held, this only amounted to a conditional acceptance, which the Plaintiff waived by protesting the bill for non-acceptance; so a partial acceptance to pay only a part of the sum drawn for, was held good to bind the acceptor so far and no farther, in *Wegerstoffe against Keene,* 1st Strange, p. 214;— and in *Powell against Jones,* Espinasse, Cases at Nisi Prius, p. 17, the Plaintiff's clerk left the bill for acceptance and called for it the next day, when the Defendant returned it saying, "there is your bill, it is all right" — Lord Kenyon ruled, that those words could by no implication amount to an acceptance, as they conveyed no evidence of Defendant's *intention to bind himself to the payment of the bill* at all events, which was necessary to charge him as an acceptor: those cases

shew, that the *intention of* the Drawee is a strong ingedient in all those questions; and also, that a Drawee may accept a bill conditionally or partially, and shall not be bound beyond the tenor of the Acceptance, or the extent of the engagement which he has made; although no doubt the Holder may refuse to receive such acceptance and treat the bill as dishonoured; there are but two cases to be found in any printed book which at all countenance the idea that a party shall be bound by a written refusal to pay or accept a note or bill, to pay it; The first is a case cited by my Lord Hardwick, in the case of *Simpson against Vaughan,* 2nd Atkins's Reports, p. 33; and the other is a note mentioned in Annally's Reports, p. 75; both of which cases he said he would now examine; and it will be found, that the first turned upon the particular circumstances of fraud which appeared in that transaction, and the other case seems to be rather an opinion or position of the author himself, than founded upon any case that was then in judgment; and in the latitude in which it is there laid down, is certainly not law, and has been condemned by subsequent authorities, as the learned Recorder said he would then shew, he said that imperfect reports of facts and circumstances, especially in cases where every circumstance weigheth something in the scale of justice, are the bane of all science that dependeth upon the precedents and examples of former times: here the Recorder read a manuscript note of a case which he had taken in the Court of King's Bench in England, in Michaelmas term 1780, when he was a very young and inexperieced student at the Temple: the name of the case was *Russell against Langstoff,* a subsequent branch of which case has been since reported in Douglas's Reports, p. 496; a person who had considerably overdrawn his cash account with the Plaintiff, who was his banker, and who refused to advance him any more money without the name of a solvent indorser, applied to the Defendant, who at his request indorsed his name on five copper plate checks in the form of promissory notes, but *in blank* without any sum, date or time of payment being mentioned; the Defendant's friend afterwards filled up the blanks as he chose, and the Plaintiff discounted the notes;... the maker of the note having become a bankrupt, an action was brought against the Defendant, who insisted that those notes being blank at the time of the indorsement, he Defendant's signature when it was written was a mere nullity, and that the maker of the notes could not alter the original operation of the Defendant's signature; and so was the opinion of the judge who tried the case; but, upon a motion for a new trial, the whole Court of King's Bench were of a different opinion, that the Defendant was bound as indorsor, and the verdict which had been found for him was set aside; and the following words were expressed by Lord Mansfield, as he took them down at the time; viz. "The Indorser in this case shan't be permitted to say he is a Rogue, and meant to cheat everybody that took the notes;" and his Lordship added, in a case at Carlisle, where the note ran "*I promise not to pay"* Lord Macclesfield held it to be a good promise to pay, but upon referring to the printed account of that case, which is to be found in 2d Atkins's Reports, p. 33 it is thus cited by my Lord Hardwick, in the case of *Simpson against Vaughan,* on the 1st February, 1739. .. .I have, said his Lordship, upon other occasions, mentioned the case on the northern Circuit before Lord Macclesfield, where a note

of hand had been passed to a girl, which in the beginning of it was mentioned to be for £50, borrowed and received from her, but at the latter end were these words, "which I promise never to pay" — and the man having been so ungenerous afterwards as to refuse payment, she was obliged to sue him upon this note. Lord Maccesfield held, that the Plaintiff was entitled to recover in an action of assumpsit, upon the lending on the one side, and the borrowing on the other; notwithstanding the words in the conclusion of the note, which was a plain fraud; and Lord Hardwick approves of the decision on that ground. The other case, or rather dictum, which has given rise to this notion, is to be found in Annally's Reports p. 75, and is stated by the author in a note in that book as follows: "Underwriting or indorsing a bill thus, I will not accept this bill, is held by the custom of merchants a good acceptance;" no case is stated upon which that question arose, nor any of the circumstances, but it seemed rather the private opinion or inference of the Reporter, than the decision of the Court, upon any case brought before it; this book is most frequently cited under the name of Cases in the time of Lord Hardwick, when he was Chief Justice of the King's Bench, in the 7th, 8th, 9th, and 10th year of George II, from the year 1732 to 1736: they were notes taken by the late Lord Annally (when Mr. Gore, a young student at the Temple) who was afterwards Lord Chief Justice of the Court of King's Bench in Ireland, and to whose memory, he would wish to pay every mark of honour and regard; and most likely it was an opinion taken up from report; for we find my Lord Hardwick, who must have decided this case, if it occurred in the King's Bench, afterwards, when he was Chancellor, holding a very different doctrine, when sitting in the Court of Chancery, on the 18th of May, 1737, a year or two after the case in Annally must have happened) in the case of *Powell against Monnier,* 1st Atkyn's Reports, p. 611, in which he condemns the notion that anything written on a bill was an acceptance; there one question was, whether the Drawee of a bill, having received it, and entered it in his [book] and written on the bill No. 84, the number of the book in which it was entered, and the day of the month and year, was a sufficient acceptance to charge him, he having afterwards returned the bill and refused to accept it; it was proved, that it was the custom of the Drawee to enter all bills he received, whether good or bad, and that his writing the page of the book in which it was entered, No. 84, on the bill, did not denote that it was entered to be paid by him; and that writing the date denoted the day the bill was returned.

Lord Hardwick held, that this writing upon the bill so explained by extrinsic evidence, did not amount to an acceptance, and added these words; — "now it has been said to be the custom of merchants, that if a man underwrites anything upon a bill, let it be what it will, that it amounts to an acceptance; but if there was no more than this in the case, I think it of little avail to charge the Defendant, because that matter has been fully explained;" — and the case was finally decided upon another ground; so that it was not at all likely that my Lord Hardwick should have decided, a year or two before, when sitting in the Court of King's Bench, that a refusal to accept, written on the bill, was a sufficient acceptance to charge the Drawee, according to the note in Annally's Reports, p. 75; but it appears, that this very question

came under the consideration of all the Judges of England some years ago, and their opinion upon it is stated by Lord Mansfield, in the case of *Peach against Kay,* tried at the sittings after Trinity Term, 1781, and cited by Mr. Bayley, p. [...] of his Treatise on Bills of Exchange; in this case, Lord Mansfield mentioned that it [was] held by all the Judges, "that an express refusal to accept written on the bill, when the Drawee approved the party who took it away, what he had written, was no acceptance; but if the Drawee had intended it as a surprise upon the party, and to make him consider it as an acceptance, they seemed to think it might have been otherwise:"- Mr. Bayley, in p. 47, lays down this general proposition: "that any words written by the Drawee upon the bill, *not putting a direct negative upon* its request, is prima facie a complete acceptance;" "nay" says he a modern reporter of some authority (Annally p. 75) would wish us to believe that an express refusal to accept written on a bill is an acceptance; but this is not the case (says he) unless it is accompanied with a conduct which shews an intent to deceive the person taking the bill away, into a belief that it is accepted:" — but it may be said that this is the solitary opinion of Mr. Bayley only; however, all the modern, legal and commercial authorities concur with and confirm his doctrine. Chitty, in his Treatise on Bills, published in 1779, p. 78, says, that in order to constitute an acceptance, there must be some circumstance, from whence it may be inferred, that the Drawee imagined he had induced the holder to consider the bill as accepted; and, therefore, an express refusal to accept, written on the bill, or an answer given to the holder, "there is your bill it is all right" cannot be construed into an acceptance, unless intended as a surprise upon the party, and to make him consider it as accepted; and in all cases, when the undertaking is doubtful, the Drawee will be at liberty to go into evidence of extrinsic circumstances, to explain and do away the presumption.

Hyde, on Bills, published in 1795, lays down the same position; — both Lord Chief Baron Gilbert, p. 101, and Buller, p. 270, state, that the Drawee must give credit to the bill, or do some act which prevents the Holder from taking the necessary steps against the Drawer.— Molloy, 2d vol. p. 86, 87, 101, and Mr. Espinasse, in his Modern Treatise on the Law of Nisi Prius, says, that any words written on a Bill (not expressing a refusal to accept) will, if unexplained by other circumstances, be deemed an acceptance: — and Montisriore, in his Principles of Law, relative to bills of exchange, insurance and shipping, published in London in 1802, expressly lays down the same rule, as well established in the commercial world, and in that great capital, which may truly be called the mistress of commerce, and where the law and custom of merchants is better understood than in any other part of the globe: here then, are a regular series of authorities concurring with Mr. Bayley, and adopting the opinion of all the Judges, as cited by Lord Mansfield, in *Peach against Kay,* in Trinity Term 1781;...and it seemed to him, that those authorities, concurring with reason and principle, were sufficient to outweigh this loose note in Annally's Reports, p. 75, which has given countenance to a contrary doctrine;.. .no injury to any fair Holder can ever arise by not admitting those new devices as acceptances;.. .there is an open, straight course to follow,... by protesting the bill for non-acceptance, and having recourse

to the Drawer and Indorsors;. ..such a writing upon it does no injury to the security;. .. a Drawee is very imprudent indeed ever to write on a bill, if he does not mean to accept it;... as it appears that anything written upon it may require explanation, to rebut the implied assent which the writing at all may raise against him in favor of the Holder.... He said, it had been well observed by a sensible writer in Moral Philosophy, Paley, p. 126, "that every contract should be construed and enforced according to the sense in which the person making it apprehended the person in whose favor it was made, understood it, which mode of construction will exclude evasion; and all attempts in the contracting party to make his escape through some ambiguity in the expressions used;". .. which doctrine the Recorder conceived was applicable to the mode of construing negotiable securities;... thus in the case before Lord Macclesfield, where a man for a past consideration gave a person a note,.. .which was expressed to be for £50 borrowed and received,... which in the latter end he promised *never to pay;* it was rightly decided, that the Payee might recover on it, because the person making the note had intentionally excited explications which he ought to satisfy;... so, if a bill be drawn payable to a fictitious person, it shall be construed against the Acceptor, and all others privy to the transaction... *as a bill payable to bearer*... on the principle, as they gave currency to the instrument which they knew could never be paid to the order of the fictitious Payee, the law will presume that they intended the formality of indorsement should be waived, *Gibson against Minet,* 1st Henry Blackstone's Reports, p. 569.... Bills, like all other instruments, are to be expounded, so far as possible to give effect to the intention of the contracting parties;... it appears, that any act which evinces an intention in the Drawee not to be bound, unless upon a certain event, will be sufficient to give the acceptance the operation of a conditional one, and that the Drawee shall not be liable, until the contingency takes place;... why, then, should not an act which evinces a clear intention in him not to be bound at all, or in any event, have the operation he intended it should have? — In *Master against Miller,* p. 4, Durnford and East's Reports, p. 343, the "law of merchants is defined by Mr. Justice Buller to be a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith;.. .and Blackstone, 2d vol. p. 460, says, that bills of exchange and policies of insurance are commercial contracts founded on equitable principles; the very essence of which consist in observing the purest good faith;... and that they are vacated by any the least shadow of undue practice or concealment;"... and on the other hand being very much for the benefit and extension of trade, they are greatly encouraged and protected by our Courts: ... upon these principles and authorities, he was clearly of opinion, upon the general question, that an open refusal to accept a bill written upon the bill by the Drawee, or his order, could not be considered as a virtual acceptance, so as to bind the Drawee to the payment of it,... unless some deceit was used by him, or some surprize practised, to induce the Holder to consider it as an acceptance;... and to neglect protesting the bill, so as to secure the liability of the other parties to it.

But it is said that by the law of merchants, if a bill is defaced, obliterated or altered, that it amounts to an acceptance of it; now as

to that, he said, if a Drawee defaces, or obliterates, a bill, so as to injure the security and deprive the holder of his legal remedy upon it, against the other parties, no doubt an action of trover, or on the case, will lie against such Drawee, to recover the value of the bill, in the same way as if he had spoliated or destroyed any other species of property; but such act is no acceptance; if the bill is lost by the Drawee, the holder is to request a note for the amount; and if he refuses it, there must be two protests, one for non-acceptance, and the other for non-payment, and the holder may recover in an action for the loss against him, but not as acceptor; if the bill is altered in a material part, it may amount to a description of the instrument altogether, as in *Master against Miller,* p. 4; Durnford and East, p. 320; where the alteration of a figure of the date of a bill, so as to accelerate the time of payment, was held to void and destroy the security; and no action could be brought upon it, even by an innocent Holder, for valuable consideration; in such a case, an action or a prosecution for forgery, or fraud, might be maintained against the person doing such an act, but it would be *no acceptance;* but here there has been no deceit: the bill has not been defaced, or obliterated; the holder has not been deprived of his remedy against the other parties. It is still a perfect security upon which an action may lie, if proper steps have been taken to hold the other parties responsible; the writing, the refusal to accept upon it no more destroys the bill, than the notary public's making his usual note upon it for non acceptance or non payment, which he generally does before the actual protest is made out; and there does not seem to be any sound principle of law or reason to support the notion, that such a writing is either an acceptance or destruction of the bill.

The Recorder also expressed his opinion strongly, that independent of the general question, the special circumstances of this case were sufficient to warrant him in pronouncing a verdict and judgment for the Defendant. He relied principally on the Defendant's having openly refused and dishonoured the bill verbally, when it was first presented to him by the Plaintiff's clerk on the 6th of May last, and returned it to him without delay; he had thereby done all that was incumbent on him by law to do, to dishonour the bill; and all the subsequent transactions, and the writing upon the bill, were sought for and solicited by the Plaintiff himself; when the bill was returned to him dishonoured, he had nothing further to do with the Defendant, but to pursue that course which is the custom of merchants in all similar transactions, to protest the bill for non-acceptance, and resort to the other parties. He sent a message to the Defendant, to request he would write upon the bill, he having been previously apprized by his clerk, of Defendant's having refused and dishonoured the bill, and of his willingness to dishonour it by any further and more solemn act; and Defendant, in consequence of Plaintiff's messages, does write and cause to be written, the words which now appear on the bill; this will bear but two constructions; 1st, either that the Plaintiff agreed to take this writing as a solemn protest under Defendant's hand, of his having dishonoured the bill, and as more authentic evidence of that fact against the other parties to the bill; or, 2dly, the Plaintiff wished to obtain this writing from the Defendant, who was ignorant of the fact, and

the legal consequences of it, under an idea that he might charge him with it as an acceptance: he would rather presume, that the first object was the real fact; but, whichever of the two was the intention of the Plaintiff, in neither point of view could Defendant be bound by it as acceptor.

If the Plaintiff agreed to take the writing as it was intended by the Defendant, viz. as a non-acceptance, it could not bind him; or if the Defendant under a misapprehension of the real fact intended by the Plaintiff, and the legal consequences of it, underwrote upon it, that alone would be sufficient to discharge the Defendant from his liability.- If a person ignorant of the fact and of the law, does an act, it shall not bind him; as where a person receives rent, ignorant of a condition broken which would avoid the lease, or ignorant that the lease is void, such receipt of rent shall not operate to confirm it; or, if a party to a bill of exchange, who is discharged from his responsibility by the laches and neglect of the holder, in ignorance of the fact and of the law, promises to pay it, or does actually pay it, it shall not bind him; and he cited the case of *Chatfield against Paxton and Co.,* Sittings after Trinity Term 38 Geo. III, Chitty p. 102. The Plaintiff gives a bill to the Defendant on Luard and Co. the Defendant gave time to the Acceptors, and they afterwards become insolvent, and the bill was not paid; Plaintiff, at their request, accepted another bill for the amount, which he afterwards paid; and this action was brought to recover back the money paid. Lord Kenyon said, his opinion was against the Defendants: it is not only necessary that the Plaintiff should know all the facts, but that he should know the legal consequences of them.

It seemed to him that Plaintiff did not know the legal consequences,- and that he paid the money under an idea that he might be compelled to pay it;... when the Defendant granted the indulgence to Luard and Co. they did it at their own risk... .When a man knowing all the facts explicitly, and being *under no misapprehension* with regard to any of them, nor of the law, acting upon them, choses to pay a sum of money *volenti non fit injuria,* he shall not recover it back again;... but, the Plaintiff's letters proved directly the contrary, and there was a verdict for the Plaintiff for £2000 and interest from the time of payment... .So here, if the Defendant underwrote on the bill under a misapprehension of the fact,... that the Defendant did not intend to receive this writing as a dishonor of the bill, but intended to conceive it as an acceptance contrary to the Defendant's declared and known intention, or under a misapprehension that in point of law it might have the effect of an acceptance; upon that ground alone it would not bind him;...the Plaintiff was under no misapprehension; he perfectly well knew that Defendant, from the beginning, dishonoured the bill, and meant by his writing to furnish the most authentic evidence of that dishonor:... on the contrary, Defendant was manifestly ignorant that the Plaintiff's messages to him, to write upon the bill, were sent with a view of obtaining thereby at acceptance of it: Defendant did not, by any word or act of his, give the smallest credit to the bill, and seems to have acted openly and candidly (though simply) throughout the whole transaction;. ..then, as to the equity of the case, it is more consonant to justice to leave the Plaintiff to have recourse to the three

prior Indosors and the Drawer, who are all liable, if proper steps have been taken to hold them to their responsibility, than to compel the Defendant to perform a contract which he never entered into, or meant to engage in, and to leave him to seek his remedy against the Drawer, who may be a bankrupt,... or perhaps, for all he knew, dead and insolvent:. .. this determination could not have the effect of clogging the circulation of bills of exchange, — or injuring commerce; — in his opinion, the determination that this sort of practice should have the effect of an acceptance, would do both;... it would not be agreebale to equity — and, with such a stamp of discredit as this upon a bill [no one] would take it in the fair course of trade, as a negotiable security;- it would therefore throw a cloud upon their negotiability; and considering such a writing an acceptance would throw a great impediment in the way of Indorsees, in having recourse for their indemnity against their respective Indorsors and the Drawer; — he was therefore most decidedly and clearly of opinion, both upon the general question, and upon the special circumstances of this case; that the Plaintiff had no right to recover against the Defendant as Acceptor; — and, as this was a new question, upon which it was possible that some doubt might be entertained, he recommended the party, if he was at all dissatisfied with his opinion, to take his remedy, under the charter, of appealing to the King in Council

This was followed on 14 November 1808 by judgment in the case of Fenwick v. Caunter the report of which reads as follows:

Fenwick v. *Caunter*

This was an action brought by the Plaintiff, for money had and received by the Defendant to his use, in order to recover back the sum of 394 dollars, which the Plaintiff alledged he had been unjustly compelled to pay by the Defendant, or in consequence of an order made by him when he was Acting Superintendant of the island, in the year 1797, in a cause wherein British subjects were parties, over whom the Superintendants had no jurisdiction. Defendant pleaded the general issue, *non assumpsit,* and the statute of limitation, and also that the act complained of was done by him in the exercise of certain judicial authorities, conferred by the regulations of the Governor General in Council of Bengal, bearing date the 1st August, 1794.

It appeared in evidence, that one Charles Cowley, deceased, was in the year 1797, seized in fee of certain premises in Beach Street, under a conveyance from one Thomas Layton, who obtained a grant of several parcels of land from the then Lieut. Governor of the island, under the authority of the Company; and that Cowley, on the 22nd August 1797, mortgaged the premises for the sum of 300 dollars to Messrs. Young and Brown; that the mortgage was registered immediately after, but that the original title deed was not delivered over to the Mortgagee, but remained in the possession of Cowley the mortgagor; and that he having become indebted to the Company in a sum of 394 Spanish dollars, for wheat and other articles purchased by him, and being called upon for payment, deposited the original title deed of the mortgaged premises in the Defendant's possession, as a security for the debt: that Plaintiff, Fenwick, on the 10th Nov. 1797, took an assignment of the mortgage executed by Cowley, to Young and Brown, for 300 dollars, which he

paid to them; and that the Mortgagor having soon afterwards quitted the island, without paying the debt due to the Company, the Defendant, who was then the acting Superintendant, threatened to proceed against Cowley, and to levy the debt out of the premises in Beach Street; in consequence of which, the Plaintiff, who was assignee of the mortgage, on the 20th Nov. 1797, paid to the Defendant the sum of 394 dollars, and took Defendant's receipt for it, as for so much received by him for the use of the Company, in discharge of Cowley's debt to them, and at the same time delivered to the Plaintiff the particulars of Cowley's account, and the original title deed of the mortgaged premises.

It appeared, that Cowley soon after returned to the island, and Plaintiff alledged that he denied the justice of the debt, and refused to give Plaintiff credit for it, of which, however, no evidence was given; Plaintiff, in a few days after, viz. 11th December, 1797, obtained a further mortgage from Cowley of his equity of redemption in the premises in Beach Street, for the sum of 900 dollars, — which included the original mortgage debt of 300 dollars, — but it did not appear, of what particulars the remainder of the consideration of the new mortgage consisted, or whether Plaintiff had charged Cowley with the 394 dollars paid to the Defendant on his account; — that the Plaintiff, the year after, sold the mortgaged premises for 825 dollars, — and afterwards in 1803, again sold the same premises for 2000 dollars; — having erected a small building upon it, which is was proved cost him about 200 dollars.

It was insisted for the Plaintiff, that Defendant had acted irregularly and illegally, in proceeding to enforce the payment of Cowley's debt out of the mortgaged premises; that he had no jurisdiction to enforce payment of any debt against the person or property of a British subject; that it was so much money extorted from him, by the Defendant taking advantage of his situation; and therefore, that he had a right to recover it back in this action. For Defendant it was proved, that he was acting Superintendant of the island in the year 1797, and the regulations of the Governor General in Council 1st August 1794, were proved, conferred certain judicial powers upon the Superintendant of this island, and particularly with respect to the recovery of claims against British subjects; the Superintendants were authorized to enforce their orders, by requiring them to comply, or quit the island; and it was also proved, that Cowley was justly indebted to the Company in the sum paid by the Plaintiff to the Defendant, and the Defendant had soon after paid it into the treasury, to the use of the Company. — It also appeared, in evidence, that jurisdiction had been in fact frequently so exercised over British subjects.

Sir E. Stanley was of opinion, that under the circumstances of this case, the Plaintiff had no right to recover; this action, for money had and received to the Plaintiff's use, in order to recover back money which had been actually paid, is an equitable action, and can only be maintained where the Defendant is obliged by the ties of natural equity and justice to refund money which he may have received of the Plaintiff: It does not lie for money paid by the Plaintiff, which was claimed as due in point of honesty and conscience, although it could not have been

recovered from him by any course of law; — because, in such case, the Defendant may retain it with a safe conscience; though by the positive rules of strict law, he might have been barred from recovering it; in such cases, *melior est conditis possidentis;* nothing of extortion, imposition or oppression has been proved; the money paid by the Plaintiff was for a fair debt due by Cowley to the Company; — no compulsory order was made against the Defendant personally; but those who acted for the Company, having threatened to proceed to recover the debt out of the equity of redemption of the mortgage premises then vested in Cowley, subject to a mortgage to the Plaintiff for 300 dollars, he being then in possession of the property, thought proper to come forward and pay the debt of 394 dollars due to the Company; — the mortgage premises were then worth much more than would have paid both debts, as clearly appears from the Plaintiff's having, in a few days after, viz. 11th Dec. 1797, obtained a further mortgage of the same premises for 900 dollars, of which sum it must be presumed at this day that the debt paid to the Defendant by the Plaintiff on account of the mortgagor, formed a part. If he had not interfered, but had suffered the Company to proceed against Cowley, or against the equity of redemption of the mortgaged premises, for recovery of their debt as well as they could, Plaintiff could not have been injured, as his mortgage would still have remained a lien upon the land, and the fund was ample to pay both; besides, the Mortgagee having suffered the original title deed to remain in the hands of the Mortgagor, and he having deposited that deed with Defenant, as a security for the debt, gave the Company an equitable lien upon it; and it might be a question, whether the prior Mortgagee would not, as between him and a subsequent creditor, without notice of his mortgage, and who gained a sort of equitable mortgage for the security of his debt, by the title deed being lodged with him, have lost his property, by allowing the Mortgagor to obtain credit by the possession of the title deed; but at all events, neither Cowley the Mortgagor, nor the Plaintiff, standing in his place, could ever have recovered the title deed of the mortgaged premises from the Defendant, without payment of the debt for which it was pledged as a security; and Defendant having voluntarily handed over the deed to the Plaintiff, when he paid Cowley's debt to him, was a sufficient equitable consideration for the discharge of that debt, to prevent his recovering it back in this action, and at this distance of time; another objection occured to him against the Plaintiff's recovery; which is, that Defendant having passed a receipt for the money for the use of the Company, and having paid over that money to them long before this action was brought, the action (if it could be supported at all) should have been brought against the Company, and not against the Defendant. — With respect to the other points made by the Plaintiff, the charter of justice of this island has recognized the acts of those persons who had heretofore exercised powers of judicature under any authority whatsoever; and it in effect confirms their acts, subject to the revisal of this Court; but surely, it could never have been the intention of the charter, that this Court should sit as a Court of strict error, to investigate all their proceedings for the last twenty years, and to determine upon their validity according to the critical rules of the British law and forms of judicature. If he was to give the charter

such a construction, it would sow the seeds of discord and litigation in the island, which would not be eradicated for twenty years to come. All the public acts of authority, and many of the private dealings between man and man, would be affected by it; the charter presumed, that many irregularities in legal proceedings, and in the mode of administering justice, may have been committed, not strictly justifiable by the rules or principles of the British law; but, were they all to be revised on that account, now that a regular system of administering justice in future, has been introduced, he thought the maxim of political justice, *communis error facit jus,* applied to such retrospective cases; unless indeed a case of corruption, oppression or injustice, was very clearly made out. He was therefore of opinion, that Defendant haying at the time the act is complained of, exercised certain judicial authorities within the island, that no action lay against him, for an error or irregularity in the exercise of such authority; but, that under the circumstances of this case, he was within the protection of that clause in the charter, which confirms (Sub modo) the acts and proceedings of persons who had heretofore exercised jurisdiction within the island; and that the law and justice of the case both concurring, there must be a verdict for the Defendant, with costs.

On 7 December 1808 there came before the Recorder the well known case of Kamoo v. Bassett. The judgment in this case was in fact reported in the first volume of Kyshe's Reports, being the earliest case he selected to be reported. The judgment is nevertheless reproduced here because, in the first place it is very short, by comparison with those appearing earlier in this paper, and second, the report in Kyshe is not verbally identical with that in The Gazette. The report in the Gazette runs as follows:

Kamboo v. *Bassett*

This was an action of assault, battery and false imprisonment, in which the Plaintiff complained of an assault, etc. on the 13th of Nov. 1807, and of an imprisonment from thence to the 28th January 1808; and laid his damages at 600 dollars.

Defendant pleaded not guilty, and justified the acts as commanding officer of the 20th regiment Bengal Native Infantry.

It appeared in evidence, that the Plaintiff, who was a native of Bengal, hired as a servant to the Defendant, in 1807, to attend at table as a kistmudgar; that he was flogged with a rattan two or three times, by the Defendant's orders, and at length complained to the Police Magistrate, who at that time exercised a jurisdiction within the island, under certain regulations passed by the Governor and Council; and who ordered that the Defendant should pay the Plaintiff his wages and discharge him — but the Plaintiff on his return was by the Defendant's order flogged by clashes [?], and received twenty stripes more, and was at different times put in the guard house and imprisoned by the Defendant's orders, in all for near three months; and at length, on the 13th Nov. 1807, was brought by the Plaintiff on the public parade and after two sepoys had received corporal punishment under the sentence of a court-martial, Plaintiff was, by the Defendant's order tied

up and received 100 lashes with a cat of nine tails, in consequence of an allegation made by the Defendant that he had traduced his character by representing him as a bad master, but Plaintiff was not tried or sentenced by any court-martial.

After the examination of several witnesses on both sides — Sir E. Stanley was clearly of opinion, that Plaintiff had a right to a verdict.— This was an act which could not be justified by the mutiny act of 27 Geo. II, or the articles of war framed under it, or by the native articles of war, which had been selected in the year 1796, under the direction of Sir R. Abercrombie, when he was Commander in Chief, and promulgated by the Governor General in Council, and which he believed was the code, by which the native troops were considered to be now governed. It was an act contrary to the usage of the army, and repugnant to every principle of justice: no man was subject to military jurisdiction, but an officer, soldier or sepoy, or some one connected with the army, nor was any offence cognizable by the military tribunal, or within its jurisdiction, but by some act which was a breach of military duty or a neglect of military discipline; and in no case could any person, as he conceived, be subject to military punishment, except in consequence of a trial, and the sentence of a court-martial; but Defendant had undertaken to be accuser and judge in his own cause, and inflicted military punishment, expressly contrary to the articles of war. It was true that this was an act done before the Charter of Justice had been promulgated here, and before this Court had been established; but yet the Charter extended in terms to civil injuries which had been sustained, as well as to crimes that had been committed before the Charter; and as punishments had been in certain cases inflicted for the one, he could not say that civil injuries should not also be redressed; although under certain limitations where they were lately done before the charter was proclaimed; the object of the Charter was to protect the natives from oppression and injustice, and he should always consider it his duty, to guard their persons, liberties and properties with the same watchful care as he should the best European or British subjects; however as this case had happened before the Charter, and the Law might not be so generally known; he should not give as large damages in this case, as he should have done for a similar injury if it had been recently committed, or since the establishment and introduction of the British Laws; in apportioning damages he must also take into consideration, all the circumstances of mitigation as well as aggrevation, the state of society here and the description of persons of whom many of the inferior classes were formed; and also the pecuniary circumstances of the Defendant, which were represented as being far from affluent; moderate damages would have the effect of making the law known, and of preventing similar practices in future — but if such outrage upon the law should ever occur again he should think it his duty to give very large damages indeed; — in a former case against the Defendant, of a trivial nature compared to the present, he had mitigated the damages to 20 dollars; in the present, he would give 150 dollars, which, though small, he trusted would have the effect of preventing the repetition of such practices in future: — Plaintiff could [not be] considered under the description of a camp follower, as the army was in cantonment in time of peace; and the offence, if any, was only cognizable by the Civil

Magistrate, and the Civil Judicature which then existed here — [but even if he] was to be considered as falling under the description of persons, who were subject to military law, he should have been tried by a court-martial, before such a public punishment was inflicted upon him; — and the act itself having been ordered by an officer who was acting as judge in his own cause, for a supposed injury done to himself, was, as he conceived [it unjustifiable].

The next case to come before the Court of Judicature was that of Dobell and McQuoid v. *Capes and Carroll which was heard in January 1809. The report in The Gazette reads as follows:*

Dobell & McQuoid v. *Capes & Carroll*

This was an action on the case brought by the Plaintiffs to recover 1000 dollars damages against the Defendants, for an alleged misbehaviour in a certain office, trust and duty, which the Defendants undertook to perform for the Plaintiffs, viz: to sell and dispose of certain goods which were deposited with the Defendants as factors, agents or auctioneers, for the Plaintiffs, at a commission of 5 per cent, upon the sale, and which have been lost by the alleged neglect of the Defendants; and it is founded upon a contract, which, tho' not expressly entered into, is implied by reason and constructions of law — that any one who undertakes any trust or duty contracts with those who employ or intrust him, to perform it with care, integrity and skill; and, if by his default or want of these qualities, any injury arises to an individual, he has his remedy in damages by special action on the case. — To this action, the Defendants pleaded not guilty: and, the material facts, as they appeared in evidence, were shortly these; that in the latter end of the year 1806, or the beginning of the year 1807, Plaintiffs sent to the Defendants, who were merchants, shopkeepers and auctioneers, sundry goods and chattels for public or private sale, in the usual course of their trade, at a commission of 5 per cent. upon the sale; that the goods were deposited in the Defendants warehouse and shop in George Town, where they usually kept their own goods and those of their other customers, and, where they were frequently seen by the Plaintiff McQuoid, who well knew the security of the warehouse and the general character of the Defendants, before he deposited the goods in their possession: and that on the night of the 11th of August 1807, the warehouse of the Defendants was broken open by certain burglars and robbers, and the goods in question, the property of the Plaintiffs, together with divers goods, the property of the Defendants, and other customers of theirs were stolen and carried away thereout; — that the warehouse was locked, barred, and bolted, on the night before this robbery was committed, with as much care and security as it ever had been before — that Defendants kept their treasure chest in the same warehouse, and that two private watchmen were employed on that night, and on every night before by the Defendants, to guard their warehouses; but, that the night on which this fact was committed, was so uncommonly dark, tempestuous and rainy, and there was so much thunder and lighting, that the robbery was committed without the watch being alarmed; and that the next morning, two bars of one of the windows were found cut, and the bolt of the outside shutter pushed back, through which the robbers entered, and through which the goods were carried away — and that information was immediately

given by the Defendants to the Police Magistrate, hue and cry raised by them, and the most diligent search made by the Defendants to discover the robbers and recover the goods, but without effect — and the question was, whether under all these circumstances, the Defendants were liable to make good this loss in an action at law.

On the part of the Defendants it was insisted that this was a loss for which they were not responsible, either by any express contract to be answerable for such perils, or by any implied responsibility imposed upon them by law; — for the Plaintiff it was contended, that the Defendants are responsible in two points of view — 1st, That Defendants under this bailment, or delivery of goods to sell at a commission of 5 per cent. were in the nature of Insurers, and responsible for all accidents by theft, robbery, or even by fire — 2d. That at all events, from the nature of their commission as bailees to sell goods for a reward, they would be answerable for neglect, and that there was negligence on their part, because their warehouse was not more secure and better guarded.

Sir E. Stanley said, he was not surprized that the law of bailments, and this sort of contract by which one man is to be made responsible for the goods of another deposited in his care, should be so little understood here, when he recollected that this important branch of jurisprudence was long and strangely unsettled, even in England itself; and that from the reign of Queen Elizabeth, to the reign of Queen Anne, from the decision in *Southcote's case,* which was in the 43d of Elizabeth, to the famous case of *Coggs against Barnard,* in the 2d of Queen Anne, the doctrine of bailments produced more contradiction and confusion, more diversity of opinion and inconsistency of argument, than any other part of juridical learning; but since the judgment of my Lord Holt, in the case of *Coggs against Barnard,* 2nd. Lord Raymond's reports, p. 909 — in which he took a masterly view of the subject; and since the able and luminous essay of Sir William Jones, who has reconciled judgments apparently discordant, and illustrated our law on this subject by a comparison of it with those of other nations, most eminent for wisdom, the Roman, the Athenian, and even the ancient Gentoo and Mahomedan law, the principles of this sort of contract seem now to be clearly settled, and the great question of responsibility for neglect fixed upon sound and rational principles: — the general rule to be deduced from all the books, is, that a bailee or depository of goods, is bound to take care of the goods, and that if they are lost by his neglect, he is responsible for them — but what the degree of care is, which he is bound to use, and the degree of neglect is, for which he shall be said to be responsible in every particular contract or bailment is a problem which involves the principal difficulty; — for there are infinite *shades of care* and diligence, from the slightest momentary thought, or transient glance of attention to the most vigilant anxiety and solicitude; so here are also infinite shades of default or neglect from the slightest inattention or momentary absence of mind to the most reprehensible supineness and stupidity; — but extremes in this case, as in most others, are inapplicable to practice — the *degrees of care* therefore required must be somewhere between these extremes, and by observing the different manners and characters of men, we

may find a certain standard; for although some men are *excessively careless,* and others *excessively vigilant,* yet we may perceive that the generality of rational men throughout the world, use nearly the same degree of care and diligence in their own affairs — and this *degree* of care therefore which every person of common and ordinary prudence and capable of governing a family, takes of his own goods and concerns, seems the proper standard to measure the responsibility which ought to be imposed upon him to whose care the goods *of another* are consigned, unless by a special contract he undertakes to be responsible for more; or unless in one or two special cases (which shall be taken notice of) in which the law upon principles of public policy does impose a higher degree of responsibility upon the bailee or depository of goods. Now in order to find the degree of neglect which every bailee is answerable for, neglect may be divided into three kinds, which are defined thus;- first, *ordinary neglect* is the omission of that care which every man of common prudence, and capable of governing a family (though perhaps not remarkably exact) takes of his own concerns — second, *gross neglect* is the want of that care which every man of common sense, how careless and inattentive soever, takes of his own property; — and third, slight negligence, is the omission of that extraordinary diligence which every circumspect and thoughtful persons use in securing their own goods and chattels: thus the several degrees of neglect being discovered, it will be proper to consider the particular cases in which a bailee is by the principles of natural law bound to use diligence, to be answerable for the omission of it. — When the contract is reciprocally beneficial to *both* parties, the obligation hangs in an even balance, and there can be no reason to recede from the fixed standard; nothing more therefore ought in that case to be required than *ordinary* diligence, and the bailee should be responsible for no more than *ordinary neglect:* as in case of goods delivered to a factor to sell, in which case both the bailor and the bailee are *interested* in the goods, and in the performance of the business, the bailor in the price for which they may sell, and the bailee in the commission which he is to receive upon the sale of those goods; or where cloth is delivered to a tailor to make a suit of clothes, a gem to a jeweller to be set or engraved, a watch to a watchmaker to be repaired, or goods to a pawnbroker as a pledge for his debt, such bailees are bound to take ordinary care of the things and are responsible for ordinary neglect, but not for robberies or inevitable accidents; but it is very different both in reason and policy, when one only of the contracting parties derive advantage from the contract — *if the bailor or owner of the goods only* receives benefit or convenience from the bailment, as when goods are deposited by him with another without any reward, it would be unjust to require any particular trouble from the bailee who ought not to be molested for his obliging conduct; if more therefore than good faith were exacted from such a person, that is if he were made answerable for less than gross neglect, few men after one or two examples would accept goods on such terms, and social convenience would be destroyed — on the other hand when the bailee alone is benefitted or accommodated by this contract, as when goods are lent or borrowed by another without any reward to be paid to the owner, it is reasonable that such a bailee should be obliged to be more than ordinarily careful, that he should be bound to use the utmost vigilance, and to be answerable even for

slight neglect — now it seemed to him that the whole fallacy of the argument in this case arose from comparing it to the case of a public carrier of goods for hire by land or water, who is certainly liable without any degree of neglect, and by mistaking the reason upon which his responsibility is founded. — It is not in consequence of the *reward* he receives for carrying the goods, but it is from principles of public policy that he is made answerable if he is *robbed* of the goods, and indeed for every other accident or loss which does not happen by the act of God, (that is, without human agency) or by the king's enemies: so an innkeeper for the same reasons is also liable for a theft or robbery of his guest's goods committed in his house: for as is said by my Lord Holt in the case of *Coggs against Barnard* — their public employment does from the nature of that species of business, and upon principles of public policy make them liable, and their liability for such accidents is an exception to the general rule which prevails in all other cases of bailments or delivery of goods in trust, because they would have such easy opportunity of confederating with thieves far out of the sight and knowledge of the owner, and of which he never could be able to furnish evidence! that the law does in those two cases only impose upon them a more rigorous degree of responsibility than upon other bailees; and such carriers and innkeepers when they engage in that course of life, are apprized of the responsibility under which they undertake it, and this sort of distinction between public carriers and bailees upon a private trust as merchants, agents or factors, is recognized by very great authority — and the rule which requires from the latter, the same *degree of diligence only* that *the generality of mankind* use in keeping their own gods, remains established by the concurrent wisdom of nations in all ages, so long ago as *Woodliffe's case,* in the 38th of Elizabeth, and which is cited by my Lord Coke in his commentary upon Littleton, 89, the result of all his wisdom and experience; it was held that robbery was a good plea for a factor or merchant, though it was a bad one for a common carrier, and in *Southcote's case,* 4th Coke's reports, 84. It is expressly laid down that in an action of account, it is a good plea for a factor, merchant, agent, bailiff or receiver, that he was robbed without his default — for says Lord Coke, "if a factor or agent (although they have wages and salary) do all he can, and is robbed, or loses the goods by inevitable accident or irrisistible force, without his default he shall be discharged — but a common carrier, innkeeper, or ferryman, who takes hire, is bound to keep the goods safely and shall not be discharged if they are stolen by thieves: formerly indeed it was held, that if a man delivered goods to another to keep, he was answerable for any loss or damage they might sustain by accident or otherwise, unless (according to *Southcote's case)* he expressly undertook to keep them only with the same care as he kept his own; and, that then he should not be answerable for thefts or other accidents — but now says Mr. Justice Blackstone, 2 vol. 452, "the law seems to be settled since the case of *Coggs against Barnard* — 2d. Lord Raymond's reports, 909 — that such a general bailment will not charge the bailee with any loss, unless it happen by gross neglect which is evidence of fraud — but if a man undertakes *specially to keep the goods safely and securely* he is bound to take the same care of them as a prudent man would take

of his own" — that is, he is bound to take ordinary care, and is answerable only for ordinary neglect.

Lord Holt in the case of *Coggs against Barnard* divides bailments into six sorts — first, when goods are delivered to keep without reward — second, when goods are lent to a friend gratis — third, when goods are hired out to the bailee for a reward — fourth, when goods are pawned as a security for money borrowed — fifth, when goods are delivered to be carried, or something is to be done about them for a reward — sixth, when goods are delivered to be carried or something to be done about them without a reward. Now as to the fourth sort, viz: a pawn — Lord Holt considers that the pawnbroker has a special property in the pawn, and he lays down the law for what neglects he shall be responsible; he is clear that although a creditor who takes a pawn is bound to restore it on payment of the debt, yet it is sufficient if he use due diligence, and if he be robbed of the pawn he will be indemnified, and notwithstanding the loss, yet he shall resort to the debtor or pawner for his debt — and the true reason of all these cases is, says Lord Holt "that the law requires nothing extraordinary or unreasonable of the pawnee, but only that he shall use ordinary care for restoring the goods, and every man how diligent soever he be being liable to the accident of robbers, though a diligent man is not so liable as a careless man" — the bailee or pawnbroker shall not be answerable in this case if the goods are stolen; and under the fifth head of bailment, which is analagous to the present case, Lord Holt distinguishes between a delivery of goods to a public carrier, common hoyman or master of a ship, and a delivery of goods to *private persons* as merchants, agents, bailiffs or factors, and says, that in the first case, the carrier if he has a reward is bound to answer for the goods, at all debts he is responsible even if robbed, or the goods are lost by other accidents, and this says he is a politic establishment for the safety of all persons, the necessity of whose affairs oblige them to trust those sort of persons, and to prevent fraud by combining with theives, &. — but though a factor, agent or bailiff, is to have a reward for his management, yet he is only to do the best he can, and if he be robbed it is a good account and the true reason is, that it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it — and Sir Wm. Jones, 106, says the carrier alone is distinguished from all other bailees for hire upon principles of public utility. Formerly it was held that carriers of letters were subject to the same rule, but since the establishment of a general post office by the statute of Charles 2d, it has been held in the case of *Lane against Cotton* [1 Ld. Raym 646] and more recently in the case of *Whitfield against Lord de Despencer,* Cowper 754 — that the postmaster general is not liable for the loss of a bank-note, stolen out of a letter in the post office; as the post office is a place for the carriage of letters, but not for insurance, and the offence of stealing out a letter being made a capital one, the civil injury was merged in the criminal; but that the responsibility of a common carrier does not extend to *warehousemen* in whose custody goods are deposited, was expressly decided in a modern case by Lord Kenyon and the Court of King's Bench, the case of *Garside against the Proprietors of the Trent Navigation* — 4 Durnford and East's reports, 582.

The Court said, the Defendants were not liable as w*arehousemen* for such accidents, and that the case of the carrier stands by itself; upon peculiar grounds he is held responsible as an insurer to prevent fraud — "Sir Wm. Jones, page 96: says, that when a person *has a compensation* and *reward* for the custody of the goods in his warehouse or store-room, he hires out his vigilance and attention, and even then he is only bound to take *ordinary* care of the goods — and with respect to such persons and commissioners, factors, agents and such like, he says, *their reward* is the true reason and *the nature of the business* is the just measure of their duty, which cannot however extend to a *responsibility* for mere accidents, or open robbery; and even in the case of *theft*— (which is not so strong a case to exonerate him as a burglary or robbery) a factor or agent has been held excused when he shewed that he had laid up the goods of his principal in a warehouse, out of which they were stolen by certain malefactors to him unknown, *Veree against Smith* 1 Ventris 121" — but in the present case, the Defendants were not to have any particular reward for keeping those goods in *the warehouse*, but according to the above authority they would not be responsible *for a robbery*, if they had now to apply these principles and decisions to the present case. The Plaintiff Mr. McQuoid, who was acquainted with the security of the Defendant's warehouse, and in almost daily habit of visiting it, deposits those goods there for the purpose of being sold by the Defendants as his agents, factors or auctioneers — no express contract is entered into by the Defendants that they would be responsible *for all perils* that might befall the goods; they lock them up in their warehouse where their own goods and money were kept, and under cover of a dark tempestuous and rainy night, a burglary is committed by certain robbers who broke into the warehouse and robbed it, not only of the plaintiff's goods, but also of the Defendants own property, which was taken away at the same time — and this, altho' the Defendants used the extraordinary caution of keeping two private watchmen to guard their warehouse, it does not appear that Defendants took less care of the Plaintiffs goods than they did of their own; and yet notwithsanding all these circumstances, the Court is called upon to determine that Defendants are liable for this loss. In his opinion it would be a most harsh and rigorous construction of such a contract; the law does not *permit* negligence in any contract, but *a less rigorous construction* prevails in some than in others. — A hirer of goods for instance is not considered *as negligent;* when he takes the same care of the goods hired which the generality of mankind take of their own; and the *letter to hire* who has his reward, must be preserved to have demanded at first no higher degree of diligence; tho' *a lender of goods* who has no reward, may fairly exact from the borrower that extraordinary degree of care which a very exact and *attentive* person of his *age and quality* would certainly have taken; no doubt it is a violate of good faith for any man to take *less* care of another's property which has been intrusted to him than of his own. Some evidence was gone into as to the strength of this warehouse compared with others, and the facility with which access might be obtained, and whether two bolts were not better than one, and iron windows stronger than wooden ones, but that sort of inquiry would lead to an endless perplexity and confusion — a

merchant, factor, or auctioneer, when he agrees to become a depository of goods, is not bound to keep a garrison or a goal, or to use all the vigilance of a centinel on his post, or of a *videt* watching the approach of an enemy, or a goaled guarding his prisoners; much less is he bound to convert his shop into a fortress, or to procure a new warehouse to suit the fancy of every new customer, or to use the same degree of anxious solicitude with which the greatest miser watches his treasure; it is sufficient that he uses usual and ordinary care, and has that sort of warehouse that the nature of the climate admits of; and which he considers safe for his own property. If the law was to require more in general cases, instead of a commission of 5 per cent. upon the sale of the goods, a much larger premium would be demanded by an insurer against such perils as the present, and no man would undertake to manage goods by commission if he was bound to greater care than that which he takes of his own goods; if he was made answerable for such accidents, no man would accept goods upon such terms, and commercial dealings would be interrupted and much convenience lost to civil society. He thought the Defendants being auctioneers, made no different in the point under the circumstancnes of this case, and he was for those reasons and upon those authorities most clearly of opinion, that the Defendants were not liable; and that judgment must be entered for them accordingly.

The next reported case is that of Shanazar Avockjohn v. Abdool Moomin, which was reported on 18 February 1809. The report in the Gazette reads as follows:

Shanazar Avockjohn v. *Abdool Moomin*

The subject matter of these causes was of the first importance to the welfare of the island: it had originally depended in a Court which had exercised jurisdiction here antecedent to the Charter, and was transferred into this Court as one of the causes existing and undetermined at the time of the publication of the Charter; and after the establishment of this Court, the parties commenced, and filed new pleadings in this Court.

The ORIGINAL BILL was filed to foreclose two mortgages granted by Defendant Abdool Moomin for 1205 dollars, on the 17th June, and the other for 1700 dollars on the 9th November 1807.

The CROSS BILL was filed by Defendant in the original cause to impeach both mortgages as usurious and obtained from him by fraud and imposition, and praying to be let into a redemption of the lands comprised therein. Both causes were heard on several days before the Hon. Sir Edmond Stanley, and on the pleadings and proofs, the material facts appeared to be as follows:-

On the 17th June 1807, the Defendant in the original cause, who was at that time in distressed and necessitous circumstances, in consideration of 1205 Spanish dollars, bargained and sold to Plaintiff, and his heirs, certain lands comprized in grant No. 1064, subject to a condition of redemption, on repayment of the said sum with interest, at twelve per cent. on or before the 17th of August then next ensuing;- and the Defendant signed a receipt on the said mortgage deed, ack-

nowledging that he had received the said sum of 1205 Spanish dollars, and acknowledged the deed before the Judge and Magistrate, whereon it was registered, pursuant to certain local regulations made by the Hon. the Governor and Council.

On the 9th November 1807, Defendants in consideration of 1700 Spanish dollars, bargained and sold to Plaintiff and his heirs, certain lands described in grant No. 358, subject to a condition of redemption, on repayment of said sum of 1700 Spanish dollars, with interest, from the 13th October preceeding, — and Defendant signed a receipt of the deed acknowledging to have received the consideration money, and acknowledged it, as he had the former, before the Judge and Magistrate, whereupon it was registered. The principal sums and interest, not having been paid at the times specified in the said mortgages, the Plaintiff in the original cause on the 27th of May 1808, instituted proceedings in the Court which formerly exercised jurisdiction here, to foreclose both mortgages; and Defendant, Abdool Moomin, also sought to be relieved against them, alledging that although he had been compelled by his necessities and distresses to sign a receipt for the said two sums of 1205 and 1700 Spanish dollars, and to acknowledge the deeds before the Judge and Magistrate for the purpose of registering them, yet in truth and in fact, he had not received, and the Plaintiff well knew that he had not received, the said two sums: that with respect to the first mortgage, of 17th June 1807, for 1205 Spanish dollars, he received on that day in ready cash, 400 Spanish dollars only, and credit for a bond formerly passed by him to the Plaintiff for 100 dollars, and that he was never paid the remaining sum of 705 Spanish dollars, but that he received 14 muskets and some other goods, which although valued to him by the Plaintiff, at the sum of 523 Spanish dollars, were not, in fact, worth 100; and that his necessities compelled him to agree to those terms, in consequence of an assurance given to him by the Plaintiff, — that if he sent those goods in his ship to Junk Ceylon, they would sell there at a great profit, and that Plaintiff *undertook the risk of that adventure*, as was *evidenced by a written agreement*, entered into between them; but that the voyage to Junk Ceylon failed, the good were not sold, and Defendant returned those goods to the Plaintiff, but he refused to receive them, [insisting it] was a good sale, and that he would bind the Defendant to it: and that with respect to the remaining sum of 182 Spanish dollars, it was kept by the Defendant as a premium for the loan of the said 1205 dollars:- and that with respect to the second mortgage, of the 9th Nov. 1807, for 1700 Spanish dollars, he had in fact only received in cash 1075 Spanish dollars, and that the remaining 625 was retained by the Plaintiff as a premium for the loan: those several allegations having been verified by the Defendant on oath, the Judge and Magistrate of the former Court called upon the Plaintiff Shanazar Avockjohn to answer them on oath, and in his answer, the Plaintiff admitted in that Court, that part of the consideration of the said first mortgage, was paid to the Defendant in muskets, fowling pieces, blunderbuses, and other goods, valued to the Defendant at 600 Spanish dollars; — the real value of which he swore he could not state, as he bought them cheap at auctions, but he was silent as to the charge of their being greatly

overvalued, and also as to their having been sent to Junk Ceylon, to be sold at his the Plaintiff's own risk, and as to the 182 dollars having been retained as a premium for the loan; — and with respect to the second mortgage for 1700 dollars, he swore that he made payments to the Defendant, amounting to 1440 Spanish dollars, but that he could not specify any other payments made by him, but produced certain vouchers for his payments, which he referred to; and the whole of which upon examination now in this Court amounted to no more than 1205 Spanish dollars, and no account given of the remainder of the consideration of said second mortgage nor does the Plaintiff the mortgagee, in any part of his answer in the former Court, pretend to say that the remainder of the consideration money of that mortgage ever was paid to the Defendant in any way whatever.

The Judge and Magistrate of the former Court, having been under some difficulty, adjourned the case for the consideration of the new Court then about to be established, under the Charter, for their determination: — and now the merits having come on to be heard, upon the former pleadings, and also upon a new original and cross bill filed in this Court, and new pleadings and proofs, it appeared in evidence in the cause, that at the time of those transactions, the Defendant Abdool Moomin was in the most embarrassed and distressed circumstances, that various money dealings subsisted between him and the Plaintiff :- that the whole of this negotiation was that of *borrowing* and *lending* money, and not *buying* or *selling* goods; that at the time of the execution of the first mortgage, 17th January 1807, Defendant received 400 dollars only, and 100 dollars credit for a former debt which he owed, and that he applied several times for the remainder of the mortgage money, that Plaintiff said he had no money, but that if Defendant took it in muskets, & he would engage they would sell at Junk Ceylon at a profit, and if not he promised to pay the balance in money; that although the muskets &c. was valued at 600 dollars, to the Defendant, they were not worth at the utmost more than 250 dollars; that the voyage failed and the goods were never sold, but Defendant offered to return them to the Plaintiff which he refused to accept; and that at the time of the loan, Plaintiff proposed to Defendant that he should pay him four per cent per month interest, which Defendant agreed to an account of his distress, — and that adding that to the twelve per cent referred to by the mortgage deeds, would amount to 60 per cent. It also appeared by a written document produced by the Plaintiff himself, that the goods were to be sent to Junk Ceylon, to be sold at his own risk and on his own account: — With respect to the second mortgage for 1700 dollars, the witness to the execution of it, and those who were present when it was acknowledged before the Judge and Magistrate proved that 1000 dollars and no more was paid on account of that mortgage, at that time; — and the said vouchers produced by the Plaintiff for payments made amounted to no more than 1205 Spanish dollars: — Two witnesses also swore, that pending the hearing of those causes in this Court, viz: in the last month, they were offered sums of money by the Plaintiff, to prove further payments from him to the Defendant of which they were ignorant and which they refused to do. — It was insisted for the Plaintiff in the original cause, that the receipt for the money executed on the mortgage deeds by the

Defendant, — and the acknowledgement of the execution thereof before the Judge and Magistrate of the former Court, for the purpose of registering them, was sufficient and conclusive evidence of the consideration having been paid and of the fairness of the deeds: — and that the Plaintiff should not be put to the proof of actual payment of it or the Defendant allowed to impeach those securities.

Sir E. Stanley was of opinion that such an acknowledgement and registery here, under the local regulations or usage which had been adopted to prevent frauds, could have no greater effect than an acknowledgement of a deed under the registry acts which prevail in Middlesex and Yorkshire in England, and universally throughout Ireland and Scotland, — the only object of the registry is to give [notice] and to prevent frauds upon subsequent purchasers and mortgagees, and by no means to give any other greater force or validity to deeds in other respects impeachable, than they would have had if they never had been registered: — these acts like the regulations here, declare that the first deed registered shall have priority, and that every deed not registered, shall be void against any other deed that is registered:- "every deed *not* registered shall be void. — but the converse of the proposition is not true, viz: that *every* deed registered shall *be valid."* — It would be a strange contradiction to say, that the act of registering a fraudulent or usurious deed, or a deed the consideration of which had not been paid should give it complete validity and sanctify it from all its defects; — so then the registry acts, which were enacted to prevent fraud, would become the surest engine and protection for fraud and imposition; — the fact is the deeds must stand upon their own intrinic foundation and validity, independent of the registry,- and it has often been decided that the registering a fraudulent or usurious conveyance or mortgage would not give it validity; — with respect to the general complexion of this case, it appeared to him that the mortgaged deeds were impeachable upon two grounds — *first*, that the original contract was usurious, or a contrivance or device *under colour and mask of a sale of goods*, to obtain more than legal interest *upon a loan*, and therefore contrary to the statutes of usury, and particularly to the 13th of Geo. III. c.63. sec.33, by which it is enacted, that no person in the East Indies shall upon any contract take *directly* or *indirectly*, for loan of any moneys, wares or merchandizes, above 12 *£1* for the forbearance of £100 by the years; and that all bonds and assurances whatsoever, whereby more shall be received or taken, shall be void; — and all contrivances, shifts and devices, to obtain more than legal interest are declared to be within the statute, and the party liable to a penalty of treble the value of the sum lent. — *Secondly*, that supposing the mortgages were not usurious, yet upon the proofs in the cause, and the admission in the answer of Shanzar Avockjohn himself, there was such an undue advantage taken of the defendant's distresses that a Court of Equity would relieve against this sort of transaction as oppresive and unconscionable. — As to the first ground of relief, the statutes of usury were made to protect men in distress against themselves; upon this principle it makes it penal for a man to *take* more than a fixed rate of interest; it being well known that a borrower in distress would agree to any terms — says the statutes, "no person shall take *directly* or *indirectly*, for a loan

of money, above the value of 12 per cent." — The most antient contrivance and usual form of usury was a *pretended sale of goods*, and all the successive statutes against usury expressly point to that practise.— it is plain from the evidence here, that it was not the intention of the parties to *buy* and *sell*, but to *borrow* and *lend*, and that the contract was in truth for a sum of money, although under the mask of a sale of goods. — An actual bona fide *sale of goods on credit or otherwise*, would not be within the statute of usury, however unfair it might be in other respects, if the real intent and meaning of the contract is a sale of goods merely; but were there is a communication for a *loan of money*, a sale of goods at a great overvalue to the borrower as the consideration of the security for the loan, would be usurious. — It has been so determined in many cases which are all collected in the great case of *Lord Chesterfield against Janssen*, 1st Atkin's Reports 301, but most particularly in the case of *Lowe against Waller* in 1781, which is reported in Douglas 736; where it was unanimously decided by my Lord Mansfield and the whole Court of King's Bench, in an action brought upon a bill of exchange for £200 which was proved to have been given upon a negotiation for a loan of money; where the lender said he could not advance cash, but would *furnish goods* to the value of £200 which upon a sale produced and appeared to be worth no more than £120: — It was held that it was a usurious loan, and that the security was void by the statutes of usury; not only as between the original parties, but that the words of the statute were so strong, that even an indorsee without notice of the usury could not recover upon such a bill against the acceptor, the borrower, but was obliged to resort to his indorsor for his indemnity: — And Lord Mansfield mentioned that it was one of the instances in which private right must give way to public convenience and utility. — In the present case, goods valued to the Defendant as part of this loan at 600 dollars, are proved to have been worth no more than 250 at the utmost, and the whole sum is made part of the consideration of the first mortgage at 12 per cent: — the contrivances of usurers to evade the former statutes were so various, that the Legislature, in the last acts do not specify any particular mode of usury, but say in general "that all gifts and devices to obtain more than legal interest, under any colour, device, or mask, shall be void."

With respect to the second mortgage for 1700 dollars, that mortgage was impeached in the former Court, *recently* after it was granted, in about five months after, and it was sworn that 1075 only of the consideration of that mortgage had been paid, and that the remainder to the *original cause* as a premium for the loan: and though the Plaintiff in the *original cause*, was not bound to disclose anything that might subject him to a penalty, yet he then undertook to set out the consideration and referred to vouchers, all of which when examined in this Court amount only to 1208 Spanish dollars; so that 492 dollars of the consideration of that second mortgage is unaccounted for, and the witnesses produced by the Plaintiff to prove the consideration and who were present at the execution and acknowledgement of it, prove that 1000 dollars and no more was paid to the Defendant at the time of the execution of that second mortgage; and that circumstance coupled with the other evidence, is the cause of the Defendants great distress

and embarrassments, and the undue advantages taken of him by the Plaintiff in the several transactions, induced the Court here to call upon the Plaintiff in the *original cause* to prove the consideration of that mortgage. — Sir E. Stanley said, he did this upon the general principles of equity and also upon the authority of many cases, and particularly of the case of *Piddock against Brown*, determined by Lord Chancellor Talbot, and which is reported in 3 Peere William's Reports 288, where it was declared by the Chancellor, "that upon producing a bond or mortgage, this is prima facie good evidence of a debt, but that wherever there are manifest signs of fraud in the obligee or mortgagee, in such case he ought to be put to the proof of actual payment; and though he may happen thereby to lose some part of the money really due to him, for want of not being able to make sufficient proof, this is but a just punishment of him (says Lord Talbot) for the fraud which he plainly appears to have been guilty of, and will be a proper discouragement to others from committing the like".

Upon the whole of the case, Sir E. Stanley was of opinion, there was abundant ground to relieve the Defendant upon the CROSS BILL which he had filed, — either upon the foundation of this being a usurious transaction and void by the statutes of usury, — or upon the ground of its being an unconscionable bargain and an undue advantage taken of the necessities and distresses of the Defendant, and so relievable in a Court of equity under the head of fraud, of which numerous instances are to be found in the books, — and particularly in that great case before alluded to of *Lord Chesterfield against Janssen* which was before Lord Harwicke in the Court of Chancery assisted by four able Judges in the year 1750. It must be remembered that this is a suit on the *equity side* of this Court and not to recover the penalties in the statute of usury: — the Plaintiff in the cross bill has come into equity to be relieved against those mortgages as usurious and fraudulent, and to be allowed to redeem, and this Court can only grant him that relief upon the terms of his doing equity: upon these grounds Sir E. Stanley pronounced the following decree.

Let the Registrar take an account of the principal sums actually and bona fide lent, and advanced by the Plaintiff in the *original cause*, and the Defendant in the *cross cause* to the mortgages of the 17th of June and 9th November 1807, in the pleadings mentioned; and let him compute interest thereon at a rate of 12 per cent per annum, from the respective times of the actual advances of the said consideration money, and let him report the balance due to the Plaintiff in the *original cause* over and above all just allowances; and the Plaintiff in the *cross cause* is declared entitled to a redemption of the mortgaged premises, upon payment of the principal and interest of the sums really and actually lent and advanced, as the consideration of the said mortgages, and upon payment of the said several sums, let the said two deeds of mortgage in the pleadings mentioned, be delivered up to the Plaintiff in the *cross cause*, to be cancelled, the same being declared to be usurious and fradulent.

And let the several vouchers of the plaintiff in the *cross cause* proved in those causes, together with the title deeds and the several

grants in the pleadings mentioned, be likewise be delivered up to the Plaintiff in the *cross cause* upon the terms aforesaid.

The next case which is worthy of note is that of R. v. Till which came before the Recorder sitting at a session of Oyer and Terminer and General Goal Delivery on 14 April 1809. This case was also shortly reported in Kyshe in Volume III at page 1. The report in the Gazette reads as follows:

R. v. Till

Richard Till, found guilty for maliciously shooting at Henry Glosterman. It was moved on behalf of the prisoner, to arrest the judgment on the ground that the statute of 9 Geo. I. c.22 commonly called the Black Act, on which the prisoner was indicted, was a local statute, which was not applicable to, or in force in the East Indies. — The Honourable Sir E. Stanley entered into a consideration of the objects and provisions of that statute and said, that as at present advised, he was disposed to concur with the opinion which he was informed had been given upon this statute, by the Hon. the Recorder of Bombay, in the case of the *King against Lieut. Mosely;* however as that case seemed to turn more directly upon the question whether the British Law was introduced into Bombay by the Charter of the 20th of Charles II, or by that of the 13th of Geo. I and whether the present act was passed prior to the introduction of the British Law into Bombay; and as it was stated, that some doubt had been entertained at Madras in *Colonel Mandeville's* case upon this point some few years ago, in consequence of which no bill of indictment was preferred on that statute, and as this was a capital case, he thought the safest as well as the most satisfactory course to take (particularly here in the exercise of a new jurisdiction) was to save the question for the opinion of all the King's Judges, in the different Courts in India, whether the statute was to be considered in its nature locally confined to England, or was in force in the East Indies: and therefore he respited judgment and ordered a *curia advisare vult* to be entered until their answer should be received, but he declared if he was forced to give an opinion at the moment, he should yield to the authority of the judgment given by the Recorder at Bombay, for whose talents and knowledge he had the highest respect, especially as he had heard that, that opinion was supported by another great authority. The officers of the Crown Office were as he conceived right under those circumstances to indict the prisoner under that statute, because if they had indicted him for a common aggrevated assault, and that it came out upon the trial that the shot was fired maliciously, so as to amount to a capital offence, the prisoner must have been acquitted of the assault in the first instance, provided this statute extends to the East Indies: as the assault and trepass would have been merged in the felony — but if it should turn out that in the opinion of the Judges, the Statute does not extend to this Island judgment upon this conviction must be arrested, and prisoner might be afterwards indicted and punished for the assault.

The outcome, as reported in Kyshe, was that the judges in India were of the view that the Act was applicable throughout the East Indies. The prisoner was therefore sentenced to death, later commuted to transportation for life.

The last matter which came before the Recorder during the first twelve months of the Courts' existence was that of Syed Abdullah Semathaan v. Frazer Sinclair which came before the equity side of the Court on 13th May 1809. The report reads as follows:

Syed Abdullah Semathaan v. Frazer Sinclair

On Saturday, the 13th instant, the Honourable the Recorder sat for the purpose of hearing a motion, for liberty to sell the Arab ship SHILANDON, some time since captured and brought into this port by the ship Farquhar, *Letter of Marque*, to restrain which an injunction had been heretofore granted by the Court, upon a bill filed on the equity side thereof, till the merits were decided in a prize court. The motion was made on behalf of William Edward Phillips, Esquire, the Collector and Comptroller of Customs on this island, and also by the Defendant, the commander of the letter of marque, and the Owners of the Cargo taken in the said vessel, grounded upon the affidavit, stating that the ship was much damaged, and in danger of being lost to all parties, and that the cargo was of a perishable nature; under those circumstances, and by the consent of all the parties interested, and present in Court, the Recorder ordered the ship and cargoes to be sold, and the proceeds to be lodged in the treasury with the Accountant General of the Court and to be preserved for the use of such persons as shall eventually be entitled thereto, under the adjudication of the Prize Court at Calcutta. The Recorder conceived that this was in support and aid of the prize jurisdiction, and to prevent a failure of justice.

Thus the Court of Judicature of Prince of Wales' Island completed its first twelve months of operation. Its main activity during this period was that of exercising its original criminal jurisdiction. Of that activity only R. v. Till appears here this being the only criminal matter which seems to have given rise to any discussion at all. It is hoped in subsequent issues to reprint further material relating to the legal development in Penang.