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usufructuary interest. Consequently, notwithstanding the deferred possession, the share of her daughter Margaretha became an asset, by virtue of the community, in the estate of her husband, as it had vested in her before the date of insolvency.

FITZPATRICK, J., and DWYER, J., concurred.

Application granted accordingly, as prayed.

[Applicant's Attorney, I. HORAK DE VILLIERS.]

QUEEN *vs.* COLTMAN AND OTHERS.

Colonial Forces.—F. A. M. Police.—Cape Mounted Rifles.—Act No. 9, 1878.

A conviction under the Cape Mounted Rifles Act, No. 9, 1878, *for refusing to serve, quashed, there not having been any overt act of disobedience, but merely a negative answer given to a question put by the Commanding Officer, which question implied an option to the men to say "yes" or "no."*

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Queen *vs.* Coltman and others.

The appellants, seven members of the Frontier Armed and Mounted Police, appealed against a conviction by the Magistrate of Komgha, on a charge of contravening Article 7 of the Schedule of Offences to Act No. 9, 1878.

The accused had been enrolled under the then existing Acts of Parliament regulating the Police Force, and their period of service had not expired when, by Act No. 9, 1878, the previous Acts were repealed, and a new force, under the title of the Cape Mounted Riflemen, created. The first section of Act 9, 1878, provided that the repeal of the previous Acts should not have the effect of discharging any person enrolled or embodied under their provisions from any service which he might be liable to fulfil, or of infringing upon any rights acquired under such Acts. After the promulgation of Act 9, 1878, the members of the Police Force were paraded, and a question was put to them whether or not they would serve in the new force for their unexpired

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term. The accused replied "No," whereupon they were arrested, and tried and convicted as above stated.

Jacobs, for the accused, contended that the men who had enlisted in the Police Force could not be compelled to serve in a military force like the Rifles. The accused did not wish to shirk the duties for which they had enlisted, and merely wished to indicate their unwillingness to being transferred. They had committed no crime.

Upington, A.G., for the Crown, submitted that the question sought to be decided was, whether or not the new Act took the place of the old one. There was merely an alteration of the name of the force, and not a single new duty or liability imposed on the men. He admitted it was a mistake to have put the question to the men, an order ought to have been given them, and punishment for disobedience would have followed as a matter of course. The men had taken up a wrong position in supposing that they were discharged from further service. There was no intention of dealing harshly with them, and they had been offered their release if they would resume their duties, which they had refused to do.

Jacobs, in reply, said the men wanted the conviction quashed. There had been no refusal of duty. If there was any ambiguity about the statute, it should be construed in favour of the accused.

De Villiers, C.J., in giving judgment, said: In this case the charge against the prisoners was, that during the period for which they had engaged to serve in the F.A.M. Police they refused to serve in terms of Article 7 of the schedule of offences, referred to in Act 9 of 1878, in the Cape Mounted Riflemen, with which corps the former has been incorporated. The 7th section of the schedule reads as follows:— "During the period for which he shall have engaged to serve in the said force, deserting therefrom or refusing to serve therein, or advising or persuading any other members to desert," and so on. This is specified as one of the offences for which a member of the Mounted Rifles can be punished. The question in this case is whether the prisoners have refused to serve in the Mounted Rifles. It must be borne in mind, in the first place, that these men have not yet, since the passing of the Act of 1878, done any duties under that Act, or any duties connected with the Mounted Rifles. The

evidence of Capt. Grant is explicit on that point. The prisoners are brought forward on parade, and certain specific questions are put to them, "Will you, or will you not, serve in the Mounted Rifles for the unexpired period of the term for which you engaged to serve in the Police?" The witnesses for the prisoners give a different version: they say the question was, "Are you, or are you not, willing to serve in the Mounted Rifles?" Whatever the form of question was, however, I think it really amounted to this, "Are you willing to serve in the Mounted Rifles, or are you not willing?" and by the form in which the question was put the prisoners might reasonably have been led to the conclusion that it was left to their option whether they would serve or not in the Rifles, especially considering that they had not up to that time served in that corps. Upon that they said "No," by which I understand them to have signified not that they refused any duty imposed upon them, or wished to disobey any lawful command, but simply expressed what passed through their mind in answer to a question which implied an option on their part. That being my view, I think these men ought not to have been convicted under the section, without an overt act on their part of disobedience. Capt. Grant ought to have given some command and ordered the men to perform some duty, and upon their refusal, he would have been justified in having them punished. Under these circumstances I am of opinion that the Magistrate's sentence ought to be quashed.

FITZPATRICK, J., and DWYER, J., concurred.

Conviction quashed accordingly.

[Appellants' Attorneys, FAIRBRIDGE, ARDERNE, & SCANLEN.]

WOLSTENHOLME *vs.* BOYES.

Writ of Execution.—Rule of R. M. Court No. 46.—*Fraud.—Costs.—Deputy Sheriff and Magistrate.*

A Deputy Sheriff, in execution of a writ against plaintiff, attached certain goods of plaintiff's in his store. Subsequently the Deputy Sheriff sold not only the goods attached