Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Pollard v. *Harragin, from the Supreme Court of Trinidad and Tobago; delivered* 13*th June* 1891.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.
MR. SHAND (LORD SHAND).

[*Delivered by Sir Richard Couch.*]

The Appellant brought an action against the Respondent, an Acting Stipendary Justice of Port of Spain, in the Supreme Court of Trinidad and Tobago, for assault and battery and false imprisonment, claiming 600*l.* as damages. The writ was issued on the 28th of October 1889, and the statement of claim was delivered on the 31st of October. On the 8th of November the Defendant, in his statement of defence, pleaded Not guilty by statute. On the 25th of November the Plaintiff demurred to the defence, on the ground that the section or sections of the Ordinance referred to in it had not been inserted in the margin, and on other grounds, and gave notice to the Defendant that the demurrer was set down for argument on the 27th of November. The demurrer came on for argument on the 29th of November before Mr. Justice Lumb, who made the following

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order:—"Upon hearing what was alleged on "both sides, the Court doth order that the said "demurrer be overruled, with costs to be paid "by the said Plaintiff to the said Defendant; "and doth further order that the said Plaintiff "do deliver to the Defendant, before 4 o'clock "p.m. this day, a reply to his statement of "defence; that the case be set down for trial on "Monday the 2nd day of December 1889, and "that the said Defendant do accept short notice "of trial."

The practice of the Court is governed by the Rules in the Schedule to the Ordinance for the constitution of the Supreme Court made in 1879. The rule under which this order was made is Rule 12 of Order XXVIII., which is,—"Where "a demurrer is overruled the Court may make "such order and upon such terms as to the "Court shall seem right for allowing the de-"murring party to raise by pleading any case he "may be desirous to set up in opposition to the "matter demurred to." The 29th of November was Friday, the following day was a half holiday, then came Sunday, and thus the Plaintiff had no time to prepare for the trial. And it is to be observed that by Order XXIV., Rule I., the Plaintiff had three weeks after the defence had been delivered to deliver his reply, and the 29th of November was the last day of the three weeks. The Defendant was therefore not in a worse position than if the Plaintiff instead of demurring had delivered the reply on the last day allowed to him for it. The meaning of Rule 12 appears to be that where the real merits of the controversy have not been disposed of on the demurrer, the Court should make such an order as would allow them to be properly tried. The order for trial on the Monday went very far, if not entirely, to prevent this, as far as the Plaintiff was concerned. And it does not appear that the learned Judge had before him any ground

for making so peremptory an order. By Order XXXVI., Rules 3, 4, actions are to be tried and heard either before a Judge or Judges, or before a Judge and jury, and the Plaintiff may with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of those modes of trial. By Rule 6 a party to whom notice of trial is given may move the Court to appoint a different mode of trial from that specified in the notice of trial, upon giving notice of motion within four days from the time of the service of the notice of trial. If the case was to be heard on the Monday these rules could not be followed, and the effect of the order was practically to deprive the Plaintiff of having a trial by jury, apparently without any argument upon that matter.

The Plaintiff on the day on which the order was made gave notice to the Defendant that he discontinued the action. This he was not at that stage of the action at liberty to do, and the discontinuance was altogether invalid.

On the 2nd of December the case came on for hearing before Mr. Justice Lumb. The Defendant appeared by Counsel; the Plaintiff did not appear. Order XXXVI., Rule 18, says, "If when an action is called on for trial the "Defendant appears, and the Plaintiff does not "appear, the Defendant, if he has no counter-"claim, shall be entitled to judgment dismissing "the action." There was no counter-claim here, and it appears from the Judge's notes that the Defendant's Counsel claimed that the Defendant was entitled to judgment under that rule. The learned Judge, instead of dismissing the action, took the evidence of the Defendant and his witnesses, and then gave judgment for the Defendant, with costs. No reason appears in the Judge's notes for this very irregular proceeding. Their Lordships will only observe that

the evidence taken appears to them to be such as it would be proper to submit to a jury, and the Plaintiff might be seriously prejudiced by not having a trial by a Judge and jury. On the 13th of December the Plaintiff made an affidavit that the trial of the action was fixed for the 2nd of December without his consent, and on the 17th of December he moved the Court, consisting of the Chief Justice and another Judge and Mr. Justice Lumb, by Counsel for an order to set aside the judgment as irregular. The Defendant's Counsel objected that the motion was really an appeal from a judgment, and that notice of appeal had not been properly given. The Court, after hearing arguments, allowed the Appellant to put his motion in form as an appeal, by affixing the stamp fee for appeals, and the case to be heard as an appeal, the Respondent not further objecting. After hearing the Appellant's Counsel the Court held that the order of the 29th of November was a proper order under Order XXVIII., Rule 12; and as to the objection that judgment was entered up before the time for setting the action down for trial had elapsed and without any notice of trial, the Court held that the Judge had ample discretion under Order LVII., Rule 6. That rule is, "A Court "or a Judge shall have power to enlarge or "abridge the time appointed by these rules, or "fixed by any order enlarging or abridging time "for doing any act or taking any proceeding, "upon such terms (if any) as the justice of the "case may require." Their Lordships doubt whether this rule is applicable where a demurrer is overruled and an order made for allowing the demurring party to plead. If it is, and assuming that it gives the fullest discretion to the Judge, they are of opinion that the discretion was in this instance improperly exercised, so as constitute a substantial denial of justice. The

intention of Rule 6 appears to their Lordships to be that the demurring party shall not be concluded by a judgment on demurrer, which does not decide the case on the merits. The plea of the Defendant did not state any facts, and none were admitted by the demurrer. The Plaintiff ought to have been allowed to raise by pleading his case on the facts, and to have had a reasonable time for proceeding to trial. By Order XXXVI., Rule 5, the Plaintiff is allowed six weeks to give notice of trial, and that is a ten days' notice. If short notice of trial may be given that is a four days' notice. These provisions, as well as those in the rules, as to the mode of trial appear to have been entirely disregarded in the order of the 29th of November 1889. Their Lordships are of opinion that this order, except so far as it overruled the demurrer with costs, should be set aside, that the judgment of the 2nd of December 1889 and subsequent proceedings should also be set aside, and that the Defendant should pay to the Plaintiff his costs incurred in the Court below subsequently to the order of the 29th of November 1889. The Plaintiff should have leave to reply to the Defendant's plea within three months from the date of Her Majesty's Order in Council upon this appeal, and to proceed to trial according to the practice of the Supreme Court. Their Lordships will humbly advise Her Majesty accordingly.

The Respondent will pay to the Appellant his costs of this appeal, but from the date on which the Appellant was permitted to proceed with his appeal *in formâ pauperis* his costs will only be allowed on that footing.