

1838.  
Nov. 28.  
1839.  
Jan. 12.

Still vs. Norton.

appear to have been due at the date of the dissolution by the firm of Norton & Co. to the firm of Still & Co., and that he was not barred from so doing by a clause in the deed of dissolution, whereby both Still and Norton did "remise, release, and for ever quit claim unto and discharge each other, &c., &c., of and from all manner and actions, cause and causes of action, suits, accounts, reckoning debts, and sums of money, claims at law and in equity, which we and each of us now hath or shall have or may or without these presents might have, claim, or demand, or be in any wise entitled to from or against the other of us by reason or in consequence of the said copartnership so hereby dissolved. Save only and except as to and respecting all or any of the covenants and agreements in these presents contained by either of the parties to be observed and performed, and to any means or remedies, &c., to be taken for enforcing the due execution thereof."

Because this cause of action did not arise from the copartnership, but from one of the covenants or agreements in the deed of dissolution, to enforce the due execution of which this action was brought.

*Postea* (12th January, 1839).—The defendant lodged a petition, and moved to have an appeal allowed.

The Court refused the application *hoc statu*, in respect that until the accounting had taken place between the parties, it was impossible to ascertain whether this judgment, even supposing it to have the effect of a final or definitive sentence against the defendant, was one for or in respect of any sum above £500, or even that it would have any effect whatever against the defendant.

After accounting between the parties, a large balance of several thousand pounds was found to have been due by Norton & Co. to Still & Co., for which balance judgment was given for the plaintiff, with costs.

FRASER vs. NORTON & Co., viz.: J. NORTON AND F. STILL.

1839.  
Aug. 30.  
" 31.

Fraser vs.  
Norton & Co.,  
viz.: J. Norton  
and F. Still.

*Mercantile Interest: Payment of. Custom of Trade, as to.*

The partnership of John Norton & Co., of Graham's Town, consisted of John Norton and Forbes Still.

In 1835, the said John Norton, living then in London, had with the plaintiff the transactions specified in the

following account-current which it was admitted had been signed by John Norton of the date it bears:

"Dr. Messrs. JOHN NORTON & Co.,

To JOHN FRASER.

1835.

Jan. 19.—To cash advanced from Mr. Norton	£70	0	0
Feb. 7.—To my acceptance to Mrs. Joseph at three months, and due 10th May ... ..	25	0	0
Feb. 7.—To shipment per <i>Agrippina</i> , per invoice annexed ... ..	82	17	5
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	£177	17	5

"London, 7th February, 1835.

"E.E. JOHN FRASER.

"Agreed, JOHN NORTON & Co."

£177 17 5

On the 8th of October, 1836, plaintiff wrote to Still & Co., which was the title of a partnership subsisting in Cape Town between the said J. Norton and the said F. Still (or, in other words, the Cape Town firm of the same partnership, of which Norton & Co. was the Graham's Town firm, and through which firm of Still & Co. all the English transactions of the partnership passed), enclosing a copy of the above account-current, with this addition, that it charged interest on each of the three items of which it was composed, —on the first bond from 19th January and 7th February, their respective dates, and on the second from the 10th May to 8th October, 1836; which interest, amounting in all to £20 1s. 4d., was added to the capital, and a balance of £197 18s. 9d. brought out against John Norton & Co.

In June, 1838, plaintiff sent out a power of attorney to his agents here to sue John Norton & Co. for £214 14s. 7d., as the balance due by them in the following account-current thereto annexed:

"Dr. Messrs. JOHN NORTON & Co.

To JOHN FRASER.

1837.

Jan. 1.—To amount due per account rendered Messrs. F. Still & Co. ... ..	£197	18	9
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1838.

May 31.—To interest on do. to date $5\frac{1}{11}$ ...	16	15	10
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	£214	14	7

"London, 31st May, 1838.

"E.E. JOHN FRASER."

1839.  
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" 31.

Fraser vs.  
Norton & Co.,  
viz.: J. Norton  
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In 1837, John Norton and Still had dissolved their partnership under both firms, agreeing between themselves, that John Norton should discharge all the debts due by Norton & Co.

John Norton refused to pay the above amount to plaintiff's agents when demanded, who thereupon brought this action against J. Norton and F. Still, as having been the partners of John Norton & Co., for the said sum of £177 17s. 5d. of capital, with the usual and customary interest thereon.

After receiving service of the summons, John Norton tendered £177 17s. 5d., the capital, and £7 10s. 6d., being interest thereon at 5 per cent., computed from the 8th October, 1838, when a letter from plaintiff dated 9th June, 1838, had been received by him demanding payment of the £214 14s. 7d. to the 2nd August, 1839, being the date of the tender, together with £15 to cover payment of all plaintiff's costs and charges.

This tender was refused.

Still allowed judgment to go by default against him.

Plaintiff called Edward Eagar: I am a merchant, and during twenty years I have in this Colony been engaged in mercantile transactions with merchants in London. As far as my transactions go, I have always understood that interest was due on the balance of our account from the day on which the balance was acknowledged. That interest was due from the day the debt was due, whether that debt was a single transaction or a balance in several transactions, and I have always paid interest accordingly. I know that other houses besides my own have settled for interest with London houses on this principle, and I believe it to be a general practice. The traders in London from whom I have bought goods generally deducted six months' discount from the amount of the invoices, and charged interest from the date of the transaction. I have only had dealings with Mr. Home, of London, but I have always understood that the above principle is acted on by all houses.

Richard Webster Eaton: I have been a merchant in this Colony for many years, and have had transactions with mercantile houses in London, and I have frequently been trustee in the insolvent estates of merchants here who had traded with London. In transacting business with my correspondent in London, Mr. Ebdon, interest was charged on both sides of the account on each transaction, and the balance of interest included in the general balance, which accumulated balance was charged with interest from the day it was carried to the new account. I always understood this to be the general custom, and I have never seen an account between merchants in which the principle was not acted on.

Ewan Christian, who had been a merchant in Cape Town, trading with London for twenty-five years, gave precisely the same evidence as Mr. Eaton, and added, "I should expect to pay interest on a balance sheet at any time from that date."

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William Gadney: I have been a merchant in Cape Town trading with London for many years. I have heard the evidence of the preceding witness, and I believe that the usual custom of trade is that which he has described it to be. But if a final balance were struck on the parties ceasing to have further transactions with each other, I should conceive that if the creditor made no demand for the balance for a length of time, then that the debtor would be entitled to object to payment of interest from the date of striking the balance. I am of opinion that if the plaintiff in this case had made a timeous application for payment of the balance as then (7th February, 1835) struck, he would have been entitled to interest from that date; but as he forbore for several years making any demand, the defendants are now entitled to object.

Plaintiff closed his case.

Defendant called no evidence as to the custom of merchants in charging interest on cases like the present.

The *Attorney-General* maintained that plaintiff was entitled to interest as charged in the account.

*Cloete, contra*, quoted *Chitty's Comm. Law*, Vol. 3, p. 310; *Voct* 22, 1, 1.

*Cur. adv. vult.*

*Postea* (31st August, 1839).—The Court held that plaintiff was entitled to charge interest on the three items in the account signed by defendant Norton, and dated 7th February, 1835, viz., on the first item from the 19th January, on the second from the 10th May, and on the third from 7th August (thus allowing six months' credit on the goods shipped per *Agrippina*) to the 31st December, 1835, and to accumulate this interest with the capital on the 31st December, 1835. That if the plaintiff had rendered a state of the account to or made a demand for payment of that accumulated balance on the defendant *tempestive* in 1836, he would have been entitled to charge interest on the accumulated balance from 1st January, 1836, but that as he had not done so he could only claim interest from the day his demand for payment became known to John Norton & Co., by plaintiff's letter of 8th October, 1836, to Still & Co. being communicated by the latter to Norton & Co., which was held by the Court to have taken place on the 31st January, 1837.

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The Court, therefore, gave judgment for plaintiff for £183 12s. 9½d., with interest thereon from 1st February, 1837, to 31st August, 1839, and costs.

### TERRINGTON vs. SIMPSON.

*Service. Affidavit. Sheriff's return.*

1840.  
Nov. 2.

*Service at the counting-house of a partnership firm is not service against one of the partners individually. Affidavit allowed to impeach the Sheriff's return.*

[Vol. I, p. 135.]

### HAUPT vs. SPAARMAN AND ANOTHER.

*Service.*

Nov. 30.

*Personal service on one partner of an alleged partnership, not at the place of business of the firm, held to be no service as against his alleged partner.*

[Vol. I, p. 135.]

### MEINTJES & Co. vs. SIMPSON BROTHERS & Co.

*Service. Pleading. Intervention.*

*Absent partners : Service of summons on. Pleading: Exception.*

*Partners absent from the Colony must be summoned (or required to intervene after summons) at the place of business of the company in Cape Town.*

1841.  
May 20.  
July 12.  
—  
Meintjes & Co.  
vs. Simpson  
Brothers & Co.

In this case the summons was taken out against J. P. Simpson, Joseph Simpson, T. Jones, and T. G. Simpson, copartners, carrying on business under the firm of Simpson Brothers & Co. A declaration was filed against these four as defendants. But by an order at Chambers obtained by plaintiffs, they were allowed to withdraw "all proceedings had in this cause against T. Jones, T. G. Jones, and Joseph Simpson, and to continue the proceedings against John Price Simpson, now or lately carrying on business at