

INSTITUTES.  
OF THE  
LAWS OF CEYLON,



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THE LAWS OF WAR AFFECTING SHIPPING AND COMMERCE,  
ETC. ETC.

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THE  
INSTITUTES OF THE LAWS  
OF  
CEYLON.

BOOK II.

CHAPTER I.

THE LAWS OF CEYLON.

JURISPRUDENCE is the science or philosophy of positive law, and is either general or particular. General jurisprudence investigates the principles common to all systems of positive law; whilst particular jurisprudence treats of the positive law of a given nation or community, such as England, France, or Ceylon. By positive law is meant the law established in an independent political community by the authority of its Supreme Government. Positive law, and consequently the particular

jurisprudence of Ceylon, is also divided into public and private law. Public law is that which treats of the constitution of the state, and the relations existing between the government and the individual members of the community. Private law (sometimes termed civil law) is that which treats of the relations of these individuals amongst themselves. It is this latter law which this second book mainly treats of, though many of the propositions or principles laid down of necessity apply as well to the determination of questions between the Crown and the subject as between subject and subject, especially where the Crown deals with a subject as if it were itself a person; as where, for example, it contracts with a subject for the performance of a public work for a price. (*Inst.* i, i, i; *Mackenzie*, pp. 44-53.)

Division of  
the law.

This branch of jurisprudence is divided by Grotius into—1, The Rights of Persons; 2, The Rights of Things; and 3, Obligations. A division and order not followed in all countries or systems of jurisprudence; but it is the division and order that will be adopted here, as being that of the Roman-Dutch writers.

Law is usually divided into the *Lex Scripta* and the *Lex non Scripta*.

*Lex scripta*.

The *Lex Scripta* comprises the statute law of the land, and includes, in Ceylon, such Acts of Parliament as are applicable to the colony; royal charters; letters patent under the great seal; instructions by the Crown to the Governor; minutes of council; proclamations; regulations; and ordinances.

Formerly all local legislation was by proclamation, on the authority of the Governor only. On the 23rd of June, 1802, it would appear that some change in the constitution of the Governor's council took place, and proclamations were subsequently issued jointly, "By His Excellency's command," with the signature of the Chief Secretary to Government, and "By order of the Council," and signed by the Secretary to the Council also. The enacting words of these statutes were very obscure, the word "enact" not generally being used in them; they were, no doubt, in general, issued by the Governor in Council; but were, probably, intended as only temporary arrangements, though those that remain unexpired and unrepealed are now treated as statutes to all intents and purposes. These proclamations were now and then published in the form of "Instructions," of which some are still in force.

Proclama-  
tions,

The proclamations of the present day are generally published under the authority of some ordinance, or other statute, and are in some cases issued by the Governor alone, and in others by the Governor and the Executive Council.

In November, 1805, the legislative acts began to be passed under the name of "Regulations." They were, of course, intended to be enacted by the Governor in Council, and in all regularity ought to have been first signed on behalf of the Council, and then on behalf of the Governor, as implying his assent. Some, however,

Regulations.

are signed only on behalf of the Governor, and one on behalf of the Council only. The later regulations are signed and published in the regular form. They all, however (except those repealed or expired), have the force of statutes.

ances. In 1833, the legislative power was taken away from the Governor's Council, and given to a Legislative Council, consisting of nine official and six unofficial members; and the legislative acts then took the name of "Ordinances,"\* and these are now regularly enacted "by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof," and are published by his Excellency's command, and signed by the Colonial Secretary; and, until the 9th September, 1861, received no formal assent, which, however, they now do.

pretation  
statutes.

The statutes of Ceylon, described above, are interpreted by the judges according to certain recognized rules, of which the chief, called "the golden rule," is to give to all the words of a statute their plain ordinary meaning, unless absurdity, injustice, or repugnance to the clear intent of the statute would be caused by so doing; and if it should, so to modify the words as to avoid that, which certainly could not have been the intention of the Legislature. (*Castreque v. Page*, 22, *L. J. C. P.* 146; *Perry v. Skinner*, 2, *M. and W.* 476);

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\* Ordinances, or ordonnances, is the oldest name of the English Statutes. They were not called acts until a late period.



and the strict grammatical construction must bend to the obvious intention of the Legislature. (*Millar v. Salomans*, 7 *Exch.* 546.)

To discover this intention, there are four things to be considered, which are specified in *Heydon's case* (3 *Rep.* 7). 1. How the law stood at the making of the statute. 2. What the mischief was for which the common law did not provide. 3. What remedy the Legislature has provided to cure this mischief. 4. The true reason of the remedy. Having considered these points, the judges should make such construction as shall suppress the mischief and advance the remedy.

A statute which treats of things or persons of an inferior rank cannot by any general words be extended to those of a superior rank, unless the general words would otherwise be entirely void. Thus an enactment relating to "bills of exchange, promissory notes, or other written securities," would not take in *bonds*, which are of superior rank (*Marsh.* 395). But the difficulty this rule is intended to meet, is now usually avoided by an interpretation clause. (1, *Bl. Com.* 88.)

Penal statutes must be strictly construed; but not so as to render them "inconvenient, and against reason; or so as to admit of any absurd consequence." Further, they may even be taken by intendment, to the end that "they should not be illusory; but should take effect according to the express intentions of the makers of the act. (1, *Bl. Com.* 88: *Dwarris on Stat.* 754-5.)

The rules in *Heydon's case.*

Statutes relating to inferior ranks cannot by general words extend to superior.

Penal statutes to be strictly construed.

tions. For example, as to the first part of the rule; a penal proclamation (14 *Jan.* 1826, § 4) confiscated the lands of *persons concerned* in certain fictitious transfers of their lands to headmen to avoid a tax; it was held that they must be *personally* concerned to be liable to such confiscation. (552, *G. A. Maddewelletenne*, 30 *Nov.* 1833; *Morg. D.* 8.) In the above case, the land alleged to be fictitiously transferred was in the possession of a son and a mother, and the transfer (if any) was by the mother only. After her death a confiscation was decreed against the son; but, as he was not *personally* concerned, and as the mother, being dead, could not be prosecuted, the confiscation was, on appeal, set aside. (*Marsh.* 387.) And on the same clause it was, on the same principle, held that a fraudulent registration of land (to avoid tax) by a headman in office, was not a fictitious transfer from some person to him for the same fraudulent purpose, within the strict construction of the clause. (*Marsh.* 288.) Similarly, a penal clause relating to the sale of wine or spirits, sold for the purpose of being consumed on the premises within which the same shall be sold, does not extend to any sale of brandy in the public streets. (1191, *P. C. Colombo*, 13 *Jan.* 1846; *P. C. Ca.*) Again, it was held by the Supreme Court that a person possessing arrack without a license could not be held criminally liable under the literal words of the Arrack Ordinance, which, literally interpreted, would make the *mere physical possession* enough for a

conviction, because it would be against reason to hold a man guilty without *mens rea*, or even *mens conscia*. (16940, *P. C. Kaigalle*, 29 Oct. 1861; *P. C. Ca.* 160.)

As an illustration of the latter part of the rule, it was held that a person causing Crown timber to be illegally felled and removed came under § 5 of Ord. 24 of 1848, which is only worded against persons felling and removing Crown timber; not only because a person causing such acts would be a principal as engaged in a common design, but because it would render the Ordinance illusory, if held not to apply to the very parties against whose malpractices it was necessary to provide, but to his servants only, possibly innocent agents in point of fact. (19058, *P. C. Kornegalle*, 1 Dec. 1859; *P. C. Ca.* 135.)

On the same principle, words will be taken as being generic terms, and not used in their most limited sense, if the latter sense would tend to defeat the whole or part of the express intentions of the act. Thus, Ord. 9 of 1842, which is for the prevention of mischief by "dogs," was held to apply to "bitches;" otherwise half the mischief would not have been done away with. (294, *P. C. Gampolla*, 21 July, 1846; *P. C. Ca.* 4.)

Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their

Generic terms.

Statutes against frauds construed liberally.

consequences penal. But this difference is here to be taken : where the statute acts upon the offender, and inflicts a penalty, it is to be taken strictly ; but when the statute acts upon the offence, by setting aside the fraudulent transaction, then it is to be construed liberally (1, *Bl. Com.* 88). Thus the 25th clause of the Police Ordinance (17 of 1844) makes a person liable to punishment who receives valuable property without showing it to the constable, &c. ; and it also enacts that the person delivering such property shall not be entitled to recover it back, unless the delivery be witnessed as therein directed. On the basis of the last two rules, the first of these provisions should be construed strictly, the latter liberally. (*Marsh.* 395.)

Statute to be construed effectively.

One part of a statute must be so construed by another, that the whole may (if possible) stand and be effective ; *ut res magis valeat, quam pereat.* (1, *Bl. Com.* 89 : *Marsh.* 395.)

A saving totally repugnant, void.

A saving totally repugnant to the body of the statute is void. (1, *Bl. Com.* 89.)

Common law and customs give way to statutes.

Where the common law and a statute differ, the common law gives place to the statute ; and an old statute gives place to a new one (1, *Bl. Com.* 89). So that native customs only remain in force so long as they remain unrevoked and unqualified by the legislature ; and if any custom is found to be at such variance with an ordinance that the two cannot exist together (though

the custom were unknown, not adverted to at the passing of the law, and not mentioned therein), the custom must give way to the ordinance. (*Marsh.* 396.)

Out of the rule that a new statute annuls an old one on the same point, arose the rule “that if one law be repealed by another which is itself afterwards repealed, the former law revives, unless such revival be expressly guarded against in the repeal of the second law.” (*Marsh.* 396.) But this rule is now altered by *Ord.* 1 of 1852, § 3, which enacts, “that when any ordinance repealing in whole or in part any former ordinance, or regulation,\* is itself repealed, such last repeal shall not revive the ordinance, or regulation, or the provisions before repealed, unless words be added reviving such ordinance, regulations, or provisions.” Also by the next clause (§ 4), “provisions repealed shall remain in force until the substituted provision shall come into operation by force of the last-made ordinance.”

Statutes derogatory from the power of subsequent legislative councils bind not; for when you repeal the law itself, you, at the same time, repeal the prohibitory clause which guards against such repeal. (1, *Bl. Com.* 90.)

Statutes impossible to be performed are void; and if there arise out of statutes collaterally any absurd con-

Repeal of statutes.

Statutes derogatory of legislative authority, void.

Impossible statutes, void.

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\* The word “proclamation” is omitted, no doubt unintentionally. There are several proclamations still laws.

sequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. (*Bl. Com.* 91.)

Wording of ordinances.

Ordinances were, formerly, like acts of parliament, extremely verbose; the enacting words, "And be it further enacted," were repeated at the beginning of every clause; but now the sections into which an ordinance is divided, where there are more enactments than one, are deemed to be substantive enactments, without any introductory words. (*Ord. 1 of 1852, § 1*). Another cause of length was the introduction of long descriptions of a person, an authority, or a thing, which were repeated in full every time the person, authority, or thing, was referred to. To get rid of this, it has been enacted that (*Ord. 1 of 1852, § 2*):—

Male to include female, and singular, plural.

1. Words importing the masculine gender shall be deemed and taken to include females; and the singular shall include the plural, and the plural the singular, unless the contrary, as to gender or number, is expressly provided.

Meaning of "Governor."

2. The word "Governor" is to be held to mean the person lawfully administering the government of this island for the time being.

Meaning of "this Island," &c.

3. The words "this Island," "this Colony," and "the Island of Ceylon," are held to mean the Island of Ceylon and the dependencies thereof.

Meaning of "Ordinance."

4. The word "Ordinance" is held to include "Regulation."

5. The word "month" means calendar month, unless words are added to show lunar month to be intended. Meaning of "month."

6. The word "land" includes messuages, tenements, and hereditaments, houses and buildings of any tenure, unless there are words to exclude houses and tenements, or to restrict the meaning to tenements of some particular tenure. Meaning of "land."

7. The word "oath," "swear," and "affidavit," shall include affirmation, declaration, affirming and declaring, in the case of persons by law allowed to declare or affirm, instead of swearing. Meaning of "oath," "swear," and "affidavit."

Ordinances are *public*, or *private*; the chief difference being, that public ordinances must be judicially and *ex officio* noticed; but a private ordinance must be specially pleaded, or formally set forth by the party who claims an advantage under it. (1, *Bl. Com.* 86.) In England, many private acts are of such public importance, that they are made public acts in the act itself. A reverse system obtains in Ceylon; for, since 25th Aug. 1852, all ordinances are deemed public ordinances, unless the contrary is expressed. (*Ord.* 1 of 1852, § 5.) Ordinances, public, or private.

The general, or, as it is popularly termed, the common law of Ceylon, is obtained from treatises on the Roman-Dutch law, that is, the Roman civil law, added to or abrogated by the feudal customs, and federal or state statutes of the United Provinces of Holland. These variations, additions, or abrogations, appeared not only in the statute books of Holland, but in respect of Dutch cus- Common law.

toms in judicial decisions, and in learned treatises of jurisconsults, which bear almost the authority of such decisions. In respect, therefore, of its Roman basis, the Roman-Dutch law may, perhaps, be looked upon as written law; but, in respect of the Dutch decisions and commentaries, as unwritten law. From this Roman-Dutch law, which is popularly regarded as the common law of a great part of Ceylon, Dutch feudalism and local customs must be largely subtracted, as well as other institutions peculiarly Dutch, which do not obtain in Ceylon; so that the Roman-Dutch law, as accepted in Ceylon, re-approaches the civil law; and indeed it will be found, in the old treatises, as in *Voet on the Pandects*, that, when not controlled by some statute or custom, the Dutch commentator always relies on the civil law as his authority.

Law of the  
maritime  
provinces.

The Roman-Dutch law, modified by statute, and the introduction of certain portions of English law and of modern equity, forms the law of the "maritime provinces," and extends to every inhabitant of the island, except in those instances in which such inhabitant is by privilege under the sanction of another form of law in certain cases.

Kandyan law.

Thus, the Kandyans retain "their civil rights and immunities, according to the laws, institutions, and customs established and in force amongst them;" but where there is no Kandyan law, or custom having the force of law, applicable to the decision of any question



arising for adjudication, the law of the maritime provinces is the law applicable for the determination of that question. (*Kandy, Conv. Art. 4 and § 5, of Ord. 5 of 1852.*) Similarly, with regard to persons under the sanction of the Thesawaleme, and also of the Mahommedan law: when these laws do not touch the question in hand, the law of the maritime provinces is applicable.

These privileges are individually acquired by descent or domicile. Thus, a woman domiciled in the Kandyan provinces comes under the Kandyan law, and is capable of becoming a security. (15756, *D. C. Kornegalle*, 14 Aug. 1862.) And in the case of married parties, the Kandyan law is not limited to the Kandyan natives, but extends to parties having their actual and matrimonial domicile in the Kandyan provinces, always supposing that its operation has not been expressly limited by any enactment on the subject. So that, an English woman domiciled and married in the Kandyan provinces, has a separate estate in property coming to her, and she can legally receive and hold property directly from her husband, or any one else, whether by way of gift, or under contract. (85; 36105; 36592; *D. C. Kandy*, 14 Aug. 1862.)

The Roman-Dutch law of community does not extend to Europeans married and domiciled within the Kandyan provinces, neither can it extend to married persons married and domiciled in Europe, though temporarily resident in Ceylon.

The principle that land descends according to the

*lex loci*, and that personal property descends according to the domicile when a party dies intestate, would often have brought the estates of intestate Europeans dying in the Kandyan provinces within the Kandyan law; but that is met by § 8 of 5 of 1852, which enacts that the succession *ab intestato* of Europeans, their descendants, and of Burghers, is to be the same as in the maritime provinces.

As the principle that domicile in the Kandyan provinces would give Europeans and others all the privileges of Kandyans, and consequently attach to them their peculiar institutions regarding marriage, it has been enacted that no marriage whatever of Europeans, their descendants, or Burghers in the Kandyan provinces, shall be valid, unless it would have been valid in the maritime provinces; and the Mahomedan code in force in the maritime provinces has been extended to the Mahomedans in the Kandyan provinces. (§§ 9 and 10 of 1852.) Prior to that ordinance Kandyan law governed Moorish parties. (18794, *D. C. Kandy*, 5 May, 1849; *Austin*, 99.)

Customs.

The unwritten, or common law, contains also general and particular customs, and particular customary laws peculiar to certain classes of the community. General custom, or the common law, properly so called, is the law by which the proceedings and determinations in the ordinary courts of justice are guided and directed. It has been pointed out, that the Roman-Dutch law is in

one sense common law, as it consisted of the civil law, modified by certain feudal and local customs. Also the customs of the Moors and Malabars are common law, even though their customs were collected into two codes and promulgated by authority, for those were simply declaratory of the law as far as it went in each case. It would seem that the Malabars, under the country law, are limited by the Thesaweleme; but certainly when the Supreme Court comes across a custom not included in the Moorish code, it never hesitates to refer to the general Mahomedan law. Also the Kandyan customs general to the Kandians may be looked upon as common law. The common law for the most part settles descent by inheritance. The rule that all waste and forest lands belong to the Crown, and that the Crown is entitled to a tithe of the paddy crops, are instances of general customs, or common law, in Ceylon. All the above are examples of established customs, forming the common law; they require no proof, and depend upon immemorial custom for their support.

The general rules and maxims of jurisprudence (including those of equity) are part of the common law of Ceylon. Such as that "a man is not bound to accuse himself; or that he must not take advantage of his own wrong, and must come into court with clean hands; or that he that seeks equity must do equity, and so on.

These customs are evidenced by judicial decisions of the Supreme Court, and by the books of persons who have

collected them together, and received as authorities of that court. The rules and maxims of jurisprudence are also to be found in those decisions, but chiefly in the writings of learned men. Judicial decisions are precedents; and it is an established rule to abide by former precedents where the same point occurs in litigation, unless they are clearly contrary to reason or divine law.

Particular  
customs.

Particular customs are those not general to the whole community, and are of two kinds, those which the law recognizes without full proof, and those that require full proof. Among the former are included the customs of the Kandyans, of the Malabars of Jaffna and Batticaloa, of the Moorish people, the tenure of service parveny, the right of the planter's share, and the like. These are some of the partial customs recognized by the law, and which require no proof, but only that the parties litigant or the lands in question are subject to them.

But there are other particular customs which themselves require to be proved, such as local rules as to fishing, use of water courses, and so on. Such a custom to be good must be *legal*.

1. It must be ancient, *i. e.* used so long that the memory of man runneth not to the contrary. If any one can show the beginning of it, it is not a good custom; therefore no custom can prevail against an ordinance, for the statute is proof of a time when the custom did not exist.

2. It must be *uninterrupted*, not indeed in the *pos-*

session, but in the *right*; so that mere *non-user* even for a term of years will not destroy the custom; but an *abandonment* of the custom, even for a single day, will.

3. As a custom arises from common consent, it must be *peaceable*, and acquiesced in; not subject to contention and dispute; its being immemorially disputed, either at law or otherwise, shows that consent was wanting.

4. Customs must be *reasonable*; rather must not be unreasonable. Thus it has been held to be a reasonable custom that a person going out to fish in a small canoe should be entitled to continue that fishing until the *maadel* is brought to the shore, as it is necessary only for him to move off to allow the *maadel* to be brought to shore. Such a custom secures to persons pursuing both modes of fishing the produce of their labours, and does not interfere with the other, more than is absolutely indispensably necessary. (16645, *C. R. Galle*, 5 *Jine*, 1860.) Thus, for example, it would probably be held a bad custom that the incoming tenant for the year, under the *nille* tenure, if he entered before harvest, should take the crop on the ground; for, in such case, his successor would take his crop in turn, and he would have no profitable motive fully to cultivate and sow the land. Such a custom would induce dishonest cultivation.

5. Customs ought to be *certain*; that is, not certain

in *quantity*, but certain in *principle*: thus, a custom to pay a tithe of the crop, in lieu of services, would be certain in principle, though uncertain in quantity; but a custom to pay sometimes a tithe, or sometimes two-tenths, at the option of the tenant or proprietor, would be bad for uncertainty.

6. Customs, when established, must be *compulsory*, and not *optional*.

7. Customs must be *consistent* with one another; for if contradictory, and if independently good, the court would have no alternative but to declare that, as both must be supposed to have cotemporary origin, they could not have had the common consent necessary to form good customs.

8. Customs in derogation of the common law must be construed strictly.

9. Customs submit to the royal prerogative. Thus, if the Crown purchases land to which the succession *ab intestato* is to all the children, yet it will, on the demise of the Crown, go to the next occupant only, and not to all the children of the Queen.

From the above it will be seen that the general law of Ceylon comprises the statute law, and the law of the maritime provinces, which last includes the Roman-Dutch law modified by statute, introduced English law, equity, and the general customs of the maritime provinces.

The particular laws comprise the laws of the Kandians, the peculiar laws of the Mahomedan population, the country or customary laws of Jaffna and Batticaloa, and admiralty law.

## CHAPTER II.

## GENERAL MAXIMS OF JURISPRUDENCE.

THERE are certain general maxims of jurisprudence which it will be advantageous to set forth before proceeding to the positive law of Ceylon.

*Ubi jus ibi  
remedium.*

“There is no wrong without a remedy.” (*Ubi jus ibi remedium.*) This is a fundamental matter of jurisprudence, recognized both in law and equity. *Jus* is often used as synonymous with *law*; but *jus* “here means the legal authority to do, or to demand anything.” (*Broom’s Maxims*, 191.) *Remedium* is the means given for the recovery or the preservation of a right. “If a man has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.” (*Per Holt, C. J. Ashby v. White*, 1 Sm. L. C. 237.) The novelty of any complaint is no objection to it, provided that an injury cognizable by the law has been inflicted;



and although there is no precedent, the courts will judge according to the law of nature and the public good (*Broom's Maxims*, 193); though where cases are new in the *principle*, it is necessary to have recourse to legislative interposition to remedy the grievance; yet, where the case is only new in the *instance*, and the only question is upon the application of a recognized principle to such new case, it is just as competent to courts of justice to determine any case which may arise two centuries hence as it was two centuries ago. (*Ashhurst, J. Pasley v. Freeman*, 2, *Sm. L. C.* 76.)

New actions, therefore, may be brought as often as new wrongs and injuries arise, whether by common law, or by statute. Thus every statute made against an injury, mischief, or grievance, impliedly gives a remedy; for the party may, if no remedy be expressly given, have an action on the statute. (2, *Dwarr. Stats.* 677.) For “where a statute gives a right, there, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident. (*Per Maule, J. Braithwaite v. Skinner*, 5 *M. and W.* 327.) In like manner, if a person neglects or refuses to do an important public duty that he is bound to perform, and thereby injures any one, the party injured has a remedy. (*Ferguson v. Earl of Kintoul*, 9, *Cl. and Fin.* 279.)

In the above maxim, viz. that “where there is a wrong there must be a remedy,” the wrong referred to

*Damnum  
absque injuria.*

is a legal wrong, not a moral wrong, or a mere loss. This qualification is expressed by the maxim that "*damnum absque injuria* is not a ground for a legal remedy." *Damnum* is such a damage, whether pecuniary or perceptible or *not*, as is capable in legal contemplation of being estimated by a court. *Injuria* is a legal wrong, that is, an act or omission of which the law takes cognizance as a wrong. Hence the meaning of the maxim is, that mere loss or detriment is not a ground of action, unless it is the result of a species of wrong of which the law takes cognizance.

The following are a few examples, which will be found more fully treated in other parts of this book.

Thus, if a man establish a nuisance close to my house, so as to render it less pleasant or uninhabitable, I suffer a loss capable of estimation by an act which in the eye of the law is a wrong, and I have a remedy; but if the nuisance had already existed, as, for example, a coir pit, and I of my own will build my house near it, I suffer, it is true, a loss, but not by the illegal act of another; I suffer *damnum absque injuria*.

Similarly, if I have acquired a servitude, as a right to light or lateral support, and my windows are darkened by a new wall, or my house is endangered by digging too near my foundations, I suffer both a *damnum* and an injury to my *jus*, and I can recover at law; but if I have not acquired a servitude, even though I suffer the same loss, no right of mine is trespassed upon, and my

neighbouring proprietor is then lawfully dealing with his own property, and works no *injuria*.

Every one has a right, *bonâ fide*, to bring an action, or bring a criminal charge, in which he may, however, be mistaken; but, although the defendant or accused party may suffer loss from my act, he has no remedy at law, because I am pursuing only a lawful public right in an honest manner, which is not an act that the law takes cognizance of as a wrong; but if I take legal action with malice, *and* without reasonable and probable cause, I am not pursuing my right honestly, and the law then regards my act as a wrong, and there is then both *damnum* and *injuria* to found a remedy upon.

So if one libels another to his damage, he is liable to an action; but if the words alleged as a libel are a confidential communication which it was his duty to make, though there is the same *damnum*, there is no legal wrong or *injuria*.

Acts of self defence are *damnum absque injuria*, as being lawful acts, even though the opposite party may be much hurt; and acts of defence against a common enemy, as, for example, erecting a wall or bank on another man's land to keep out a flood, are *damnum absque injuria*.

An old example is the case of rival trades. Thus, if a new comer, by the lawful acts of commerce, draw the trade away from an old firm, that is *damnum absque injuria*; for, though the old trader is suffering a real loss, the new comer is guilty of no legal wrong.

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Again, some executors complained that some persons claimed, by an action, some land which had been seized in execution for a debt due by the testator's estate. The action was discontinued. The executors then brought a suit to recover for the loss, delay, and inconvenience occasioned to them as executors in not being able to satisfy their testator's debt. This was *damnum absque injuria* (24345, *D. C. Colombo*, 11 June, 1860), in as much as the executors had no further title to the land; and bringing an action to substantiate a claim does not lessen any right, which, of course, may be exercised during litigation.

(For other examples, see *Broom's Commentaries*, pp. 76-80.)

The mode of determining whether damage has or has not been occasioned by what the law considers an *injury*, is to consider *whether any right existing in the party damaged, has been infringed upon; for, if so, the infringement thereof is an injury*. This is the mode of establishing the *injuria*.

If the *injuria* be shown, the law will presume a *damnum* in the technical sense above laid down; and in that sense *injuria sine damno* is not a ground of action; but if *damnum* be taken in the sense of an actual perceptible loss in the particular case, *injuria sine damno* may be a ground of action. Thus a suit is maintainable against one who makes a projection over the land of another before any rain falls to cause actual damage; for the right has already been injured; and every injury to a

*Injuria sine  
damno.*

right imports a damage in the nature of it, though there be no pecuniary loss.

But there are cases in which an injury takes place and an actual damage, but not a legal *damnum*, that is, a damage capable of being estimated. Thus, if a man so injures a road (as digging a trench across it) so as to interrupt the traffic, the community is injured, and it is impossible to estimate the damage to each person; in such case no civil action lies, but the trespasser is punishable criminally. If, however, any one falls into the trench and suffers injury, he then has an estimable loss, and a right of action, unless it is his own fault.

Another example of *injuria sine damno* is where the damage is too *remote* to be the subject matter of an action; in other words, because it is not the natural consequence of the act committed by the wrongdoer. Such damage is not, in legal contemplation, capable of being estimated by a court; and though there is actual damage, there is no *damnum* to ground an action upon. Thus, in a suit for slander, if special damages are claimed, they must be the legal and natural consequence of the words spoken, and not the mere wrongful act of a third party induced by the slander. For example, also, the director of certain musical performances brought an action for the publication of a libel on one of his singers, who was thereby debarred from singing by the fear of being ill received. The director lost profits in consequence; but it was held that the damage was too

Damage too remote.

remote, and the action not maintainable. (*Ashley v. Harrison*, 1, *Esp.* 48: see also *Lumley v. Gye*. 2, *E. and B.* 216.)

Again, a court cannot, in legal contemplation, estimate damage, where the action is opposed to public morality or public policy, or is litigated *in alieno foro*.

It is a maxim of equity; also, that there cannot be a right without a remedy; but still there are limitations of this maxim, even in equity: as where a man becomes remediless at law from his own negligence. But on the basis of this maxim, where one who has no remedy at law, and has not lost or sacrificed his remedy by his own laches or act, and there is no equal or superior adverse right, he will be entitled to relief.

The law, having given a man a remedy, next asserts that to obtain it "you must come into court with clean hands." An illustration of this maxim is found in the courts refusing all assistance to recover upon immoral contracts. No one can stipulate for iniquity. No polluted hand is permitted to touch the pure fountains of justice. Not only cannot money be recovered on such contracts, but if it has been paid in pursuance of immorality, the court will not aid the payer to get it back again. (*Collins v. Blantern*, 1, *Sm. L. C.* 322.) This question will be found fully developed in the chapter on Contracts. In like manner, if a party seeks to cancel, set aside, or obtain the delivery of an instrument on account of fraud, and he himself has been

Similar equitable maxim.

You must come into court with clean hands.



GENERAL MAXIMS OF JURISPRUDENCE.

guilty of wilful participation in the fraud, the court will not interpose in his behalf, unless the fraud is against public policy, and public policy would be defeated by allowing it to stand. (*St. Eq.* § 695.)

A somewhat similar principle, in seeking a remedy, is that "No man can take advantage of his own wrong." This is a maxim habitually applied by the Supreme Court to cases for decision.

No man can take advantage of his own wrong.

Thus, for example, a landlord cannot deny his own title as against his lessee; as if a lessor refused to repair on the ground that he was not the landlord at the time of the lease; for so allowing him to refuse, would allow him to take advantage of a wrongful act. (See *Levy v. Horne*, 766, 3, *Q. B.*)

Example.

So, also, if a man prevents a thing being done, he cannot avail himself of the non-performance he has occasioned. As, if the obligee of a bond prevented the obligor from performing the condition by some act, the bond is still saved. (*Com. Dig. Condition, D. 1.*)

So, also, if a man refuses a tender, although the debt is still due to him, as he was wrong in refusing, he is not entitled to damages or costs.

Tender.

So, also, if one is bound by a contract or duty to perform an act at a given time, and he by another and wrongful act of his own renders the former act impossible, he at *once* becomes liable for breach of contract, and not at the stipulated time merely.

Contract or duty rendered impossible.

When, by common will or accident, two materials of

Case of confusion.

different owners become mixed so as to be indivisible, the mixture is common proportional property (*Grot.* 2, 8, 8, 99); but if the owner of articles, such, for example, as oil or wine, mixes them, without consent, with similar articles of another, that is a wrongful act by the owner, for which he is punished by the other owner becoming owner of the whole. (*Bond v. Hopkins*, 1 *Scho. and L.* 433: *Aldridge v. Johnson*, 7, *E. and B.* 899.)

Wrong  
names.

A similar instance is that of false or wrong names; thus, a deed executed in a false name is binding, and a judgment suffered by default under a wrong name is good; for, as the parties erroneously named must have known the name was false or wrong, he was guilty of deceit, of which he cannot take advantage. (See cases cited in *Broom's Com. 2nd. Ed.* 157.)

No one can  
take advantage  
of his own  
fraud.

So that a man cannot take advantage of mere silent deceit, and still less can he of his own fraud. The author of wrong, who has put a person in a position in which he had no right to put him, shall not take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong. (*Hawkins v. Hall*, 4 *Mg. and Cr.* 281.) All cases of fraudulent preference, and secret gifts to defraud creditors, come under this principle, and will be found described in other parts of this treatise.

Estoppel in  
pais.

An estoppel *in pais* is referable to this principle, and of which there are two familiar examples:—1, That a tenant cannot dispute his landlord's title (*2nd Sm. L. C.*

709); and 2, That the owner of goods who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them *bonâ fide*, cannot recover them from the vendee. (*Gregg v. Wells*, 10 *A. and E.* 90-8.) In both cases the party would clearly gain by his own wrong, if not estopped by the law. Generally, where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. (*Pickard v. Sears*, 6, *A. and E.*: *Nickolls v. Atherstone*, 10, *Q. B.* 949.)

The above maxims may be regarded as maxims of jurisprudence; but it will be necessary to notice some general maxims generally considered maxims of equity.

1. *Acquitas sequitur legem.* Equity follows the law; that there may be uniformity of decision. This maxim has not so full a meaning in systems derived from the Roman law as it has in the English system, where a very strong distinction is made between common law and equity; but still some important rules subsist under this maxim.

Thus, equity is governed by legislative enactments.

Also, by the rules of law. For example, no principle of equity can set aside the community of husband and wife, in the absence of an *ante-nuptial contract*.

It also means that it allows the course of law to proceed.

But these rules, and the maxim itself, are allowed by equity only so far as it can allow them without sacrificing claims grounded on peculiar circumstances, which render it incumbent upon equity to interpose, in accordance with the maxim that equity will not suffer a right to be without a remedy.

Laches.

*Vigilantibus, non dormientibus, aequitas subvenit*; which means, that when a party appeals to the equitable powers of the courts, equity discountenances *laches*, and, independently of any ordinance or rule of prescription, refuses to interfere, where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of rights. (*Sm. M. Eq.* p. 19.) An example of this occurs in the first volume (p. 526), in reference to stale applications for administration; the courts will consider, equitably, whether in such cases letters of administration ought to issue or not, although there is no prescription as regards administration. On the same principle, the right of a creditor to make legatees refund may be lost by laches. (*Ridgeway v. Newstead*, 2 *Gif.* 492.) Similarly, the courts will not grant an injunction in cases of gross laches or delay by the party seeking it; as, for example, where, in the case of a patent, the patentee has lain by and allowed the violation to go on for a long time without objection or seeking redress. (*St.* § 959. a.)

He that seeks equity must do equity, in the transaction in respect of which relief is sought; thus, if by *boná fide* alteration of the character of material one becomes the owner, he cannot claim the thing made unless he does equity by compensating the former owner of the material. (*Grot.* 2, 8, 4, 98: *Sm. M. Eq.* 23.)

Equity looks upon that as done which ought to be done; which means, for example, if one whose rights are in question is entitled to call for a transfer of property, his rights will be dealt with as if the transfer was actually made. Similarly, money left to be laid out in land passes to the person to whom the testator's land is left. (*Sm. M. Eq.* 24-7.)

*Qui potior est tempore, potior est jure*; i. e. where persons have rights in other respects equal, priority gives the better right; as, where there are several special mortgages of the same thing, the oldest is preferent. (*V. der Ldn.* p. 179.)

Where a man is bound to do an act, and he does one which is capable of being considered to have been done in fulfilment of his obligation, it shall be so construed, because it is to put the most favourable construction on the acts of others. (*Sm. M. Eq.* 28; citing 2 *Sp.* 204; *Wilcocks v. Wilcocks*; *Blandy v. Widmore*, 2 *L. C. Eq.* 2nd Ed. pp. 345-347.)

## CHAPTER III.

## THE RIGHTS OF PERSONS.

## (DE JURE PERSONARUM.)

Division of  
the law.

"ALL our law," says the Institutes, "relates either to persons, or to things, or to actions. Let us first know the persons; as it is of little purpose to know the law, if we do not know the persons for whose sake the law was made." (*Inst. L. 1, R. 3.*)

Persons and  
status.

In strict legal sense, a *person* is one clothed with a certain status, and capable of enjoying civil rights. The term *status*, or *caput*, is used to describe civil capacity; it varies in different individuals, and depends on the existence of certain qualities, determined partly by public and partly by private law. It also often varies in the *same* individual; as one person may possess several, and distinct, civil capacities. He may have the *persona patris*; or *tutoris*; or *mariti*; that is, he may be regarded in his character as a father, guardian, or husband. Men may, in Ceylon, be considered to be

under two divisions—1. Citizens and foreigners. 2. Men who are independent (*sui juris*); those who are *alieni juris*; that is, subject to the power of another, such as children to their parents, wards to their guardians, and wives to their husbands. (*Sandars*, p. 86, *et seq.*: and *Mackenzie, R. L.* p. 75.)

From individuals, we naturally turn to aggregations of individuals, having the same interests, held jointly or in common, which, being regarded in their aggregate form as a nation, a clan, or a family, came to have an individual distinction (though represented by the king, the chief, or the father). As long as these aggregations possess any members, they have a perpetual succession, and though new members are born, and old members pass away, yet the family, for example, never dies. From the family, arose the notion of an artificial aggregation of members, possessing a perpetual succession, by the constant accession of new members not by birth, but by election or some other process. The family is the primitive idea of a corporation, and in the Roman law the family was a corporation, of which the father or *paterfamilias* was the representative, or public officer. These artificial associations of persons, with perpetual succession, are termed "corporations aggregate," and, inasmuch as they possess a purpose, and are endowed by the law with a civil capacity, and enjoy civil rights, such corporations are regarded as "persons;" sometimes termed juridical persons. From the notion of the per-

Judicial persons or corporations.

petuity of capacity and succession of a corporation aggregate, is derived that of a perpetual capacity *or office* continued, not by a number, but by a single line of individuals. This is a *corporation sole*.

“A corporation aggregate is a true corporation; but a corporation sole is an individual, being a member of a series of individuals, who is invested, by a fiction, with the qualities of a corporation. The sovereign, or the parson of a parish, are instances of corporations sole. The capacity, or office, is here considered apart from the particular person who from time to time may occupy it; and this capacity being perpetual, the series of individuals who fill it are clothed with the leading attribute of corporations—perpetuity.” (*Maine's Ancient Law*, p. 187.)

A *person*, as said above, is one clothed with a status, and capable of enjoying civil rights. Civil rights are absolute and relative. Absolute rights are such as belong to men, merely as individuals; relative, those which are incident to them as members of society.

Absolute rights belong to all persons capable of enjoying civil rights; but not all in the same degree. They consist, principally, in the right of personal security; that is, in a legal and uninterrupted enjoyment of life, limbs, body, health, and reputation. Life is the immediate gift of God, a right inherent by nature in every individual. And, as a general rule, every one is also entitled to immunity from all corporal insults and

Absolute  
relative  
rights.

Absolute  
right.

To personal  
security.



injuries; also, from all practices that may prejudice or annoy the preservation of a man's health. Again, the security of reputation and good name from the arts of detraction and slander are rights to which every man is entitled by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right. (*Bl. Com.* pp. 129-134.)

Next to personal security, the law regards, asserts, To liberty. and preserves, the personal liberty of individuals. This personal liberty consists in the power of locomotion; of changing situation; or removing one's person to whatsoever place one's own inclination may direct, without imprisonment, restraint, or annoyance, unless by due course of law. (*Bl. Com.* p. 134.)

These rights are modified by the different civil capacities of individuals. Individuals differ from each other in their natural and social qualities; by reason of sex, birth, age, state of mind, and a variety of other circumstances; which are made the ground of peculiar privileges, or disabilities. The following distinctions are the most important.

Differences in legal capacity

The law gives more extensive privileges to men than Sex. to women; not so much as encroachments on freedom, as from indulgence for the weaknesses of the female sex. They cannot act as magistrates, judges, or advocates, and are in general incapable of the higher kinds of public civil employment; although they are now, in many countries, extensively employed in the lower branches. A woman,

up to her majority, and after her marriage and not being a widow, is under perpetual guardianship; and, as in Ceylon, women are generally married before they come of age, they seldom enjoy a full civil capacity. Unless as a mother or grandmother, they cannot, under the Roman-Dutch law, become guardians; and cannot become sureties for any one. (*Grot.* pp. 33-292: *Mackenzie, R. L.* 77, 2nd Ed.) However, in practice, a woman is allowed to renounce the last privilege. (*V. der Lind.* 209.)

Birth.

A child is held to be born alive, if it has breathed after having been separated from the body of the mother. Yet a child in the mother's womb is supposed to be born for many legal purposes. It is capable of receiving a legacy, and other patrimonial interests. (*Nasciturus pro jam nato habetur, quando de ejus commodo agitur.* *D.* i, 5, 7.) It may have a guardian assigned to it. Also, if any one dies, leaving a widow with child, a share may be reserved in the division of the succession to the coming infant. (*Bl. Com.* p. 130: *Mackenzie, R. L.* 77, 78.) The unborn are considered as *persons*, so far as may tend to their benefit, but not to their disadvantage. (*Grot. B.* i, ch. 3, § 4, p. 15.)

Bastards.

Birth gives rise to the distinction between lawful children and bastards. A lawful child is one procreated by the husband and wife united in lawful marriage. A bastard is the offspring of unlawful intercourse. As a general rule, lawful children follow the condition of the father: bastards follow the condition of the mother;

that is, illegitimate children succeed to the inheritance of their mother, *ab intestato*, which occasions the maxim, that the "*mother makes no bastards.*" No distinction seems now to be made between the issue of incest, or adultery, and simple illicit intercourse. (*Grot. B. i, ch. 12: V. der Lind. 165: Mackenzie, R. L. p. 78.*) All children born of an illicit connection are, *sui juris*, not in the power of the father; as the law admits no relationship between them and the father, but recognizes them as relations of the mother. (*Inst. L. 1, § 10, p. 12: Mackenzie, R. L. 78.*)

Age has a most important effect on civil capacity. Age. In the case of *minors*, the period of incapacity in Ceylon terminates at the age of twenty-one. (*Ord. No. 7 of 1865, § 1.*) Infants have various distinctions of civil capacity, which are almost in the nature of privileges in order to secure them from hurting themselves by their own improvident acts. The minor can only contract under certain restrictions, and no negligence can be imputed to him in the pursuit of his civil rights; but these points are more fully treated of under the head of "guardian and ward." The minor, or infant, obtains full civil capacity by coming of age, and also by operation of law, such as by marriage, or by obtaining from the Governor letters of *venia aetatis*\* (the privilege of

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\* The right of granting letters of *venia aetatis* is not affected by No. 7 of 1865, as, being a prerogative of the Crown, it must be expressly taken away.

majority), which place him, for some purposes, on the footing of 'having attained his majority. (*Sed vide post*, "Guardian, Curator, and Ward.")

State of mind.

Unsoundness of body seldom affects the legal capacity of persons. Unsoundness of mind has more important consequences. Absolute incapacity may arise from madness or mental derangement. All persons of unsound mind are considered to have no will of their own, and consequently are incapable of coming under any obligation, or doing any act which can legally bind them. But when mental derangement is of a fluctuating character, deeds done by persons *sui juris* during a lucid interval are held valid in law. (*Mackenzie, R. L.* p. 79, and see *post*, "Guardian, Curator, and Ward.")

Subjects and foreigners who are British subjects.

All persons born in the British dominions, that is, either within the United Kingdom or the territories thereto belonging, whether their parents be natives or foreigners, are held to be natural-born subjects of the Sovereign of Great Britain and Ireland. Further, all children born abroad, whose fathers and grandfathers, by the father's side, were natural-born subjects, are now deemed to be natural-born subjects themselves, unless the ancestors of them were attainted or banished beyond seas for high treason; or were, at the birth of such children, in the service of a prince at enmity with Great Britain. (7, *Ann*, ch. v; 4, *Geo. II*, ch. xxi; and 13, *Geo. III*, ch. xxi.) And if an alien woman marry a natural-born subject, she becomes, *ipso facto*, naturalized. (7 and 8 *Vict.* ch. lxvi, §§ 3, 16.)

## THE RIGHTS OF PERSONS.

An alien who is the subject of a friendly state may take, and hold, every species of property in Ceylon\* except perhaps Ceylon shipping. Aliens cannot hold *British* shipping under the alien act, which would properly include Ceylon shipping. A foreigner having no property in Ceylon must give security for costs. (See "Costs.")

Rights of foreigners in Ceylon.

Naturalization cannot be obtained in Ceylon, except by an ordinance. By such an ordinance it is usually enacted that the naturalized person shall, within the limits of the island, enjoy and transmit to his descendants, and those claiming by or through him, all the rights and capacities which a natural-born subject of Her Majesty can enjoy or transmit. And that the privilege shall come into force only on the Governor issuing his letters patent to that effect (which patent must be stamped to the amount of twenty-five pounds), and on the alien taking the oath of allegiance. (See No. 2 of 1862.) The advantage the alien obtains is, that he may hold any Crown or municipal office in the island; also shipping; and that his position is not altered by a condition of war—a very important privilege to an alien merchant in the present day, as, on the occasion of an alien friend becoming an alien enemy, his right to contract or recover his debts will be suspended during the war, though he remains liable to be sued.

Naturalization, how obtained.

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\* So decided in a case of which the author has no note.

Allegiance in  
different  
countries.

Under the English law, allegiance to the sovereign power is considered a perpetual obligation; or, at least, one that cannot be renounced or dissolved without the consent of the sovereign authority and the subject. This doctrine of allegiance extends to all the Queen's subjects, whatever the local law. (1, *Bl. Com.* ch. x.) An opposite doctrine of a national character was recognized by the Roman law, and is adopted in the French Civil Code, which declares the character of a French subject to be lost by naturalization in a foreign country; by accepting public employment from a foreign government, without the sanction of the Sovereign of France; and by every establishment made in a foreign country, without the intention of returning; in which light, however, no establishments for commercial purposes are to be regarded. Similar regulations exist in other continental states. (*Mackenzie, R. L.* 90: *Code Civil Art.* 17.)

## CHAPTER IV.

## PARENT AND CHILD.

THE first relation that occurs in life, and the most universal, is that of parent and child.

Children are either legitimate or illegitimate.

Legitimate children are either from their birth legitimate, or, being born illegitimate, become legitimate afterwards. Those children are legitimate from their birth between whose parents the relation of marriage subsisted at any time during the pregnancy of the mother. (*V. d. K.* § 169: *V. Ln.* 1, 7, 2, p. 33: 2, *Ste. Com.* 291-2: *Co. Lit. b. n.* 1, 2.)

Legitimate children.

Illegitimate children become legitimate by the marriage of their parents (6 of 1847, § 31: *V. der. Ldn.* 1, 4, 2, p. 93), unless such children have been procreated in adultery. They may also be legitimized by writ of the sovereign, which is granted chiefly in cases where, by the death of one of the spouses, the legitimitization by subsequent marriage becomes impossible; generally, however, subject to the condition that the children

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were not procreated in incest or adultery, to whom legitimization is granted very rarely, and only for weighty reasons. This royal legitimization does not affect the relations, except those who consent thereto. (*V. der. Ldn. : Ibid. : Grot. 1, 12, 9, p. 52.*)

Legitimacy  
presumed.

Whether the husband is the real parent of a child born to his wife during the marriage, or after the death of the husband, may, however, be open to controversy. Where the husband and wife have cohabited together, and no impotence is proved, or unless the husband has been absent for not less than nine calendar months, or forty weeks before the birth, or could not for other reasons have had sexual intercourse with his wife during that period, the issue is conclusively presumed to be legitimate, though the wife is shown to have committed adultery during the same time. Even where the parents are living separate, a presumption of legitimacy arises so strong that it can only be rebutted either by proof of previous divorce (either *a. vinculo* or *a. mensa et thoro*), or by cogent and almost irresistible proof of non-access for forty weeks prior to the birth, in a sexual sense. Nor is the fact that a woman is living in notorious adultery in itself sufficient to repel this presumption. (59202, *P. C. Colombo*, 27 Aug. 1861; *P. C. Ca.* 155: 1, *Kerr's Bl.* p. 483: see also *Best on Evidence*, pp. 413-52, 3rd Edition.)

Illegitimate  
children.

Illegitimate children are those who are mere bastards, and others are bastards procreated in adultery or

incest. The former are those born of unmarried persons who can marry, and the latter those born of married persons in adultery, and those born of unmarried persons too nearly allied by blood or affinity to be able to marry. In the first case the children can become legitimate by the marriage of their parents; in the latter, they cannot.

Mere bastards are reckoned to have no father; they can neither bear his name, nor inherit property from him or his relations, unless by will. But from the mother and her relations they take inheritance like other children, according to the maxim, "the mother makes no bastards."

Bastards procreated in adultery or incest take no inheritance from father, or mother, or their relations, except by will. (*V. Ln.* 1, 7, 4, p. 33: *Grot.* 1, 2, §§ 1-9, p. 50-52.)

In general, parents are entrusted with the custody and education of their children, on the natural presumption that the children will be properly treated, and that due care will be taken of them in regard to learning, morals, and religion. But whenever this presumption is negatived by the actual state of the case, and a father is guilty of gross ill-treatment of his infant child, or is living in gross immorality, or gross impiety, or otherwise acts in a manner injurious to the morals or interests of his children, a competent court (in its equity capacity) can deprive him of the custody of his children,

Custody and education of children.

and appoint a suitable person to act as guardian. (*Sm. Eq. M.* 405: *St.* §§ 1341-49.)

Maintenance  
of legitimate  
children.

Parents are legally bound to provide legitimate or illegitimate children with necessary maintenance where the children, of whatever age, are impotent and unable to work, either through infancy, disease, or accident; but not when the children can support themselves. (1, *Kerr's Bl.* 473-5: *Ord. No. 4 of 1841*, § 3: 27015, *P. C. Matura*, 10 Aug. 1860; *P. C. Ca.* 144: 25497, *P. C. Jaffna*, 30 Sept. 1859.) Maintenance means support, with food, clothing, and other conveniences. (23022, *P. C. Galle*, 6 May, 1857; *P. C. Ca.* 107.) This duty of maintenance is enforced against every person, in whole or in part, able to maintain his family; and who leaves his legitimate (or illegitimate) children, whereby they become chargeable to, or require to be supported by, others, is liable as an idle and disorderly person. (No. 4 of 1841, § 3, par. 2, and subsequent clauses.) But this is a mere penalty for an offence, and the Police Court cannot award maintenance (2716, *Harrispattee*, 15 Aug. 1861; *P. C. Ca.* p. 153), nor order payment of arrears of maintenance. (33407, *Matura*, *P. C.* 26 June, 1862; *P. C. Ca.* 169.) Parents may, however, be liable in a civil suit for the maintenance of their children, though not at the suit of the children, who are generally minors, or, if not minors, cannot sue unless by leave of the court (*V. Lwn.* 5, 3, § 6, p. 523); but may be sued by the children's guardians, *ad litem*, or others appointed

by the court in its equitable jurisdiction. (See *Husband and Wife*.)

The parental authority consists in the custody, control, and entire direction of the maintenance and education of the child whilst it is under age, and gives the parents the right to exact reverence and obedience, and, in cases of improper conduct (*V. der Ldn.* 1, 4, 1, p. 92 : 3, *Ste. Com.* 299), to inflict moderate chastisement, or otherwise to correct them in a reasonable manner ; and the parent may delegate this authority to a tutor or schoolmaster. (2 *Ste. Com.* 299-301.)

The father's power over his children.

The parental power is not only possessed by the father, but also by the mother ; though, of course, the mother, as a minor under the wardship of her husband, possesses no power over the child, as against the father, unless delivered into her custody by a competent court. (*Macq. on Divorce*, 174.) But, after the father's death, she is entitled to the custody of the child during minority ; and, where no other guardian has been appointed, stands (if unmarried) in the father's place as to the consent required to the marriage of the child during its minority.

Inasmuch as the Roman-Dutch law does not recognize any separation of husband and wife by private arrangement (*V. d. Ln.* p. 89), it follows that, in the eye of the law, until a judicial separation takes place, they are living together, and that it would not be in the power of the husband to refuse the mother access to her

children, as in England; so that the privileges given by Talfourd's Act are common law in Ceylon.

Children cannot proceed against their parents at law without leave of the court, which is termed *venia agendi*. (*V. der. Ldn. Ib.*)

The parental authority also consists in the administration of property which may fall to the children by inheritance or otherwise; but this power is not exercised as parent, but as guardian in nature; so that it is open for a person bequeathing property to children, or for a competent court, to appoint a guardian in respect of that property. But whatever the children, who are living at their parents' expense, obtain, either by profit or labour, goes to the parents in full property; the parent, however, has not even the usufruct of other property, and the children can dispose of their property by will, if old enough, and if not, it passes *ab intestato*. The father may, however, claim to have his children supported out of the usufruct of their property. (*Grot.* 1, 6, §§ 1 and 3, pp. 30-1: *V. Ln.* 1, 13, §§ 1 and 2, pp. 60-1: *V. der. K.* §§ 102-6.)

Constructive  
frauds in the  
case of parent,  
or person  
standing in  
*loco parentis*.

The law is careful to guard that the father shall not abuse his peculiar power; and thus contracts and conveyances whereby benefits are secured to their parents, or to persons who stand *in loco parentum*, if not entered into with scrupulous good faith, and reasonable under the circumstances, will be set aside, unless third parties have acquired an interest under them. And where a

child recently after attaining majority makes over property to the father, without consideration or for an inadequate consideration, equity will require the father to be able to show that the child was really a free agent and had adequate and independent advice. And if an estate, held in trust for a father for life, the remainder to his son in fee, is sold by father and son immediately on the son coming of age, and the whole purchase money is paid to the father, then, if the assistance of the court is required by the purchaser to complete the transaction, its straightforwardness must be proved. (*Sm. M. Eq.* pp. 70-1, see cases there cited.)

It is universal in Ceylon, under every system of law that obtains there, to introduce the parent to become a party to, and to render himself responsible *in solidum* with the children, whatever their age, to marriage engagements entered into, though verbally with their consent; and, as there is nothing unreasonable or contrary to express law in the usage, the Supreme Court has upheld it. (2855 and 3036, *D. C. Galle*, 6 Jan. 1838; *Morg. D.* 210.)

Parents, in Ceylon, parties to children's marriage contracts.

In the English law, the children of persons too poor to support themselves, must, if of sufficient ability, maintain their parents. (2, *Ste. Com.* 302.)

Maintenance of parents.

The father of an illegitimate child is not primarily in law bound to support his illegitimate child; but if the mother cannot maintain it, and the father fails to maintain it, so that it becomes chargeable to another,

Maintenance of illegitimate children.

he is liable, as an idle and disorderly person, for not maintaining his child. (No. 4 of 1841, § 3, p. 2: 25497, *Jaffna, P. C.* 30 *Sept.* 1859; *P. C. Ca.* 134.)

The parental authority ceases—

1st. By the death of the parents; in which case, if the children are yet minors, the parental power is passed over to that of the guardians (if any).

2nd. By the lawful marriage of the child; whereby the son becomes major, and the daughter passes from the parental to the marital power; and the effect of this is so great that the daughter under age, being once freed from the power of the father by a marriage, which happens to be dissolved by the death of the husband during her minority, does not return again under the paternal power.

3rd. By majority, whether attained by arriving at the age of twenty-one years, or full age, or by letters of *venia aetatis*. (*V. d. L.* 1, 4, 3, pp. 94-5.)

*Venia aetatis.*

Letters of *venia aetatis* are granted by the Governor, as the representative of the sovereign; and he may grant them in any district of the island. (21 of 1844, § 3.) They bear a stamp of £5. Before granting them, the Governor may order an enquiry, or hear the parents upon the matter. In Holland, generally, the magistrate did not grant *venia aetatis* to males under twenty, or females under eighteen years of age; but, from § 2 of 21 of 1844, it would seem that wider license is intended in Ceylon. (*V. der. Ldn. Ibid.*)

Termination  
of parental  
authority.



Lastly. The parental power ceases by tacit or indirect emancipation,\* when children, with the previous knowledge of the parent, take up a residence elsewhere, and exercise openly a trade or calling. (*V. der Ldn. Ibid. vide etiam, Grot. ; V. Lwn. ; and V. der K.*)

Children, if released from the paternal power by any one of these means, acquire the right to administer their own property, and a *persona standi in judicio*. Besides these modes, the guardianship of the father ceases if he becomes civilly dead, or is himself placed in ward. (*Grot. 1, 6, §§ 4 and 5, p. 31 : V. d. K. 109.*)

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\* Direct emancipation is not now in use, since *venia aetatis*.

## CHAPTER V.

## GUARDIAN AND WARD.

Different  
species of  
guardianship.

GUARDIANS, in the Roman-Dutch law, are either testamentary or dative.

Natural or legitimate guardians formerly were in use in Holland; but were first disused as to property. The surviving parent, though not appointed by will or the magistrate, still continued to be the guardian of the person of the child, though process was carried on in the name of the legal guardian, who had the administration of the property. (*Grot.* 1, vii, 8, p. 33.) But the pupillary magistrate (if no guardian was appointed by will) was bound to appoint the nearest relatives as guardians, provided they were fit persons. (*Van der K.* § 117.)

The Supreme Court of Ceylon looks upon the parent so far as the natural guardian (at least for the nurture of the child), that it will not deprive the parent of that character and appoint another in the parent's place, except under very strong circumstances indeed against the character and conduct of the parent. (10, *D. C. Amblangodde*, 21 Dec. 1836; *Morg. D.* 114.)

The guardian by nature, even for nurture, does not now exist in the law of Ceylon; but where no guardian is appointed by will, the court will, in appointing a legal guardian, give the preference (no reason being against it) to him who would under the Roman law have been the natural guardian (*legitimus tutor*), i. e. the relative nearest in blood. (See *V. Lwn.* ch. xvi: and *Sandars*, 134.) The old law so far remains "that a guardian who has been appointed by a pre-deceased father has, *jointly with the mother*, the care of the *person* of the ward." (*Van der K.* § 118.)

Testamentary guardians, in the law of Ceylon, are appointed by will or codicil, or by special act of guardianship, executed by the father or the mother, as well at the death of the former as of the latter. Testamentary guardians are appointed by the mother as well as the father, who has equal power in that respect; so that, if guardians have been appointed by the parent who first dies, the survivor may afterwards appoint co-guardians with equal powers; and this extends to children who are unborn as well as born; but it is necessary that the guardian be named or specially described, so that the certainty of it may be known, and may not depend on any contingency. (*V. d. Ldn.* 1, 5, 2, p. 99: *Grot.* 1, 7, 9, p. 34: *V. d. K.* § 118.)

Testamentary  
guardians.

Strangers who leave any estate or legacy to the children of others may appoint guardians for them; but this is not a *personal* guardianship, which concerns

the maintenance and education of children, but a real guardianship, regulating the administration of the property so bequeathed. (*V. d. Ldn.* 1, 5, 2, p. 100: *V. d. K. In.* 118.)

Appointment  
by the court.

A competent District Court has the power to appoint guardians where there is no guardian, or where it appears to the court that a guardian of any kind should be superseded. It may appoint guardians, both of the person and the estate of an infant, whether legitimate or illegitimate, who has property, or of the person of an infant only, who is a party to proceedings in the court.

Guardians ad  
litem.

Guardianship *ad litem* occurs where a person, usually the father or ordinary guardian, is appointed by a court of justice to prosecute or defend for an infant in any suit to which he is a party. (*V. d. Ldn.* 395: *Sm. M. C. L.* 94.) This guardian is called also *prochein ami*, and may be any person who will undertake the infant's cause; and it frequently happens that an infant, by his *prochein ami*, or guardian *ad litem*, institutes a suit against a fraudulent guardian. The *prochein ami* (who is usually the father) acquires by this species of guardianship no authority over the person or property of the infant, except as regards the suit itself; but, as he possesses all the authority, and incurs all responsibility for costs and otherwise of an ordinary suitor, the court will not allow him, if an uncertificated bankrupt or insolvent, to act as guardian *ad litem*. (*Watson v.*

*Fraser*, 8, *M. and W.* 660: *Ditchitt v. Latchwell*, 12, *M. and W.* 779: 1, *K. Bl.* 492.) And the court may call upon the curator *ad litem* to give security for the minor's share, or to deposit the share in court. (8414, *C. R. Cultura*, 20 Jan. 1857.)

According to the general rule, every one who is appointed guardian by the court (though not by last will) is bound to accept the office, and may be constrained to it by *gyzeling*, though he may offer good excuse to the court for not serving. (*Grot.* 1, 7, 14 and 15, p. 33.)

Who may be guardians.

Some persons are, however, prohibited from becoming guardians, and others are privileged to decline it. Among the prohibited persons are those especially who are themselves under guardianship or curatorship, or under age (even though they have obtained *venia aetatis*, or have been emancipated); also all females, except the mother and grandmother, as long as they remain unmarried. Military persons are not prohibited, but may excuse themselves. Clerks under government, to be guardians, must first obtain leave of their principals. Also those who have three guardianships, or are above seventy years of age, or disabled by sickness or bodily infirmity, are excused from serving as guardians. (*Grot.* 1, 7; 6, p. 33: *V. d. Ldn* 1, 4, 1, pp. 98, 99: *V. d. K.* 112, 113.)

A father and mother, and, in default of these, the grandfather and grandmother (if able), are preferred to all others in the guardianship of their children and

Who are preferred as guardians.

## GUARDIAN AND WARD.

grandchildren. These ancestors ought, if appointed guardians, to have a colleague appointed with them, and they retain the office (even in case of difference with the children), the men for life, and the women as long as they remain unmarried. Failing ancestors, two or more guardians are nominated, the oldest and nearest male relatives on the side from which the child has sprung, in as far as they may be found; and if there be none, then the oldest and next in succession, and so on; and on failure of competent relations, then two other fit males may be appointed. (*Grot.* 1, 7, 11, 12, p. 35: *V. d. K.* 114.)

Surviving  
parent or  
relative bound  
to see guardian  
appointed.

To prevent minors being without guardians, where parents have not provided a guardian, provision should be made by the District Court of the domicile of the deceased parent; and the nearest relations, if fit persons, should be appointed. In Holland, in order that this provision might not be neglected, it was the universal rule, in all cases of the death of parties who left children, to summon the executors or administrators to produce the will before the judge of the place, and therefore it would in Ceylon be done by the District Court. A nominated guardian also should apply to the court when his co-guardian dies, in order that another may be appointed in his stead. If a surviving parent does not claim the guardianship, he may be required, by civil process, to appear before the court, to show why he should be excused from being made dative guardian;

but if the surviving parent nominates a fit person acceptable to the court, he will be held to have claimed the guardianship; but in such a manner that if he acts *bonâ fide* he is not subject to the responsibilities. (*Grot.* 1, 8, 13, p. 35: *V. d. K.* 123: *V. d. Ldn.* 1, 5, 2, p. 100.)

The power and reciprocal duty of a guardian and ward are in the English law defined to be the same, *pro tempore*, as that of father and child; except that every guardian, when the ward comes of age, is bound and compellable to account to him, and must answer for all losses by his wilful default or negligence. The guardian is allowed his reasonable costs and expenses, but may not make any profit out of his ward's estate. It is usual for guardians to indemnify themselves, by applying to the Court of Chancery, acting under its direction, and accounting annually before the officers of the court.

Duty of guardians in England.

But in Ceylon the duties of a guardian are more minute, and consist, in the first place, in making an inventory of the goods of the children, or in demanding this from the surviving parent who remains in possession. (*V. der Ldn.* 1, 4, 3, p. 101, citing *V. der K.* 135, *et seq.*) Even if the duty of inventory is excused by will, or is not considered advantageous, the court may order one to be made. Making a false inventory works a forfeiture of share in the property, or even may be punished as fraud; and on the discovery of further property, an inventory may be enlarged. (*Grot.* 1, 9, 3 and

The same in Ceylon.

## GUARDIAN AND WARD.

4, p. 41, to which work I must refer the reader for further minute account of the office of guardian.)

The giving security, though not imperative, may be ordered at the discretion of the court. (*V. d. Ldn.*; *Ibid.*; *Grot.* 1, 9, 1, p. 40: *V. d. K.* 134.) The guardian should not be allowed to receive a large sum of money without giving security of immoveable property.

The correct course is, doubtless, to insist upon all moneys being paid to the Loan Board, which has succeeded to the functions of the Weeskamer; but where the sum of money is small, and the interest derivable from the Loan Board insufficient for the maintenance of the minor, the court may, in extreme cases, allow money to remain with the guardian; always taking, however, from the guardian undoubted security, which, in this colony, should be nothing less than the security of immoveable property.

Even strangers would be doing a service if they bring the insolvency, misconduct, or incapacity of the guardian to the notice of the court; but the near relation of a minor has an undoubted right to do so.

The D. C. should see that, in all cases where guardians have the money of minors, such money should be brought into court, to be deposited in the Loan Board, or real security taken thereof.

(*Vide*, also, *Rules and Orders*; 1295, *D. C. Galle*, 1 June, 1860.)

Duty with respect to the person.

With respect to the person of the ward, the guar-



dian must maintain and educate the ward according to his circumstances by the surviving parent, or next of kin, or such other nearest friend as may be able and willing to do so at the cheapest rate, or, failing these, by other respectable persons. The ward should be brought up to some calling, or otherwise educated according to circumstances.

With respect to the property, he must exercise the same care for the preservation of all that is of substantial value as a good father of a family would over his own. The guardian has charge of the property; and if there is more than one guardian, the property should be placed in a particular fund, or chest, to which the guardians cannot, one without the other, have access. He must collect and call in, with great diligence, the outstanding debts; and the cash in hand must be laid out in government securities (if any), bearing interest; or, within two months, invested in the purchase of land or interest, under the penalty of paying the ward legal interest if he does not, without leave of the court. He must take care that the rents or interests be secured (under the sanction of the court) on proper mortgages, or by good security, who shall be bound *in solidum* with the principal debtor; the principal sums to be repayable on the ward becoming of age. (*Grot.* 1, 9, 10, p. 43: *V. d. Ldn.* 1, 4, 3, p. 102.) Such previous sanction of the court is also necessary, generally, to the guardian in all transactions of importance; for example, in the con-

With respect  
to the  
property.

tinuing or discontinuing of any trade or business, or in compromising a doubtful claim, matter, or the like. (*V. d. Ldn. Ibid.*)

The office of guardian is indivisible, and each is responsible for the other.

Power of guardians.

The power of a guardian consists, in general, in assisting and representing the ward in all transactions concerning him, and especially in appearing for him in law. (*V. d. Ldn.* 1, 5, 5, p. 105.) But it does not extend over a testamentary disposition, or a will; for the ward, when arrived at the age of puberty, may make a will without his guardian.

Guardians are not to benefit at the expense of the ward.

And to protect the ward from an improper influence being exercised by the guardian, neither the guardian nor his children can derive any benefit from the ward's testament; neither by inheritance, nor by legacy. And during the existence of guardianship, the relative situation of the parties occasions a general inability to deal with each other. Transactions between guardians and wards are not permitted to stand, even when they have occurred after the minority has ceased, if the intermediate period is short; and especially if all the duties attached to the office have not ceased, or if the estate still remains in some sort under the control of the guardian; unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most absolute good faith on the part of the guardian. But when the guardianship has entirely ceased, and a

## GUARDIAN AND WARD.

fair and full statement of all transactions growing out of it has been made, and a sufficient time has intervened to allow the ward to feel completely independent of the guardian, then there is no objection even to a bounty being conferred upon the latter. (*Grot.* 1, 8, 2, p. 37 : *V. d. Ldn.* p. 105 : *St.* § 317-20 : *Wright v. Vanderplank*, 2 *K. and J.* 1.)

Unless the law expressly requires it, the consent of the guardian is not necessary to the validity of the marriage of the ward. (*V. d. Ldn.* 1, 5, 5, p. 105 : *Grot.* 1, 8, 3, p. 37.)

Power over marriage.

Legal proceedings must be conducted in the name of the guardians, except in criminal cases, in which the ward appears personally. But the guardian cannot sue or proceed at law in behalf of the minor, in any doubtful case, without the previous authority of the court, at the risk of paying the costs himself if he proceeds without any such authority. (*V. d. Ldn.* 1, 5, 5, pp. 105-6 : *Grot.* 1, 8, 4, p. 381 : *V. d. K.* § 127.)

Guardian to appear in court for ward.

Guardians may (with the knowledge and sanction of the court) sell the moveable property of the ward ; but the property must be sold by auction to the highest bidder : otherwise, should loss occur, it will fall upon the guardian ; and the object of the sale should be the benefit of the ward. For the purpose of preventing any such acts of the guardian, in case of the death of the infant before he comes of age, from improper changing, and through partiality or otherwise, the rights of parties who,

as heirs or distributees, would otherwise be entitled to the property, the court considers lands purchased by the guardians with the infant's personal property, or with the rents and profits of his lands, to be personality, and distributable as such. Immoveable property, and the rents and profits of it, cannot be sold or encumbered by the ward without a previous decree of the court; which shall not be granted unless for payment of debts, or the support of the minor children, or otherwise manifestly for the advantage of the ward. In all cases the sale must take place in a public manner, after previous publication; otherwise the sale is invalid, and the guardian responsible for the loss. The proceeds arising from the sale of immoveable property (as, for example, timber cut down on the land of the infant) passes still as immoveable property. And when the court sanctions or decrees any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it if it had remained in its original state. (*V. d. Ldn.* 1, 5, 5, p. 106: *Grot.* 1, 8, 6, p. 39.)

Guardians  
may contract  
beneficially  
for the ward.

Guardians have, also, the power to enter into other transactions for the manifest benefit of the ward; but they must proceed in these matters with especial caution, otherwise they are responsible for the loss. (*Grot.* 1, 8, 7, p. 39.)

Suits between  
the guardian  
and ward.

The ward, or his representatives (in the case of his death), may, in their due time, institute process, on ac-

count of the acts of his guardian, against each of his guardians, or their representatives *in solidum*, for an account, and the handing over of the property in their hands, and also for damages for mal-administration. In turn, the guardian, or his representatives, may sue the ward, and those who succeed to his rights, for payment of all disbursements and indemnity, as well as for a release on the foot of the accounts and transactions of the guardianship, and also for a reasonable compensation for time and labour. (Usually, according to Van der Linden, two and a-half per cent. on receipts, and one and a-quarter on payments, and one per cent. on ready money found in the house of the defunct, or on goods sold, or money received by the redemption of rents, annuities, mortgages, or other obligations.) (*V. d. Ldn.* 1, 5, 6, pp. 107-8: *Grot.* 1, 8, 8, p. 40.)

Guardianship terminates—

1st. By the death of the ward; in which case the guardian must account to the representatives of the ward. Termination of guardianship.

2nd. By the death of the guardian; when the guardianship passes to those whom, by will, he has appointed, if he has the power of surrogation, or, on failure thereof, to the court.

3rd. By the majority of the ward.

4th. By the marriage of the ward.

5th. By the ward obtaining letters of *venia aetatis*.

6th. On complaint to the court by relatives or co-

guardians, against a guardian, either of incapacity, *malá fides*, or bankruptcy, the guardian can be removed by the court, either finally or provisionally.

7th. On the lengthened absence of the ward from the island without intelligence, the guardianship can be determined by the court; and the property will be disposed of, in trust or otherwise, as the court shall adjudge.

8th. When the time expires, or the cause fails, or the subject is at an end, for or on account of which any one was appointed guardian; as in the case of *guardian ad litem*.

When guardianship terminates by majority or marriage, it can nevertheless be continued by the judge, either wholly or in part, if the court sees a good reason for so doing. (*V. d. Ldn.* 1, 5, 7, p. 108: *Grot.* 1, 10, p. 45: *V. d. K.* 159-63.)

## CHAPTER VI.

## HUSBAND AND WIFE.

## OF THE MARRIAGE CONTRACT.

MARRIAGE is the union, in domestic and sexual intercourse, of man and woman for their joint lives; having for its objects the comfort of mutual love and the procreation and rearing of children. Marriage defined.

The law so far regards this social compact as a contract, that it allows it only to be good and valid where the parties, at the time of making it, were, in the first place, *willing* to marry; secondly, *able* to marry; and, lastly, where the parties actually *have* married in the proper forms and solemnities required by law.

They must be willing to marry. "*Consensus non concubitus faciat nuptias.*" And all violations of the free

will, that will absolutely nullify an ordinary contract, will nullify a marriage.

Secondly. They must be able to marry.

Impotency.

Thus:—1. As marriage is for sexual, as well as domestic intercourse, incurable impotency at the time of marriage is a ground for avoiding it. (*V. d. Ldn. B. 1*, ch. 15, p. 87: *Grot. B. 1*, ch. 5, § 4, p. 21: *Macq.* 343-4: *Ord. No. 6 of 1847*, § 29: and *Ord. No. 13 of 1863*, § 1 and 29.)

Bigamy.

2. A second marriage is void, if the husband had another wife, or the wife had another husband, living at the time of such second marriage. (*Ord. No. 13 of 1863*, § 1 and 29, cont. *Ord. No. 6 of 1847*, § 28.) Except among Mahomedans, and except among the Kandians, where the second marriage was prior to the proclamation of Ordinance No. 13, 1859, in any district or portion of a district in the Kandian Provinces, under section 36 of the last-mentioned ordinance. (See also *Grot. B. 1*, ch. 5, § 2, p. 20: *V. d. Ldn. B. 1*, ch. 14, § 2, p. 70.)

Want of age.

3. No marriage is valid, the male party to which is under sixteen, or the female under ten; or if a daughter of European or burgher parents, under fourteen years of age; and among the Kandians, to which the male party is under sixteen years of age, or the female under twelve years of age. (*Ord. No. 6 of 1847*, § 27: *Ord. No. 13 of 1859*, § 3.) No promise to marry made by an infant under age is binding on such person, though it is upon



the opposite party, if of age. (*Marq.* 168: *Add. Cont.* 937.)

4. The marriage of an idiot or lunatic, except during Lunacy. a lucid interval, is void. (*Grot. B.* 1, ch. 5, § 4, p. 21: *V. Lon. B.* 1, ch. 14, § 2, p. 71: *V. der Ldn. B.* 1, ch. 3, § 6, p. 79: *Marq.* 342.)

5. A widow, whose husband has not been dead a Suspected pregnancy. sufficient time to determine to a certainty whether she is pregnant or not, cannot consent to a marriage. (*Grot. B.* 1, ch. 5, § 3, p. 21: *V. der Ldn. B.* 1, ch. 3, § 6, p. 79.)

Marriages within the prohibited degrees of consanguinity or affinity are also void. (*Ord. No.* 13 of 1863, § 21: *Ord. No.* 13 of 1859, § 5.) No marriage is valid where either party is directly descended from the other; or where the female shall be the sister of the male, either by the full or the half blood; or the daughter of his brother, or of his sister by the full or the half blood, or a descendant from either of them; or daughter of his wife by another father; or his son's, or grandson's, or father's, or grandfather's widow; or where the male shall be brother of the female, either by the full or half blood; or the son of her brother or sister by the full or half blood, or a descendant of either of them; or the son of her husband by another mother; or by her deceased daughter's, or grand-daughter's, or mother's, or grandmother's husband. (*Ord. No.* 6 of 1847, § 27: *Ord. No.* 13 of 1859, § 5.)

Thus marriages between persons lineally related to one another are void; and so also are marriages between persons collaterally related to each other by consanguinity (but not by affinity) in the second degree: thus a man cannot marry his sister; but he may marry his deceased wife's sister (24468, *D. C. Colombo*, 21 July, 1859); the first being related to him in the second degree by consanguinity, the second by affinity.

Marriages void when violating prescribed regulations.

Marriages are sometimes void on account of the violation of some of the regulations prescribed by law for the due celebration of marriage, and which will be noticed in the following paragraphs.

Modes of solemnizing and contracting marriage.

There are two modes of proceeding to marriage:— one by the solemnization of marriage by a minister of any registered place of worship; and the other by contracting marriage before a registrar of marriages: up to a certain point, the process is the same for both.

Registrars of marriage.

There is a registrar-general of marriages for the whole colony, and a provincial registrar in each of the provinces. Each province is divided into districts, and one or more marriage registrars are appointed for each district, all of whom perform their duties under regulations made by the Government (not inconsistent with the law). (*Ord. No. 6 of 1847, § 7.*)

Notice of intended marriage.

In every case of marriage (except of a death-bed marriage), one of the parties gives notice to the registrar of the district in which that party has dwelt for not less than twenty-one days then next preceding. The

notice must be in a form which the registrar is bound to supply to the party gratis. The notice must be signed by the party, and attested by two witnesses personally acquainted with one or both of the parties. The notice must state the name (and, when they are different, the name that the party is commonly known by), the condition, profession, and dwelling place of each party, and whether each is of full age or not. The notice is entered by the registrar in a book called "the marriage notice book;" and is published by suspending it in his office, and at appointed conspicuous places in his district, from the time of entry to the period of issuing the certificate hereafter mentioned. (*Ord. No. 13 of 1863, § 7.*)

If the parties have not resided for twenty-one days in the same but different districts, the notice must be given in each district. In case one of the parties has recently arrived in the island, and has not "acquired a residence," notice in the district in which the other party resides is sufficient. (*Ord. No. 13 of 1863, § 8.*)

Parties in  
different  
districts.

At any time, not more than three months, nor less than twenty-one days after notice, the registrar (or, if the parties reside in different districts, the registrar of each district), on the request of the party in respect of whom the notice was given, issues his certificate; provided that no lawful impediment is shown to his satisfaction against the issue, or that its issue is not forbidden by any one whose consent is required to the marriage. The certificate sets forth the notice and the date of its entry,

Certificate.

and that the certificate has not been forbidden, and that twenty-one days have elapsed since the entry of notice, or that the marriage is to be by license. (*Ibid.* § 9.)

Governor's  
license.

Instead of allowing twenty-one days to elapse from the notice to the certificate, the Governor may license the issue of the certificate on or after any day mentioned in the license. The license is issued only on the oath or affirmation of one of the parties before the registrar, to the effect that the party believes that there is no impediment of kindred or alliance, or other lawful cause, or any suit, to bar or hinder the marriage; and that either the required consent has been given, or that the marriage has been authorized by a judge, as hereafter mentioned. The stamp for a license is three pounds. (*Ibid.* § 10.)

Persons whose  
consent is re-  
quired may  
forbid issue of  
certificate.

Any person, whose consent is required to a marriage, may forbid the issue of the certificate, by writing, at any time before the issue thereof, the word "forbidden" opposite the entry of the notice, with his name and abode, and his relationship to the party whose marriage he forbids. In such case, the notice and certificate, and all other proceedings thereupon, become utterly void, unless the marriage has been authorized by a judge. (*Ibid.* § 11.)

If the issue of the certificate is forbidden, the registrar reports the circumstance to the District Court, and suspends all proceedings until the court decides (which

it does in a summary way) whether the certificate ought to issue or not. If the court decides against the issue, the notice of marriage, and all proceedings thereupon, are void; but if the contrary, they are valid, and the certificate may issue, even though three months from the entry of notice may have expired. The court may also adjudicate,\* that the certificate has been forbidden on frivolous and vexatious grounds, and may condemn the party forbidding the same to pay (in addition to costs, and all civil damages to which he may be liable) a fine not exceeding twenty pounds. (*Ibid.* § 12.)

The persons who require consent by the local law to marry, are any male under twenty-one years of age, not being a widower, and any female under sixteen years of age (or, in the case of a daughter of an European or Burgher parents, under twenty-one years of age), not being a widow. (*Ord. No. 6 of 1847*, § 18.)

Who require consent.

The persons who have authority to consent to a marriage, and to forbid the issue of the certificate, are the father, if living; or, if the father be dead, the mother; or, if both father and mother be dead, the guardian or guardians of the parties so under age, lawfully appointed, or one of them. (*Ibid.*)

Whose consent required.

Such consent is required for the marriage of any such party so under age, unless there is no person authorized to give such consent. (*Ibid.*) But after

Consent, how far necessary.

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\* This must be by a separate adjudication after cause shown.

marriage it is not necessary to give (in support of such marriage) any proof of the consent required; nor can any evidence be given to prove the contrary in any suit touching the validity of the marriage. (*Ord. No. 13 of 1863, § 27.*)

Forbidding the solemnization of marriage.

In addition to the forbidding the issue of the certificate, the persons whose consent is required may forbid the publication of banns, or the solemnization of marriage.

If consent to a marriage is withheld unreasonably, or from undue motives, the party desiring to marry may apply to the judge of a Court of Record (which includes the District Court and the Court of Requests) to decide the question in a summary manner; from whose decision an appeal lies to the S. C. or any judge of it.

A similar application may be made, if any party whose consent is necessary to the marriage is *non compos mentis*, or in parts beyond the island. (*No. 6 of 1847, § 18.*)

If the Court of Record allows the marriage, its judge issues a certificate of allowance, which is equal to lawful consent. (*Ibid.*)

Caveat.

Any person may, on payment of one pound, enter a caveat with the registrar against the grant of a certificate of marriage. The caveat must bear the signature, residence, and objection of the person entering it. The registrar determines the matter of the caveat, except in cases of doubt, or if any party objecting to or requiring the certificate is dissatisfied with the registrar's opinion;

OF THE MARRIAGE CONTRACT.

the matter may then be referred to the District Judge, who decides it summarily. (*Ord. No. 13 of 1863, § 13.*)

Entering a caveat on frivolous or vexatious grounds subjects the party so doing (in addition to costs and civil damages) to a fine not exceeding twenty pounds. (*Ibid.*)

So far the process, both for ecclesiastical marriage, and the civil contract carrying the legal consequences of marriage, are the same; and consist in giving the required notice to the registrar, and obtaining a certificate of notice, either by effluxion of time or by the Governor's license.

The parties named in the certificate may, if they prefer it, contract marriage at the office of the registrar, and in the presence of the registrar (whose duty it is to solemnize such marriage), and of two other witnesses, with open doors, and between the hours of eight in the morning and six in the afternoon.

Marriage contracted before a registrar.

The registrar first addresses the parties to the following effect:—

“ Be it known unto you A. B. and C. D. that by the public reception of each other as man and wife in my presence, and the subsequent attestation thereof, by signing your names to that effect in the registry book, you become legally married to each other, although no rite of a civil or religious nature shall take place: and know ye, further, that the marriage now intended to be contracted, cannot be dissolved during your lifetime, except by a valid judgment of divorce; and that if either

of you, before the death of the other, shall contract another marriage before the former is thus legally dissolved, you will thereby become guilty of bigamy, and be liable to the heavy penalties attached to the offence."

Each party to the marriage then makes the following declaration, in the presence of the registrar and the witnesses :—

"I, A. B. do solemnly declare that I know not of any lawful impediment why I, A. B. may not be joined in matrimony to C. D. here present."

The registrar is entitled to the appointed fee for the marriage, and forthwith enters in a Marriage Register Book a statement of the marriage, in a form comprising the following particulars :—number in the Marriage Register Book ; date of marriage ; names and surnames of parties ; ages (full or minor) ; condition ; rank or profession ; residence at the time of marriage ; place of marriage. Every entry of marriage is signed by the parties married, the registrar, and the witnesses. The marriage by contract is then complete and registered.  
(*For Form, see App.*)

In districts where it is contrary to the habits and feelings of any class of people to require their females to appear in public before wedlock, the Governor may give directions respecting such cases, as to the hour and place of marriage, and, with the Executive Council, may prescribe a higher fee for such marriages ; yet these



## OF THE MARRIAGE CONTRACT.

marriages must in other respects follow the ordinance.  
(*Ord. No. 8 of 1865, § 3.*)

Marriage by religious solemnization is in the following manner:—

Marriage by religious solemnization

1. It must take place in a registered place of worship. The proprietor or trustee of any separate building used as a place of public Christian religious worship, may present an application to the Registrar General that such building may be registered for solemnizing of marriages therein, together with a declaration signed by at least twenty householders, and countersigned by the proprietor or trustee.

Registered places of worship.

Where the population is so scattered that it is difficult to obtain twenty signatures, the Registrar General may issue a certificate upon those of as many householders as reside within a convenient distance of the place of worship, and upon such other evidence as may satisfy him that the building is a *bonâ fide* place of worship. (*Ord. No. 8 of 1865, § 1.*)

The Registrar General may then register such place of worship for the solemnization of marriages in a book provided by him for that purpose; and he gives a certificate of such registration on a stamp of £3 (provided by the applicant), and also public notice in the Government Gazette. (*Ord. No. 13 of 1863, § 5.*)

No stamp is required where the building was habitually used for marriages before the *date* of 13 of 1863, i. e. 31 Dec. 1863, which is the date of assent; or where

## HUSBAND AND WIFE.

of you, before the death of the other, shall contract another marriage before the former is thus legally dissolved, you will thereby become guilty of bigamy, and be liable to the heavy penalties attached to the offence."

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Registered places of worship.

Where the population is so scattered that it is difficult to obtain twenty signatures, the Registrar General may issue a certificate upon those of as many householders as reside within a convenient distance of the place of worship, and upon such other evidence as may satisfy him that the building is a *bonâ fide* place of worship. (*Ord. No. 8 of 1865, § 1.*)

The Registrar General may then register such place of worship for the solemnization of marriages in a book provided by him for that purpose; and he gives a certificate of such registration on a stamp of £3 (provided by the applicant), and also public notice in the Government Gazette. (*Ord. No. 13 of 1863, § 5.*)

No stamp is required where the building was habitually used for marriages before the *date* of 13 of 1863, i. e. 31 Dec. 1863, which is the date of assent; or where

## HUSBAND AND WIFE.

the building has been substituted for such building as aforesaid. (*Ord. No. 8 of 1865, § 2.*)

This registration may be cancelled on the building becoming disused for public worship; or, in the case of another building being substituted for the registered building, the former registration can be cancelled, and a registration of the new building substituted on a stamp of £2. (*Ord. No. 13 of 1863, § 6.*)

2. The marriage is to be solemnized according to the "usages of the church, denomination, or body, to which the minister (of the registered building in which the marriage takes place) belongs, and not elsewhere, or otherwise." (*Ord. No. 13 of 1863, § 14.*) It may be solemnized by the minister of the registered building, or any other minister. (*Ord. No. 8 of 1865, § 5.*) No clergyman or minister is compellable to solemnize marriage between persons, either of whom shall not be a member of his own communion, nor otherwise than according to the rules and customs of such communion; nor unless he is satisfied by the declaration of the parties, or otherwise, that the proposed marriage is consistent with such rules or custom. (*Ord. No. 13 of 1863, § 17.*)

Ecclesiastical marriage.

The ecclesiastical marriage differs from the contract marriage, inasmuch as the different churches and the dissenting bodies demand and acknowledge prohibited degrees of consanguinity and affinity different from those laid down in the local law, and different modes of pro-

OF THE MARRIAGE CONTRACT.

ceeding towards the celebration of marriage, and can charge also their own fees for ecclesiastical marriage, according to their usages, rules, or customs.

Thus, a clergyman of the Church of England is not compellable to marry persons lineally related to each, or collaterally related to each other in the second or third degree, according to the mode of computation in the civil law, whether they be related by consanguinity or affinity. Thus, not to marry a man to his wife's sister, for she is related to him in the second degree by affinity; nor to marry his sister's daughter, nor his wife's sister's daughter, for she is related to him in the third degree. But he may marry him to a first cousin, for she is only related in the fourth degree. The relations by consanguinity of the wife are always related by affinity to the husband; and, in like manner, the relations by consanguinity to the husband are always related to the wife. But the relations by consanguinity of the husband are not, as such, related, even by affinity, to the relations by consanguinity of the wife; and hence the church permits two brothers to marry two sisters, or a father and a son a mother and a daughter. Nor is the husband, as such, related, even by affinity, to those who are only related to the wife by affinity; and, therefore, a man may marry his wife's brother's wife. (2, *Ste. Com.* 255-6.)

The ecclesiastical prohibitions as to collaterals extend not only to the half-blood, but to illegitimate children. (*Idem*, 256.)

Further, a clergyman is not compellable to marry

Canonie  
disabilit

Celebratio  
marriage.

## HUSBAND AND WIFE.

except by one of the following modes of proceeding towards the celebration of marriage:—

banns.

1. By a publication of banns upon three successive Sundays, in the church or chapel where the marriage is to be solemnized, according to the usages, rules, or customs of the communion of that church. If either party be under twenty-one years of age (not being a widow or widower), the publication of banns can be avoided by the open declaration of dissent by the parent or guardian of the minor.

ecclesiasti-  
license.

2. By a license from the ecclesiastical authority; that is (in the Church of England), an ordinary license from the Bishop of Colombo, or his commissary, or surrogate.\*

By the rule of the communion of the Church of England, in the case of license, one of the parties must have had his or her usual place of abode for fifteen days immediately preceding in the district in which the place of worship in which the marriage is to be solemnized is situate, and, whether by banns or by license, the marriage must take place between eight in the morning and twelve o'clock in the forenoon, except in the case of a special license, and be solemnized by a person in holy orders, and before not less than two other credible witnesses. If the intended husband or wife, not being a widower or a widow, is under the age of twenty-one, and his or

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\* Whether the Bishop of Colombo, or any other church authority, can legally issue a special license for Ceylon, is not at present very clear.

## OF THE MARRIAGE CONTRACT.

her parent or guardian openly signifies disapproval at the time the banns are published, the publication is void. And on obtaining a license, one of the parties must make oath as to his or her belief that there is no lawful impediment, and that one of them has had his or her usual place of abode, for fifteen days immediately preceding, within the district within which the marriage is to be solemnized; and, where one of the parties, not being a widower or a widow, is under the age of twenty-one years, that the consent of the father, or if the father is dead, of the guardian, or if there is no guardian, then of the mother, being unmarried, or if no mother unmarried, then of the guardian legally appointed, has been had. (*Sm. M. C. L. 73.*)

On the delivery of the registrar's certificate to the minister of any registered place of worship, and after the publication of banns by him (if required by his communion), or if the marriage be by ecclesiastical license, on the delivery also to him of the license, the minister can solemnize a marriage according to the rules or custom of his communion, in such building, between the parties named in the certificate. The marriage must be solemnized with open doors, between the legal hours of eight in the morning and six in the evening; and if the canonical hours of that communion are more limited, then between the canonical hours of that communion (except in the case of a special license—this license authorizes ecclesiastical marriage at any convenient time

Celebration  
ecclesiastical  
marriage.

or place, and therefore in a private house). There must be two or more credible witnesses present besides the minister. The ceremony must be in the building, and not elsewhere, or according to any usages but those of the church or communion to which the minister belongs.

Registration  
of ecclesiasti-  
cal marriages.

Immediately after the solemnization of any marriage by the minister of any registered place of worship, the minister enters into a book to be kept for that purpose in the place of worship, a statement of the marriage, in the same form, and with the same particulars, as in the case of contract of marriage before a registrar (see *ante*, p. 72), similarly signed by the minister, parties, and witnesses. The minister forthwith transmits to the registrar a duplicate of the statement, similarly signed; and all such statements of marriages so transmitted to him, after being copied by the registrar (with the word "copy" prefixed) into the Marriage Register Book, are filed by him, and duly preserved, according to a given rule in his office. (*Ord. No. 13 of 1863, §§ 18 and 19.*)

Evidence of  
the marriage.

Every entry of marriage in the Marriage Register Book, or any copy thereof, certified under the hand of the registrar, is the best evidence of the facts recorded therein before all courts, and in all proceedings before or in which it may be necessary to give evidence of the marriage to which the same relates. (*Ord. No. 13 of 1863, § 19.*)

Omitted or  
erroneous  
registration.

Where a marriage has, without fault of the parties thereto, been omitted to be registered, or has been er-



OF THE MARRIAGE CONTRACT.

roncously registered, either party, or his or her lawful representative, may apply to the District Court of the district in which the marriage took place, to have the marriage correctly registered. (*Ord. No. 13 of 1863, § 20.*)

If both the parties to any marriage knowingly and wilfully intermarry under the provisions of Ord. 8 of 1865, in any place other than the office of the registrar or registered place of worship (except when specially licensed thereto under the provisions of this ordinance), or under a false name or names, or without certificate of notice duly issued, or knowingly and wilfully consent to acquiesce in the solemnization of a marriage by a person not being a minister or a registrar for the district, the marriage of such persons shall be null and void. (*Ord. No. 8 of 1865, § 6.*)

Clandestine marriages void.

Any minister competent to solemnize marriages may solemnize them without the preliminaries required by the ordinance between persons of whom one is supposed to be on the point of death, subject, however, to the following conditions:—

Death-bed marriages.

1. The minister solemnizing the marriage shall be subject to the penalty prescribed by the 25th section of the ordinance, and the marriage has no legal effect whatever, unless the minister, within forty-eight hours of the solemnization thereof, forwards to the nearest registrar a report of the marriage, in the form and comprising the particulars set forth in the Schedule D to the ordi-

Minister to report such marriage.

nance annexed, or to a like effect, which statement must be signed by the minister and another credible person not being a party to the marriage, and a certificate by such minister and credible person to the effect that one of the parties, who must be named in the certificate, was supposed to be in a dying state at the time of the solemnization.

Limited effect of such marriage.

2. Such marriage has no legal effect, except that of preventing the re-marriage of either of the said parties with any other person, until the same shall be acknowledged by the parties before the registrar in the manner herein described. It is necessary for the parties, prior to such acknowledgment, to give the notice or obtain the license as is by the ordinance made necessary to authorize its solemnization, and the notice and license is subject to such caveat or other proceeding by way of prohibition as would be legally sufficient to prevent it. The registrar is authorized and required to enter the marriage so acknowledged into the Marriage Register Book, in substantially the form prescribed by the 19th section of the ordinance; and the marriage so acknowledged is good and valid to all intents and purposes whatsoever.

Proviso.

Penalty for fraud.

Any person wilfully giving a false statement or certificate, or fraudulently procuring a marriage to be solemnized under the provisions of the 4th section of this ordinance, or fraudulently acting in contravention thereof, or contrary to its plain intent and meaning, is

liable to a fine not exceeding £50, or to imprisonment with or without hard labour not exceeding three years.

The registrar may, on the special application of the parties, supported by the affidavit of two credible persons that either of such parties is very ill and unable to leave his abode, license the solemnization of a marriage, or accept the acknowledgment at any place other than a registered place of worship or registrar's office.

When registrar may grant licenses.

The personal consequences of marriage consist principally in the power of the husband over the wife. The wife becomes by marriage, as it were, a minor, and the husband her curator or guardian, or, as it is termed, the church guardian of his wife; and accordingly a woman is bound to pay due obedience to her husband; but he may not exercise any cruelty towards her, but is bound and justified in defending her. For example, when a wife was arrested upon an illegal warrant, the arrest being an assault on the woman, her husband was held justified in her rescue. (422, *D. C. Jaffna*, 16 Nov. 1860.) The custody of her person belongs to him; and though he may not chastise her, he may restrain her liberty in case of gross misbehaviour. (*V. d. Ldn.* B. 1, ch. 3, § 7, p. 84: *Grot.* B. 1, ch. 5, § 20, p. 26: *Kerr's Bl.* V. 1, pp. 470, 471.)

Personal consequences of marriage.

The husband is bound to provide his wife with necessaries as much as himself; and if she contracts debts for them he is obliged to pay them, unless he supplies her with necessaries himself. (*Montague v. Benedict*, 3,

Wife's necessaries.

*B. and C.* 31, 32, *Sm. L. C.* 374: *Seaton v. Benedict*, 5, *Bing.* 28: *Renaux v. Teakle* 8, *Ex.* 680.) And, unless there is evidence to the contrary, it is presumed that a wife who resides with her husband is authorized to bind him by contracting for necessaries; but for anything but necessaries he is not chargeable, unless the wife had authority, express or implied, to contract for him. (*Manby v. Scott*, 1, *Sid.* 120: 2, *Sm. L. C.* 341, *et notes*: *Reid v. Teikle*, 13, *C. B.* 627.) Also a wife who is living separately from her husband has no such authority, unless the separation was by consent (11601, *C. R. Jaffna*, 6 June, 1853: 13934, *C. R. Jaffna*, 17 Jan. 1855: *Nell*, 244), or by her husband's compulsion, or occasioned by his misconduct, and he does not make adequate provision for her support. And certainly, if she elopes, or lives with another man, her husband is not chargeable even for necessaries. (*Sm. Contr.* 415: *Add. Contr.* 767.)

Although a married woman residing with her husband has an implied authority from her husband to order food, clothing, furniture, and other necessaries, yet, if the person who furnishes the goods is sufficiently apprized that she has no authority to pledge her husband's credit, the husband is not responsible; so, also, if her orders are of such a description as, under the circumstances, naturally to raise a doubt whether her husband would have authorized her to give them, the tradesman is bound to satisfy himself that they were so authorized. (*Sm. M. C. L.* p. 78: *Add. Contr.* 767, 768.)

LEGAL CONSEQUENCES OF MARRIAGE.

As a general rule, the wife has no power to appear in court (*V. der Ldn.* 1, 3, 7, p. 84); that is to say, that if the wife be injured in her person she can bring no action for redress, but her husband must sue for her and on her behalf (32761, *D. C. Colombo, N. 15 Sep.* 1842; *Morg. D.* 332); neither can she be sued without making her husband a defendant; and when sued with her husband, execution can only be taken out against her property, but not against her person (4806, *D. C. Batticaloa, Coll. Morg. D.* 271), unless the husband is dead in law; as if the husband has abjured the realm,\* or is banished, or unless the husband is out of the country, or has abandoned his wife, or is legally separated from her (13934, *C. R. Jaffna, 17 Jan.* 1855), or has refused without any just ground to join in an action to support her rights or to save her property. In such cases a woman will be allowed to sue as a single woman; the advisable course being, where a woman living with her husband sues as a single woman, to call upon the woman to state the circumstances under which she is living with her husband, and the reason why he is not joined in the action, and to call upon the husband either to become a party, or to assign his reasons for refusing, and then for the court to decide whether the suit shall proceed without him or not. (*Marsh.* p. 218: *Kerr's Bl.* 1, 469.)

Of suits  
law by o  
against h  
band and  
wife.

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\* This rule does not apply when his is an alien enemy. (*De Wahl. v. Braune*, 1, *Hurlst. v. Nor.* 178.)

Contracts by  
the wife.

A wife is not capable of herself to enter into any contract without the knowledge or consent of her husband, so as to bind herself or her husband to others, except for necessaries (*see ante*, p. 82), and except so far as she may clearly appear thereby to have derived an advantage or profit; so that a husband may sue on a contract made with his wife on good consideration, and if he dies without suing, the right to sue upon it will survive to his wife. (*V. der Ldn.* 1, 3, 7, p. 84: *Grot.* 1, 5, 23, p. 27, and *Sm. Cont.* 285: *Add. Cont.* 761.)

A married woman cannot bind herself by a mercantile contract; but if, with the knowledge of her husband, she carries on a trade openly, she binds herself and her husband by contracts necessary in the conduct and consistent with the purposes of such trade or merchandize (18481, *C. R. Galle*, 20 June, 1859); or unless her husband is civilly dead, as when he is under sentence of transportation; or if she is legally separated, and continues to live apart from him, and to carry on trade for her own support. In these cases she is a legal trader, and may become an insolvent. (*V. der Ldn.* 1, 3, 7, p. 84: *Sm. Merc. Law*, 18: *Sm. Cont.* 285: *Add. Cont.* 770.)

Wife's liability for husband's debts.

The wife is bound and liable for all the debts and engagements contracted by her husband, even without her knowledge and consent, equally with him during the marriage; and after his death, for one half, except for obligations arising out of delict amounting to crime

on the husband's part; so that if even all the husband's property becomes forfeit by such delict, the property of the wife remains untouched. (*V. der Ldn.* 1, 3, 7, p. 85: *Grot.* 1, 5, 22, p. 27: 26414, *D. C. Colombo*, 29 Oct. 1861.)

The husband may at pleasure alienate or encumber the wife's property, and also whatever he has held without community, and he may do this without her consent, and even when all community of property has been excluded by ante-nuptial contract (*Grot.* 1, 5, 22, p. 27: *V. der Ldn.* 1, 3, 7, p. 85: *V. der K.* § 92), unless it is expressly stipulated that the husband shall not have the administration of her property; in that case she may judicially interdict him from alienating or encumbering her property. If, however, the husband make such a manifest misuse of his marital power as to be likely to bring his wife to poverty, she may claim a *separatio bonorum*, and interdict his administration of her property; and if this prohibition be published, the husband has not afterwards the power to alienate or encumber her property, nor render her responsible for his debts (or of a particular creditor without publication). (*Grot.* 1, 5, 24, p. 29: *V. der Ldn.* 1, 3, 7, p. 85: *V. der K.* § 97.)

Husband  
power to  
alienate.

The wife may also petition that the husband's person and property may be placed under curatorship; and the husband's tutelage, or his insanity, suspends (but does not necessarily determine) the marital power; and the

wife may then claim the administration of her own property. (*Grot.* 1, 5, 27, p. 29: *V. der K.* § 101: *V. der Ldn.* 1, 3, 7, p. 85.)

Community.

Marriage confers a community of property between the spouses; that is, they hold all their property in common, not only in right, but in actual possession, in a kind of joint ownership or partnership, it being an established rule (when not limited or excluded by a previous marriage contract) that man and wife can have no separate property. The spouses enjoy alike the profit or gain of the common property during marriage, and are equally affected by all the losses and charges on the property on either side; and the community once introduced by marriage can in no wise afterwards be done away with. This community takes place not only in the first, but also in subsequent marriages, although there may be children of the first bed. (*Grot.* 2, 11, 8, 109: *V. der Ldn.* 1, 3, 8, 96: *V. der K.* 216, 217, 219.)

No community in clandestine marriages.

There are only two cases wherein this community does not take place: 1. In the clandestine marriage of minors; that is, a marriage of minors without the legal consent of parents, guardians, or a competent court. 2. In a marriage originating in the abduction of one of the parties, whether with or without his or her consent, but without the knowledge of parents or guardians. (*Ibid.*)

Community takes place, *ipso jure*, on the completion of the marriage; that is, under the later systems of



## LEGAL CONSEQUENCES OF MARRIAGE.

Ceylon, the moment it is celebrated; under former systems, not until after consummation, or whatever act marked the completion of the marriage. And the community of goods by marriage extends to everything possessed by the party on either side at the time of the marriage, or acquired by them during marriage, whether by inheritance, legacy, donation, purchase, profit, or otherwise. No property of any kind is excepted, but such as, after the death of the party possessing it, or after the expiration of some limited period, is to revert to a third person, and thus by its nature is incapable of coming into community. Thus, feudal property (whether direct or hereditary feuds), and property which is limited or tied up by last will, do not come into community, except as regards fruits thereof; and money realized by the sale of feudal property becomes common property. (*Grot.* 2, 11, 10, 110: *V. der Ldn.* 1, 3, 8, 87: *V. der K.* 220: *V. der Ldn.* 4, 23, 3, 410.)

Property subject to a *fidei commissum*, or goods in trust, and the like, are not affected by community. No community in t

As a consequence of the community of goods, the debts of one of the spouses is liable during the marriage for the debts of the other, even if contracted before marriage, and without any compensation when the community is dissolved; but this charge upon the common property ceases with the dissolution of the marriage; after which the property of the one is not answerable for the debts of the other contracted before marriage. Debts of spouses.

but the sole liability of the indebted spouse revives, if nothing has been done to put an end to the debt, or unless judgment has been recovered during the continuance of the marriage. (*Ibid.*)

Division of goods on dissolution of marriage.

When the marriage is dissolved, the common property is equally divided between the spouses, or their legal representatives; and in case there have been children, who, during the marriage of their parents, have received anything in the advancement, either of their marriage, or trade and merchandize, they must bring the same into the common property before division. This collation not only comes to the benefit of the other children, but also to the benefit of the surviving parent, even, sometimes, of a step-parent. The common property, on being apportioned, is valued as if it had passed by sale. The funeral expenses and those immediately consequent on death are defrayed out of the share of the deceased spouse; and half the debts contracted during marriage are also (if yet unpaid) taken out of the share of each spouse, with this difference, that whereas the wife, or legal representative, can be sued only for half the debts, the husband, or his legal representative, is liable (as a consequence of his guardianship) to be sued by the creditors of the common property for the whole of the debts; although the wife, or her representative, becomes bound to him for a half. (*Grot.* 2, 11, 17, 111: *V. der K.* 224-5.) This does not include debts arising *ex delicto*.

## LEGAL CONSEQUENCES OF MARRIAGE.

A widow has the right of renouncing the common property by a solemn ceremony previous to the interment of her husband; as if she walks before her husband's corpse or bier simply in her ordinary dress; and she becomes thereby released from the debts which were contracted during marriage; though it does not affect those debts\* which she herself has contracted during marriage with the authority of her husband, much less those contracted by her as a female trader, when she has publicly carried on the sale and purchase of goods, whether in the presence or absence of her husband. For these she is liable. (*Grot.* 2, 11, 18 and 19, 112: *V. der K.* 226-7.)

Renuncia  
of commu  
by widow

The consequences of the community of goods thus established are as follows:—

Consequer  
of the com  
munity of  
goods.

1. The goods of both parties brought into community at the marriage, as well as those afterwards acquired, are, during the marriage, common.

2. This property, during marriage, is under the control and disposition of the husband.

3. All debts contracted before marriage are common, and must be paid out of the common estate.

4. At the death of either party, the community of goods ceases *ipso jure*.

5. The common goods of the husband and wife are

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\* Query, the half only of such debts.

then (after collation) divided into two parts, the one half assigned to each, or their legal representatives.

6. Each is liable to one half the debts contracted during marriage; but the husband is subject to be sued by third parties for the whole, and the wife for half.

‡ Ante-nuptial marriage contracts.

Frequently the spouses do not think proper to marry according to the law of the land; but on terms and conditions which are regulated by a special contract, termed an ante-nuptial contract, and which is an agreement between future spouses, or others concerned, for the disposition of the property of the marriage, and regarding the conditions by which the marriage is to be regulated; and, as in other contracts, stipulations contrary to any prohibitory law, or to morals, or to the nature of marriage, are invalid; as, for example, a stipulation that the husband may not change his domicile without the consent of his wife, for that would be contrary to marital authority.\*

This agreement can take place as between the parties themselves, as well verbally as by writing; so that, if no written agreement is entered into, the contract can be proved by parol.† But, in order to render these contracts, even when in writing, effectual as against creditors, they should be entered into publicly, or in the

\* *Sed contra Voet ad Pand.*, v. 1, § 101.

† Not so, if they concern landed property.

## LEGAL CONSEQUENCES OF MARRIAGE.

presence of a notary and witnesses, or of the relatives of both parties, or before respectable parties; for, otherwise the public might be defrauded by secret agreements.

In these marriage contracts is sometimes inserted an inventory or list of the wife's property; but the inventory is sometimes contained in a separate and non-notarial instrument, and annexed to the contract: the neglect to make and annex such inventory does not vitiate the contract; but the quantity and value of such property will have to be proved by other evidence. (*Grot.* 2, 12, 1-4, p. 112: *V. der Ldn.* 1, 3, 3, p. 74: *V. der K.* 228-30.) If, when this property comes to be proved or valued, it is found to be less than expected, the ante-nuptial contract cannot therefore be set aside, reformed, or varied, on the ground that it was intended there should be a pecuniary consideration on both, and that the pecuniary consideration on one side has failed. (*Campbell v. Ingilby*, 21 *Beav.* 567; 1, *D. and F.* 393.) Where no ante-nuptial contract has been entered into before marriage, community takes place as soon as the marriage is completed; and no alteration in this respect can be made subsequently by any act *inter vivos*, unless a separation; not only from bed and board, but also from property, is decreed by a court. (*Grot.* 2, 12, 5, p. 113: *V. der K.* 231.)\*

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\* As to a man or woman contracting marriage with a widow or widower who has children. (See *Grot.* p. 113: *V. der K.* 232.)

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\* As to a man or woman contracting marriage with a widow or widower who has children. (See *Grot.* p. 113: *V. der K.* 232.)

Whoever marries with a young man or young woman under age, and without consent, cannot take anything by community, as before stated; no more can he derive from the property of the spouse any benefit by ante-nuptial contract. (*Grot.* 2, 12, 7, p. 113.)

In establishing an ante-nuptial contract, two rules may be observed.

1. The will of the parties contracting (whether it be the future spouses, or those who promise or stipulate anything in such contracts) should be left entirely free.

2. The right of disposing of the property, as well *inter vivos* as *causá mortis*, should be also left free and independent of the consent of relatives.

Subjects of  
ante-nuptial  
contract.

The subjects of an ante-nuptial contract are chiefly these:—

1st. The property of the spouses.

2nd. The property of the children.

3rd. The property of any third party.

1st. As to the property of the spouses, the usual stipulations are as follows:—

1. The spouses may renounce the community wholly or in part, or to any extent, or under any condition not unreasonable; thus one may stipulate for any benefit, as to have a particular thing solely for himself or herself, or a particular sum, or annual amount, or a portion of the dowry, however paid, whether immediately or after the party's death; but not to share in the



profits without being responsible for the losses, for that would be unreasonable; or, rather, to look upon returns as profits, without deducting losses, which would be contrary to fairness (which reconciles V. der K. with Grotius and Noestadt).

2. That the spouses shall, on each side, bring in their separate property (either the whole or a defined portion) to the support of the burdens of the marriage, without inducing any community of goods.

3. That one shall not be answerable for the debts of the other contracted before or after marriage.

4. That the gain and loss shall be mutual, or that the community in this shall be excluded, or the wife may stipulate that she (which includes her representatives) shall, after the dissolution of the marriage, take either a half or any other share of the profit and loss, or claim her own property brought into the marriage. This right of election (if stipulated for) may even be exercised during the marriage, if the husband is reduced to poverty, otherwise the wife would lose her election.

5. That the wife for her property, on the dissolution of marriage, shall have the right of dower, legal mortgage, or preference.

6. That the wife shall have the administration of her own property, without its being in any way subject to the marital power.

7. That the survivor shall be entitled to a certain sum, by way of gift, out of the goods of the party who dies first.

These gifts are termed dowry ; but cannot be claimed or received until the payment of all debts.

Succession by  
ante-nuptial  
contract.

The ante-nuptial contract may also provide how, after the death of one or both of the parties, the succession to the property is to be regulated ; in which case the succession cannot be revoked at the will of one party, and is to be preferred, not only to legal, but also to testamentary succession ; though a testamentary disposition may be made in the ante-nuptial contract itself,\* revocable at the will of the disposing party.

1. A stipulation that one party shall succeed to the whole estate of the other is not cancelled by the birth of children.

2. Another successory stipulation is that which allots to the survivor a child's portion ; and, if there be children by a former marriage, it is to be determined strictly ; but if there be no such children, it should be liberally construed, according to the intention of the contracting parties.

3. If a filial portion is contracted to the surviving spouse, under the condition "if children be born," then,

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\* It is questionable whether several of these covenants, though undoubtedly good Roman-Dutch law, would not now in Ceylon be held contrary to equity and good morals.

failing this condition, the share is not due; but if it has been left absolutely, and if no children are born, it includes the entire inheritance, and not a half. (*V. der K.* 237, overruling *Van Leuween and Voet.*)

4. Strangers, either certain or uncertain, may be admitted by ante-nuptial contract to succeed to the property of the spouses.\* Such a disposition, if made without a regular contract entered into with them, is, like a will, revocable; but if promised to them, by joining them in the stipulation, it cannot be revoked; contrary to the rule which obtains in other kinds of successory contracts. If it is not revocable (or if stipulated that the property should revert to the side whence it came), a new succession *ab intestato* would seem to be introduced, which, if not confirmed by the mutual promises of the spouses, will not prevent a contrary disposition by will, nor affect a prior disposition in favour of relatives. If such prior disposition has been made in favour of a stranger, it seems to be a question of will (*i. e.* what may be the real wishes of the parties).

LASTLY. In ante-nuptial contracts, disposition may be made concerning the succession to the property of the children; that is, how the children, in case they die within the age to make a will, shall be disposed of:—

Succession to the children's property by ante-nuptial contract.

1. By electing a particular rule of succession, under any of the forms of law obtaining in Ceylon.
2. By admitting to the succession of the first dying

children the remaining survivors; and to the succession of the last survivor the relatives of that side from whence the property came. Such a disposition neither prevents the spouses from making a different disposition by will, nor burdens the children with a *fidei commissum*; but it excludes the parent, who has so long contracted, from the succession.

Whatever is not expressly stipulated for by the ante-nuptial contract is subject to the community. In so much that, if the community of property be excluded, the community of profit and loss accruing during the marriage remains; and in profit and loss is not included an inheritance (whether *ab intestato*, or by will) with its incumbrances, excepting where it has been expressly stipulated that *all kinds of profits* should be in common.

The *fructus* or profits of property come, also, into community, unless the same be expressly excluded therefrom. Under the community of profits are included life annuities, and profits derived from ships, also the benefits of usufruct; but not such things as do not consist in fruits, such as lofty trees. Profits likewise include things purchased with money belonging in common, or exclusively to either spouse (even if no community of profits exist between them); the spouse to whom the money belonged becoming a creditor to the amount so spent. But things purchased before the

marriage and delivered afterwards are not profits; and it will, of course, only apply to things purchased in support of the marriage and, therefore, as owing by the joint fund when it comes to be collated to the spouse in question: it would not, for example apply to the personal apparel of either. (*V. der K. overruling Voet in this opinion.*)

Where the community of profit and loss remains, and those of profit and of debts before marriage are excluded, the property of the wife cannot, during marriage, be taken in execution for such debt by the creditors of the husband.

When a wife has stipulated for the free election of her own property, and, after the dissolution of the marriage, there is more than sufficient to pay half the debts contracted during the marriage, she may prevent the sale of her property on account of such debts.

The spouses, or their representatives, have, after dissolution of the marriage, a right, the one against the other, to require an account or collation of the property which had been brought to the marriage, in case such has not taken place, and that, free from all charges, in case no mention of charges is made; but during marriage, collation cannot be compelled of any particular property which the spouses had, before marriage, promised each other in respect of the marriage. A husband may, however, sue his father-in-law for a promised

Collation on dissolution of marriage.

dowry, which is the old maxim, "Love a bridegroom; but give to the bride." From this duty of mutual indemnification, after the dissolution of the marriage, it follows that a widow can claim her dowry from the heirs or representatives of her husband within a year. (*Groeneveg*, in l. 1, § 7, c. *de Rei Ex.* 1.)

The collation is also to obtain compensation for the property remaining out of the community, and which has been sold by the husband during the marriage; and an accidental loss occurring to the property of either spouse (not in common) must be borne by the owner; and, indeed, all necessary expenses of an extraordinary nature; but money expended in the improvements of the property of either must be collated to the extent of the improvement. (*V. der K.* commenting on *Grotius*.)

The collation is also to obtain advantages stipulated for, or the dowry, or the morning gift; which latter, though it accrues to the wife then after her marriage, if she prove a virgin, is only paid after dissolution and discharge of debts.

By the dowry is here meant the marriage gift promised as a provision for the widowhood of either spouse. It is reckoned in the estate, and being a bounty only, if immoderate, is diminished as an inofficious donation; but it is not satisfied by a legacy, unless the gift is expressly revoked in the bequest.

A wife may not derive out of her husband's property

any profits, nor even receive any compensation, before all creditors are satisfied; but if there is no community of profits and loss, or if, in exercise of her election, a woman renounces her community of profit and loss, she becomes a preference creditor for her compensation over all other creditors; and for her right of dowry and legal mortgage she gains a preferent right, not only against subsequent, but also against prior mortgage creditors of her husband.

Whatever the spouses have stipulated in each other's favour cannot, by any act during their lives, be revoked, even by mutual consent, as such a revocation would have the effect of a gift between man and wife, which is not permitted in law. A wife may, however, renounce the stipulation respecting dowry and legal mortgage in favour of her husband's creditors. Revocation.

A revocation is good when made by last will, provided both spouses continue in this mind, and confirm it by death; but either of the spouses may, by a subsequent testamentary disposition, even without the knowledge of the other, revert to the ante-nuptial contract. This is even permitted, after the death of one of the spouses, to the survivor; provided he or she has not in the mean while accepted any benefit under the will of the predeceased spouse.

"Lawyers," says Van der Linden, "differ as to whether the conditions concerning succession (*parta successoria*) are revocable or not;" but Van der Linden

inclines to the opinion that such conditions have merely the force of a last will, and may, therefore, be revoked by both or even by one spouse.

Husband  
liable to  
punishment  
for not  
maintaining  
his wife.

The above are the legal consequences of marriage, as between the parties themselves and others; but there is one other that may be mentioned here, though more properly belonging to the criminal law. It has been said (pp. 82-3) that a husband is bound to provide his wife with necessaries; but, in addition to that, every husband, being wholly or in part able to maintain his family, leaving her without maintenance or support (that is, clothing, food, and other conveniences; 23022, *P. C. Galle*, 6 May, 1857; *P. C. Ca.* 107), whereby she shall become chargeable to, or require to be supported by, others, is deemed an *idle and disorderly person*, and liable, on a *first* conviction, to imprisonment, with or without hard labour, for not more than *fourteen* days, or to a fine not exceeding *twenty shillings*; on a second conviction he is deemed a *rogue and vagabond*, and is liable to imprisonment as above, not exceeding *one* month, or to a fine not exceeding *two* pounds; and on conviction a third time, or more often, he is deemed an *incorrigible rogue*, and is liable to imprisonment as above, not exceeding *four* months, and to corporal punishment not exceeding *twenty-five* lashes. (*Ord. No. 4 of 1841*, §§ 3, 4, and 5.)

Merely *refusing* to maintain a wife, however, does not bring a husband within the Ordinance; he must leave



her to be supported by others. (10922, *P. C. Colombo*, 9 May, 1848; *P. C. Ca.* 20.)

The husband's liability to support the wife should be set out in the charge against him; also the time of the alleged offence, *i. e.* when he left her to the support of others; the date of leaving being important, as, by the 22nd section of No. 4 of 1841, the period for prosecution is limited to one month from the date of the desertion. (6436, *P. C. Galle*, 28 Dec. 1848: 765, *P. C. Hambantotte*, 23 Sept. 1852; *P. C. Ca.* pp. 22, 58.)

It is not absolutely necessary that the husband should leave the wife; there are many forms of desertion; thus, if a wife can prove that it is impossible for her to live in her husband's house, in consequence of his cruelty, or open adultery with a woman kept in the house, and she leaves his house in consequence, she is entitled in law to be supported by him. (19285, *P. C. Callura*, 2 Dec. 1857; *P. C. Ca.* 114.)

Further, in reference to this prescription, the offence is not constituted by mere desertion, and is not complete until the wife becomes chargeable to, or requires to be supported by, others, and the time of the limitation runs from the date when that happens. (*Reeves v. Gates*, *L. J.* vol. 33; *M. C.* 246.)

Also, in reference to this prescription of prosecution, it has been laid down in one case that it is not a continuing offence, so as to allow the charge at any time of the party's absence; but a single act, *viz.* leaving the wife without

maintenance, though the consequences of that act may continue. (883, *Matura*, *P. C.* 24 *Nov.* 1848.)

Yet, in a later case, it was held that, although the original desertion and refusal of support took place more than one month previous to the lodging of the complaint, the fact of the defendant persisting in that course carries his offence from one day to another, and all that is required is, that the offence should be laid as having been committed on some day within a month of commencement of the prosecution. (10144, *P. C. Galle*, 23 *July*, 1850.) This ruling, that leaving wife or child so as to require support from others is a continuing offence, has been repeatedly upheld by the S. C. (5912, *P. C. Harrispattoo*, 19 *Jan.* 1865: 52235, *P. C. Galle*, 19 *April*, 1865: also 7676, *P. C. Matelle*, 3 *April*, 1855; *P. C. Ca.* pp. 70, and numerous similar cases.) The first case must, therefore, be considered as overruled; and if the complaint is brought within a month of the last day of continued desertion, though the desertion has continued for years, it is not prescribed.

No previous demand for maintenance is necessary to maintain the prosecution, if the defendant leaves his wife or child whereby either becomes chargeable to others. (4890, *P. C. Pangwelle*, 23 *May*, 1865.)

The wife is not a legal witness against her husband on this charge. (7172, *Calmane*, *Batticaloa*, 17 *Feb.* 1865.)

The mother of illegitimate children is not entitled to

the maintenance of them by the father, and can bring no charge against him under the above ordinance. (43806, *P. C. Matura*, 30 *May*, 1865.)

The process is entirely criminal: any fine inflicted must go to the Crown, and cannot be ordered to be paid to complainant as maintenance; nor can the magistrate order or receive a notarial bond for the future maintenance of the wife. (883, *P. C. Matura*, 24 *Nov.* 1846: 10922, *P. C. Colombo*, 9 *May*, 1848; *P. C. Ca.* pp. 7, 20: and 765, *P. C. Hambantotte*, 23 *Sept.* 1849, pp. 7, 20.)

OF DIVORCE ANNULLING MARRIAGE, AND SEPARATION.

THERE are four modes of untying or loosening the matrimonial bond, namely:—

1. A divorce declaring nullity of marriage.
2. Divorce from the bond of marriage.
3. Divorce from bed and board, or, as it is no more sensibly termed, judicial separation.
4. Separation by consent.

1. The first is a divorce whereby the marriage is declared null, as having been absolutely unlawful *ab initio*, and the issue, if any, become bastardised, and the parties are enabled to contract another marriage. This total divorce must be for some impediment existing before marriage, not arising afterwards; which may be any of the causes for avoiding marriage above mentioned, or

Nullity of marriage.

for incurable impotency at the time of marriage. (*Ord. No. 6 of 1847, § 29.*)

Divorce *a vinculo matrimonii.*

2. Divorce (*a vinculo matrimonii*) from the bond of marriage can be pronounced by any court having competent matrimonial jurisdiction, on the grounds of adultery subsequent to marriage, or malicious desertion. (*Ord. No. 6 of 1847, § 29.*) The above grounds include adultery in either spouse; and adultery includes bigamy with consummation, rape, and unnatural crime. (*V. der Ldn. 1, 3, 9, p. 89.*) A malicious desertion may be taken to be a desertion without reasonable excuse, and a desertion not to be a mere departure from the wife, but a departure for such a length of time, or under such circumstances as to show that the spouse does not mean to return. So that malicious desertion may be taken to mean a departure contemplating a final departure, or for an unreasonable length of time, without reasonable excuse. This is generally evidenced by the spouse having departed for a great lapse of time (in England, two years) without sending intelligence to the other spouse. But any circumstances may be evidence of such a criminal act; and, among others, the commission of a heinous offence, whereby a person is subjected to imprisonment for life, or transportation, or becomes civilly dead.

Condonation.

By the English statutable law, the court may not grant a divorce if the plaintiff has been accessory to, or connived at, the adultery, or has condoned it. And the court will not be bound (though it may, if it sees fit) to

grant a divorce, if the plaintiff has, during the marriage, been guilty of adultery, or of unreasonable delay in presenting or prosecuting the claim, or of cruelty towards the other party; or of having deserted, or having wilfully separated from the other party, before the adultery complained of, and without reasonable excuse; or of such wilful neglect or misconduct as conduced to the adultery. These principles for regulating divorce in England are defined by statute, and properly so when a new court was being created; but in Ceylon they flow naturally without statute, from the equitable nature of Ceylon jurisdictions.

No one in Ceylon can come into court but with clean hands; and the courts have full judgment of the purity of a cause; nor can a remedy be pursued where there has been gross *laches*, or a long and unreasonable acquiescence in wrong. Not even in the case of condonation; the condonation may either arise from an immoral acquiescence in what is wrong, and then the condoner is impure as a plaintiff; or the condoner may consider the moral wrong to him, the only wrong, as satisfied, and forgive the adulterer the offence. A condonation is to be gathered from facts, as well as from express forgiveness; so that if a husband has carnal knowledge of his wife after knowing her adultery, he is held to condone. (*V. Lwn.* 1, 15, § 1, p. 84.)

Without doubt, in cases where the marriage has been dissolved on account of adultery, or malicious

Second marriage after divorce.

desertion, the innocent party may contract a second marriage: and it would seem that there is no law which prohibits the adulterer from marrying again, especially if the injured party marry another, and all hope of reconciliation is at an end (*V. Lwn.* 1, 15, § 1, p. 84)—except it be that the second marriage shall not be with the person with whom the adultery was committed. (*V. der Ldn.* 1, 3, 10, p. 91.)

When divorced, the husband and wife may sue one another, on legal evidence of divorce, the mere admission of the parties not being sufficient. (211, *C. R. Batticaloa*, 4 March, 1851; *Nell*, 170.)

Judicial  
separations.

Separations may be by the court, or by consent, in certain cases. The former of these is called divorce *a mensâ et thoro*, *i. e.* a judicial separation from bed, board, cohabitation, and goods; and this separation may be prayed for by the party, even where a divorce *à vinculo* might have been asked, and the court could not, in such case, give more than a judicial separation; for the suit, in either case, is founded upon the prayer of the party injured, and not actually upon the injury, as if it were a trespass or a penalty. (*V. Lwn.* 1, 15, § 2, p. 84.) Besides, the law loves to leave a door ajar for reconciliation, and will prefer to decree judicial separation rather than a divorce *a vinculo* (*V. der Ldn.* 1, 3; § 9). Judicial separation may, therefore, be decreed for adultery subsequent to marriage, and malicious desertion, and also when for other reasons the continuance of the cohabita-

tion would become dangerous or insupportable. So that a judicial separation may be decreed on account of cruelty, or protracted differences, or for gross, dangerous, and unsupportable conduct in either spouse. (*V. der Ldn.* 1, 3, 9, p. 89 : *Grot.* 1, 5, §§ 18-20, p. 26.) The consequences of this separation should, in the opinion of this writer, appear in the decree; but they are generally division of goods, and suspension of the community and of the marital power as long as the spouses remain apart; with decree of alimony to the wife, if innocent and if necessary; and the payment of costs by the party to blame. (*Ibid.*) There is an appeal both Appeal. to the Supreme Court and to the Privy Council in cases of divorce. (11016, *D. C. Colombo*, 6 Feb. 1836.)

The spouses may agree to separate by consent. This Separation by consent. cannot, in Ceylon, for persons whose matrimonial domicile is in Ceylon, according to some authorities, be fully completed without the intervention of the authority of a competent court; who, after a summary enquiry that the spouses have lawful cause for the separation, and that provision is made respecting the property, may confirm the agreement to separate, which it is best should be by deed entered into before the court. (*V. der Ldn.* 1, 3, 9, p. 89 : *V. der K.* 90.)

Under a deed of separation, affirmed by the court, the parties are judicially separated, and the wife is, to all intents and purposes, a single woman whilst the separation continues: she can sue her husband on the

deed of separation, for arrears of allowance, and, perhaps, even for an increase of allowance, if it prove insufficient, or the husband's position improves; and if she does not make her allowance suffice, she, and not her husband, is liable for her debts; and his marital power is suspended. (839, *D. C. Galle*, 11 *Sept.* 1835: 1569, *Kandy*, 7 *Dec.* 1833: *Marsh.* 219.)

English mode  
of separation  
by consent.

The English law on separation by consent is in principle the same as in Ceylon; but English practitioners have adopted a mode of applying the law which is equally open to use under the law of Ceylon, and which recommends itself by the privacy it affords in affairs so delicate and painful to the feelings.

A private separation in England generally commences with *articles of separation*, which is an agreement not between husband and wife, but between the husband and certain trustees on behalf of the wife. It is not an agreement for separation, which, both by English and Ceylon law, would be void; but it is an agreement recognizing that the husband has either separated, or has come to the resolution of present separation, and proceeds to provide certain things for the comfort of both spouses under the circumstances. An agreement providing for the contingency of a future separation, or a covenant for separation, whether immediate or future, is void (2, *Ste. Com.* 284, 285: *Sm. Law of Prop.* 1008); but in the articles the husband usually covenants with the trustees appointed on behalf of the wife for her



maintenance; and the trustees covenant to indemnify the husband against her debts; and each party covenants not to molest the other.\*

The intervention of trustees is necessary, as husband and wife cannot contract with one another, as this would have the effect of a gift between a man and his wife, which is not permitted either in Ceylon or English law; so that a deed of separation entered into between husband and wife alone, without the intervention of trustees, is utterly void.

There would seem to be no reason in the law of Ceylon, or in equity, why the courts of Ceylon should not recognize these deeds or articles of separation executed for the purpose of maintaining the wife, and producing quiet between the spouses, where the spouses have actually come to a resolution of present separation. Under such articles the parties can live separate, until they choose to be reconciled, the spouses being still subject to the ordinary disabilities of coverture—the courts only recognizing it as between the husband and trustees.

On application, the court may compel spouses, in pursuance of articles of separation entered into between them, to execute a formal deed of separation, based on those articles, between man and wife. The court does

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\* Also, in England, not to sue for the restitution of conjugal rights; but that suit does not exist in Ceylon. (17665 and 19934, *D. C. Galle*, 19 June, 1862.)

not directly or indirectly enforce a separation personally, as it favours reconciliation; but will arrest bare molestation, and all such personal acts as would violate the agreement in respect of property; but it will not arrest *boná fide* attempts to obtain reconciliation. (2 *Sp.* 528-32: *St.* § 1428.)

If a wife induces her husband to execute a deed of separation in contemplation by her of her renewal of an illicit intercourse, the deed is void. (*Evans v. Carrington*, 2, *D. F. and J.* 481.)

On reconciliation, the former rights and consequences of marriage revive (*V. der Ldn.* 1, 3, 10, p. 91), and the deed of separation becomes void; so that if the parties wish to separate again, they must enter into a fresh deed. (2 *Sp.* 532.) Indeed, the agreement is so dependent on the separation, that any breach of it cannot be enforced after reconciliation, though a cause of action arose during separation. (*St.* § 1428: 2 *Sp.* 528: *Wilson v. Wilson*, 1, *H. L. Cas.* 538: 5, *Idem*, 51, 61, 62.)

#### PAST SYSTEMS OF MARRIAGE.

IN the preceding pages has been described the present existing system of marriage and divorce; but it is necessary, for the purposes of deciding questions of inheritance and legitimacy, to mention the repealed systems.

By Regulation No. 4 of 1806, § 3, all marriages be-

tween Roman Catholics which had taken place in Ceylon since 26 August, 1795, according to the rites of the Roman Catholic church, were declared to be valid in law, although the forms appointed by the former Dutch government had not been observed. By the first section, Roman Catholics were also allowed the unmolested profession and exercise of their religion in every part of Ceylon; so that now Roman Catholic marriages since 26 August, 1795, up to the present time are valid, subject, of course, to the laws regulating registration and the evidence of marriage.

The Roman Catholic disabilities were removed by Act of Parliament, 10, Geo. IV, ch. 7, which was declared by Regulation No. 5 of 1829, to have been applicable to Ceylon as fully as if Ceylon had been expressly mentioned in the act, and included in its provisions.

In 1815, it being found that the number of persons authorized to perform the ceremony of marriage in the colony was insufficient to afford due opportunity to the native Protestants to unite themselves in matrimony, the Governor or Lieutenant-Governor was allowed to appoint, by warrants to that effect, such further number of persons as might be necessary for the purpose.

And all marriages of persons known by the description of natives, and professing the Protestant religion, which had been theretofore or thereafter celebrated by persons theretofore or thereafter authorized and ap-

pointed to that effect by the Governor or Lieutenant-Governor, were made legal and valid to all intents and purposes. And all such marriages were to be celebrated according to the forms then lawfully used.

And as many native Protestants had been married in different parts of the island by the several missionaries resident therein, it was enacted that all such native Protestants as had been married by the missionaries before the date of that regulation should be deemed to have been legally married.

In 1822, from the want of sufficient and exact regulation, the registers of the marriages and births of the natives of the maritime settlements which were established by the Dutch government, had in several districts become wholly inefficient, and in all were greatly subject to corruption and fraud; so that it became highly expedient, for the security of property and the happiness of individuals, that such registers should be restored and enlarged, and general rules established and promulgated touching their effect as evidence of marriage; accordingly, Regulation No. 9 of 1822 was passed.\*

Registers of marriages to be kept.

It enacted that the registers of marriages of natives of the maritime settlements, as well as of natives of the continent of India residing in the maritime settlements,

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\* Held to apply to persons married by Christian rites as Christians, though secretly professing heathenism. (19493, *D. C. Calcutta*, 22 Oct. 1863.)

of whatsoever religion, sect, or caste, should be kept upon one uniform principle, and by such persons and according to such forms as the Governor, or, in his absence, the Lieutenant-Governor, should from time to time appoint and direct. (§ 2.)

Further, that no marriage between natives of the maritime settlements or of India residing there, which should be alleged to have taken place within the maritime settlements on or after the 1st day of August, 1822, should be considered valid in law, so as to convey any right of property, either to the parties themselves, or to any children born from their connection, or to any relations on either side as the consequences of marriage, unless the same should be registered by the Governor or Lieutenant-Governor in the register appropriated for the registry of the district, or part or portion of a district in which the parties were resident, or in the register of any particular class of inhabitants of the district to which a separate register might be assigned. (§ 3.) If, however, the marriage had not been registered as required by the Regulation, the want of registration does not render the marriage generally invalid, but only makes it ineffectual for the purposes mentioned in this third section. (*No. 5, Q. v. W. Dingy Appoo, 17 June, 1848, Coll.*)

Marriage, to be considered valid, to be registered.

Further: then future entries in such registers were made, if subsequent cohabitation between the parties be also proved, sufficient evidence in law to establish a

Registers and subsequent cohabitation sufficient evidence of marriage.

marriage between natives of the maritime settlements, or of India residing in the maritime settlements, of whatsoever religion, sect, or caste they might be, although no other rite of a civil or religious nature may have taken place; provided that the actual validity of such marriages should be subject to the exceptions of incompetency in the parties to contract, on the ground of consanguinity, affinity, minority, or otherwise, as by the laws applicable to the parties was or might be provided; and also to the exception of fraud in the registry itself. (§ 4.)

Previous entries of marriages intended, and cohabitation, likewise proof of marriages.

Further: the entries which had then already been made, or were before the 1st of August then next made, of marriages or of intended marriages of the natives of the maritime settlements, or of India residing therein, in the registers or tomboos kept under the authority of government, by the schoolmasters in the different maritime districts, followed by cohabitation of the parties, are in like manner taken to be in law proof of actual marriage; subject, however, to the exceptions in the fourth clause, and also to such further exceptions as by the laws theretofore in force might be made against the same; provided such last-mentioned exceptions should be made before the competent court within twelve months from that date; and further, that the enactment should not preclude the admission of other legal proof to establish marriages antecedent to the 1st of August then next, where no registry of the same had taken place. (§ 5.)

Other legal proof admitted.

Further: no entry of a marriage, or of an intended marriage, could be made in any register (except where the parties are of the Mussulman religion), unless due proclamation thereof had been made by the person to whom the application was made for registering the marriage, on three different and successive Sundays, at such public place as in each district, or division of a district, had been assigned from time to time by advertisement by the Governor or Lieutenant-Governor; unless a special license had been produced for dispensing with such previous proclamation, under the signature of the collector of the district, on a stamp of ten rix dollars, and which could only be issued by the collector on the application of both parties, and on their satisfying him on oath, if they were both of the competent age, to wit, the man twenty-five and the woman twenty years old, that no legal impediment existed to their marriage; or otherwise on the application of the father or guardian of the party or parties who might be under that age. (§ 6.)

Proclamation to be made of marriage.

Except by license.

These clauses (§§ 4, 5, and 6) do not draw a very clear distinction between the registration of a "marriage" and an "intended marriage;" and indeed the registration of an intention to marry (except in some cases under the 11th section, see *post*); because it does not of itself constitute a marriage till followed by cohabitation, and, unless so followed, is no marriage at all; but where there has been a registration of the publica-

tion of banns, it may be considered equivalent to the registration of "an intended marriage;" and, for the reasons above given, sufficient to establish a marriage, if followed by cohabitation. Moreover, the practice which has prevailed since No. 9 of 1822 has so interpreted that Regulation, that the requirements of the third section are satisfied by the registration of an intended marriage, and also that such registration, followed by cohabitation, shall be proof of marriage. (33498, *D. C. Colombo*, 16 *June*, 1864.)

In an earlier case it was laid down as follows:—

"It is a circumstance worthy of notice, that the Regulation regarding native marriages, No. 9 of 1822, requires in no part of it, as a condition essential to the validity of a marriage, that the consent of parties shall be recorded by any functionary, civil or religious; or that they shall appear *together* or singly before any such officer. The two sole conditions of that law are, a publication or license with registration of banns, and subsequent cohabitation; but, even for the purpose of making proclamation and registration, it is not incumbent on the officer to insist on the appearance of both or either of the parties; he is to proceed 'when applied to'; so that it is not only possible to go through these formalities without the consent, or even knowledge, of the parties, but, bearing in mind the very tender age at which females are often affianced in this country, on which occasions the banns are frequently proclaimed, it is probable, with regard to them, that this will occur.



“Where the sole evidence of consent is ‘subsequent cohabitation,’ it follows that the proof on this point must be more conclusive than might otherwise be required; for if the previous consent of both parties were duly recorded, a court would presume cohabitation, except in very extraordinary cases. Now, however, subsequent residence together, or the ‘conducting’ the bride according to custom, or the proofs of familiarity admitted in matters of this nature, must be insisted on; and to infer a marriage from the mere fact of occasional visits having been paid by the intended husband at the bride’s father’s, though after publication of banns, is more than the court would feel inclined to do.” \* \* \*

“Thus, the native marriage law required no official evidence of consent, but set aside the universal principle that the *consensus*, and not the *concubitus facit nuptias*.” (2855, 3036, *D. C. Galle*; *Morg. D.* 209.)

If one of the parties to be married or registered resided in a different division from the other, the proclamation took place in both divisions, and a certificate thereof was sent by the proper officer of the division in which the woman resides to the officer of the division where the man resides, in the register of which last division the marriage was to be entered. (§ 7.)

If parties reside in different districts.

The proper officer, on being applied to, was to make the necessary proclamations and to register the application, under a penalty. (§ 8.)

Officers authorized to keep registers to proclaim and register applications.

If any objection was made between or at the periods of the proclamation, the entry of the marriage would

Objection to marriage.

not take place, except upon order of the Provincial Court of the district, to which the objection must have been forthwith reported, in order that the person so objecting might be called upon to substantiate his or her objection or allegations within ten days, and that the same might be decided on; and if such objection was not substantiated within the time appointed, the registry took place as if no such objection had been made. (§ 9.)

Marriage of Protestants to be before, or immediately after, registered.

All natives of the maritime settlements, or of India residing in the maritime settlements, professing the Protestant faith before the registry of their marriages, or as soon after as might be possible, were obliged to be married according to the rites and ceremonies of the United Church of England and Ireland, or other Protestant form, by persons licensed to perform such marriages. Any persons professing the Protestant faith, who had been registered, and neglected to avail themselves of the first opportunity of having their marriage celebrated before a licensed person, were liable to pay a fine. (§ 11.) •

No baptism necessary to registry of marriages. Degrees of

No previous baptism was necessary to the registry of persons married under that Regulation. (§ 13.)

relationship within which native Christians may not contract marriage.

The degrees of relationship within which the natives of the maritime settlements, or of India residing in the maritime settlements, being Christians, might not contract marriage, are according to the laws which had prevailed and had been published by the Government of the United Provinces of Holland, as follows :—

No man or woman can be married to his or her direct ascendant or descendant in any degree; no man or woman can be married to his or her brother or sister either by the full or half blood; nor uncles to nieces being their brother's or sister's children, or to their female children or descendants; nor aunts to their nephews being their brother's or sister's children, or to their male children or descendants; nor shall a man marry his wife's sister, or her daughter by a former marriage, or her niece; nor his son's, or grandson's, or brother's, or nephew's widow; nor may a woman marry her husband's brother, or his son by a former marriage; nor his nephew; nor her deceased daughter's, or grand-daughter's, or sister's, or niece's husband. (§ 14.)

Besides all marriages of the natives of the maritime settlements, or of India residing in the maritime settlements, being Christians, within the aforesaid degrees being void, provided a suit be brought for that purpose during the lives of the parties, the parties contracting such marriages were by law liable to punishment for incest. And a marriage, if it is not set aside in the lifetime of the parties, cannot be afterwards interfered with or pronounced void. (343, *D. C. Negombo*, 21 *May*, 1834; *Morg. D.* 16.) (§ 15.)

Penalty on such marriages.

Whereas marriages had been celebrated under the licenses issued in pursuance of the 7th Regulation of 1815; it was enacted, that a correct register of all such marriages as each person so licensed shall have celebrated should be sent in to the Principal of Schools

Registers of all marriages under the 7th Reg. of 1815 to be sent to the Principal of Schools.

within three months from 15 April, 1822; and that all persons by whom marriages of the natives of the maritime settlements, or of India residing in the maritime settlements, being Protestants, were in future solemnized, gave a certificate thereof to the parties, and then sent a duplicate thereof to the person authorized to keep the register for the district in which the husband resided, that the marriage might be noted therein. (§ 16.)

Certificate of future marriage.

Transcripts of registers to be sent to the Principal of Schools.

The transcript of all entries made in each month in the registers were sent in four days from the end of each month to the Principal of Schools at Colombo, and extracts or certificates of the transcripts of such registers issued by the Principal of Schools at Colombo are considered as evidence in law of the same validity as extracts of the original registers. All such extracts, whether from the original or transcript of registers, were issued on paper bearing a stamp of the value of six fanams. (§§ 18 and 19.)

Regulation not to apply to Europeans, nor to affect the spiritual, ecclesiastical, or religious laws of any religion, sect, or caste.

Nothing in this Regulation contained extended to or applied to the marriages or baptisms of persons, either British or others, commonly known and distinguished in India by the appellation of Europeans; or taken, or construed to affect the spiritual, ecclesiastical, or religious laws or discipline of any religion, sect, or caste, touching the ritual celebration of marriages of natives, otherwise than that the sole legal proof of the same, as therein before declared, should be the register thereof thereby directed. (§ 21.)

## CHAPTER VII.

## CORPORATE PERSONS.

HAVING dealt with individuals, we come to corporate persons; a view of persons derived rather from the English rather than from the Roman-Dutch law. The nature and origin both of corporations aggregate and sole have been pointed out in a former chapter; but, as Mr. Maine remarks, few continental jurists have succeeded in fully realizing a true corporation. Corporate persons.

Voet derives the view that he has in the matter from the idea of a flock of sheep, or a flight of birds, seen so far off, are to appear as one thing; this he calls *universitas rerum*: passing from things to men, and looking mentally at a distance at many men engaged in the same pursuit, or under the same rule, or occupying the same geographical position, they appear as one person; this he terms *universitas hominum*. The examples he gives are more or less of a public nature, as a municipality, a city, a village, and the county. And it is not clear whether *universitates* of this public nature required any public act of incorporation to entitle them to the privileges of the *universitas*; indeed, there was a certain class of tolerated *universitates* which had no approval of the state. (*Voet*, iii, 4, 3, vol. i, p. 286.)

The *universitas* was treated as a person, and could

use the rights and hold the place of a private person, but so that the members of the body were not bound for the liabilities of the *universitas*, unless specially bound by name.

From *universitates* of a public nature, it is easy to pass on to those of a more private character; these were called *collegia vel corpores licita*. An example of these are the guilds of trades, as the *collegium pistorum*.

They were either lawful and privileged, or illicit, that is, established for an unlawful purpose, or forbidden by the state. *Collegia* must have been established in order to meet by a *senatus consultum* with constitutions, or by the authority of the prince. Lawful *collegia* could hold their property in common, have a common chest, be heirs to such of their members as died intestate, accept legacies, and acquire goods in other methods; commence and defend actions, enter into contracts, and do other things in a corporate form. But they were probably, in late days, confined to associations of students, or trade guilds; the more particularly so, that no one could be a member of more than one *collegium* at the same time. (*Voet*, 47, 22, §§ 1 and 2: *Ff.* 3, 4, 1: *Domat*; iii, 1, 15.) *Universitates* and *collegia* do not appear to have had any common seal or signature, but chose a public officer, termed a syndic, to deal with the public, either in affairs or courts of law, for them. (*Voet*, iii, 4, 5.)

This form of corporation has no representative in Ceylon, and the corporations embodied there are on the

English model, and have been founded by Royal Charter; as, for example, the chartered banks; or by ordinance, as the Emigration Commissioners, &c.; or under the authority of the Joint Stock Companies' Ordinance.

This enquiry is important, in order to learn upon what basis of law Ceylon corporations are to be governed. As they are purely English institutions, they will probably be held to follow the English law, which is sketched out here.

The principal incidents of a corporation aggregate are that—

1. They have a perpetual succession. This is the very end of incorporation; for there cannot be a succession for ever without an incorporation; and, therefore, all aggregate corporations have a power, necessarily implied, of electing members in the room of such as go out.

2. It can sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may.

3. It can purchase lands, and hold them for the benefit of the members and their successors.

4. It has a common seal.

5. It can make bye laws, or private statutes for the better government of the corporation, which are binding upon the members, unless contrary to law, or the act, charter, ordinance, or articles of incorporation under which it exists, or unreasonable. (1, *Bla. Com.* 475.: 1, *Kerr*, 506.)

6. A corporation must in general contract by deed,

and cannot bind itself by parol. (*Grant on Corp.* pp. 55-60.) Except when the acts to be done are such as the corporation by its very constitution is to do, or such as are necessarily incident to its business. And except as to acts of frequent recurrence, of immediate urgency, or altogether trivial in their nature, so that doing them in the usual way under seal would be inconvenient and absurd. Hence a corporation which has a head may give a personal command, and by parol do sundry small acts. (See *Broom's Com.* ch. v.)

A corporation can neither sue nor be sued for assault, or such like injuries, though it may for a breach of contract. It cannot be guilty of an offence of commission, though, under the English law, it may of omission; as for the non-repair of a bridge or a highway, when this duty is imposed upon it; but there is nothing to show that this can be done under Ceylon law, except so far that a private corporation, with a succession and a common seal, being a purely English institution, not to be confounded with any form of *hominum universitas*, may, on its introduction into Ceylon, be supposed to bring all its common law with it. Neither can a corporation be condemned to penal imprisonment or corporal punishment. A corporation cannot be executor or administrator, or be seized of lands to the use of another. Nor can it be committed to prison, and therefore cannot be *guzelled*.

An aggregate corporation may take goods and chattels for the benefit of themselves and their successors;



but a corporation sole cannot. Aggregate corporations, also, that have by their constitution a head, cannot do any acts during the vacancy of the headship, except only appointing another; neither are they then capable of receiving a grant. In aggregate corporations, in English common law, the act of the major part is esteemed to be the act of the whole. In the civil law this major part must in general have consisted of two-thirds of the whole; else no act could be performed. Under the English common law *any* majority is sufficient to determine the act of the whole body. (1, *Bla. Com.* 478: *Kerr*, 580: *Mackenzie, R. L.* p. 156.)

An ordinance (No. 4 of 1861) was passed to promote the establishment of partnerships, or joint stock companies, with or without limited liability, and to provide for their registration. It does not apply to persons associated together for the purposes of banking or insurance. (§ 3)

The registration of companies is conducted as follows:— Registration.

The Governor appoints and removes at pleasure registrars, assistant registrars, clerks and servants, and, with the advice and consent of the Executive Council, makes regulations with respect to their duties, and as to the salaries or fees they are to receive. Nevertheless the registrar of the joint stock companies is entitled to receive certain fees (see *App.*), which must, unless otherwise directed by the Governor, be paid into the public treasury. The documents kept by the registrar

are open to the public, and copies can be obtained.  
 (§ 4) Until a registrar is appointed, the Registrar of the Supreme Court acts instead. (*Ibid.*)

Company formed by memorandum of association and registration.

Seven or more persons associated for any lawful purpose (not banking or insurance) may, by subscribing their names to a memorandum of association, and otherwise complying with the ordinance, procure themselves to be formed into an incorporated company, with or without limited liability. (§ 5.)

Penalty on partnerships exceeding a certain number.

Not more than twenty persons may carry on in partnership any trade or business for gain, unless registered as a company, or incorporated by act of parliament, royal charter, or letters patent. Any persons carrying on business contrary to this provision, are severally liable for the whole debts of the partnership, and may be sued without joinder. (§ 6.)

Matters required to be prescribed by memorandum of association.

The memorandum of association must contain:—1. The name of the company. 2. The town in which the registered office is to be. 3. The objects of the company. 4. The liability, limited or unlimited. 5. The amount of nominal capital. 6. The number of shares, and the amount of each share. In the case of a limited company, the word "limited" must be the last word in the name of the company.

Prohibition against identity of names in incorporated companies.

No company can have a name identical with, or so resembling the name of another company as to be calculated to deceive; and if it has, the first-mentioned company may, with the sanction of the Governor, change its name; and the new name may be registered in the

place of the other, rights and liabilities remaining the same. (§ 8.)

The memorandum of association must be in proper form (see *App.*) in the schedule thereto, or as near there- to as circumstances admit; and binds the company and the shareholders subject to the provisions of the ordinance. (§ 9.)

Form of memorandum of association.

Every subscriber of the memorandum must take one share at least in the company. The number of shares taken by each must be set opposite his name in the memorandum; and, upon incorporation, he is entered in the register of shareholders as a shareholder to that extent. (§ 10.)

Shares to be taken by subscribers of memorandum of association.

Articles of association may be signed by the subscribers prescribing regulations for the company; but if no such regulations are prescribed, the regulations in table C in the Ord. are applicable. (§ 11.)

Articles of association.

The articles of association bind the company, subject to the provisions of the ordinance. (§ 12.)

Effect of articles of association.

The memorandum of association must bear a stamp of five pounds, and the articles of association a stamp of one pound. Signing a printed copy of either is deemed a signature of either, and where the proper stamp has been fixed to either it is not necessary to stamp any printed copy so signed. Execution by any person of either must be attested by one witness at the least; one witness being sufficient. (§ 13.)

Stamp on memorandum of association, and articles of association, and use of printed copies.

In order to obtain incorporation, the memorandum of association, together with the articles of association

How to obtain incorporation.

(if any), must be delivered to the registrar, who must transmit the same to the Governor, and cause them to be published in the Gazette, in three consecutive numbers. After such publication, the Governor may, with the advice and consent of the Executive Council, under the Public Seal of the Island of Ceylon, declare the company to be incorporated; which declaration must be endorsed on the memorandum of association and in the form following:—

“Whereas the subscribers to this memorandum of association have done all things to entitle them to incorporation as a company, with limited (or unlimited, as the case may be) liability: Now know ye, that we, with the advice and consent of the Executive Council, do declare the said subscribers and their successors to be incorporated as the  
 Company (Limited), under the provisions  
 of the Joint Stock Companies' Ordinance, 1861.”

The memorandum of association, with the declaration endorsed thereon, and the articles of association, is thereupon returned to the registrar, who must register the same. (§ 14.)

Certificate of  
 incorporation  
 issuable to  
 any party.

The registrar must, on payment of five shillings, issue a certificate of incorporation of any company to any person applying for the same, and such certificate is admissible in evidence. (§ 15.)

Effect of  
 registration.

Upon the declaration of incorporation being registered, the subscribers to the memorandum of association, together with such other persons as may

from time to time become shareholders in the company, are thereupon a body corporate, by the name prescribed in the memorandum of association and declaration of incorporation, having a perpetual succession and a common seal, with power to hold lands, but with such pecuniary liability on the part of the shareholders as is hereinafter mentioned. The declaration of incorporation is conclusive evidence that all the requisitions of the ordinance in respect of incorporation have been complied with; and the date of such declaration is deemed to be the date of the incorporation of the company. (§ 16.)

No dividends are payable except with the sanction of the directors. And if they declare and pay any dividend when the company is known by them to be insolvent, or any dividend, the payment of which would to their knowledge render it insolvent, they are jointly and severally liable for all the debts of the company then existing, and for all thereafter contracted, so long as they respectively continue in office. The amount for which they are all so liable must not exceed the amount of such dividend; and that if any director objects thereto, and files his objection in writing with the clerk of the company, he is exempted from the liability. (§ 17.)

Directors to be liable for debts, if dividend be paid when the company is known by them to be insolvent.

As soon as a certificate of incorporation has been granted, the company may issue certificates of shares to the subscribers to the memorandum of association, and

Issue of shares by company.

to all other persons to whom shares may be allotted, of such number and amount as may be prescribed by the memorandum of the association, but not of any greater number or amount. The shares so issued are moveable property, and are not of the nature of immoveable property; and each share must be distinguished by its appropriate number. (§ 18.)

There is a registrar of shareholders, and an annual list of shareholders on the register is made up; and a company not keeping a proper register is liable to a penalty of five pounds for every day's default. (§§ 19-21.)

Restrictive definition of shareholders' trusts.

No notice of any trust, express, implied, or constructive, can be entered on the register or receivable by the company; and every person who has accepted any share whose name is on the register of shareholders, and no other, is deemed to be a shareholder. (§ 22.)

Transfer of shares.

The transfer of any share must be in the form in the schedule of the ordinance, and executed both by the transferrer and transferee. The transferrer is holder until the transferee is entered in the register. (§ 23.)

Certificate of shares.

A certificate, under the common seal of the company, specifying any share or shares held by any shareholder, is *prima facie* evidence of the title of the shareholder to the share or shares therein specified. (§ 24.)

Calls a debt to Company.

The amount of calls, for the time being, unpaid on any share is a debt due from the holder to the company. (§ 25.)

The register and annual list of shareholders are open to inspection under certain rules. The company may close the register at certain times. A limited company may convert paid-up shares into stock, and give notice of such conversion of capital into stock, and establish a register of holders of stock. (§§ 26-30.)

Register and annual list.

Stock.

The ordinance provides a remedy for improper entry or omission of entry in the register of stock, or that of shareholders. (See §§ 31 and 32.)

Remedy for improper or omitted entries.

The register of shareholders is evidence of any matters by the ordinance directed or authorized to be inserted therein. (§ 33.)

Register to be evidence.

Copies of the memorandum of association and articles of association must be forwarded to every shareholder, at his request, on payment of the sum of one shilling for each copy, or such less sum as may be prescribed by the company. (§ 34.)

Copies of the memorandum and articles of association to be given to shareholders.

The company must have a registered office, and give notice of the situation of the registered office to the registrar; and every limited company must paint or affix, and keep painted or affixed, its name in English, Singhalese, and Tamil, on the outside of every office or place of business of the company, in a conspicuous position, in letters easily legible; and must have its name, in English, engraven in legible characters on its seal; and mentioned, in English, in legible characters, in all notices, advertisements, and other official publications of the company; and in all bills of exchange, promissory notes,

Registered office.

indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company; and in all bills of parcels, invoices, receipts, and letters of credit of the company. Penalties are imposed on non-publication of name, not exceeding five pounds, nor exceeding fifty pounds for using an improper corporate seal. (§§ 35-8.)

General meeting of Company.

A general meeting of the company must be held once, at the least, in every year. (§ 39.)

Accounts to be kept.  
Balance sheet.

The directors must cause true accounts to be kept, and a balance sheet to be made out and filed with the Registrar of Joint Stock Companies within twelve months after the incorporation of the company, and once, at least, in every year (form in the Schedule to the Ord.), signed by the directors, or any three or more of them; who must certify at the foot that it is, to the best of their belief, a true account of capital and liabilities. No dividend is payable, except out of the profits, including interest on capital. (§§ 40-43.)

Dividend.

Audit.

The accounts of the company must be audited by one or more auditors. A copy of every balance sheet, and of the report thereon by the auditors, must be open to inspection. (§§ 44 and 45.)

Alterations of regulations.

Any registered company may, in general meeting, by a special resolution of three-fourths in number and value of the shareholders of the company for the time being entitled to vote, alter the regulations contained in the articles of association. Such special resolutions must be registered, and a copy of any special resolution



must be given to any shareholder on payment of one shilling, or of such less sum as the company may direct. (§§ 46-49.)

The company, if authorized by its regulations, may increase its nominal capital; but notice of any increase must be given to the registrar within fifteen days from the date of the resolution authorizing the increase. If such notice is not given, the company incurs a penalty not exceeding five pounds for every day's neglect. (§ 50.)

Notice to registrar of increase of capital.

If any registered company carries on business when the number of its shareholders is less than seven, for a period of six months after the number has been so reduced, then every person who is a shareholder in such company during the time that it so carries on business after such period of six months, is severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same without joinder. (§ 51.)

Prohibition against carrying on business with less than seven shareholders.

The minutes of general meetings of the company, duly entered in books provided for the purpose, and signed by any person purporting to be the chairman, are receivable in evidence; and, until the contrary is proved, every general meeting is deemed to have been duly held and convened. (§ 52.)

Evidence of proceedings at meetings.

Contracts on behalf of any company registered under this Ordinance, may be made as follows (that is to say):—

Contracts, how made.

- (1.) Any contract which would be by law required to be in writing, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged.
- (2.) Any contract which would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged.
- (3.) Any contract which would by law be valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged. (§ 53.)

Execution of  
deeds abroad.

Any registered company may, under their common seal, empower any person, either generally or specifically, as their attorney, to execute deeds on their behalf in any place; and every deed signed by such attorney is binding on the company. (§ 54.)

Promissory  
notes or bills  
of exchange.

A promissory note or bill of exchange may be made, accepted, or indorsed on behalf of a company by any person acting under the express authority of the company. (§ 55.)

Any mortgage made by a company implies the following covenants (unless words expressly negating such implication are contained therein) :—a covenant on the part of the company to pay the money thereby secured, and interest thereon at the time and rate therein mentioned; a covenant that they have power to mortgage the property, and that the same is free from incumbrances. (Form given in Schedule to Ord. (§ 56.)

Mortgages registered under this Ordinance.

Any conveyance by a company implies (unless words expressly negating such implication contained therein) :—

Conveyances registered under the Ordinance.

A covenant that, notwithstanding any act or default done by the company, they were, at the time of the execution of such conveyance, possessed of the lands or premises thereby conveyed as their own absolute property, free from incumbrances occasioned by them, or otherwise, for such estate or interest as therein expressed to be conveyed free from incumbrances occasioned by them.

A covenant that the person to whom such lands or premises are conveyed, his heirs, executors, administrators, and assigns (as the case may be) shall quietly enjoy the same against the company and their successors, and all other persons claiming under them, and be indemnified and saved harmless by the company and

their successor from all incumbrances occasioned by the company.

A covenant to warrant and defend the title of the person to whom such lands or premises are conveyed, his heirs, executors, administrators or assigns; and to grant, at its own expense, such further deeds as may be necessary to render such conveyance effectual. (§ 57.)

Inspectors.

An examination of the affairs of a company may take place by inspectors appointed by the Governor. And all officers and agents of the company must produce, for the examination of the inspectors, all books and documents in their custody or power. Any inspector may examine upon oath the officers and agents of the company in relation to its business, and may administer such oath accordingly. If any officer or agent refuses to produce any such book or document, or to answer any question relating to the affairs of the company, he incurs a penalty not exceeding five pounds for each offence. (§§ 58-9.)

The inspectors report their opinion to the Governor, who directs the same to be forwarded to the registrar. All expenses are defrayed by the shareholders upon whose application the inspectors were appointed. (§ 60.)

Any company, whether limited or unlimited, may in general meeting appoint similar inspectors with similar powers of the affairs of the company. (§ 61.)

A copy of the report of any inspectors, under the seal of the company, is admissible as evidence. (§ 62.)

Report of inspectors to be evidence.

Any summons or notice may, except in cases where a particular mode of service is directed, be served by leaving it, or sending it through the post by letter addressed to the company, at their registered office; or by giving it to any director, secretary, or other principal officer of the company; and any notice to the registrar may be served by sending it to him through the post by letter, or by delivering it to him, or by leaving it for him at his office. (§ 63.)

Service of notice on company and registrar.

Notices by letter must be posted in time to admit of the letter being delivered in the due course of delivery, within the period (if any) prescribed for the giving of such notice; and in proving such service, it shall be sufficient to prove that such notice was properly directed, and that it was put in the post office at the time aforesaid. (§ 64.)

Rule as to notices by letter.

Any summons, notice, writ, or proceeding requiring authentication by the company, may be signed by any director, secretary, or other authorized officer of the company, and need not be under the common seal of the company, and the same may be in writing, or in print, or partly in writing and partly in print. (§ 65.)

Authentication of notices of company.

When a limited company is party to any suit, the judge, if it be proved to his satisfaction that there is reason to believe that if their opponent be successful the assets of the company will be insufficient to pay his

Provision as to costs in actions brought by or against certain limited companies.

costs, may require sufficient security to be given for such costs; and if the limited company be plaintiff, he may stay all proceedings until such security be given; or, if the limited company be defendant, he may refuse to admit the defence, and, after the expiration of a stated time, to be named by him, to enable the company to furnish such security, may, on their still failing to give security, treat the case as an undefended one. (§ 66.)

Winding up  
preliminarily.

The provisions of the ordinance relating to the winding-up of companies apply to companies registered under the ordinance, and not to any other companies. (§ 67.)

Liability of  
present share-  
holders in  
respect of  
debts.

In the event of any company being wound up, the existing shareholders are liable to contribute to the assets of the company to an amount sufficient to pay the debts and liabilities of the company, and the costs of winding up; save that, if the company is limited, no contribution shall exceed the amount unpaid on the shares held by a shareholder, and his proportion of the costs. (§ 69.)

Liability of  
former share-  
holders in a  
company  
other than a  
limited com-  
pany, with  
respect to  
debts.

In the event of any company, other than a limited company, being wound up, any person who has ceased to be a shareholder *within* the period of three years prior to the commencement of the winding-up is deemed, for the purposes of contribution, to be an existing shareholder, and is under the same rights and liabilities, save for any debt of the company contracted after the

time at which he ceased to be a shareholder, as a shareholder. (§ 70.)

In the event of any limited company being wound up, any person who has ceased to hold shares within one year prior to the winding-up is, for the purposes of contribution, an existing holder of shares, and has the same rights and liabilities, save that he is not liable for any debt of the company contracted after he ceased to be a shareholder. (§ 71.)

Liability of former shareholders in a limited company with respect to debts.

The commencement of winding up a company is defined to be at the time of the presentation of the petition for winding up. (§ 72.)

Rights of contributories between themselves :—

(1.) In the case of an unlimited company, every transferee of shares shall, in a degree proportioned to the shares transferred, indemnify the transferrer against all existing and future debts of the company.

(2.) In the case of a limited company, every transferee shall indemnify the transferrer against all calls made or accrued and due on the shares transferred subsequently to the transfer.

A company may be wound up by the court under the following circumstances :—Whenever the company, in general meeting, has passed a special resolution requiring the company to be wound up by the court : or, when it does not commence its business within a year from its incorporation, or suspends its business for a

Circumstances under which companies may be wound up by court.

year: or when the shareholders are less than seven: or when the company is unable to pay its debts: or when three-fourths of the capital of the company have been lost or become unavailable. (§ 75.)

Company when deemed unable to pay its debts.

A company is deemed to be unable to pay its debts: —when a creditor for a sum exceeding fifty pounds has served a demand under his hand, and the company have, for three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound to the satisfaction of the creditor: or when satisfaction of a judgment or order of any court, in favour of any creditor, cannot be obtained within ten days. (§ 76.)

Application for winding up is to be by petition by a creditor or contributory; or if not for debt, by a contributory alone. (For proceedings, see §§ 78 to 82.)

Fraudulent preference.

Any fraudulent preference of any creditor, if made or done by or against any company, is, in the event of an order being made for winding up, made or done by way of fraudulent preference of the credit of such company, and is invalid accordingly. The presentation of a petition for winding up a company corresponds with the filing of a petition for adjudication of insolvency in the case of a trader; and any conveyance or assignment by any company of all its estate and effects to trustees for the benefit of all its creditors is void. (§ 83.)

The court has power to examine persons suspected of having property of the company. (§ 84.)

Penalty on falsification of books.

If any director, officer, or contributory destroys,



mutilates, alters, or falsifies any books, &c. (or is privy to the same), with intent to defraud the creditors or contributories, every person so offending is liable to imprisonment for any term not exceeding two years, with or without hard labour. (§ 85.)

The court has power to arrest any shareholder about to abscond, or to remove, or conceal any of his property. (§ 86.)

Absconding shareholder.

Attachments, sequestrations, and executions within three months next before the petition are void as against the liquidators; yet the attaching creditor may receive any money due to him and already realized, with costs, and may continue the attachment, &c. for the costs, but the attachment, &c. is released by tender of costs. (§ 87.)

Attachments, &c.

All books, &c. of the company and of the liquidators, as between the contributories of the company, are *prima facie* evidence. (§ 88.)

Books of company to be evidence.

The court may, after an order for winding up a company, and either before or after it has ascertained the assets, or debts in respect of which the contributories are liable, make calls on any of the contributories to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts of the company and costs; and it may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may fail to pay

Power of court to make calls.

tors; if more than one are appointed, the court must declare whether any act of the official liquidators may be done by all or any one or more of them.

- (2.) The court must, in the appointment of an official liquidator, consult the interest of both the creditors and contributories, and hear both creditors or contributories. It may, unless both the creditors and contributories concur in a single liquidator, appoint one or more liquidators; may declare that any act may be done by a majority, or it may require the liquidators to apply to the court; it is not obligatory on the court to appoint more than one liquidator. (§ 77.)

Powers of  
official liqui-  
dators.

The official liquidator

May bring or defend any suit or proceeding, civil or criminal, in the name and on behalf of the company.

May carry on the business of the company for the beneficial winding up of the same.

May sell the immoveable and moveable property of the company, in whole or parcels.

May execute in the name and on behalf of the company all deeds, receipts, and other documents, and may use the company's seal.

May refer disputes to arbitration, and compromise any debts or calls, with notice to, and subject

to the consent of creditors, or any of them as the court may direct, and with the sanction of a special resolution.

May prove, and draw a dividend in the insolvency or sequestration of any contributory.

May draw, accept, make, and indorse any bill of exchange or promissory note, and also may raise upon the security of the assets of the company any requisite money.

May do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets. (§ 100.)

The official liquidators may, with the approval of the court, appoint and pay clerks or officers. The official liquidators are paid as the court directs. (§§ 101 and 102.)

When the affairs of the company are wound up the court declares it dissolved; this dissolution is confirmed by the official liquidators to the liquidator, who makes a minute accordingly. (§ 104.)

The judges of the Supreme Court may make rules concerning the proceedings for winding up a company and the fees to be paid in such proceedings, but such rules are made, the special sanction of the court is required to proceedings for winding up a company, and the official liquidators are appointed as in section 100. (§ 105.)

A company may be wound up voluntarily.

- (1.) Where the company has passed a resolution for the purpose.

the company expires, or whenever the event occurs upon which it is provided by the articles that the company is to be dissolved.

- (2.) Whenever the company in general meeting has passed a special resolution, requiring the company to be wound up voluntarily.

Whenever a company is wound up voluntarily, the company must, from the date of the commencement of such winding up, cease to carry on its business, except for the beneficial winding up thereof; and its corporate state and powers continue until the company is wound up.  
(§ 105.)

Notice of resolution to wind up voluntarily.

Notice of any special resolution to wind up a company voluntarily must be given in the Government Gazette. (§ 106.)

Consequences of voluntary winding up.

- (1.) The property of the company is then applied to its liabilities, and subject thereto, and, unless otherwise provided by the articles, is distributed amongst the shareholders.
- (2.) One or more liquidators may be appointed for the purpose of winding up, &c. appointed in general meeting.
- (5.) When several liquidators are appointed, every power may be exercised by two of them.
- (6.) The liquidators may, before ascertaining the assets, or the debts due by the contributories, make a call.

- (7.) The voluntary liquidators have all powers of official liquidators, but without the intervention of the court.
- (8.) All books in the hands of the liquidators must be open to the shareholders.
- (9.) When the creditors are satisfied, the liquidators must adjust the rights of the contributories amongst themselves; and may make calls which they deem necessary.
- (10.) As soon as the company is wound up, the liquidators must make up an account; and such account, with the vouchers thereof, must be laid before any one appointed by the company to inspect the same; and such inspection being concluded, the liquidators must call a general meeting, to consider the account, with one month's previous notice, published in the Government Gazette.
- (11.) That general meeting can only consider the account; but may do so, though no quorum is present thereat; and if the meeting is of opinion that the affairs of the company have been fairly wound up, they may pass a resolution to that effect: the liquidators publish a notice in the Government Gazette, and make a return to the registrar of such resolution; and one month from the registration of such return, the company is deemed dissolved.

(12.) If within one year after the resolution the affairs of the company are not wound up, the liquidators must immediately make an account and a report, and a general meeting must be called to consider the same, from year to year, until the winding up of the company is completed. (§ 107.)

Costs to be paid out of assets in priority to all other claims. Saving of rights of creditors.

All costs of voluntary winding up are payable out of its assets, in priority. (§ 108.)

Voluntary winding up does not prejudice the right of any creditor to have a company wound up by the court. (§ 109.)

## CHAPTER VIII.

## OF THE DIVISION OF THINGS.

NATURAL philosophy considers things according to their physical properties: law regards them as the objects of rights. In legal phraseology, the word *res*, or *thing*, comprehends, not only material objects, but also the actions of man; and, in general, everything that can be the object of a right. (*Mackenzie, R. L.* 161.) As *person* comprehends every being who has rights, and is subject to them, so *thing* comprehends all that can be considered the object of a right. (*Sandars, 37.*)

Notion of things.

The object of a right need not be limited to things corporeal and visible; but may be incorporeal, or the pure creation of the law. Things, then, may be corporeal or incorporeal.\* We see a house or a field; we do not see a right to inhabit the one or to reap the fruits of the other. Those material objects of a right which may be seen and felt are corporeal things; those

Corporeal and incorporeal things.

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\* Or, as the jurists express it, *tangi possunt*, or *tangi non possunt*.

objects of a right which cannot be handled or perceived by the senses, but which are intangible abstractions of the mind, or creations of the law, are incorporeal things. Incorporeal things always consist in a right: it is easy to see that the *use* of a corporeal thing is nothing without the power or right of using it; that the use and the right to use are so connected as to be identical with one another. The right, therefore, to use a corporeal thing is, in the language of the law, an incorporeal thing. It is, moreover, evident that, not only a right to the use of a corporeal thing may exist, but also a right to the use of a *person*; just as a master has a right to use the services of his servant; or a land-owner those of a builder, with whom he may have agreed for the building of a house; or the services of a corporation, as, for example, a right to be carried, for payment, in a company's steamer; or it may be a right to have compensation from a person for an injury done by him. An incorporeal thing may not only consist in a corporeal thing, but also in a person being bound to me for my service.

Things are, therefore, again of three classes:

1. Corporeal things.
2. Incorporeal things, consisting of rights to the use or service of corporeal things.
3. Incorporeal things, consisting of rights to some service, consideration, or compensation from a person.

Rights *in* and  
to things.

The first two imply a right *in* a thing (*jus in re*), as



it is a right whereby the thing itself is bound to me ; so that I may pursue this right in the thing against any possessor whatsoever.

The last implies the right to a thing (*jus ad rem, vel in personam*), as it is a right whereby not only the thing itself, but the person with whom I have dealt, is bound to me ; so that I have only an action against him for the delivery of the thing contracted for, or for the performance of the act stipulated, or the remedy of some wrong. For example, you may be in possession of goods which are my property ; there my remedy is against the goods themselves, and I reclaim them as mine, although they may have come into a third hand : but if I lent you a sum of money, which you fail to repay at the stipulated time, then I have no right in any of your goods which form part of your estate, but merely a personal action against you to compel payment. In the first, if your estate becomes insolvent, I reclaim, as owner, my property, which never formed part of your estate ; but, in the second case, I come in as a concurrent creditor *pro rata* with the others. (*Grot. ii, p. 58, et seq. : Sandars, p. 37, et seq.*)

*Jura in re* are also called *real rights*, and *jura ad rem, personal rights*; and are further illustrated by saying that a real right is urged against the world at large, by asserting a title in a person to the exclusion of all other persons ; whereas a personal right is primarily urged against particular persons only. The difference between

Real and  
personal  
rights.

real and personal rights, is nearly the same as that between property and obligation.\*

Real rights, as shown above, are of two classes: rights to corporeal things, and incorporeal rights to corporeal things. That is a real right to a thing which is our own (*jus in re propria*), and real rights to things which belong to another (*jura in re aliena*).

The real right, *jus in re propria*, is called the right of property, or *dominium*. Of *jura in re aliena*, or incorporeal rights to a corporeal thing, there are four kinds: servitudes, emphyteusis, superficies, and the right of pledge, or mortgage. Of these *emphyteusis* and *superficies* bear the nearest resemblance to *dominium*, or property. Van der Linden also includes the right of inheritance among real rights.

*Jura in rem*, or personal rights, are reducible to four; viz. those which arise from *contracts*; from *quasi-contracts*; from *delicts*; or from *quasi-delicts*. (*V. der Ldn. B. 1, ch. 6, pp. 112-14.*)

#### OTHER DIVISIONS OF THINGS.

WE have seen that the natural division of *res*, or things, into corporeal and incorporeal has led us to the

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\* These terms (*jus in re* and *jus ad rem vel personam*) are not Roman, having been borrowed from the Canonists. They enter deeply into legal discussions, and sometimes help the solution of difficult problems. (*Mackenzie, R. L. 166.*)

various distinctions of rights; but there are other divisions of things also used in statutes, precedents, and text books, which it is necessary to refer to.

Corporeal things are moveable and immoveable. Moveable and immoveable things.  
 Some moveable things are incorporated with immoveables, or are so constantly associated with their use that the law considers them as immoveables; as, for instance, a house, each brick of which is moveable, is itself immoveable, because attached to the soil. Moveables generally consist of money, goods, and every kind of property, except land, and things attached to the land, which are called immoveables. Moveables are held to follow the person of the owner, and to be governed by the law of his domicile. Immoveables being regarded as inseparably connected with a particular territory, are governed by the law of the place where they are situated. This is the great point about this distinction: that the former class follow the domicile of the owner as to law, and the latter the land they are fixed to.

Things are also divisible or indivisible: thus, a house cannot be divided, but a field may be. Divisible, and indivisible things.

Things are also principal or accessory; that is, they are the direct object of rights, or are only so as forming portions of, or being intimately connected with, something that is the direct object of rights; thus, a tree is a principal thing, its fruit an accessory. Things principal and accessory.

Another distinction in the Roman law is that between *genus* and *species*. Genus and species. By the *genus* is meant a

whole class of objects, such as horses, or the general name for an object, such as wine, oil, or wheat. *Species* is the particular member of a class, or particular portion of the object comprehended under *genus*; as *this* horse, or the wine in *this* bottle. If a purchaser buys a horse, or a certain quantity of oil, the thing bought is said to be determined by its *genus*; but if he bought a certain black horse, or the oil in a particular vase, the thing bought is said to be determined by its *species*.

*Res singulares,*  
and *rerum*  
*universitas.*

Things are also particular or collected under some head, when the whole collection is a *thing* in law. Thus a sheep is a particular thing (*res singularis*), a flock of sheep is a collection of things (*rerum universitas*). As, also, are such comprehensive things as an inheritance, a dowry, &c.

We have now been dealing with the subjects and objects of private property: it is not the object in this part to deal with things over which private persons can exercise no exclusive right, or *res extra commercium*. Things common to all mankind or the public, or belonging to public corporations, or belonging to none, will be dealt with in a later portion of this work. (*Grot. ii, 1, p. 58, et seq. : Sandars, p. 37, et seq.*)

## CHAPTER IX.

## RIGHT OF PROPERTY.

PROPERTY, absolute ownership, or *dominium*, is a right to the absolute use, enjoyment, and disposal of a thing without restraint, except what is imposed on the owner by law or contract. As necessary incidents of the absolute use, enjoyment, and disposal, the owner (*dominus*) has:—

Property defined.

The use of the thing (*usus*).

The profits of the thing (*fructus*).

The right to prevent others from using or taking the profits of the thing.

The right to alter, consume, or destroy the thing.

The right to alienate, or to make over to others, any other sort of right in the thing, as for example, the use of it.

These rights are *jura in rem*, and any one may be separated from the rest and enjoyed by different persons; such fragments of the *dominium* being termed “servitudes.” A person may also have a right over a thing in the ownership of another, limited by the extent to which he has a claim against the owner; as a creditor has over the thing given him in pledge as a security for

his debt. This is termed the *jus pignoris*. When any *jus in re* is parted from the dominium, of course the right of property is not perfect. (*V. der Ldn. B. 1, ch. 7, p. 115: Sandars, 45, 166: Mackenzie, R. L. ch. 2, 165.*)

Possession  
defined.

A person may own a thing with or without possession, or he may possess without being the owner. Possession is the actual retention of a thing with the purpose of keeping it to one's self; it implies not only a fact, but an intention; not only the fact of the thing being under the control of the possessor, but also the intention on the part of the possessor to hold it so as to reap exactly the same benefit from it as the real owner would, and to exercise the same rights over it, even though he may be well aware that he is not the real owner, and has no claim to be so. Both these parts of the definition are necessary to constitute possession. Simple physical occupation, or *apprehensio* (or, technically, *detention*), without this object or *animus*, is insufficient. For example, a lessee, or an attorney, or agent, or a depositary has detention, but not possession of the thing. Neither does the mere object or design to possess anything, without actual detention of it, create the right of possession. So that, in losing possession, both the above requisites must fail before the right of possession can be said to be lost. (*V. der Ldn. B. 1, ch. 13, § 1, p. 183: Grot. B. 2, ch. 2, p. 69: Sandars, 44.*) The two requisites, then, of legal possession are

briefly summed up in the words "*apprehensio*," and "*animus*." It is necessary to bear this in mind, as it is common to speak of a person having the possession who has mere *apprehensio*.

Of course, in the case of a small chattle or moveable thing, such as a horse, or a jewel, it is easy to see what is detention; but where the property is immoveable, or the thing large, it is not so easy. The apprehension of a corporeal thing means such a dealing with it as enables the person apprehending to deal with the thing at his pleasure. Thus, a person who enters on a part of a piece of land has possession of the whole, because it is at his pleasure to go to any part of it. A person who holds the key of a granary has the means of getting into the granary. (*Sandars*, 217.)

The *animus*, as explained above, means the intention of the possessor to hold the thing possessed as his own, and not as a person to whom a thing has been pledged holds, for he holds it avowedly as belonging to another (*alieno nomine*).

Properly speaking, legal possession is applicable to corporeal things only, as these alone are capable of an actual *apprehensio*; but the law has also introduced a possession of incorporeal things, such as servitudes, inheritances, offices, &c. (*Grot. B. 2, ch. 2 and 5, p. 70.*) In such a case, the apprehensio must be evidenced by some act, use, or exercise of right with an *animus*.

The presumption of right in a party who is in the possession of property, or of that quasi-possession of

Possession  
*primâ facie*  
evidence of  
property.

which rights only occasionally exerciseable are susceptible, is highly favoured in every system of jurisprudence, and seems to rest partly on principles of natural justice and partly on public policy. (*Best*, 465.) Possession, or quasi-possession, as the case may be, is *primâ facie* evidence of property. "*Melior (potior) est conditio possidentis*," and the possession of land, or the receipt of rents or profits from the person in possession, is *primâ facie* evidence of absolute ownership, or estate in fee. (*Best*, 465: 1760, *D. C. Matura*, 11 Feb. 1837; *Morg. D.* 132: 4459, *D. C. Uttuan Kandy*, 20 May, 1837; *Morg. D.* 155.)

Presumption  
as to property.

So that, *first*, a possessor is always presumed to hold in his own right, and as proprietor, until the contrary is shown. And, *secondly*, the contrary being once established, and it being shown that the possession commenced by virtue of some other title, such as that of tenant or planter, then the possessor is presumed to have continued to hold on the same terms until he distinctly proves that his title is changed. (2889, *D. C. Caltura*, 12 June, 1837; *Morg. D.* 169: 419, *D. C. Negombo*, 5 Aug. 1862.)

Possessor  
entitled to  
protection  
of his  
possession.

This principle, that "possession is *prima facie* evidence of property,"\* entitles the possessor (subject to the distinction subsequently noticed) to have his possession protected against every one but the true

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\* Thus possession is popularly said to be "the badge of property," or "nine points of the law."



owner; even the true owner cannot dispossess him without a previous judgment or decree; and, even if the possessor be dispossessed without such a decree, on the ground of the right of property in another, he must first be restored to the possession, before his title can be gone into. (*Grot. B. 2, ch. 2, § 6, p. 70: V. der Ldn. B. 1, ch. 13, § 2, p. 184: Sandars, p. 44.*)

Possession is distinguished again into *boná fide* and *malá fide* possession. A *boná fide* possessor is one who, though not the true proprietor, entertains any probable or apparent right of property, that is, conscientiously believes himself to be the true proprietor on probable grounds; and a *malá fide* possessor is one who knows, or ought to know, that he is not the rightful owner of the subject possessed by him. This distinction has an effect on these three questions:—1. The right of protection in the possession. 2. The right to fruits. 3. And the right to the benefit of prescription after long possession.

When any one is in possession of any property or right *a year and a day* (at least), he has a right to hold it in his possession until any one else who opposes him therein has legally taken over the property in question; without making any distinction whether the possession was *boná fide* or *malá fide*; because the mere possession is sufficient, and excuses any one from further proving why and how he has such a right thereto. (*V. Lvn. B. 2, ch. 8, p. 129: 9163, C. R. Ballepitty Modera,*

*Boná fide* and  
*malá fide*  
possession.

Difference as  
to protection.

11 April, 1860: 6504, *D. C. Ratnapoora*, 3 July, 1855.) Conversely, a *boná fide* or legal possessor can only be dispossessed by the owner at any time by legal process; but a *malá fide* possessor can be dispossessed within a year and a day of his first possession, by any contrivance, or any force not amounting to a breach of the peace, as in the case of re-entry upon land (see p. 423, vol. i); but after a year and a day, he can only be dispossessed by legal process. This distinction does not appear in the Roman law, which, for the purposes of protection to the possession, placed the *boná fide* and *malá fide* possessor on the same footing. (*Sandars*, 44 and 218.) The Roman-Dutch law looks upon an intruder as a trespasser for a year and a day; but after that, gives him the possessory rights of a legal possessor.

Difference as  
to fruits,  
rents, &c.

The title to fruits alone is acquired by possession, when the same is *boná fide*, and the fruits actually gathered or received. So that a *boná fide* possessor is in this respect the same as a usufructuary. For natural reason demands that the fruits which he has gathered shall be his in return for his care and culture. And therefore, if the real owner appears, and claims his land, he can have no action for fruits which the possessor has consumed. (*Grot. B. 2, ch. 2, § 2, p. 91: Inst. 2, 1, 35.*) If the fruits are gathered or received, but not consumed or spent, they belong to the owner of the soil, unless the *boná fide* possessor has acquired a prescriptive right to the fruits as moveables. (*Sandars*, 188:

*Mackenzie, R. L.* 175.) The interest of the *bonâ fide* possessor also extended to all the fruits of the land, and not only to those produced by his cultivation and care. (*Sandars*, 189.)\*

The same allowance is not made to him who is knowingly in possession of another's estate; and therefore he is compelled to restore, together with the lands, all the fruits, although they may have been consumed. (*Inst.* ii, 1, § 35, adopted by *Grotius*, &c.)

As a general principle, mesne profits should not be granted in a case of merely disputed right; but only in cases where land has been obtained by force, or held over without any colour of right. (4234, *D. C. Four Corles*, 30 Nov. 1836; *Morg. D.* 107.)

A separate action may be brought for mesne profits, even though, in a former suit for the land, the plaintiff declared for mesne profits, but gave no evidence. Mesne profits cannot be recovered for more than two years. (1547, *D. C. Badulla*, 15 July, 1862: 8 of 1834, § 9.)

The privilege attaching to *bonâ fide* possession ceases after legal process has been commenced. (*Grot.* ii, 6, §§ 3, 91.)

3. The distinction of *bonâ fide* and *malâ fide* possession has also an effect on the right of prescription. It

Difference  
as to  
prescription.

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\* By the custom of Scotland, perception (receipt or gathering) alone seems the possession without consumption; and civil fruits, as the rents of houses, are in the same situation as the rents of lands. Question, whether the interest of bonds and other investments are so. (*Mackenzie, R. L.* 176.)

is only when the possession is *bonâ fide* and *ex justa causâ* that the operation of prescription (or *usucapio*) can transmute possession into ownership. But this will be fully treated of under the head of prescription.

When the possessor may re-enter.

Another right derived from the doctrine of possession is the right of a landlord to re-enter at the expiration or surrender of a lease. At the beginning of this chapter it has been pointed out that a lessee, &c. is not a possessor; accordingly, both under the Roman-Dutch as well as under the English law, a landlord is entitled to resume possession at the expiration or surrender of the lease (without a legal process) of the premises leased, and to remove the furniture or other property therefrom, after the notice demanding possession given by him. (4591, *D. C. Jaffna*, 30 June, 1852; *Coll.*)

Possession, how lost.

Possession is lost by death; so much so that possession does not pass to the heir, even upon his adiating or accepting an inheritance; but a new taking, or apprehension, of it is necessary for the maxim, *le mort saisit le vif*, did not hold in Holland. Possession is also lost by abandonment, or the intention of not possessing any more; also where another person obtains actual possession of the thing, so that we no longer have any power over it. (*Grot.* ii, 2, § 12, p. 71: *V. der K.* 182.)

## CHAPTER X.

## ACQUISITION OF PROPERTY.

IN treating of the acquisition of property, there is an obvious difference between acquiring rights over a particular thing (*res singularis*), and acquiring rights over an entirety (*or universitas*)—of a number of things comprised in such a term as an inheritance, which may include the entirety of the rights belonging to a deceased person, both real and personal. Thus, one division of the subject of the acquisition of rights is into two parts; one comprising the modes in which real rights are acquired over particular things; the second comprising the modes in which an entirety of rights, both real and personal, pass from one person to another. (*Sanders, 46.*)

Acquisition is over single things, or entireties.

The subject of acquisition is not only divisible by the nature of the things acquired, but into two divisions in respect of the *manner* of acquiring them. The acquisition of property is either original or derivative. An original acquisition applies to things which have never

Acquisition is either original or derivative.

previously been the property of any one, or which at least were not so immediately before the acquisition. A derivative acquisition arises when a person enters into the right of property which had pre-existed in another, and derives the thing from him. In this class of cases there is always a loss of property in the thing by the former owner, who makes it over to the new proprietor. (*Mackenzie, R. L.* 168.)

## Occupatio.

*Res nullius cedit occupanti*—that which is no man's property belongs to the appropriator. This is termed acquisition by occupancy, and may be said to apply principally to land in an unoccupied country, to wild animals, and to property that has been abandoned. If we seize on, or, as we should say, occupy the land, and catch the wild animals, or save the abandoned goods, we gain a right by being the first to occupy. There are two essential elements of occupation; first, that the thing acquired should have been the property of no one (*res nullius*); secondly, that the person acquiring should bring the thing into his possession; that is, into his power, and do so with the intention of holding it as his property. (*Sandars, 172.*)

Wild beasts,  
&c.

Wild beasts, birds, fish, and all animals which live either in the sea, the air, or on the earth, so soon as they are taken by any one become the property of the captor, whether taken upon his own ground or that of another. Whatever of this kind you take is regarded as your property, so long as it remains in your power;

but when it has escaped, and regained its natural liberty, it ceases to be yours, and becomes the property of the next captor. It has been considered to have gained its natural liberty, if it has either escaped out of your sight, or if, although not out of your sight, it could not be pursued without great difficulty. (*Inst.* ii, 1, § 12.) Wounding a wild animal without actual capture does not confer property, as many accidents may happen to prevent capture. (*Inst.* ii, 1, § 13.)

A qualified property may subsist in animals naturally wild, by their being reclaimed and tamed by industry and art; or so confined as to be in a man's immediate power—as deer in a park or a private forest, rabbits and hares in a warren, and fish in a pond. So, peacocks and pigeons which are in the habit of flying out and returning, are property as long as they show an *animus revertendi*. They are yours as long as they have the intention of returning; but if they cease to have this intention, they cease to be yours, and become the property of the first person who takes them. These animals are supposed to have lost the intention, when they have lost the habit of returning. As Blackstone says, in all cases the property is not absolute, but defeasible. (*Inst.* ii, 1, § 15 : *Bl. Com.* 391, 392 : *Grot.* ii, 4, §§ 13, 14.)

Wild animals  
partially re-  
claimed.

Peacocks and  
pigeons.

Bees also are wild by nature; therefore bees that swarm upon your trees until you have hived them, are no more considered to be your property than the birds which build their nests upon your trees; so, if any one

Bees.

else hive them, he becomes their owner. Any one, too, is at liberty to take the honeycomb the bees may have made. But, of course, if, before any thing has been taken, you see any one entering your land, you have a right to prevent his entering. A swarm which has flown from your hive is still considered yours as long as it is in your sight and may easily be pursued; otherwise it becomes the property of the first person that takes it. (*Inst.* ii, 1, § 14: *Grot.* ii, 4, § 15: *Bl. Com.* ii, 393.)

Domesticated  
animals.

Tame or domesticated creatures, such as horses, cattle, sheep, goats, poultry, and the like, remain the property of their owners, though strayed, and not confined. Thus, if your geese or fowls should be frightened, and fly out of your sight, they are still yours, and any one detaining such animals with a view to his own profit is guilty of theft. (*Inst.* ii, 1, § 16: *Mackenzie, R. L.* 169: *Grot.* ii, 4, § 16.)

Occupancy by  
finding.

Property may be acquired by the finding of unowned goods, or of goods abandoned by the owner. All goods found in the sea or upon the earth belong to the finder, if no owner appears; and even all found in the earth, if *casually lost*, and unclaimed, and also such as are *designedly abandoned*, are the property of the finder, with this modification, that if the goods are found on the finder's own land, he takes the whole; but if on the land of another, he is entitled only to half, and the other half goes to the owner of the soil. That the owner has abandoned the property must clearly appear; therefore



we cannot acquire by occupancy stray beasts, or a lost purse of money, or other valuables; but are bound to give public advertisement in the newspapers, and to the magistrates, and to use all proper means to find the owners, before any occupancy. (*V. der Lind.* i, 7, § 2, p. 117: *Inst.* ii, 1, § 18: *Bl. Com.* 295: *V. der K.* 198.)

But a different rule attaches (by English law) to treasure trove (that is, money, coin, gold, silver, plate, or bullion, found hidden *in* the earth, or other private place, the owner being unknown), and which by royal prerogative belongs to the Crown. This prerogative is now only used to secure ancient coins and curiosities, as the Crown invariably now returns to the finder the value of the treasure trove in modern coin. But by the law of the maritime provinces, treasure found by a person on his own land passes wholly to the finder; but if found on another man's land it is divided between the owner and the finder; and if found on Crown land or city land, half will go to the Crown or city, as the case may be. (*V. der K.* 198: *Inst.* ii, 1, § 39.) But the English prerogative governs the law in the Kandyan Provinces, as it did before No. 5 of 1852, which does not expressly take away any Crown right.

Treasure  
trove.

Shipwrecks and derelicts at sea are now regulated Shipwrecks. by an ordinance, by which private rights are determined as a branch of public law; accordingly the subject of shipwrecks will be found discussed in another part of this work.

Another mode of acquiring property is termed ac- Accession.

cession, or the addition made to our property by its natural or civil increase or produce. Thus, all animals born of those of which you are the owner, is your property. (*Inst.* ii, 1, § 19.) Similarly, with regard to any other fruits of our cattle or land. And any one having *bonâ fide* possession of land is entitled to the emblements or crops produced by his labour, and which he has gathered. (*Inst.* ii, 1, § 35.) Also, civil fruits, such as the rents of houses, or the interest of money, all belong to the proprietor of the principal subject, by right of accession.\*

Accession of trees.

On the same principle, trees and shrubs taking root in your ground, though planted by a stranger, become yours. (*Inst.* ii, 1, §§ 30-32: *V. der Ldn.* i, 7, § 2, p. 119.) Thus, trees planted on a leasehold estate pass with the land; and an owner who has not directed them to be planted is not bound to restore the value of them. (*V. der K.* 215.)

Accession of houses.

A house or other building, though erected with materials and at the expense of another, belongs to the owner of the ground on which it is built. The owner of the materials must have done it knowing or not knowing that the land was not his own. If he did not know that the land was not his own, when the building is destroyed he can reclaim the materials; or if he is in possession of the building, he can refuse to deliver it to

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\* As to accession by inundation and alluvion, see *Grotius*, B. ii, ch. 9, p. 100.

the owner, unless he is indemnified for his expenses, so far as they have been incurred profitably to the owner; and he may sue for his compensation if not in possession.

This principle is also expressed by saying, that he who builds on another's land, of which he was in possession *boná fide*, may, on losing possession, recover the *useful* expenses incurred by him, even by action; which means, the expenses incurred if the building was erected of necessity, or for use, but not for pleasure; in the latter case, the land owner has the choice of retaining the same on paying for it, or of allowing the removal of what may have been built. In assessing compensation, it would seem that the value of the house recovered ought not to be more than might fairly be expected by the owner to be built on the land. (1047, *C. R. Kaigalle*, 10 Oct. 1861.) Evidence should therefore be adduced as to the value of the land, and also as to the amount of money laid out by the stranger in the building, or useful improvements of a building, as the house or improvements may be more than the bare value of the land. (30873, *D. C. Kandy*, 3 July, 1860. See also 2893, *D. C. Colombo*, 17 Sept. 1839; *Morg. D.* 282.)

But if one, building on the land of another, *knows* that it is not his own land, he loses all property in the materials, and is considered to have voluntarily alienated them, unless he can show that it was not his intention to give them to the owner of the soil. Nevertheless, if one who knows he is not the owner, but is in *boná fide*

occupation—as a lessee, for example—he can, even after his occupation ceases, recover the value of the materials, if he built with the consent of the landowner; but not, if without consent, though he may remove the materials during the term of his possession. During the possession of such a person, the landowner cannot claim the house, unless he pays for the materials and the workman's wages; it is held a fraud for him to do so. One who is in possession *malâ fide* has no redress, except for necessary expenses. (*Inst.* ii, 1, § 30: *Sandars*, 185: *Grot.* ii, 10, § 8, p. 106: *V. der Ldn.* i, 7, § 2, p. 119: *V. der K.* 212-214.)

If one erects a building upon *his own* land with another's materials, the former is considered to be the owner of the building as long as it stands, because he is bound to make compensation. But if the building should fall, the owner of the materials may receive and get back his own. This is introduced, because it is for the general benefit that a house built should not be pulled down. (*Grot.* ii, 10, § 7, p. 106.)

Specification.

When workmanship is performed by one person, and the materials belong to another, or when two moveable things belonging to different owners are blended or incorporated, difficult questions arise as to ownership. When a new subject, or species, is formed from materials belonging to another, as flour from corn, wine from grapes, or the like, the operation is called *specification*. In such cases the rule is: "If the thing made can be

reduced to its former rude materials, then the owner of the materials is also considered the owner of the thing made; but if the thing cannot be so reduced, then he who made it is the owner of it. For example, a vessel cast can easily be reduced to its rude materials of brass, silver, or gold; but wine, oil, or wheat, cannot be reconverted into grapes, olives, or ears of corn, or mead be resolved into wine and honey. But if a man has made anything *partly* with his own materials, and partly with the materials of another, as if he made a garment partly with his own and partly with another man's wool, then the maker is the owner, since he not only gave his labour, but furnished part of the materials." (*Inst.* ii, 1, § 25.) This must be understood only of materials inseparably mixed together. If some of the materials were only accessory, and the thing made was not a new thing, it would not necessarily belong to the maker, but would only belong to him if he were the owner of the principal materials; but if the different materials were separable, they would still belong to their separate owners. Thus, if a man weaves his own gold into another man's cloth, the cloth attaches to itself the ownership of the gold—the weaver, if he did it *bonâ fide*, being entitled to compensation. Yet a painting drawn upon another man's board or canvass belongs to the painter, in consideration of the excellence of his art, "for it would be ridiculous," says Justinian, "that a work of Apelles or Parrhasius should go as an acces-

sion to a miserable tablet." This favour is not extended to what was written on another man's paper, or parchment, which goes not to the writer, but to the owner of the materials; but this latter doctrine has no reference to literary property, considered as the result of study or genius, but merely to the property of the writing as such. (*Inst.* ii, 1, §§ 25, 26: *Sandars*, 181: *Grot.* ii, 10, § 4, p. 106: *Mackenzie, R. L.* 172.)

Commixtion.

If materials belonging to two persons are mixed together by their mutual consent, whatever is thence produced is common to both; as if, for instance, they have intermixed their wines, or melted together their gold or silver. If the materials are different, and form a new substance, as electrum, from the fusion of gold with silver, the rule is the same. If things of the same sort are mixed *without* the consent of the owners, and admit of separation, as in the case of two flocks of sheep, the property remains distinct.\* But when the things so mixed cannot again be separated—as, for instance, two casks of wine—the whole becomes common property, the different qualities of the wine before they were blended being taken into account in the division of the price. All such questions should be determined as far as possible upon the principles of natural equity. (*Inst.* ii, 1, §§ 27, 28: *Mackenzie, R. L.* 173.)

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\* According to Justinian, this would also be the case with two heaps of wheat, which would appear difficult to separate, but not absolutely inseparable. (*Inst.* ii, 1, § 28.)

Among the derivative modes of acquiring property, *Traditis.* are, donation, exchange, contract, succession, and other just title.

A contract by which one person binds himself to give anything to another, does not make that other the owner of the thing; or, in other words, a mere promise cannot secure or confirm a title. A further step is necessary. The thing must be handed over or delivered to the person who is, under the terms of its contract, to become its owner. This handing over is called *traditio*; and a perfect *traditio* implies, first, that it is a real absolute owner capable of alienating the thing who transferred it; and, secondly, that he placed the new proprietor in possession of the thing. He must also transfer the thing with the intention to pass the property in it. And the person to whom it is transferred must receive it with the intention of becoming its owner. In the simplest case, that of a portable moveable, the owner of the thing may really hand over the thing to the person who is to become the possessor; but it is not necessary that this should be done. What is necessary, is, that the party who is to receive it shall have the thing in his power, and that the two parties should express in any way the wish of the one to transfer, and of the other to accept, the possession. The thing need not be touched; land, for instance, need not be entered upon, but the person who is to be placed in possession must have the thing before him, so as to be able, by a

physical act, to exercise power over it. (*Sandars*, p. 191, citing *Savigny on Possession*, B. ii, §§ 16 and 17.)

The delivery, in order to convey the property, must result from some consideration; whether it is grounded on liberality as in the case of donation, or on contract as in the cases of purchase, exchange, and the like, which consideration is termed the title to the thing.

Moveable property may properly be delivered *privatim*; and if any one should sell or give to me any part of his property which is in my custody, the same is considered as delivered. In like manner also, fruits which are considered as delivered by the owner; and merchandize contained in a warehouse is considered as delivery, by delivery of the keys. (*Inst.* ii, 1, §§ 44 and 45: *Sandars*, pp. 192 and 193: *Grot.* ii, 5, §§ 11 and 12, p. 88.) Although moveable property, and even in some cases ships and public securities, may be alienated by simple delivery, yet there is an exception in respect of larger ships,\* and those instruments wherefrom annual returns are derived; these are required to be delivered in the presence of the court.† (*V. der Ldn.* ii, 3, § 3, p. 606: *V. der K.* 201.)

Reclamation  
of goods.

The delivery of moveable property does not affect the dominium, or title, unless the purchaser has paid

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\* That is, of the burthen of four *lasts* and upwards. (*V. der Ldn.* p. 606.)

† The Merchant Shipping Ordinance, No. 7 of 1863, does not seem to touch this question.



the purchase money, or secured the seller for the same, or unless the seller has credited him for the amount. If the purchase be for ready money, and no payment be made, then the vendor within a short time, generally within six weeks, may reclaim the goods. But it would seem that if credit is given beyond the usual time of reclamation, the dominium is passed. (*Grot.* ii, 5, §§ 11, 12, 14, pp. 88, 89: *V. der K.* 201, 203: *V. der Ldn.* pp. 120, 606: *V. Lwn.* ii, 7, § 2, 121: *Inst.* ii, 1, § 41.)

It has been above stated that a man can reclaim goods sold for cash, transferred, and not paid for within a short period, as six weeks, from any person whatever that may be in custody of them; but, in Holland, a *bonâ fide* purchaser in a public market place, on a regular market day, was not compellable to restore them, even if they turned out to be stolen, without receiving compensation. (*Voet*, vi, 1, §§ 7, 8: *V. Lwn.* ii, 7, 3, p. 122.) But as there are no public markets and market days in Ceylon, this exceptional privilege of *market covert* was held not to apply in Ceylon, and that an owner can recover goods not paid for, even from an innocent purchaser. (38407, *D. C. Kandy*, 24 June, 1864.)

When moveables, sold for cash and transferred, cannot be reclaimed.

Delivery may be made by the owner himself, or by his agents; so that, if one is entrusted by an owner with the uncontrolled administration of all his goods, and he sells and delivers anything which is a part of these goods, he passes the property in it to the person

Delivery by agents.

who receives the thing. (*Inst.* ii, 1, §§ 42, 43 : *Grot.* ii, 5, § 15, p. 89.)

The tradition, or transfer of immoveable property can take place only by a writing judicially or notarially executed according to the provisions of the Ordinance of Frauds and Perjuries, which will be found discussed under the head of *Vendor and Purchaser*.

Tradition may also take place by a judicial decree or sentence.

## CHAPTER XI.

## TITLE BY PRESCRIPTION.

PRESCRIPTION is a mode of acquiring property when Prescription. a man can show no other title to what he claims than that he and those under whom he claims have for a prescriptive period enjoyed it. This prescriptive enjoyment is differently measured, or rather differently evidenced, in different places. This enjoyment (by which a right to property is acquired by lapse of time) is understood in the Roman-Dutch law, to be undisturbed possession, for the third part of a century. (*V. der Ldn.* i, 14, § 2, p. 121: *Grot.* ii, 7, § 9, p. 96: *V. Lwn.* ii, 8, § 5, p. 131.)

Prescription is by some jurists termed *usucapio*, Usucapio. which was anciently the acquisition of property by continuous possession for the period defined by the law; this was originally different from the *prescriptio longi temporis*, which simply barred the remedy of the former owner against the possessor. But now prescription is used in a general sense, so as to apply either where

lapse of time extinguishes the right of the former owner and transfers it to the possessor; or where it merely bars the remedy of the former owner against the possessor. (*Mackenzie, R. L.* 186.)

Prescription  
in Ceylon.

In Ceylon, the word *prescription* is used synonymously with the English *limitation of actions*. (*Marsh.* 518.) For example, "a grandfather gained a prescriptive title (or rather a right not to be sued), his immediate heir (the father of the defendant) abandoned the land, and transferred no title to his own heir, the defendant. It was held that the prescription might have been available to the defendant's father; but not to the defendant during his father's lifetime." Now, had the title been by *usucapio*, and not by limitation, the defendant would have had a reversion to defend, and therefore a legal status, even during his father's lifetime. (1957, *D. C. Callura*, 1 June, 1836; *Morg. D.* 82.)

Thus, in Ceylon, a person being prevented from bringing an action for land after a limitation of ten years, a title is said to be gained by prescription after ten years, and not after the third of a century, as defined by the Roman-Dutch law.

Prescription  
ordinance.

Prescription, or limitations, have been endeavoured to be fully met by an ordinance (No. 8 of 1834), which was, no doubt, intended to be a code of the whole of this branch of the law; but experience shows that it is not so, and principally because it was founded upon English common law acts, and to the exclusion of limi-

tations in equity. Accordingly, several causes of action and grounds of claim are left unprovided for, and their limitation must be determined by the Roman-Dutch law, or by equity.

The ordinance deals with:—1. Claims relating to immoveable property held in legal possession. 2. Instruments of hypothecation, or mortgage. 3. Bonds for money, for agreements, for trusts, and for penalties. 4. Bills of exchange and promissory notes. 5. Other written securities not included in 2, 3, and 4. 6. Claims for moveable property. 7. Unwritten promise, contract, bargain, or agreement relating to moveable property, or to recover money lent. 8. Goods sold and delivered. 9. Shop bills and book debts. 10. Wages. 11. Loss, damage, or injury. 12. Actions against fiscals.

Cases included.

The ordinance does not include, and leaves to the common law and equity:—1. Claims relating to land held under a vicious possession (*longissimi temporis*). 2. Limitation, or lapse of servitudes by non-user, or other charges upon land by non-claim. 3. Instruments, not being securities (as, for example, written covenants), upon which suits can be brought; not being suits for moveable property, loss, damage, or injury (as, for example, for specific performance). 4. Trusts not contained in the condition of a bond. 5. Suits for the specific performance of duties not created by contract. 6. Hypotheccs, or mortgages, not created by an instru-

Cases not included.

ment; unless a suit upon them should take the form of a claim for moveable property, loss, damage, or injury.

7. Contracts for labour not paid for in the form of wages, as with a company to supply coolies, or to write a book.

As to land, or immoveable property, the second section provides that "proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immoveable property, by a title adverse to or independent of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent, or produce, or performance of service, or duty, or by any other act, by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour, with costs."

"And, in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands, or other immoveable property, to prevent encroachment or usurpation thereof; or to recover damages for such encroachment or usurpation; or to establish the claim in any other manner to such land or other property. Proof of such undisturbed and uninterrupted possession, as hereinbefore explained, by such plaintiff or intervenient, or by those under whom he

claims, shall entitle such plaintiff or intervenient to a decree in his favour, with costs."

"Provided always, that the said term of prescription of ten years shall only begin to run against parties claiming estates in remainder, or reversion, from the time when the parties so claiming acquired a title to the land in dispute." (*Ord. No. 8 of 1834, § 2.*)

Now the points arising in this clause are:—

1st. What are lands, or immoveable property?

2nd. What is possession?

3rd. What is undisturbed and uninterrupted possession?

4th. What is an adverse title?

5th. How is the prescribed period of ten years to run.

1. That which is the subject of prescription under section two of the prescription ordinance, are "lands,\* or immoveable property." This not only includes lands in the ordinary sense, but also any ground, soil, or earth whatsoever, as arable meadows, pastures, woods, moors, waters, marshes, and heaths. Also houses and other buildings; not only the surface of the earth, but everything under and over it; in short, everything

What are lands or immoveable property under the ordinance.

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\* Yet at one time it was held that the ordinance did not apply to service parveny lands, which were (under Regulations No. 8 of 1809) lands held *in capite* from the Crown, descendible to male heirs only, and inalienable; but now, by No. 3 of 1852, these lands are set free (2834, *D. C. Cultura*, 1837; *Morg. D.* 169), (16463, *D. C. Colombo*; *Morg. D.* 247 and 3400, *D. C. Colombo*; *Morg. D.* 256,) and placed on the basis as other tenures originated in a Crown grant.

Service parveny lands.

terrestrial (*Bl. Com.* 2, 15: *Grot.* ii, 1, §§ 12, 13), but also things which are the subject of property, but which cannot pass by delivery, but only by conveyance (*V. der Ldn.* ii, 7, § 3, p. 120); as, for example, the right one has upon or to immoveable property, provided they really consist in enjoyment and possession, as quit rents, tributes, power of redemption, or the like (*V. Lwn.* p. 102); but common, secured, or mortgaged rents, and annual rents are moveable property.

A right of way in actual enjoyment (and by a parity of reasoning, all easements and servitudes that issue out of lands), not being a mere claim, or title, or abstract right, is "immoveable property" under the ordinance. (41, *C. R. Point Pedro*, 5th Nov. 1860, overruling 22909, *D. C. Colombo*, 1858.) It must also be observed that the words are "lands or immoveable property;" that is, the property must be not merely immoveable by nature, but immoveable on account of title. Thus, if A build on B's land by his permission, with the condition that the house is to be given up to B on paying A's expenses, so that B, on tender, could at any time remove the house, that could scarcely be called immoveable property vested in A so as to create prescription. (See *similar case*, 964, *D. C. Jaffna*; *Morg. D.* 55.)

What is  
possession  
under the  
prescription  
ordinance.

2. The possession of the person claiming by prescription must be an *absolute* possession, and not *partial*, or *qualified*; as, for example, if the original owner con-



continued to perform service for the land, and granted permission for the cultivation of the land, this would show that the original owner had not parted with the legal title to the land, and that the holder had only a qualified possession, not sufficient to found prescription upon. (*Marshall*, 524.) Thus, also, precarious possession, that is, possession *virtute officii*, would be insufficient. (5632, *Manaar*, 16 Dec. 1862.) In like manner, a conditional possession is not sufficient, such as is granted by a Kandyan deed of gift,\* which is by Kandyan law recoverable at any time by the grantor, and that not only by deed, but by any act determining the tenure at will. (23043, *D. C. Kandy*, per *Carr*. Sept. 22, 1852; *Austin*, 147.) So, also, where the holder is put into possession, on the condition of performing services for the land to the Crown, or a third party, such possession cannot originate prescription. (17154, *D. C. Kandy*, Per *Carr*. Sept. 9, 1841; *Austin*, 86.) As, also, where land was held by a party by a decree allowing him to hold it until a certain compensation was paid to him by the other party; this possession was deemed a possession *sub modo*, not creative of prescription. (19816, *Per Temple*, April, 17, 1847; *Austin*, 112.)

Also, there must, it appears, be actual enjoyment, not a mere claim, or title, or abstract right; and this is

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\* The holder is a kind of trustee, and, if the trust is created by a notarial deed, the trust can only be annulled or altered by an instrument of equal force; but the prior deed does not create a possession carrying prescription. (22886, *D. C. Kandy*, 12 Sept. 1851; *Austin*, 159.)

undoubtedly so in the case of incorporeal property (41, *C. R. Point Pedro*, 5 Nov. 1860); but this does not mean *actual occupation*, but is understood in its more general sense of the party being the ostensible proprietor or owner of the land, especially where the possession of the actual *occupier* is, in the construction of law, the possession of the proprietor or owner. (905, *D. C. Four Corles*, 15 June, 1836; *Morgan*, 87.)

Possession  
under  
mortgage.

On the principle that the possession of the person claiming by prescription must not be derived from, or dependant on, that of the claimant, a mortgage, where the mortgagee is allowed to hold in lieu of interest, will convey no prescriptive possession, as long, at least, as the power to redeem the mortgage remains in the mortgagor. (*Marshall*, 522: 5401, *J. C. Kandy*, 20 Nov. 1833; *Morg. D.* 5: *S. C. Austin*, 24: 250, *G. A. Madewelle-tenne*, 6 Dec. 1833; *Morg. D.* 10.) Thus, in the case of an ordinary mortgage, the mortgagor has at any time a right to full possession by payment; if, however, the mortgage bond has a fixed limited period for redemption, at the expiration of which, therefore, the power of redemption would be gone, that would furnish a substantial ground of defence. (1814, *G. A. Kandy*, 25 Oct. 1833; *Morg. D.* 2: *S. C. Austin*, 16.) But where the possession is for a very long time, as for thirty years, the onus is on the defendant to prove that the plaintiff held only as mortgagee. (18020, *D. C. Kandy*, 12 March, 1846: *Austin*, 90.)

If, however, the property is not redeemed within the period fixed for repayment, the possession then becomes adverse; and, as ten years' possession clearly covers any defect of title, it is needless to enquire whether the stipulation for repayment was sufficient *per se*, or not, to establish a perfectly valid title. (21429, *D. C. Colombo*, 24 July, 1839; *Morg. D.* 281.)

On the same principle, possession of land in trust for another can give no title by prescription, at least as against the person for whose use the trust was created. (4901, *J. C. Kandy*, 2 Nov. 1833: *Marshall*, 523; *S. C. Morg. D.* 4.)

Possession  
under trusts.

A *pangua* was entrusted by the owner during absence to one who entrusted to the defendant, who held for twenty-seven years. Plaintiff was owner's son, and an infant when his father went away. Money and produce were sent to the absent father by the first trustee. Held that there was only a trust for the original owner, and that both the first and second trustees gained no prescription. (5809, *Ratnapoora*, 19 Dec. 1833; *Marshall*, 524.)

Possession under irregular instrument.

A title by prescription will not be affected by any irregularity in the instrument under which a claimant first obtains possession. (1953, *D. C. Islands*, 22 Dec. 1834; *Morg. D.* 28.)

The possession required is legal possession, and must be so proved.

The above cases show the possession must be legal possession, and the presumptions as to the nature of a possession, apply to possession under the ordinance (see *ante*, p. 158). So that, if a person claiming prescription is proved to have had originally only a dependant title, he must, to maintain his case, show when his title became adverse. (2343, *D. C. Matura*, 9 Aug. 1837; *Morg. D.* 187.)

What is undisturbed and uninterrupted possession.

3. Any interruption is inconsistent with the acquiescence on the part of others, which is the very soul and essence of title by prescription in the possessor. Such interruption or disturbance may turn out, on enquiry, to be without foundation; but, at least, it tends to show that the person who interposes it has not assented, even by silent implication, to the right of the possessor. The safest and most obvious course by which to express dissent from the right of the possessor (on which, if pursued before the ten years of possession are completed, will be an answer to the claim by prescription) is to institute an action for the land, the title to which is disputed. (*Marshall*, p. 525.) But the possession can be disturbed and interrupted (in reference to prescription) by the assertion of other claims than by an action. The Supreme Court has held that, where the

possession under which a party claims a prescriptive title has ineffectively been "contested," this contest would, nevertheless, be an interruption or disturbance to defeat the claim of prescription. Thus, a claim made before, and award by a *gangsabe*, which was not submitted to (8450, *Gov. Ag. Kornegalle; Morgan*, 6), or the commencement of an action in the usual way, have been held sufficient to bar a title to a prescription. (1215, *D. C. Kandy*, Aug. 18, 1834; *Austin*, 12: 13751, *D. C. Kandy*, Oct. 9, 1844; *Austin*, 54.)

It is not necessary that there should be an actual entry to disturb the possession and to prevent the operation of the ordinance, as the Supreme Court, under the Roman-Dutch law, adheres to former decisions, that a constructive or civil interruption by *litis contestatio*, or by *vocatio in jus*, and even by a complaint or protestation duly made, when on account of the absence of the adversary, a *litis contestatio* cannot be interposed, are sufficient to disturb possession. (*Burge*, 24, 26, 65: *Voet*, xli. 3, n. 19-21: 12911, *D. C. Kornegalle*, 19 July, 1854\*; 83, *C. R. Chavagacherry*, 11 Dec. 1856, *Nell* 253.)

Thus, a suit ending in a nonsuit disturbs the possession (9601, *D. C. Kandy*, 19 July, 1854: 12911, *Kornegalle*, *idem*.) Conversely, in the case of an action for land, where the defendant had previously commenced an action against

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\* There is a case in *Austin's Reports*, 5276, *D. C. Kandy*, p. 23, which appears to militate against this plain principle; but on reference to *Marshall*, p. 526, it would seem that there is some error in the reports.

the plaintiff for disturbing his possession, which he did not press on, it was held that this circumstance was not sufficient to bar the defendant's right of prescription which he had acquired by his possession. (1623, *D. C. Batticaloa*, 20 Feb. 1835; *Morg. D.* 34.)

What is an adverse title?

4. The title on which a prescription must be founded is "a title adverse to, or independent of, that of the claimant or opposing party in the action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or of any other act by the possessor, from which an acknowledgment of a right existing in another person would be fairly and naturally inferred) for, &c." The phrase, "title adverse to," is well known to the law; and in the Regulation No. 13 of 1822 (repealed by Ord. No. 8 of 1834) it is the only phrase used, and was explained to mean "that it is"—not that the title must in express terms negative that of the claimant (for this would be not impossible), but that the right of the possessor should be derived from that of the claimant, as in the case of a tenant holding from his landlord; or dependant on that of the claimant, as when a person is allowed to occupy by permission from the real owner; or collateral to it, as in the case of two joint tenants: in other words, the possession was said to be such as was inconsistent with the probability of any just right or title on the part of the claimant. (1271, *D. C. Chilaw*, 27 Aug. 1834; *Morg. D.* 20.)

The difference introduced by the ordinance "consists" (as Marshall says, p. 519) "in *explaining* the term 'adverse title,' in the second clause, as regards the possession of land." And, in page 520, he says, "The expression, 'adverse title,' in Regulation No. 13 of 1822, § 3, having been sometimes understood as requiring the production of title deeds expressly contradictory of a right in any other, it was advisable, in adopting the term in the ordinance, to give *some explanation* of what the law intended by a title adverse to that of the party claiming the land." And then points that, accordingly, the decisions of the Supreme Court upon the regulation are *not inapplicable* to the ordinance. Thus Sir C. Marshall looked upon the words added in the ordinance as a partial and incomplete explanation of the words adverse title, leaving it open to the law, as found in English reports and former decisions, to complete the explanation when required. But, in 1844, the Supreme Court enunciated that the words in the parenthesis were not only "some explanation;" but a *declaration*, of what an adverse title is, under the ordinance. The court, after repelling certain decisions, on the ground that they were unfortunately founded on the general law, independent of the express provisions of the ordinance, went on to say, "the ordinance of prescription has not simply declared that a possession of ten years adverse to, or independent of, that of the claimant shall give a prescriptive title, leaving it to the court to say

what is, in the law, an adverse possession; but, in the parenthesis in the second clause of the ordinance, it is also declared what shall be considered such an adverse possession under that ordinance." (6587, *D. C. Colombo*, No. 4, 6 Aug. 1844.)

A few months previous to the passing of the ordinance, the Supreme Court had defined adverse title in the following words:—

"The meaning of the expression "adverse title" is not that the title must in express terms negative that of the claimant (for this would be impossible), but that the right of the possession should not be derived from that of the claimant, as in the case of a tenant holding from his landlord; or dependant on that of the claimant, as when a person is allowed to occupy by permission from the real owner, or *collateral to it, as in the case of two joint tenants*: in other words, the possession must be such as is inconsistent with the probability of any just right or title on the part of the claimant." (1271, *D. C. Chilaw*; *Morgan*, 21: and *Marshall*, 521.)

It will be seen, from the last of these definitions, that, as joint tenants have a unity of title, time, interest, and possession, if one joint tenant obtains legal possession of his co-tenant's share, he cannot be said, at any time, to have a possession inconsistent with the probability of any just right or title on the part of his co-tenant; and thus, under this old definition, which is that of the general law, no joint tenant could prescribe



against his co-tenant. But the ordinance is held to introduce a new definition ; namely, that to found adverse title, all that is sufficient is that “ the possession should be unaccompanied with any acknowledgment of a right existing in another person.” A definition which allows a collateral or joint tenant to prescribe as well as any other person. Accordingly, in all recent cases, the court has uniformly held that, under that parenthesis, there can be no exception drawn in favour of the possession of one co-tenant, joint tenant, or tenant in common, not being adverse to the other, from the tenure of their estates alone ; and, looking to the evil arising from the extreme subdivision of land in the colony under the existing law of succession, it may be reasonably presumed that the Legislature intended to annul all distinctions in law between the possession of such persons and others. (6587, D. C. Colombo, No. 4, 6 Aug. 1844.)\*

The ordinance thus admits all, having independent titles, to prescribe ; it must not, however, be supposed that this must, *prima facie*, be founded on a *bona fide* title to the land. Where possession has been enjoyed uninterruptedly for many years, and without contest, the title or right of possession becomes, in fact, an adverse one against all the world ; because nobody having disputed it, the law presumes that the possessor has a better right to it than any one else, even though he may

*Bona fide*  
title not  
necessary to  
prescription.

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\* This overrules No. 3025, D. C. Colombo ; Morg. D. 272, and 1271, D.C. Chilaw, above cited.

not have a single paper or document to show in support of his title; this is the very essence of a title by prescription; and the second clause of the ordinance only requires the possession to have been undisturbed, uninterrupted, and unaccompanied by an act from which an acknowledgment of a right in another can be inferred. As an illustration of this principle, if one comes in as mortgagee, and with the knowledge of the mortgager, publicly and consistently disclaims his mortgage, and deals with the land as his own for ten years before action is brought, he gains a prescriptive title. (1652, *D. C. Negombo*: 71, *Morgan*: 521, *Marshall*. See, also, 183, *D. C. Caltura*, 25 Feb. 1835; *Morg. D.* 38.) As to the fifth point in page 181, see pp. 200-1. (15054, *D. C. Kornegalle*, 29 Sept. 1863).

Prescription  
as to  
moveables—  
Instruments.

By the third clause of the same ordinance, "no action, nor any claim by way of reconvention or set off, is maintainable upon any instrument of hypothecation, or mortgage, or bond conditioned for the future payment of money, or the performance of any agreement, or trust, or the payment of penalty, whether notarial or not; and whether under the seal of the obligor or not, unless such action shall be brought, or such claim, by way of reconvention, set up within ten years from the date of such instrument, or the last payment of interest thereon."

In deciding whether any instrument comes under this clause, consideration should be paid to the nature

and effect of the document, rather than to the nominal designation which may be given to it, whether in pleadings or in the body of the instrument itself. (*Marshall*, 529.) Thus, an instrument, though inconsequentially termed a bond (for there is no magic in words), that is in effect a mere acknowledgment of a certain sum of money lent and advanced, to be recovered from the debtor personally, upon a condition, is no actual bond, and does not require ten years to be prescribed. (1315, *D. C. Galle*, 19 Nov. 1833; *Morg. D.* 4.) Similarly, a "debt ola," which, though called by the parties a bond, was in its tenor and effect a promissory note, was held not to fall under the above clause. (*Marshall*, 529.) So a mere agreement, though called a bond by the parties, does not come under this clause. (216, *D. C. Cultura*, 22 Dec. 1834; *Morg. D.* 29; *Marshall*, 528.)

"No action, nor any claim by way of reconvention or set off, is maintainable on any bill of exchange, promissory note, or other written security (not falling within the description of instruments set forth in the previous clause), unless such action be brought or such claim be set up within six years from the time at which such bill, note, or security, shall have become due, or when any payment of interest shall have been made thereupon." (8 of 1834, § 5.) In the first case under this clause, the prescription runs from the date of the bill, &c. falling due; that is, on the expiration of the days of grace allowed to the instrument; and, in the

Prescription  
of bills of  
exchange,  
promissory  
notes, &c.

case of cheques, and bills at sight, or notes payable on demand, from the date of the cheque, bill, or note.

Prescription  
as to chattels,  
unwritten  
promises, &c.

“No action, nor any claim by way of reconvention or set off, for any moveable property, or upon any unwritten promise, contract, bargain, or agreement relating to moveable property, or to recover money lent without bond, note, or other written security, shall be maintainable, unless such action be brought, or such claim be set up within three years after the cause of action or claim shall have arisen.” (*Ord. No. 8 of 1834, § 5.*)

Prescription  
as to goods  
sold, shop  
bills, wages,  
&c.

“No action, nor any claim by way of reconvention or set off, for any goods sold and delivered, or for any shop bill or book debt, or for the wages of artisans, labourers, or servants, shall be maintainable, unless the same be brought or set up within one year after the debt shall have *become due*.” (*Ord. No. 8 of 1834, § 6*), and not from the last demand. (48, *C. R. Newera. Ellia*, 18 June, 1861.)

This clause (which is the same as Reg. 13, of 1822, § 7) contemplates, as regards the wages of artisans, labourers, and servants, only minor earnings, payable daily, weekly, monthly, or at such other short period as would justify the *presumption of payment*, and the consequent prescription, if not sued for *within one year*; but where a party has agreed in writing to pay a fixed sum on the completion of a certain work, at some indefinite period, it cannot be considered as wages within the

meaning of this clause; but may be sued for at any period within ten years, under the third clause. (564, *D. C. Wadimoratchy*, 18 Feb. 1836; *Morg. D.* 77.) Similarly, by a parity of reason, this clause applies only to such debts as, being usually discharged at short periods, would justify the presumption of payment, if not sued for at the end of a year's credit.

The above terms of limitation are founded on the presumption of payment, arising from the time the creditor has allowed to elapse without exacting payment; in any case therefore (falling within the purview of the above clauses) in which the creditor, or party claiming as creditor, is enabled to prove to the satisfaction of the court any *written promise, acknowledgment, or admission made*, or any *act done\** by the alleged debtor, *within the term prescribed for bringing the action*,† from which promise, acknowledgment, admission, or act, the court shall be convinced that the debt has not been paid or satisfied, *it shall and may be lawful* for the court to give judgment in favour of the creditor, as it might

Protection of prescription when removed, and cases taken out of the ordinance.

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\* The ordinance speaks only of an "act," not of an omission or failure to do an act; although, from such conduct an acquiescence may sometimes be inferred, or to strengthen evidence of a defendant having done some act recognizing the plaintiff's title. (15339, *D. C. Colombo*, 21 Dec. 1852.)

† These words have been held to denote simply a measure of time, not to be reckoned from the cause of action, but *backwards, from the date of action brought*; so that an acknowledgment, &c. within the particular prescriptive term before action is brought is sufficient to bar prescription. (10390, *C. R. Galle*, 29 Jan. 1865, overruling 2672, *D. C. Jaffna : Nell*, 257.)

have done if the action had been brought, or the claim by way of reconvention or set off had been made, within the time limited by the ordinance. (*Ord. No. 8 of 1834, § 7; 17952, C. R. Jaffna, 20 Jan. 1857.*) This important clause embodies, in statutable language, much of that which was common law prior to its enactment. The foundation of the plea of prescription, as regarded alleged debts, was the presumption of payment which the law raises after a certain lapse of time; and which presumption was liable to be repelled by a promise of payment, or other act, by the defendant, inconsistent with the idea of payment within the prescribed period. (14025, *D. C. Galle, 2 April, 1834; Morg. D. 13.*) Indeed, all that is required by this proviso is that the court shall be convinced, by such admission of the alleged debtor, that the debt had not been paid or satisfied, and proof of his liability might be adduced *aliunde*. (13686, *D. C. Colombo, 19 July, 1854.*)

It is first to be observed that this clause applies only to any promise, &c. made by a debtor himself, and does not provide for the case of a like promise, &c. made by an administrator, so as to prevent the distinct operation of the independent proviso in the clause that follows (the 8th), under which an action is not maintainable against the estate of the debtor, unless brought within one year after the death of the debtor. (11739, *D. C. Batticaloa, 20 Dec. 1854.*)

Next, it is to be observed that a *promise*, to take a

debt out of the statute, must be in writing; and it seems to have been acquiesced in that an *acknowledgment* must also be in writing; but it was, at the same time, held that a *parole admission* was sufficient to bar the prescription. (8976, *D. C. Kandy*, 1839: 253, *Morg. D.*: and *Austin*, 42.) But this has since been overruled in two cases (4825, *Chilaw, C. R.*: *Nell*, 2137: and 21142, *Matura*, 18 Dec. 1862). The court thus returning to the view taken by Marshall, p. 520, who asserts that it is an imitation of 9, Geo. IV, c. 14, § 1, which requires the promise, &c. to be in writing, and *signed* by the party making it. The Ceylon ordinance so far differs from the English act that it does not require the promise, &c. to be signed.

No deed, instrument, or writing, liable to duty, and not properly stamped (and which would be a written promise, acknowledgment, or admission under the prescription ordinance), can be received to “extinguish the right” to prescription, nor can it for such a purpose be acted upon by the court. This is not one of the collateral purposes for which such an unstamped writing can be received. (*Stamp: Ord.* 1861, § 6: *Jones v. Ryder*, 4 *M. and W.* 32: 24985, *D. C. Colombo*, 18 Oct. 1859.)

Improperly stamped documents how far admissible to take case from prescription.

The seventh clause further allows any act done by the debtor to be received in evidence as proof that the debt is still unsatisfied. Such acts include part payment of the principal (9047, *C. R. Colombo*: *Nell* 152),

Acts barring prescription.

or payment of interest; there may be also many acts done by the debtor, besides payment of part of the principal or interest, which are utterly irreconcilable with the idea of the debt having been satisfied; as, for example, where the debt is secured by a partial delivery of land to the creditor, the debtor continuing to perform certain acts indicative of the right of ownership, but permitting, and perhaps assisting in the cultivation of it by the creditor, so as to show beyond all doubt that the incumbrance or debt still exists. (*Marshall*,

Compromise.

520.) An offer of a compromise is not such an act; for every man is at liberty to purchase his tranquillity at a sacrifice, and it does not change the relative position of the parties if he fail. (2416, *D. C. Calawa*, 18 Jan. 1837: *Morg. D.* 129.)

Death of creditor.

“In case of the death of the creditor, if the term of three years and of one year, as limited by the fifth and sixth clauses of the ordinance respectively, shall not have elapsed at the time of such death, his heir, executor, administrator, or assignee, shall be allowed to commence an action on his behalf, after the expiration of the said term, provided he do so within one year after the death of the creditor.” (*Ord. No. 8 of 1834*, § 8.)

Death of debtor.

“But in the case of the death of the debtor before the term of three years, or of one year, shall have elapsed, no such action shall be maintainable, unless brought within one year after the death of the debtor.”



It is to be observed that these two provisos have different effects; the former tends to lengthen out the prescription, the latter to shorten it.

“No action for any loss, injury, or damage shall be maintainable, unless brought within two years after the cause of action shall have arisen.” (*Ord. No. 8 of 1834, § 9.*) This clause includes, therefore, actions for assault, menace, wounding, and imprisonment: for libel or slander, for injuries to the person or to land, or personal property, and actions for the detention of property. Mesne profits, or fructus, are also included. It has been shown before that there are few cases in which this last loss, by the law of Ceylon, can be recovered; but when it can, the recovery extends only over two years. (26750, *D. C. Kandy*, 12 Aug. 1857: *Coll. Austin*, 190: 14674, *Badulla, D. C.* 27 May, 1857: 15471, *D. C. Badulla*, 15 July, 1862.)

Prescription as to actions *ex delicto*.

“No action shall be against any fiscal for any act or neglect of himself or his officers unless brought within *nine* months after the cause of action arising, nor unless such notice be given and all other conditions be complied with as are prescribed for declaring the duties and responsibilities of Fiscals.” (*Ord. No. 8 of 1834, § 9.*)

Prescription as to actions against fiscals.

It is provided that, with respect to all the terms of prescription in the ordinance respectively limited for actions, or for claims by way of reconvention or set-off, if, at the time of the right of bringing such action, or

Provision in case of disability.

such claim accruing, the plaintiff or defendant shall not be resident within Ceylon, or if, by reason of the minority, or the coverture, or insanity, whether of the plaintiff or the defendant, either party be disabled from prosecuting such action, or setting up such claim, the period of prescription of such action or claim shall begin to run in every such case from the time when such absence from Ceylon or such disability shall cease." (*Ord. No. 8 of 1834*, § 10.) Thus, when a widow possessed a life interest in an estate, the defendant could not maintain any prescriptive title against the heir's claims within ten years of the widow's death, because the heir acquired only a right of possession upon the widow's death; and clause 2nd of *Ord. No. 8 of 1834*, expressly declares that the term of prescription shall only begin to run against parties having estates in remainder or reversion from the time they acquire a right of possession. (2765, *D. C. Colombo*, 15 June, 1842: *Morg. D.* 329. Similar cases, 17697, *D. C. Kandy*; *Austin*, 88: and 29224, *D. C. Kandy*; *Austin*, 211.) Also it does not run against an insane person. (4997, *C. R. Batticaloa*, 9. Jan. 1855: *Nell*, 243.)

Prescription once commenced to run cannot be stopped.

"When such absence or disability shall have ceased, and the term of prescription shall have commenced to run, no new absence or disability shall be allowed to prevent such prescription from being completed." (*Ord. No. 8 of 1834*, § 11.) In other words, when prescription once begins to run, it continues to do so notwithstanding

ing any subsequent disability ; so that, on the death of a person in whose lifetime the time first began to run, his heir must enter within the residue of the ten years, although he laboured under a disability at the death of his ancestor. (23466, *D. C. Kandy*, 29 June, 1854 ; *Coll. Austin*, 149.)

It is provided by the last clause (12th) of the prescription ordinance that nothing in it shall in any way affect the rights of the Crown. It had previously been decided that no prescription runs against the Crown. (6418, *G. A. Ratnapoora*, 30 Oct. 1833 : *Morg. D.* 3.) This clause retains this state of things expressly, although unnecessary, as the Crown is not bound by any ordinance in which it is not expressly named.

Rights of  
the Crown  
reserved.

Judgments do not fall within the intention of the prescription ordinance. The only term that would bar a judgment would be such a lapse of time as would form an irresistible presumption that it had been either satisfied or released ; and the law prescribes the time after which the presumption arises ; namely, *thirty* years. (1096, *D. C. Caltura*, 6th May, 1835 ; *Morg. D.* 42 ; 16914, *D. C. Colombo*, 6 Oct. 1835 : *Morg. D.* 319.)

Prescriptions  
at common  
law.  
Judgments.

There is no term of prescription as regards *applications for, or issuing,* letters of administration. (But see *Testamentary Jurisdiction.*) Where, however, a District Court has directed letters of administration to be taken out, it must be presumed that the Court was satisfied that the interests of the parties concerned made

Administra-  
tion.

such a measure necessary. (1923, *D. C. Chilaw*, 3 June, 1855; *Morg. D.* 47.)

Prescriptions  
in equity.

On the principle that equity follows the law, equity would regulate, by analogy to the ordinance, the precise time fixed for asserting such equitable titles and claims as the ordinance does not apply to. Equity always discourages laches; and holds that laches is presumable in cases where it is expressly at law. Thus, in cases of equitable titles to land (not included in § 2 of *Ord. No. 8 of 1834*, if any), equity requires relief to be sought within the same period in which a claim to the land could be made; and, in cases of personal claims, it also requires relief to be sought within the period prescribed for personal suits of a like nature. There are cases in which the ordinance would be a bar, but in which equity will, notwithstanding, grant relief, as when a person perpetrates a fraud (22938 *D. C. Kandy*, 22 Sept. 1852; *Austin*, 143); that in equity would debar him from availing himself of any title from exclusive possession. So, also, where a person carries on an unfounded litigation, protracted so as to subject his adversary to the statutory bar.\* (*St.* § 64 *a.*)

Prescription  
as to trusts.

A most important class of such cases is that of

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\* In 19816, *D. C. Kandy: Austin*, 112, it was held that a defendant allowed to hold land until a certain compensation was paid by the plaintiff held the land *sub modo*, and that twenty-two years' possession gave him no title; but it might have also been held, in equity, that putting the ordinance in force would work a forfeiture of a nature that equity ought to grant relief against.

trusts, under the third section of *Ord. No. 8 of 1834.*) Bonds, conditioned for the performance of any trust, are by that clause barred, unless sued upon within *ten* years from the *date of such instrument*. But suppose the trust is to last more than ten years (as, for example, to pay an annuity for twenty years, or for a maintenance), is the *cesti qui trust* to have no remedy after the ten years have elapsed? It will be for the court to say, when the case arises, whether the general equity as to trusts is not to apply to this case also.

In apposition to the above, although equity will generally supplement the law, yet there are cases where the ordinance is not a bar, but where equity, notwithstanding, will refuse relief. (*St. 64. a.*)

As long as the relation of trustee and *cestui que trust* is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the *cestui que trust*. But where this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavourable to its continuance—in all such cases equity will refuse relief, on the ground of lapse of time, and inability to do complete justice. This doctrine will apply even to cases of express trust, and, *a fortiori*, it will apply with increased strength to cases of implied or constructive trusts. (*St. Eq. 1520.*)

Specific performance.

The period within which a party may claim the specific performance of a prospective stipulation must depend upon circumstances. (4919, *D. C. Colombo*, 26 April, 1837; *Morg. D.* 145.) To entitle a party to a specific performance, he must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps towards the performance on his own part. If he has been guilty of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his suit will be dismissed; for equity does not, any more than law, administer to the gross negligence of suitors. (*St. Eq.* 771.)

## CHAPTER XII.

## INHERITANCE BY WILL.

ANOTHER class of real rights, or rights in a thing, is the right of inheritance; by which, when a party is entitled to an estate, or to a part of it, or by legacy has acquired a title to any thing, he succeeds to all the rights of the ancestor or testator; so that the property acquired by these titles becomes a new species of property. Rights of inheritance.

This property, however, by inheritance or legacy, is not acquired with us, or cast upon us solely by descent, or under the will *ipso jure*, but must be entered upon or accepted by a positive act. (*V. der Ldn.* 1, 8, 1, p. 123.)

Inheritance is of two kinds, either by last will or *ab intestato*. Last will, what.

A last will is the direction which any one gives as to the disposal of his property after his death, and which can take effect only when the proper forms are observed.

Under the Roman-Dutch law, wills were either open or close; but Ceylon legislation has made all wills open wills, that is, demanded for all wills the same form of open execution.

Wills are also written or verbal, the latter being called *nuncupative*: but the latter are confined to "any soldier in actual military service, or any mariner or seaman being at sea" (7 of 1840, § 13.) These may dispose of their property as they might have done before the ordinance. Thus, in whatever manner the wishes of a military person are expressed, whether in writing or not, the testament prevails by the mere force of his intention. But during the time when they are not on actual service, and live at their own homes or elsewhere, they are not permitted to claim this privilege. (*Inst.* ii. 11.) The same rule would apply to Ceylon mariners; but soldiers, under the mutiny act, would be held to be under 29 *Car.* ii, c. 3, as to nuncupative will (for which see *Bla. Com.* ii. 500.)

Codicils.

Besides a regular will, there is also a less perfect sort of will, termed a codicil. In form, codicils and wills for the greater part agree, and they require the same form of execution. In English law, a codicil is a mere supplement to a will, or an addition made by the testator, annexed to and taken as part of a testament, being for its explanation or alteration, or to make some addition to, or else some abstraction from the former dispositions of the testator. (*Bla. Com.* ii. 500: ii *Kerr*, 530.)



But by the Roman-Dutch law, by a codicil no direct appointment can be made, but a will is necessary for such purpose; that is, the *relictio hereditatis*, or general residue, after naming legacies, &c. cannot be passed by a codicil merely. (*V. d. Ldn.* i. § 9, 2, p. 127; *Grot.* ii. 17, §§ 2 and 4, p. 126; *V. der K.* 289.) But whether this distinction would be now maintained in Ceylon, since wills and codicils are executed alike, has yet to be judicially determined.

Any one competent to make a will may devise, bequeath, and dispose of by will, all the property within Ceylon which at the time of his death belongs to him, or to which he is then entitled, of whatsoever nature or description it may be, moveable or immoveable, and all and every estate, right, share, or interest in any property, and which, if not so devised, would devolve upon the heirs-at-law, executor, or administrator, to such person or persons not legally incapacitated from taking the same, as he shall see fit.

What may be left by will.

And no will made either within or beyond the colony subsequently to the time when the ordinance commenced and took effect, is liable to be set aside as invalid or inofficious, either wholly or in part, by reason that any person who by any law, usage, or custom, now or at any time theretofore in force within the colony, would be entitled to a share or portion of the property of the testator, has been excluded from such share or portion, or wholly disinherited by or omitted in such will; but

Proviso.

every testator has full power to make such testamentary disposition as he shall feel disposed, and, in the exercise of such right, *to exclude from the legitimate or other portion, any child, parent, relative, or descendant; or to disinherit, or omit to mention any such person,* without assigning any reason for such exclusion, disinheritance, or omission; any law, usage, or custom, now or heretofore in force in the colony to the contrary notwithstanding. Provided that nothing therein contained extends, or is construed to extend, to authorize or entitle any testator to dispose by will of any property or estate of his wife, or to exclude or deprive her of any life or other interest (belonging to her in her own right) in any property; and to which property, estate, or interest, she would have been entitled if the ordinance had not been passed. (*Ord. No. 21 of 1844, § 1.*)

It must be observed that this clause does not absolutely abolish the right of "legitimate or other portion," but only gives a right to exclude any one from the legitimate or other portion, or to disinherit, or to omit certain persons; if, therefore, a will contains nothing from which such exclusion, disinheritance, or omission can be inferred, the right of legitimate or Trebellian portion, even in the case of a child, parent, relative, or descendant, still remains. It is easy to conceive such a will; but as it is not likely now often to occur, this law of legitimate portion will be only shortly noticed from Van der Linden.

“There must be some exception in a will in favour of children, or their descendants, who must be left by their parents at least their *legitimate portion*, which, if the children are four or less in number, amounts to *one third*; and if five or more, to *one half* among them of the parent's property. Parents, if heirs at law, are also entitled to this legitimate portion, but the brothers and sisters of the deceased have not this right, unless an infamous person is appointed heir.” (*V. der Ldn.* i, 9, 5, p. 131.)

No will made by any male under the age of twenty-one years, or by any female under the age of eighteen years, is valid, unless such person has obtained letters of *venia aetatis*, or has been lawfully married (21 of 1844, § 2.)

Who are incompetent to make a will.

Further: the following persons are incompetent:—

Who may not make a will.

Those who by reason of any mental or bodily infirmity are deprived of the control and administration of their affairs; for example, insane persons and prodigals. The latter are, however, allowed to make a last will, provided they have previously obtained an *octroi*, or license, and leave their property to their blood relations. (*V. der Ldn.* B. i, ch. 8, § 3, p. 128.)

For the making of a will by or on the part of children, the consent of parents is not required; nor by orphans of their guardians; nor with respect to married women the consent of their husbands. Married persons often make a joint will, which is called a *mutual testament*, and which, although contained in one paper, is held as two

distinct wills, wherein each disposes of his or her separate property, and this disposition, therefore, either is at liberty either mutually or separately to revoke. (*Ibid.* 129: *V. Lwn.* p. 223: 10866, *D. C. Negombo*, 31 Oct. 1845.)

Who may  
take under a  
will.

Next arises the question, who are the persons legally incapacitated from taking under a will.

Under the above first clause, property can only be left "to persons not legally incapacitated from taking the same."

Now, the persons legally incapacitated under the Roman-Dutch laws, which are still in force in Ceylon, are as follows:

1. Guardians, curators, administrators, or their children, cannot accept by will any devise of real property, or that which is considered as savouring of reality, from minors.

2. Those who have clandestinely married, or eloped, cannot receive anything from another by devise.

3. Children born in incest, or adultery, can receive only their maintenance from their parents. There is no restriction as to other illegitimate children, except where there are lawful children; the former are then incapable of taking more than a twelfth part by will.

4. A man or woman, on second marriage, cannot enjoy more than the least portion which comes to any one of the children by the former marriage. (*V. der Ldn.* i, 9, § 4, pp. 130, 131, citing *Grot.* and *V. der K.*)

Roman Catholic priests are not now incapable of taking by will.

Every will made beyond the limits of Ceylon, containing any devise or disposition of immoveable property situate in Ceylon, duly made and executed according to, and in conformity with, the forms and solemnities prescribed by the law of the country where the will was made and executed, by any person by the law of such country, or of Ceylon, competent to make a will, is valid, and effectual to alienate and pass the property in any immoveable property so devised or disposed of by any such testament.

Wills made  
beyond  
Ceylon.

Every will duly made and executed in the manner aforesaid, in any place beyond the limits of the colony, by any person competent to make a will by the law of the place where he is domiciled at the time, is valid, and effectual to alienate and pass the property in any moveable property by such will bequeathed or disposed of. (*Ord. No. 21 of 1844, § 4.*)

Every will re-executed, or republished, or revived by any codicil, is deemed to have been made at the time at which it was re-executed, republished, or revived. (*Ibid. § 5.*)

No will, testament, or codicil, containing any devise of land or other immoveable property, or any bequest of moveable property, or for any other purpose whatsoever, is valid, unless it is in writing, and executed in the following manner: that is to say, it must be signed at the

The execution  
of wills in  
Ceylon.

foot or the end thereof\* by the testator, or by some other person in his presence, and by his direction; and such signature must be made or acknowledged by the testator in the presence of a notary public and two or more witnesses, who must be present at the same time, and duly attest such execution; or if no notary be present, then such signature must be made or acknowledged by the testator in the presence of five or more witnesses present at the same time, and such witnesses must subscribe to the will in the presence of the testator; but no form of attestation is necessary. (*Ord. No. 7 of 1840, § 3.*)

In a case where the framing or execution of a will was not characterized by any fraud, but only wanted sufficient formal attestation, and the heirs, who were the parties to have taken that objection to the will *in limine*, elected to abide by and act upon the will during a long course of years, and the widow took an absolute benefit under the will, and acknowledged by deed that she received her husband's property to be possessed under the provisions of the will, she was deemed to hold the property as trustee for those beneficially interested under the will, and could not make an independent disposition of her half share. (*Vide Grot. p. 123, and Van Lion-223, 224: 2 Story Eq. Jurisprudence, 759.*) The mother

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But if it is a will under the Proclamation of 1820, it may be signed at the top, and need not be signed before witnesses. (18135, *D. C. Kandy; Austin, p. 22.*)

granted her half share, as if there were no will, to Steven, one of the heirs. Held that Steven was precluded under such a course, and also in respect of his own conduct, from calling on the court to enforce the strict letter of the ordinance. (16936, *D. C. Caltura*, 23 *Aug.* 1858.)

No appointment made by will, testament, or codicil, in exercise of any power, is valid, unless it is executed as above mentioned; and every will, testament, or codicil, executed as above, is, so far as respects the execution and attestation thereof, a valid execution of a power of appointment by will, testament, or codicil; notwithstanding that it shall have been expressly required that a will, testament, or codicil, made in exercise of such power, is executed with some additional or other form of execution or solemnity. (*Ord. No. 7 of 1840*, § 4.)

Appointment  
and powers.

No will, testament, or codicil, or any part thereof, can be revoked otherwise than by the marriage of testator or testatrix, or by another will, testament, or codicil, executed in the manner above required; or by some writing, declaring an intention to revoke the same, and executed in a manner in which a will, testament, or codicil, is required to be executed; or by the burning, tearing, or otherwise destroying the same, by the testator or testatrix, or by some person in his or her presence, and under his or her direction, *with the intention of revoking the same.* (*Ibid.* § 5.)

Revocation of  
will.

No obliteration, interlineation, or other alteration, No alteration

in a will shall have any effect unless executed as a will.

made in any will, testament, or codicil, after the execution thereof, is valid or has any effect, except so far as the words or effect of the will, testament, or codicil, before such alteration, are not apparent; unless such alteration is executed in like manner as is required for the execution of the will; but the will, testament, or codicil, with such alteration as part thereof, is deemed to be duly executed, if the signature of the testator or testatrix, and the subscription of the witnesses, be made in the margin or some other part of the will, testament, or codicil, opposite or near to such alteration, or at the foot or end of, or opposite or near to, such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will, testament, or codicil. (§ 6.)

No will revoked to be revived otherwise than by re-execution, or a codicil to revive it.

No will, testament, or codicil, or any part thereof, which is in any manner revoked, can be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will, testament, or codicil, which is partly revoked, and afterwards wholly revoked, is revived, such revival does not extend to so much thereof as has been revoked before the revocation of the whole thereof, unless an intention to the contrary be shown. (§ 7.)

Publication not to be requisite.

Every will, testament, or codicil, executed in manner hereinbefore required, is valid, without any other publication thereof; provided always that every such will,



testament, or codicil is, after the decease of the testator or testatrix, duly proved and recorded in the District Court empowered by the charter to grant probate or administration in such case, according to such general rules of practice as are now or hereafter may be made by the Judges of the Supreme Court. (§ 8.)

If any person who attests the execution of any will, testament, or codicil, is at the time of the execution thereof, or at any time afterwards, incompetent to be admitted a witness to prove the execution thereof, such will, testament, or codicil, is not on that account invalid. (§ 9.)

Will not be void on account of incompetency of attesting witness.

If any person attests the execution of any will, testament, or codicil, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, disposition or appointment of, or affecting any immoveable or moveable property (other than and except charges and directions for the payment of any debt or debts), is thereby given or made, such devise, legacy, estate, interest, gift, disposition, or appointment, is, so far only as concerns such person attesting the execution of such will, testament, or codicil, or the wife or husband of such person, or any person claiming under such person or wife or husband, utterly null and void; and such person so attesting can be admitted as witness to prove the execution, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift,

Gifts to an attesting witness to be void.

disposition or appointment mentioned in such will, testament, or codicil. (§ 8.)

Creditor  
attesting to be  
admitted a  
witness.

In case, by any will, testament, or codicil, any immoveable or moveable property is charged with any debt or debts, and any creditor, or the wife or husband of any creditor whose debt is so charged, attests the execution of such will, testament, or codicil, such creditor, notwithstanding such charge, can be admitted as a witness to prove the execution of such will, testament, or codicil, or to prove the validity or invalidity thereof. (§ 11.)

Executor to  
be admitted a  
witness.

No person is, on account of his or her being an executor or executrix of a will, testament, or codicil, incompetent to be admitted as a witness to prove the execution of such will, testament, or codicil, or a witness to prove the validity or invalidity thereof. Nor does any executor or executrix, by reason of his or her attesting such will, forfeit the recompense or commission for his or her trouble payable by law, custom, or practice. (§ 12.)

Wills prior to  
*Ord. No. 7 of*  
1840.

No will, testament, or codicil, made prior to the passing of the Ordinance (*No 7 of 1840*) is invalid by reason of the same not having been executed and acknowledged before, or attested by a notary licensed to practise within the district wherein the land or property devised is situated; provided that the will, testament, or codicil shall have been, at the time of the date, duly

executed, acknowledged before, or attested by a notary licensed to practise in some other district. (*Ord. No. 7 of 1840, § 14.*)

The parts of a will are *relictio hereditatis and legatum*, or residue and legacy. The person or persons who take the residue are looked upon as the heirs; and if a person is named heir without being expressly made residuary legatee, he may take the residue, after the payment of primary charges upon the estate: and a principal point in all wills is the naming of the heirs. The words to this effect are not important, provided the intention of the testator clearly appears. Nor is the description material, nor is it important in what part of the will he is named, nor for what time, nor, if there be more heirs than one, whether they are appointed heirs for equal or unequal portions, or with or without condition or reservation. With respect to conditions, it must be observed that those have relation to a cause or thing not yet in *esse*.

Relictio  
hereditatis.

That they must be possible, since impossible conditions are held to be void in law, and as if they had not been inserted in the will.

That they must not be *contra bonos mores*, or of a nature to be irreconcilable with, or overturn, or defeat the will of the testator; a condition that the heir should refrain from doing a particular act is lawful, and the heir is bound by that to give security that he will not do it.

*Jus accrescendi.*

When several are all appointed *joint* heirs, and one or more of them happen to die *before* the testator, their share goes to the survivors, unless each of the heirs has only a separate portion of the inheritance; this is termed the *jus accrescendi*. (For other examples of *jus accrescendi*, see *Sandars*, pp. 281-2.) It is not affected by *Ord. No. 21 of 1844*, § 20, which only applies to survivorship, when the heirs have come into possession, or after the testator's death. (*V. der Ldn.* i. 9, § 6, pp. 132-3.)

In addition, a man may institute as heir whomever he pleases, known or unknown, born as well as unborn, provided they are capable of taking by last will, and as many as he pleases. (*Grot.* ii, 18, § 4, p. 132: *Ord. No. 21 of 1844*, § 1.)

Construction of words in a will.

Friends, or relatives, or heirs by blood, mentioned by last will, are understood to be meant in the same succession as they would inherit according to the law of the land, unless there were any manifest token of a contrary intention. (*Grot.* ii, 18, § 22, p. 139.)

Construction.

As to the construction of wills, it has been held that where the meaning is doubtful, and the parties have put on it for several years their own construction, reasonable in itself, the court will not disturb that construction. (13763 *D. C. Colombo*, 7 Feb. 1838: *Morg. D.* 217.)

Substitution.

As it is very possible that the person named in the will as heir may, by dying before the testator, by renunciation, or for some other cause, not be heir at the

death of the testator, it is prudent in such cases to provide for it by naming one or more others in case of such failure. This is termed *ordinary substitution*.

By another kind, termed *quasi substitutio pupillaris*, parents may dispose of the property of their children who are not *compos mentis*, provided that this act is rendered valid by a decree of the District Court. (*V. der Ldn.* i, 9, § 7, p. 134 : *V. der K.* 312, overruling *Grot.* ii, 19, § 9, p. 141.)

Where there is no substitution, an heir may be instituted by simple words, as “*Let John be my heir ;*” but in substitution they would be “*Let John be my heir, and in case John be not my heir, let Peter be my heir.*” It may also be added, “*in case Peter is not my heir, let Fernando be my heir ;*” and so on to any extent, as well to strangers as to relatives.

And an institution may be made not only to one after one, but also to one after two : “*Let Herman and Robert be my heirs ; and in case they are not my heirs, let Bernard be my heir.*” Or two after one : “*Let Louis be my heir ; if Louis be not my heir, let Richard and William be my heirs.*” Or each after each : “*Let Frederick and Charles be my heirs ; if Charles is not my heir, let Leonard be my heir ; if Charles is not my heir, let Henry be my heir.*” Or two under each other : as, “*Let Alard and Frank be my heirs ; if Alard is not my heir, let Frank be my heir ; if Frank is not my heir, let Alard be my heir.*”

If in the substitution, or the following degrees, no

portions are named, then the portions are understood to be the same as those which have been expressed in the institution or first degree. As if it is said, "*Let Lambert and Gillies be my heirs, each for half. If Lambert be not my heir, let the above-named Gillies be my heir; if Gillies be not my heir, let Roderick be my heir. And if it should so happen that neither Lambert nor Gillies can or will be heirs, then Roderick will be heir to the whole.*" (*Inst.* ii, 15, §§ 1, 2, and 3. *Grot.* ii, 19, §§ 3-8 pp. 140-1.)

*Fidei commissum.*

Sometimes a person is appointed heir under the condition that the property after his death shall pass to another; this is termed *fidei commissum*. The person who makes it is termed *fidei committens*; the person to perform it, *fiduciarius*; and the person to be benefited, *fidei commissarius*. There are no peculiar words necessary to the creation of a *fidei commissum*, provided the person to whom the property is to go over is clear. The mere prohibition of alienation without saying in whose behalf it is prohibited, is of no effect; but it is otherwise when prohibition alienates out of the family. (*V. der Ldn.* i, 9, § 8, p. 136; *Sandars*, 339.)

*Fidei commissaire*, substitutions or trusts, are of different kinds:—

1st. A pure *fidei commissum* under no condition.

2nd. A conditional trust, or *fidei commissum*, which only takes effect in a particular case; for example, in case the instituted heir dies without issue. This condition is implied when any one in the ascending line

burthens any of the descendants with a universal *fidei commissum*.

3rd. A *fidei commissum* in succession, when the substituted heirs are in like manner affected with a trust or limitation over to third persons.

4th. A trust of the whole inheritance, or of part of some special property.

5th. A reciprocal trust, when two persons are each mutually affected with a trust for the other.

6th. A trust of the residue; as when the heir is charged, in case he died without issue, to suffer the residue of the property at his death to pass to a third person. In this case he must suffer a fourth part of the original property to pass. (*V. der Ldn.* i, 9, § 8, pp. 136-7.)

The instituted heir may be charged to make over the inheritance, or he may be asked and requested in polite terms (*i. e.* in the will) to do so; in either case the will must be fulfilled, in case the *heres fidei commissarius* desires it. The instituted heir may also be charged to give over the whole of the inheritance, or part of it, either immediately or after a certain time, and positively or conditionally. Even an heir by descent or succession may also be charged with such transfer or giving over; and the *heres fidei commissarius* can also be charged to give over the estate which has been devised to him, either wholly or in part, to another. (*Grot.* ii, 20, §§ 1-4, pp. 141-2.) The same applies to

legatees, as well as to heirs. (*Inst.* ii, 23, § 12 : *V. der K.* 313.)

The person to whom the limitation over of the enjoyment of anything is made, must wait until the event takes place on which such limitation is to take effect; of, for example, the death of the heir under the will. He must, however, be at this time in a capacity or state to take as substituted heir; and this limitation in his favour is not such a vested interest in him as to pass to his heirs, when he himself is not entitled at the time of his death. As, for example, if he die before the heir under the will. (*V. der Lnd.* ii, 9, § 8, p. 137.)

Whenever a person says, "*I bequeath to John my estate, and if John dies without children, then I will that it shall go over to Paul.*" Of course a *fidei commissum* is created in favour of Paul, until the event excluding, *i. e.* John dying with children, takes place. In this case, it is understood that if John first dies, his children shall take precedence of Paul. Of course this means that, if John dies with children, Paul may be excluded. But the question remains, if there are children during John's lifetime, is a *fidei commissum* created in their favour during their respective lives; or, failing that, is John at liberty to leave the property away from his children, when it does not go to Paul? It seems that no *fidei commissum* is held to be created in favour of the children, unless the children were the descendants of the testator, or that the children were also charged with



any legacy, or that any other signs arose on the face of the last will, from which the intention of creating a *fidei commissum* could be further collected. (*Grot.* ii, 20, § 5, p. 142.) Of course, if no *fidei commissum* is created in favour of the children, and Paul is excluded, John, under No. 21 of 1844, § 1, could leave the property away from them.

An heir, thus affected with a trust, has a real though burthened right of property, and thus differs from him who has a mere usufruct in the subject of which the naked right of property is in the meantime left to another, who may leave it to his heirs, although he die before the *usufructarius*. In the meantime it is also incident to a trust, that the heir, so long as the trust cannot be executed, enjoys the fruits of the property; and that he retains the whole under his disposition, except when the testator has appointed a special administrator.

He must exercise his power over the property as a good father of a family, and preserve the trust property in a proper state, and make a proper inventory thereof; and, lastly, he must give security to the party in expectancy for the delivery of the property when his possession and title expire.

The person who is in the enjoyment of property burthened with a trust, has no right to incumber or alienate it at his pleasure; but only for the payment of debts, which are a charge on the property itself; or

with the consent of all the parties in expectancy, or for purposes of absolute necessity. In the latter case, however, a previous decree of a competent court is necessary. (*V. der Ldn.* i, 9, § 8, pp. 138-9.)

Trebellian  
portion.

When the event takes place on which the property is to be given over, the heir must suffer it to pass to the person to whom it is limited; saving, however, to the instituted heir his right at law to deduct and retain a fourth part, which is termed the *trebellian portion*; this legal right is, however, in most cases expressly barred by the will, and further power is given so to exclude it, in the case of children, parents, relatives, or descendants, by No. 21 of 1844, § 1. He can claim his fourth part, whether anything is left to him by the will or not; but if anything is left to him as part of the inheritance, it must be brought into collation. (*V. der Ldn.* ii, 9, § 8, p. 139: *Grot.* ii, 20, § 6, p. 143.)

In the fourth part are likewise computed the fruits which are received, except as regards children in the first degree. (*Grot.* ii, 20, § 8, p. 143.)

This fourth part, as well as of legacies, cannot be withdrawn when such is clearly forbidden by the last will: and by the Ordinance 21 of 1844, § 1, it can be withdrawn as to children in the first degree. (*Ib.* § 9, p. 144.)

When, by the form of the will, children are entitled to a legitimate portion, and have drawn it, they may also draw a trebellianic portion, if they are burthened

with a *fidei commissum*. So that such children, if less than five, take half (but not more than half) the inheritance; and the prohibition to alienate, or any other incumbrance, takes no effect in this respect. (*Ibid.* § 10, p. 145: *V. der K.* 316.)

The trebellian portion has been noticed, because, though it may be considered as obsolete, like the legitimate portion, it is not absolutely abolished. It would be difficult to determine its actual relations under the modern form of administration.

A prohibition to alienate is limited in favour of the person who expects the property, and is always confined to the words, and not extended from one degree to another; and should it even be fixed *ad infinitum*, yet it cannot by the last will extend beyond four generations. (*Grot.* ii, 20, § 11, p. 145.)

How long property may be tied up.

Nothing less than a statute can free property from the bond of *fidei commissum*, before the passing away of four generations; and in the case of land, there ought to be a full previous investigation. (*V. der K.* 217.)

The words in a testament, "*that the property neither shall nor may be alienated beyond blood relations,*" are in general understood as a contract and *fidei commissum* in favour of the blood relations; so that (except in the case of legitimate and trebellianic portions, where they occur) no alienation may be, either by deed, inter vivos, or by last will. A different rule obtained at Amsterdam only. (*Grot.* ii, 20, § 12, p. 145: *V. der K.* 318, 319.)

If a person dying childless is charged to give over to a third person the residue of the inheritance, he may not retain more than three fourths of it; and if he has made away with more than three fourths, then he and his heirs, and, if necessary, the property last alienated or disposed of, may be sued on account thereof. He is also bound, if required, and is not exempted, to give security in this behalf, except to a brother or sister, or to a child; but on the failure of dowry, or necessary marriage property, he may alienate even the fourth part. The community of property which is continued by the desire of a testator differs from a *fidei commissum* of the residue. (*Grot. ii, 20, 13, p. 146: V. der K. 320.*) And Grotius adds, that when the usufruct of the inheritance is bequeathed to any one, provided he gives it over to another, the word usufruct is improperly taken for encumbered property.

A *fidei commissum*, or trust, ends :

1st. By failure of the condition upon which it is made.

2ndly. When the person in expectancy dies before the heir, or becomes incapable, or disqualified to take.

3rdly. By the perishing of the trust property without the fault of the heir.

4thly. By the express renunciation of the property in expectancy.

5thly. In case the heir thus charged with a trust dies before the testator, and thus the appointment of the heir itself fails.

6thly. By a release from the trust, which can only be obtained from the sovereign, and only for lawful reasons, and on consent of all the parties in expectancy. (*V. der Ldn.* i, 9, 8, pp. 139, 140.)

## CHAPTER XIII.

## LEGACIES.

Who may  
bequeath  
legacies.

THOSE who may make a will have also the power of bequeathing by legacy, and all persons capable of taking by will may also take as legatees.

The subject of  
legacies.

Whatever is *in commercio* may be the subject of legacy; also profits in expectancy; above all, *res singulares*, as well corporeal as incorporeal, such as a house, or land.

Indirect  
legacies.

A testator may charge his heirs with the giving of any particular thing, or doing any particular act, and, on the non-performance of the act, may charge him with a legacy to a third person, provided this condition is *not contrary* to law, or *contra bonos mores*.

Improvement  
and deteriora-  
tion in lega-  
cies.

In the case of a legacy of a corporeal thing, improvements subsequent to the bequest accrue to the legatee, and deteriorations (with all accessories to what is lost), without fault of the representative, are his loss.

Encumbered  
legacy.

In the case of a corporeal thing encumbered, if the continuance of the encumbrance would deprive the re-

representative of the testator or the heir of the *jus domini*, as if a thing were in pawn or mortgaged, the representative or heir must redeem the thing, and hand over the thing to the legatee. If the representative, &c. fails to perform that duty, the specific legatee is entitled to compensation from the general assets. (*St.* § 566 *a*, 2 *Sp.* 774.) But if the encumbrance, such as charges and other things, does not tend to destroy the *jus domini*, the legatee must accept for better, for worse.

Incorporeal things may also be left by legacy, as a usufruct, or private right of way; also acts, as if the testator bequeaths that his representative shall build a house for the legatee.

Incorporeal things the subject of legacy.

*Res universales* may also be the subject of a legacy, as a flock of sheep, household stuff, furniture, farming and household utensils, a wardrobe, a set of jewels; even maintenance, including food, clothing, and lodging. This last lasts a man's lifetime, and is larger or smaller according to the circumstances of the testator and the legatee; but food left as a legacy means only meat and drink. (*Grot.* ii, 22, §§ 1 to 26, pp. 153, 154.)

Also, *res universales*.

In a bequest of *household furniture* is included all that is necessary for the usual furnishing of a house, but not *plate*, or costly articles serving for mere ornament.

Household furniture.

The bequest of a farm, or landed property, *thoroughly furnished*, comprehends not only all that is necessary to

Farms and land.

the cultivation of the land, but also all the household furniture, and all that is necessary to render the house habitable; but a bequest of a parcel of land, with all its appurtenances, or all that belongs to it, carries with it only the implements of husbandry serving to the culture of the land.

Clothes.

Under the head of *clothes* is comprised all articles which are used for this purpose, both for the head and feet, but not that which pertains only to ornament. (*V. der Ldn.* i, 9, § 9, p. 145.)

Legacies paid by instalments.

Legacies, whether for maintenance or not, are sometimes left to be paid *yearly, monthly, or weekly*. Legacies of this nature are due in advance, from the first day of the year, month, or week; and, therefore, if the legatee die within this time, it goes to his heirs.

But if a legacy is left to a person at different days, as to be paid in three years, it must be paid partly at the end of each year, that is, one third each year; and such a legacy, should the legatee die in the interval, falls to his representative or heir. (*Grot.* ii, 23, § 14, p. 162: *V. der Ldn.* i, 9, § 9, pp. 144, 145.)

Legacies of things generic, and general legacies.

Things generic may be left by legacy, as corn, or gold and silver, which latter do not include coins, but they include the plate, unless that is especially left to some one else; and plate itself comprehends all the table service, as dishes, plates, spoons, forks, knives, bowls, salt cellars, candlesticks, chafing dishes, &c.;



but no other plate, such as silver chandelier branches, images, &c. pass under such a bequest, though they would under a bequest of silver.

A general legacy of goods, out of a certain class or description, comprehends also things which are not entirely of the same nature, but wherein some other matter, by way of addition, is contained. For example, under a legacy of tortoise-shell boxes possessed by the testator, are comprehended also those of tortoise-shell with gold or silver setting or mounting.

When a general legacy is followed with the *enumeration* of the special sorts, the legacy is not confined to the special enumeration, unless another object of this limitation clearly appears. Under general legacies, are not comprehended those things which, though comprised under the principal head, have been already specifically bequeathed to another.

A legacy of anything generic carries with it the *legatum optionis*; as if horses or rings are left, the legatee, and even his descendants, may make *one* choice of the very best; the choice is to be made at a time fixed by the representative, and if more than one have a choice, they must either agree, or take first choice by lot. And if a generic thing is left without mention of choice, if such a thing actually exists in the testator's estate, the legatee has his choice; but if not in the estate, or if consisting in weight and measure, as a sack of rice, then the determination rests with the testator's

representative. (*Grot. ii, 22, §§ 27 to 30, pp. 155, 156: V. der Ldn. i, 9, § 9, p. 145.*)

Legacies of things not under *dominium*.

A testator may dispose of his own property held in *dominium plenum vel minus plenum*, and also his *jus in personam*. He may bequeath to his debtor his claim, or release, or even a respite.\* And not only his own goods, but also those of heirs, or even of third persons; and, in the latter case, the representative or heir who is burdened with such a legacy is bound to purchase the thing so left from the owner, and to give it over to the legatee, or at least the value, if the owner is not disposed to part with it. In case the thing so left is already the full and absolute property of the legatee, the legacy is void, unless the legatee has obtained it by purchase, or the like, in which case the heir is bound to

\* In this respect, the practice of the Court of Chancery is as follows: Where a creditor leaves a legacy to his debtor, and either takes no notice of the debt, or leaves his intention doubtful, the legacy is not deemed as either necessarily or *prima facie* manifesting an intention to extinguish the debt; but the court will require some evidence, either on the face of the will, or *aliunde*, to establish such an intention. (*St. § 1123.*) For, if the legacy is less than the debt, it would clearly be a positive injury to the creditor to construe the legacy as a release of the debt; and even if the legacy is more than the debt, it does not follow that, because the testator has manifested his bounty towards the debtor in that respect, he intends the debtor to have another benefit which has no necessary connection with the former. Where the testator does not mention the debt, but gives the debtor a legacy of equal or greater amount, he thereby benefits the debtor to at least the same extent, by giving him the means of paying the debt, as if he had directly forgiven the debt, but had given the debtor nothing, or nothing but the overplus; and his reason for thus giving the debtor the means of paying the debt, without alluding to the debt, may have been one of kind consideration towards the debtor, namely, in order that none but the executor might be aware of the debt.

reimburse him the price he has paid. So, in general, would a legacy of a debt to the creditor be void, unless the debt were advanced in time, or value; as if the legacy made it immediately payable, or payable in a convenient place, when only otherwise recoverable in a distant or foreign jurisdiction.\*

A legatee's own property may be left to him, from the circumstance of the legatee having purchased or acquired a *titulo oneroso* to property of the testator between the date of the will and the testator's death. If the testator knew this, the legatee is entitled to the price

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\* A legacy given to a creditor, if it is of an amount equal to or greater than the debt, and in other respects equally beneficial, will, in general, in the absence of all countervailing circumstances, be deemed to be a satisfaction of the debt, on the principle that a testator shall be presumed to be just before he is generous. (*St. §§ 1119, 1120: 2 Sp. 605-607: Edmunds v. Lowe, 3, K. and J. 318: Shadbolt v. Vanderplank, 29, Beav. 405.*) But this principle has no application to cases where the testator expressly directs his debts to be paid, and his assets are sufficient to pay both debts and legacies. And the court leans very strongly against holding the legacy to be a satisfaction. Hence the rule is not allowed to prevail, where the legacy is of less amount than the debt, even as a satisfaction *pro tanto*; nor where there is a difference in the time of payment of the debt and the legacy; nor where they are of a different nature, as to the subject-matter, or as to the interest therein; nor where a particular motive is assigned for the gift; nor where the debt is contracted subsequently to the will; nor where the debt is contracted subsequently to the will; nor where the legacy is contingent or uncertain; nor where the bequest is of a residue; nor where the debt is a negotiable security; nor where the debt is on an open and running account, so that the testator might not know whether he owed anything. And as to a debt strictly so called, there is no difference whether it is a debt due to a stranger, or to a wife, or to a child. (*Sm. M. Eq. pp. 361, 362, citing St. §§ 1103, 1122: 2, Sp. 605-608: Jefferies v. Mitchell, 20, Beav. 15: Hassell v. Hawkins, 4, Drew, 468: Cole v. Willard, 25, Beav. 568.*)

As to legacies  
to creditors.

of the thing, unless he intended to renounce the legacy. If he obtained the thing without any valuable consideration, he is not so entitled. (*Grot.* ii, 22, §§ 31 to 37, pp. 156, 157: *V. der Ldn.* i, 9, § 9, pp. 142, 143.)

Legacies of things not *in commercio*,

Legacies of things not *in commercio*, and which cannot be sold or alienated, are void. (*V. der Ldn.* i, 9, § 9, p. 143.)

Legacy under a charge.

Where a legacy is left, with an express charge to the legatee to hand it over to another, or to allow him something out of it, or some enjoyment of it, the first legatee may choose whether he will take the profit with the loss, or renounce both. (*Grot.* ii, 22, §§ 32 to 43, pp. 157-159: *V. der Ldn.* i, 9, § 9, p. 142.)

Legacy, by what words effected.

A legacy may be bequeathed by any words that fully express the testator's intention, whether they be in the form of a command, or a request to his representative. So that a legacy is void, if it is impossible to gather in whose behalf it is made; but if the intention of the testator can be made clearly to appear, an error in the name or description of the legatee is not fatal. So, also, a legacy is void if it cannot be discovered what thing the testator meant to leave; but, similarly, an error in the name or description of the thing is of no consequence, provided the intention of the testator can be clearly made out; neither will an error in the motives assigned for the legacy affect it.

In the interpretation of bequests, *the proper signification of the words* of the will must not be departed from,

unless there are good reasons to believe that the testator had understood them in another sense. For example, when the disposition in his will would otherwise amount to a contradiction, or could not be supported, the words at all times must be so interpreted that the disposition in the will may stand. In cases of doubt with regard to the sum, the *least* must be taken as meant. So, also, if there are two things in the estate, and it is doubtful which is meant, the legacy may be fulfilled by the least.

Calling a parcel of land by a wrong name, or erroneously describing any article, does not vitiate a legacy or will, provided the real intention is clearly manifest.

When a testator has made two contrary dispositions by his will, and in each of these seems equally to persevere; or when no distinction can be made in respect to that which he perseveres in, and in that which he has changed his intention; the one disposition annuls the other, and neither can take effect.

A legacy may be expressed in any part of a will.

Several matters may be bequeathed to one person, and one thing to two or more persons; in which case, if the one be unwilling or unable to take under the bequest, the same comes either wholly to the other, or to the *relictio hereditatis*: which of these two must be gathered from the intention of the deceased. (*Grot.* ii, 22, §§ 12 and 23, §§ 1 to 5, pp. 159-60: *V. der Ldn.* i, 9, § 9, pp. 140-3: *V. der K.* 326.)

Conditional legacies.

To a legacy may be added a cause, a condition, and a modus.

If the cause assigned is incorrect, it does not, nevertheless, vitiate the legacy; but should a condition or modus fail, the legacy also fails.

A condition arises by its being expressed in the legacy; as if the testator says, "*I leave Fernando a hundred pounds, on condition of his coming to reside in Colombo;*" or it may arise by a testator charging his representative or heir with the giving of any particular thing, or doing any particular act, and, on non-performance of the condition, may charge him with a legacy to a third person.

A condition must not be contrary to law, or *contra bonos mores*; so that legacies given for the purposes of scandalizing any one are void; as are those made through mere caprice, or palpably tending to reward vice, or if made with the object of enticing others to grant legacies to us; so, also, are legacies obtained from the testator by deceit and misrepresentation; and also those which are made to depend entirely on the will of the representative or heir.

If no time is specified in the condition, it may be fulfilled at any time by the legatee, and the legacy acquired; but if he does not perform it in his lifetime, his heir has no right thereto.

Where, also, the condition consists in abstaining

from any thing, the legatee may claim it at once, giving security to abstain, according to the condition. On the other hand, a legatee may claim security from the representative or heir on account of a legacy the condition or time whereof has not arrived.\*

All those who take any benefit under the will, whether as heirs or legatees, may be burthened with the duty of paying a legacy to others. (*Grot. ii, 23, §§ 6 to 10, pp. 160-1: V. der Ldn. i, 9, § 9, pp. 141-2.*)

A modus is a condition where the legatee has to do something, as if he receives a sum of money to erect a monument or a tomb to the testator. A modus may be claimed forthwith, under security to fulfil the directions in the will. (*Grot. ii, 23, § 11, p. 161.*)

If the legatee dies before the testator, the legacy is a lost or lapsed legacy. From the moment of the testator's death, the legatee acquires a vested right in the legacy,† in so far as it is not subject to any condition,

Modus.

Lapsed legacies.

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\* It is the modern, and perhaps more appropriate, practice of the Court of Chancery in England to order the fund to be paid into court, even if there is not any actual waste, or danger of waste. (*St. § 603.*)

And where a specific legacy is given to one for life, and after his death to another, there the legatee in remainder can obtain a decree for security, from the tenant for life, for the due delivery over of the legacy to the remainder man, if there is some allegation and proof of waste, or danger of waste. But, in the present day, if there is no such allegation and proof, the remainder man is only entitled to have an inventory of the property which was bequeathed him, so that he may be enabled to identify it when his right of present possession accrues. (*St. § 604.*)

Legacy payable at a future day—how dealt with in Chancery. Specific legacy to one for life, remainder to another—how dealt with in chancery.

† When once vested, it cannot be divested. And if a legacy is given for a particular purpose, the fact that it cannot be effected will not

Legacy for a purpose which

in which case it only vests from the day the condition is fulfilled. The addition of a certain limited time has this effect, that, although the right to the legacy is vested by the death of the testator, the right to demand the legacy does not arrive until the time arrives. When it is uncertain whether the time mentioned may ever arrive, or when it may come, it is held a condition precedent, except in cases in which this limitation of time is not annexed to the legacy itself, but only to the time of payment; in which last case, if the legatee dies after the testator, but before the legacy itself is payable, the right, nevertheless, is vested and passes to the heir. (*V. der Ldn.* i, 9, § 9, pp. 145-6: *Grot.* ii, 23, § 13, p. 162; and 24, § 29, p. 171.)

Abatement of legacies.

If the estate, after payment of debts, is insufficient to pay all the legacies, they must all abate in proportion, unless some priority is specifically given by the testator to some legacies over others. But, as between specific and pecuniary legacies, the loss is to fall wholly on the latter, whether secular or charitable. (*Sm. M. Eq.* p. 257, citing *St.* §§ 554-6 and 1180; 2, *Sp.* 314, 343.)

Ademption of legacies.

Prior to the permissive exclusion of the legitimate and other portions, under No. 21 of 1844, it was held

cannot be accomplished.

prevent the legacy from vesting in the donee; for the purpose could not generally be performed until the legacy is paid, or at least vested: so that, if a bequest be to, or in trust for, a legatee to apprentice him, or the like, it is an absolute gift to the legatee; and if he dies before it is so applied, it will belong to his representatives. (2, *Sp.* 462, 466, note c.)



that who was left an *inheritance* was not entitled to claim it as a *legacy* and to claim his *inheritance also*. (3626, *D. C. Batticaloa*, 3 Jan. 1842; *Morg. D.* 325.) Notwithstanding the ordinance, the principle remains, that, where a portion or provision is secured to a child by an antenuptial contract, marriage settlement, or otherwise, and the parent or person standing in *loco parentis*—that is, a person meaning to stand in the place of a parent, as regards providing for a relation's child—afterwards, by will gives the same child a legacy, whether particular or residuary, without expressly declaring it to be in satisfaction of such portion or provision. In such case, if the legacy is substantially the same in its value, in its nature, in time of payment, in certainty, and in benefit, with the portion or provision, and if it is not given for a different purpose, it will, in absence of evidence to the contrary, be deemed a full satisfaction of the portion or provision; if the legacy is less in amount than the portion or provision, or if it is payable at a different period, then (looking to the weight of authority) it may be deemed a satisfaction *pro tanto* or in full, according to the circumstances. (*Sm. M. Eq.* 358, citing *St.* § 1103, 1104, 1109, 1110; 2, *Sp.* 427-430, 432, 433, 438-440: *Lady E. Thynne v. Earl of Glengall*; 2, *Ho. of Lords*, 153: *Pinchin v. Simms*, 30 *Beat.* 119: *Charlton v. West*, 30; *Beat.* 124.)

Where a parent, or other person standing *in loco parentis*, bequeaths a legacy, whether particular or resi-

As to portions left by will to a child.

duary, to a child to whom he stands in that relation, and then by an act *inter vivos* makes a provision for the same child, of equal or greater amount, of equal certainty, and substantially the same in kind and in degree of benefit, without expressing it to be in lieu of the legacy, or for other objects than those for which the legacy was given; in such case, in the absence of evidence to the contrary, it will be deemed a satisfaction or ademption of the legacy. And if the provision *inter vivos* is not much less than the legacy, it will be deemed an ademption *pro tanto*. (*Sm. M. Eq.* citing *St.* § 1111 and note, and 1103-1105, 1112, 1113, 1115; 2 *Sp.* 429, 432-435, 438-440: *Hopwood v. Hopwood*, 22 *Beav.* 488; 7, *Ho. of Lords*, 728: *Schofield v. Heap*, 27 *Beav.* 93; *Becton v. Barton*, 27 *Beav.* 99: *Montefiore v. Guedalla*, 1 *D. F. and J.* 93.)

No ademption of legacies to strangers.

But this doctrine of the constructive ademption of legacies has never been applied to legacies to mere strangers, unless under some peculiar circumstances; as where the legacy is bequeathed for a particular purpose, and a portion is afterwards given by the testator, by an act *inter vivos*, exactly for the same purpose, and for none other. (*Sm. M. Eq.* p. 360, citing *St.* § 1100, note, 1117, 1118; 2 *Sp.* 430.) Indeed, in the case of strangers, the *onus probandi* is upon those who contend that the two provisions are to be considered but as one; whereas, in the case of children, the *onus probandi* is on those who contend for the double provision. (2 *Sp.*

430.) The term "strangers" here includes all who are not legitimate children of the donor, or children to whom he has placed himself *in loco parentis*. (*Sm. M. Eq.* citing *St.* § 1116; 2 *Sp.* 429.)

The equitable doctrine of election is recognized in Ceylon. (329, *D. C. Matura*, 2nd Dec. 1859: 19559, *D. C. Trincomalie*, 30th June, 1861.) Doctrine of election.

The following condensed account of so much of that doctrine as clearly applies to Ceylon is taken from Mr. Smith's "Manual of Equity," *Tit.* iii, ch. 10, p. 350.)

"Election is the choosing between two rights, by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both. \* \* \*

Definition.

"The doctrine of election arises in cases where a grantor, or, more commonly, a testator, gives away, either knowingly or by mistake, that in which he has no interest, or the whole of that in which another person besides himself has an interest, and in the same instrument makes a gift to the owner of the property so given away, or to the person entitled to such interest. In such cases, the owner of such property, or the person entitled to such interest, cannot both take the gift and retain his own property or interest; but if he takes the gift, he must resign his own property or interest. On the other hand, if he elects to hold his own property or interest, or, as the phrase is, if he elects against the instrument, he cannot have the gift; or at least he can-

Where election arises.

not have the entire gift without compensating the party whom he has disappointed by electing to take his own property. Equity, in not suffering the disposition by which such gift is made to enure to the benefit of the person so electing against the instrument, will not render that disposition inoperative, but will make it the means of effectuating that intention of the author of the instrument which such person has frustrated by so electing to retain his own property or interest: for equity will treat such gift, or at least a part of it, as a trust in the donee or devisee, the person so electing, for the benefit of the party disappointed by such person's refusing to give up his own property or interest. (See *St.* § 1077, *note*, and 1081-1084, 1086, 1088, 1089, 1093: 2 *Sp.* 586-588, 601-604: *Noys v. Mordaunt*, and *Streatfield v. Streatfield*, 1 *Lead. Cas. Eq. 2nd Ed.* 271, *et seq.*: *Swan v. Holmes*, 19, *Beav.* 471: *Wintour v. Clifton*, 21, *Beav.* 447: *Stephens v. Stephens*, 3, *Drewry*, 697: *Usticke v. Peters*, 4, *K. and J.* 437: *Anderson v. Abbott*, 23, *Beav.* 457: *Grosvenor v. Durston*, 25, *Beav.* 97: *Fitzsimmons v. Fitzsimmons*, 28, *Beav.* 417: *Honeywood v. Foster* (No. 2), 30, *Beav.* 14: *Howells v. Jenkins*, 2, *Johns. and H.* 706: *Whitley v. Whitley*, 31, *Beav.* 173.) Indeed, the doctrine of election can never be applied where an election is made contrary to the instrument, unless the interest that would pass by it is of that freely disposable nature that it can be laid hold of to compensate the party who suffers by the exercise of such election against the in-

strument. Thus, where there is a fund subject to the appointment of a father amongst his children, and the father appoints a part to some of his children, and the other part to persons not objects of the power, any child who is an appointee may both take his appointed share and also claim his share of the improperly appointed portion, as in default of appointment. But if there is a power to appoint to two, and the donee of the power appoints to one only and gives a legacy to the other, he cannot claim the legacy and also dispute the validity of the appointment. (2 *Sp.* 590: *Re Fowler's Trust*, 27, *Beav.* 362.) \* \* \*

“The doctrine is equally applied to all interests, whether immediate or remote, vested or contingent, of value or of no value. (*St.* § 1096: 2 *Sp.* 588.)

“*Primá facie*, it is not to be supposed, nor must it be proved by extrinsic evidence, that a testator disposes that which is not his own, so as to raise a case of election. It must appear on the will itself, by plain demonstration or by necessary implication (2, *Sp.* 592, 593, 595: and see iii, *Burge*, p. 717: *D. C. Trincomalie*, 30 *June*, 1861.)

“The same doctrine of election also arises in cases where it was apparently a testator's intention to dispose of all the property he might have at the time of his death, and the heir, who is a devisee under the will, claims property which was purchased subsequently to the will, and which, consequently, under the old law,

did not pass by the will, but was intended to pass to another person under the general words of the will. (*St.* § 1094; *Schroeder v. Schroeder*, 1, *Kay*, 578.)

“According to the preponderance of authority and principle, a person electing against a will does not forfeit the whole of the benefit intended for him, where the value of the gift exceeds that of his own property or interest; but he is only obliged to compensate in value the claimant whom he has disappointed by his refusing to give up his own property or interest. (*St.* § 1085: 2, *Sp.* 601-604.)

Election as to one benefit.

“A person may decline one benefit given him by a will, such as a legacy charged with a portion, without being precluded from taking another benefit by the same will, unless it is fairly inferable, from the nature of the different benefits, that he should take all or reject all. (*St.* § 1081: see 2, *Sp.* 591.)

Election need not be made in ignorance of circumstances.

“The party is not bound to make an election till all the circumstances are known. And if he should make a choice in ignorance of the real state of funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him. And he is entitled, in order to make an election, to maintain a bill in equity for a discovery, and to have all the accounts taken, to ascertain the real state of the fund. (*St.* § 1098: 2, *Sp.* 598: *Wintour v. Clifton*, 21, *Beav.* 447.)

Election presumed.

“An election may be presumed from a long acqui-

escence, or from other circumstances. (*St.* § 1097: 2, *Sp.* 598-600: *Worthington v. Wiginton*, 20, *Beav.* 67.)

“The doctrine of election is not applied in the case of creditors. They may take the benefit of a devise for payment of debts, and also enforce their legal claim against other funds disposed of by the will; for a creditor claims not as a mere volunteer, but for a valuable consideration, and *ex debito justitiæ*. (*St.* § 1092: 2, *Sp.* 592.)

No election in the case of creditors.

“Where the person bound to elect labours under any disability, as infancy or coverture, the court will consider whether it will be most beneficial for such person to take under or against the will or deed, and will decree accordingly. (2, *Sp.* 587.)”

Disability.

The legatee has three distinct actions for his legacy:—

Recovery of legacies.

1st. A personal action under the will, against the representative or heir, or any other person charged with the payment of the legacy; or against the representative for the delivery of the thing with such increase, or decrease, as it may have suffered; provided the latter has not been caused by the fault of the representative or heir.

2nd. An action *in rem*, to recover the thing itself, against any possessor whatsoever.

3rd. An hypothecary action, on the ground of the tacit or implied mortgage which the law gives to lega-

tees in this respect, in all the property which comes to the heir from the testator. (*Grot.* ii, 23, §§ 15 to 19, pp. 162-3: *V. der Ldn.* i. 9, § 9, pp. 146-7.)

Will must be proved.

In order to recover a legacy, the party suing must prove the will. (28108, *C. R. Galle*, 21 July, 1864.)



## CHAPTER XIV.

### OF INHERITANCE AB INTESTATO.

THE inheritance *ab intestato* takes place when the deceased has either made no will, or his will, for some of the reasons stated in the prior chapter, becomes void.

Inheritance  
*ab intestato.*

Also, if all the instituted heirs renounce the inheritance, it becomes an inheritance *ab intestato*. But if, out of many, one only should accept the inheritance, the descent *ab intestato* is excluded; for the other shares would accrue to him. And, in the former case, if the relatives who could have inherited by descent *ab intestato* are expressly named or tacitly pointed out by the will, then those relations must take under the will. (*V. der Ldn.* i, 10, § 1, p. 157 : *Grot.* ii, 27, §§ 1 to 5, p. 174.)

Now, as several systems of laws regulate intestacy in Ceylon, rules have been laid down for regulating the several cases that may arise; they are as follows:—

Rules regu-  
lating it.

1. As regards the personal or moveable property,

the succession by intestacy is regulated by the law of the place of domicile of the deceased.

2. But succession by intestacy to immoveable property follows the law of the place where it is situated, or *lex loci rei sitae*.

Succession to  
land.

The feudal institutions of Holland not extending to Ceylon, land in general passes *ab intestato* in the same manner as moveable property, except in the case of the land being subject to any customary law, or particular custom: in the one case, the land must be shown to be within the *locus* of the customary law; and in the other, the custom must be proved. The succession to land in the Kandyan and Malabar provinces will be described in their proper place. In the remainder of the island, land is principally held in fee simple, as having been obtained from the Crown under some form of Crown grant, or as having been *service parveny* land. The latter, in the maritime provinces, was land held in fee simple, but formerly subject to the following rules: that is, it was deemed as being held immediately under the Crown; the succession to it was in the male heirs only of those dying possessed of such lands, and it reverted to the Crown on failure of male heirs, or breach of conditions of tenure; finally, it could not be in any way alienated, charged, or encumbered, nor sold under execution (*Reg. No. 8 of 1809*); but, on the 25th of August, 1852, it was, from that date, placed exactly in the same position as other lands held in fee simple. (*Ord. No. 3*

of 1852.) In dealing then with successions prior to the 25th of August, 1853, we must look to Reg. No. 8 of 1809.

Kindred are divided into three parts, ascending, descending, and collateral; and their nearness or distance of relationship is measured by degrees. Ascending and descending relationship commence at the first, but collaterals commence at the second degree, because they do not take origin from the intestate himself, but from some other person than himself.

Degrees of kindred.

Parents, grandparents, and great grandparents are related to the intestate in the first, second, and third degrees respectively, and so on for more distant ancestry.

Ascending line.

Similarly, children, grandchildren, and great grandchildren are related to him in the first, second, and third degrees respectively, and so on for more distant descendants.

Descending line.

Brothers and sisters, both of the full and half blood, are related to him in the second degree of collaterals; and their children, or nephews and nieces, are in the third degree; so are uncles and aunts, as they, being brothers and sisters removed two degrees from the parent, who is removed one degree from the intestate, are of course three degrees from the intestate. Again, brothers being two degrees apart, and each of their families one degree from each of them respectively, their

Collaterals.

children—that is, first cousins—are in the fourth degree from one another. Thus, counting each birth as making a new degree, and commencing in the ascending or descending scale with degree number one, and in the collaterals with degree number two, the distance of kindred from one another can be found. (*Grot.* ii, 27, R. 176.)

The inheritance *ab intestato* (which takes place either when the deceased has made no will, or his will, for some of the reasons mentioned in the last chapter, has become void) was, under the law of Holland, of two kinds. One kind, called that of the Political Ordinance of 1580, and the other the New Aasdomsch, or the North Holland and West Friesland Law of Succession *ab intestato*, passed in 1599.

The old East Indian Dutch Colonies, including Ceylon, followed the Political Ordinance as declared by a resolution of the United Provinces on the 13th of May, 1594, subject to certain modifications which will be noticed in the proper place. (*V. der K.* 352.) Van der Keesel published his treatise in 1800, after the occupation of Ceylon by the British; therefore it is fair to conclude that the resolution of 1594 was in force in Ceylon at the time of the cession of the Maritime Provinces; and, as nothing has been done to disturb the then existing law *ab intestato* as derived from the Dutch, the legal conclusion is, that the Political Ordinance of 1580 is the law of Ceylon at this time, as regards suc-

The law of South Holland regulates intestacy in Ceylon.

of N. Holland  
 added by Code  
 1876.

cession *ab intestato*. However, as the intestacy law of North Holland approaches most nearly that of England and the civil law, and is in many respects the more just and equitable in its provisions, it is in this work given side by side with the Law of South Holland, in foot notes.

Children, grandchildren, and remoter descendants are preferent to all others in the estate of the parents. All the children take equally *per capita*; that is, they take equal shares: but grandchildren take *per stirpes*; that is, they take amongst them the share their deceased parent would have taken *per capita*, had he or she not pre-deceased the intestate. The children of a child of an intestate thus represent that child and divide his share. Thus, if there are several sets of grandchildren, say two by a son of the intestate and three by a daughter, though each stock takes an equal share one with another, each grandchild does not. For example, in the above case, the son and daughter would transmit a half of the estate to each stock; then the children of the son would each take a fourth of the estate, and the children of the daughter each a sixth only. And this holds good even if the intestate has only grandchildren alive at the time of his death. It is well to observe that in this latter point the law of England is different; for if all the children are dead, and only grandchildren exist, they all take, not by families, but *per capita*; that is, equal shares in their own right, as next of kin. (V.

Law of intestacy as to descendants.

*der Ldn.* i. 10, § 2, p. 158: *Grot.* ii, 28, § 13, p. 187: *Demat.*, part ii, b. 2, tit. 1, § 2: *Mackenzie, R. L.* 287.)

Collation.

This division, however, is governed by the rule that children becoming heirs *ab intestato* to a deceased parent, or grandchildren becoming such heirs by representation to a deceased grandparent, must bring into *collation*,\* or, as it is termed in the English, *hotchpot*, all that they have received from the deceased parents above the others, either in the advancement of their marriage, or to establish them in any trade or business; or even as simple donations. If what they have received had not been valued, its legal value at the time of the donation is brought into the account; but if it had been valued, it may be sufficient to place the same valuation in the account, and then to divide.

When children succeed to the first-dying parent, using community of property with the surviving parent, the whole of the dowry is brought into account in appraising the estate; and afterwards, in dividing it with the survivor, the children collate a half-part of it with the parent, as if it had formed part of the pre-deceased parent's estate, and should therefore be reckoned in his half share:† and after the death of the survivor, the children will then collate the other half with his brothers.

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\* This resembles, but is not identical with, the *collatio bonorum* of the Roman law.

† Overruling *Voet ad Pand.* xxxvii, 6, § 7.

(*V. der Ldn.* i, 10, § 3, p. 164 : *Grot.* ii, 28, § 14, p. 188 : *V. der K.* 348-50.)

The children and remoter descendants failing, the inheritance goes to his father and mother, in case they are both alive. Intestacy as to ascendants.

• But if only one of the parents be alive, whether father or mother, which is termed the *separation of the bed*, the surviving parent (in case there be brothers or brother's children on the side of the pre-deceased parent) succeeds to a-half; and if there be none, then to the whole. When there are brothers or brother's children, the other half of the property, not given to the surviving parent, goes to the brothers and sisters, whether of the whole or half blood, in equal shares, and their children and grandchildren, *per stirpes*; provided the half brothers and sisters and their descendants are related to the deceased on the side of the deceased parent. And, except as to the above half, when there are brothers or brother's children, when the *bed is separated*, the surviving father or mother, and all the collateral relations which are of kin to the deceased through the surviving father or mother, are excluded.\*

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\* But, according to the law of North Holland, if only one parent is alive, he or she divides with the brothers and sisters of the deceased, whether of the full or half blood, and their children and grandchildren, by representation, the whole of the inheritance; namely, the surviving parent takes one half, and the brothers and sisters and their children the other half. This must be understood of half brothers and sisters who are related to the intestate by the side of the deceased parent.

In case there is no full or half brother or sister alive, then the sur-

(*V. der Ldn.* i, 10, § 2, p. 159 : *Grot.* ii, 28, § 17 : *V. der K.* 352.)

Law of intestacy as to collaterals, both parents failing.

4th. Father and mother both failing, the property of the intestate goes to his brothers and sisters, whether of the whole or half blood, and their children and grandchildren.

The inheritance is divided into two equal portions, called the father's side and the mother's side, without regard to whether the deceased could have left behind more property derived from the side of the father than that of the mother. One half the full brothers and sisters divide with the half brothers and sisters of the father's side, and the other half divide with those of the mother's side; but if there are only half brothers and sisters on one side, the full brothers and sisters take then, in the first place, one half of the property, and divide the other half with the half brothers and sisters. (*V. der Ldn.* i, 10, § 2, p. 160 : *Grot.* ii, 28, § 18, p. 189.)

Collaterals of full blood failing.

5th. When full brothers or sisters, or their children, or grandchildren fail, and there are half brother's and sister's children or grandchildren on both sides alive, then one-half of the goods goes to the half brothers and sisters, or their children and grandchildren, *per stirpes*, on the father's side; and the other half to the half

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viving parent inherits the whole, although there may be children and grandchildren of the deceased brothers and sisters. (*V. der Ldn.* i, 10, § 2, p. 159.)



brothers and sisters on the mother's side, their children and grandchildren, as before. (*V. der Ldn.* i, 10, § 2, p. 160 : *Grot.* ii, 28, § 22, p. 190.)

6th. In case all the half brothers and sisters, their children and grandchildren, are related to the intestate only on one side, they take only half of the goods, and the other half goes to the next of kin of the other side.\* Half blood on one side only.

7th. Although those who succeed are all equally near in degree to the intestate, yet they take *per stirpes*, and not *per capita*.† (*V. der Ldn.* i, 10, § 2, p. 162.)

8th. All the persons above enumerated failing, then all the goods of the intestate go to the next descendants of brothers' and sisters' grandchildren *per capita*; after these, to the grandfathers and grandmothers of both sides, if both be alive; but if one of these be dead, either grandfather or grandmother, then his or her share goes to the nearest relations on such deceased grandfather's or grandmother's side; namely, to the uncles and aunts of the intestate and their children of the first degree, by representation, in such a way that,

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\* But, in North Holland, these half brothers and sisters, their children and grandchildren, who are related to the intestate on only one side, take the whole of the goods; unless there be a grandfather or grandmother, or higher ascendant, yet alive, related to the intestate on the other side. Since then, such half brothers and sisters, their children and grandchildren, would only take one half, and the next ascendant or ascendants, *per capita*, of the other half.

† But, according to the law of North Holland, they take, in this case, *per capita*, and not *per stirpes*.

the goods being divided into two parts, one half goes to the father's and the other to the mother's side, the next of kin of the half bed dividing only with the *half hand*. (*V. der Ldn.* i, 10, § 2, p. 163; citing *Pol. Ord. Art.* 23, 24, and 27.)

Where there are no uncles or aunts, then their children of the first degree take *per stirpes*; and on failure of these, *per capita*.\* (*Ibid.*)

Special points  
with respect  
to the inher-  
itance *ab*  
*intestato*.

In pages 247 and 248 was given the special points relating to inheritance being related by the *lex loci*, and collation; but there are some others to be noticed.

Man and wife cannot be heirs to each other *ab intestato*.†

Illegitimate children succeed to the inheritance of the mother *as intestato*, as the mother makes no bastard. But are they, in like manner, admissible to the inheritance *ab intestato* of their mother's relations? Van der

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\* But, according to the law of North Holland, when all the persons enumerated in articles 1 to 7 fail, the inheritance goes, first to the nearest in the ascending line *per capita*; although it should happen that on the one side both the grandfather and grandmother, and on the other side only one of the parents, should be alive. After these, to the nearest descendants of brothers or sisters, grandchildren, *per capita*, whether of the full or half blood. Afterwards, to uncles and aunts, and their children of the first degree, by representation. Uncles and aunts failing, then to their children of the first degree, and also great aunts and uncles with them, *per capita*; and, after all these, to the next of kin, also *per capita*, to the exclusion of all who are in a more remote degree.

† Except, according to the law of North Holland, when no next of kin of the intestate are found.

Linden is inclined to the opinion of those who answer in the negative.

Bastards who leave children born in lawful wedlock, may be succeeded by these as heirs *ab intestato*; and on failure of children, the goods go to the next of kin on the mother's side, so as to exclude the Crown.

When any one dies intestate without next of kin or heirs, the estate escheats to the Crown; but this failure of heirs must be complete, since, if any kin can be found, even beyond the tenth degree, they take the goods. So also when the next of kin of one side fail, their part does not escheat, but goes to the next of kin of the other side.

## CHAPTER XV.

## EXECUTORS AND ADMINISTRATORS—THEIR DUTIES.

When their  
duties arise.

EXECUTORS, as has been pointed out in the first volume, page 509, are appointed by will, or codicil; and administrators are appointed by the court. Their duties are very much the same; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration; and then he differs still less from an executor: and, secondly, that an executor may do many acts before he proves the will; but an administrator can do nothing until letters of administration are issued; for the former derives his power from the will, and not from probate; the latter owes his entirely to his appointment by the court.

Sealing up.

The executor's first duty (and the administrator's also, if the act is not already performed) is to seal up the effects of the deceased at his house.

Funeral.

Then to bury the deceased in a manner suitable to the estate he leaves behind him. Necessary funeral

expenses are allowed, previous to all other debts and charges; but if the executor, or administrator, is extravagant, it is a species of *devastation* or waste of the substance of the deceased, and can only be prejudicial to himself, and not to the creditors or legatees of the deceased. (*V. der Ldn.* i, 10, § 10, p. 148: *Bla. Com.* iv, p. 508.)

The executor, or the administrator *durante minore* Proving the will.  
*actate*, or *durante absentia*, or *cum testamento annexo*, must prove the will. (See p. 508, vol. i.)

The executor or administrator must then take a true, full, and perfect inventory of all the property, moveable and immoveable, and all rights and credits of the deceased. (*Form, Testamentary Jurisdiction, No. 3, R. and O.* p. 98.) It must be delivered into Court one week, at least, before it is sworn; and if correct, must be sworn to. (P. 530, vol. i.)

He is to collect all the property and outstanding debts; and, to satisfy debts of the estate, he may convert any of the property, which is convertible, into ready money, to answer the demands made upon him. Property of the deceased convertible into ready money is termed *assets*. (See p. 532, vol. i.)

The executor or administrator must pay the debts of the deceased; and in doing so must observe the rules of priority; otherwise, on a deficiency of assets, if he pays those of a lower degree first, he must pay those of a higher out of his own estate.

Priority of  
payments.

The canons of priority are given by Van der Linden, in reference to an insolvent estate. The canons for the most part agree with those applicable to an executor or administrator, but would, as a whole, be modified for the case of the distribution of an intestate's estate. It must be remembered that administrators did not exist under the Roman-Dutch law, and even executors are not mentioned by Grotius; so that, though the marshalling of debts amongst themselves is clearly defined by the Roman-Dutch writers, the application of that system to the duties of executors and administrators nowhere appears. In this work, therefore, the English system is of necessity followed, modified so as to be consistent with Roman-Dutch law. In questions of administration, in the absence of anything in the Roman-Dutch or local law to guide, the Supreme Court has been in the habit of referring to English authority. The order of payments is as follows. (See *V. der Ldn.* i, 12, § 4, p. 378: *Bl. Com.* ii, p. 511: *Kerr*, ii, p. 545.)

1st. All funeral charges, and the expense of proving the will, and the like. By analogy to the distribution of an insolvent estate, judicial costs would take precedence of funeral expenses; but clearly, in the case of succession, the first duty in a tropical climate is the burial of the dead. Also the rent of the house or land, servants' wages for the current year, government and town taxes.

2ndly. Such debts as are by particular statutes to

be preferred to others; as, for example, the wages of labourers. (*Ord. No. 20 of 1861, § 5.*)

3rdly. Crown debts take rank in the following manner: upon mortgage, judgment, award, bond, or other speciality, or upon simple contract, other than revenue officers and public accountants, before all specialities or other debts accruing subsequent to the accruing of the above Crown debts. But this rule is not to affect the rights of those having special mortgages or hypothecation of immoveables of a prior date to the Crown claim, and duly executed, or of any persons having a legal lien, mortgage, or privilege, which is entitled to preference over any such special mortgage or hypothecation of immoveable property as aforesaid, according to the Roman-Dutch law; provided that no *bonâ fide* sale, pledge, transfer, or alienation of moveables upon good consideration, prior to execution of the Crown upon any judgment or award of any debt, fine, penalty, or forfeiture, shall be invalidated.

Fraudulent and collusive transfers, encumbrances, judgments, and suits by Crown debtors, in hindrance of the Crown are void, and executors must be cautious not to give them effect. (*Ord. No. 14 of 1843, §§ 5 to 8.*)

But with regard to any revenue officer, or other public accountant, his lands and tenements which he has within the time during which he remains accountable to Government are liable for all public moneys due

from him to Government; and such lands, &c. and his moveables may be sold in execution for their payment, as fully as if the Crown had a special mortgage upon such lands from the day the officer first became accountable. (*Ord. No. 14 of 1843, § 4.*)

4thly. Money due upon mortgages, special and general, having preference upon the proceeds of the sale of the mortgaged property, are preferent under certain conditions, for which see "Mortgages."

5thly. Debts due upon bonds, covenants, and other such deeds.

6thly. Debts due upon simple contracts, as upon promissory notes and verbal promises. (*V. der Ldn. i, 12, § 4, pp. 178, 179: Bl. Com. ii, p. 511: Kerr, ii, pp. 545, 546.*)

Payment of legacies.

When the debts are all discharged, the legacies are to be paid by the executor as far as his assets extend; and he himself has no preference in the payment of his own legacy. If the assets, after payment of debts, are insufficient to pay all the legacies, they must all abate in proportion, unless some priority is specifically given by the testator to some legacies over others. (*St. §§ 554-556: 2 Sp. 314.*) But as between specific and pecuniary legacies, the loss is to fall wholly on the latter. (*2 Sp. 343.*) A specific legacy does not abate at all, unless there is not sufficient without it. Also specific legatees are preferred to the heirs, because the heir, instead of being expressly an object of the testator's



regard, like the specific legatee, takes only by act of law. Upon the same principles, if the legatees have been paid their legacies, they are afterwards bound to refund a rateable part, if debts come in more than sufficient to exhaust the *residuum*, after the legacies are paid. (*Sm. M. Eq.* pp. 257-267 : *Bl. Com.* ii, 512, 513 : *Kerr*, ii, pp. 547, 548.)

When all the debts and particular legacies are paid, the surplus or *residuum* must be paid to the residuary legatee, if any be appointed by the will; and if there be none, then the executor must distribute the property amongst the next heirs-at-law, in the legal proportions. (See *ante*, pp. 251, *et seq.*)

Assets in England are applied in a particular order; and, although there is nothing expressly laid down on this subject, by analogy with the order of execution on property, considering what has gone before in respect of legacies, the English order is not inconsistent with Ceylon law; the main principle being, that in all cases the moveables shall be exhausted before the immoveables are touched.

In the rules following, to explain why legacies, &c. are considered assets, it must be observed that, when the executor has paid all the known debts, he may pay the legacies; but the legacies remain liable to be refunded to discharge any unknown debts that may arise; they therefore are recoverable assets, until those unknown debts become prescribed.

The order is as follows :—

1st. The general personal estate, except under the circumstances below mentioned.

2ndly. Any land particularly devised simply for the payment of debts.

3rdly. Lands descended.

4thly. Property devised and bequeathed to particular devisees and legatees, but charged with the payment of debts.

5thly. General legacies.

6thly. Lands comprised in a residuary devise.

7thly. Specific legacies, and lands specifically devised.

8thly. Both moveables and immoveables, over which the person, whose estate is to be administered, has exercised a general power of appointment. (*Sm. M. Eq.* pp. 258, 259.)

The English law carries the question much further, showing how certain funds are to be charged; but as these points arise almost entirely from the distinctions between legal and equitable assets, and between real and personal property, which do not exist in Ceylon, they are not in general applicable there.

Liabilities of  
executors, &c.

If the executor pays debts out of their proper order, and there is not sufficient assets to satisfy those of a higher degree than those he has paid, he will be liable for those debts out of his own estate.

In all cases where he places the money of the deceased's estate in the hands of a banker, he must take

care not to mix it with his own; for, if he places it in a common account with his own, he could be deemed to have treated it as his own, and would be charged with interest, and be liable to the legatees and heirs for any loss sustained by the banker's insolvency. (*St.* § 1270: 2 *Sp.* 934: *Sm. M. Eq.* 193.)

He is not permitted to make any profit to himself from the property with which he is entrusted, or from the office itself, except his legal fees. (See vol. i, p. 531.) All advantage gained belongs to the estate; so that he is accountable for all interest he ought to have made, and would have made, if the will directed any particular investment, or, in the absence of such a direction, the investment allowed by any general rule of the court. He is also accountable for actual gains and interest beyond the amount of such interest above-mentioned. (*Sm. M. Eq.* p. 195.)

Where there are co-executors, each has a several Co-executors. right to receive the debts due to the estate, and all other assets, and is competent to give a valid discharge by his own separate receipt; and, therefore, if co-executors join in a receipt, it is a purely voluntary act, and it will be presumed that they jointly received the money. Accordingly, then, a co-executor is presumed to have done an act involving responsibility; because he has done that which an executor who has not actually received the money is not called upon to do. (*Sm. M. Eq.* pp. 198, 199.) In general, a co-executor is responsible for his own acts

and defaults, and for those wrongful acts and defaults of his co-executors of which he is privy, and in which, though without any corrupt motive, he expressly, tacitly, or virtually acquiesces, or which would not have happened but for his own act or default. Thus, if two executors have properly sold property of the estate, and one of them hands the cheque for the proceeds to the other, who misapplies it, they are both liable. (*Sm. M. Eq.* p. 196: *Trutch v. Lamprell*, 20, *Beav.* p. 116: *Horton v. Brocklehurst*, 29, *Beav.* p. 504.) So, also, were two co-executors jointly to sell property of the estate, the proceeds of which are received by one, and invested by him upon an improper security, the other is liable; for it is his duty to see it properly invested. (*Sm. M. Eq.* p. 197: *Thompson v. Finch*, 22, *Beav.* p. 216.) So, if two executors are directed to invest on mortgage, or in stock, and they leave the fund in a bank, and one dies, and the other misapplies it, the estate of the former is liable, though the latter may sell out stock on the death of his co-executor. (*Sm. M. Eq.* p. 197: *Gibbins v. Taylor*, 22, *Beav.* p. 344.)

## CHAPTER XVI.

## THE RIGHT OF SERVITUDE.

THE meaning of the term servitude has been given and distinguished previously. Servitudes defined.

Servitude is a real right, *jus in re*, whereby an inheritance, whether it be a house or land, is burthened with a certain duty or service, useful or convenient to the neighbouring house or land (*V. der Ldn.* i, 2, § 1, p. 167: *Add. Torts.* p. 43); or again, whereby a man's property may be burthened with a duty or service, to the use or profit of another. (*V. der Ldn. idem.*)

Servitudes are divided into real and personal (though both kinds are *jura in re*). Servitudes, real and personal.

The real are rural or urban praedial servitudes; or, in ordinary phrase, land or house servitudes. (*Sandars, Inst.* 44: *V. der Ldn. idem.*)\*

The personal servitudes are the usufruct, or right of

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\* Addison says, that the Roman law called them "praedial or urban;" but in reality that law divided them into praedial and non-praedial (i. e. real and personal), and the praedial into rural and urban servitudes.

use of another's property; also rights reserved on grants of land, leases, &c. as tithes, fines, or quit rent, and the like.

Conventional  
and natural  
servitudes.

House or land servitudes are, in most English law books, termed *easements*. Mr. Addison, however, more scientifically divides them into natural servitudes and conventional servitudes, or easements.

Natural servitudes being the duty or service which every landed estate is bound to render to an adjoining property, so as to prevent the management of one property being a source of injury and annoyance to another (*Add. Torts.* 43); and are connected with natural rights to water, drainage, support from adjoining lands, and support from the subsoil, &c. Natural servitudes are therefore derived from the situation of places, and are a necessary and natural adjunct to the properties to which they are annexed.

Conventional servitudes, or easements, are founded upon contract, grant, prescription, or custom; as a right of way over a neighbour's land, or to take water from his well, &c.

The property to which the privilege is annexed as a benefit, is termed *res dominans*, or the *dominant tenement*; and the property on which the burden or servitude is imposed is called *res serviens*, or the *servient tenement*. (*Sandars, Inst.* 44: *Sm. M. C. L.* 97.)

Land servitudes may be either natural servitudes or easements. House servitudes are all easements.

Natural land servitudes are those accessorial to the enjoyment of water; to the drainage of land; to the support of adjoining lands, and of the surface by the subsoil, when vested in different proprietors.

Natural servitudes.

Where there are distinct proprietors on opposite banks of a stream, each riparian proprietor is, *primâ facie*, the proprietor of half of the land covered with the stream which is nearest to his own bank; but he has no property in the water. Every landowner has a right, however, as a natural incident of property, to use the water of a natural stream flowing through or by his land for any reasonable purpose not inconsistent with a similar right in the proprietors of the land above and below; as, for instance, to drink, or to water his cattle, to turn his mill, &c. But he cannot seriously diminish the quantity, nor deteriorate the quality, nor alter the flow of the water, to the injury of another proprietor, otherwise than by such diminution, retardation, or acceleration, as may be the necessary result of a reasonable use; unless he has gained a title to the easement, by grant or prescription, so to use the water. (*Sm. M. C. L.* 97, collating *Add. Torts.* 48-51: *Broom's Com.* 764-5: *Gale on Easements*, 191-7, 238-9: *Tudor's Real Property Ca.* 118-9: *Dixon's Law of the Farm*, 124-9, 132. See, also, *Grot.* ii, 34, § 15, p. 208.)

Running water.

The right to the enjoyment of the water of a surface stream, and the right to underground springs and water,

Well water.

are governed by different rules. A person may sink a well on his own land, and get as much water as he pleases, although he thereby seriously diminishes the supply of water to the springs and wells in his vicinity, or even drains them dry. The adjoining proprietor has no other remedy than to sink deeper wells, and use appliances to get back the water. (*Chasemore v. Richards*, 20, *L. J. Ex.* 401: *Reg. v. Metrop. Board*, §c. 32, *L. J. Q. B.* 105: *Acton v. Blundell*, 12, *M. and W.* 324: *Dickinson v. Grand Junction Canal Co.* 7, *Exch.* 282.)

Servitudes  
accessorial to  
drainage.

All lands are burthened with the servitude of receiving and discharging all waters which naturally flow down to them from lands on a higher level. And if the owner or occupier of the lower lands obstructs the natural flow of the water through his lands, so as to cause the higher lands to be flooded (unless he has gained a right by contract, grant, prescription, or custom, to pin back the water), or if the owner or occupier of higher lands causes the surface and drain water to flow on the lands below in a greater volume, and in an unnatural manner, he will be responsible in damages. (*Shury v. Pigott*, 3 *Bulstr.* 340: *Chasemore v. Richards*, cited above: *Sharp v. Hancock*, 8, *Scott's, N. R.* 46.)

Servitude of  
support from  
adjoining  
lands.

Every proprietor has a common right to such lateral support from the adjoining land as is necessary to sustain his own land in its natural state, not weighted with walls or buildings; but not *ex jure naturae* to the addi-



tional weight for buildings, save and except if the buildings are ancient, and the additional support has been enjoyed for twenty years. (*Add. Torts.* p. 451: *Humphries v. Brogden*, 12. *Q. B.* 744.)

One man may own the surface of land, and another the subsoil. The surface has a right to the support of the subjacent strata, sufficient to maintain the surface in its natural state; but not to the additional support necessary for buildings, until a right has been acquired by grant or prescription. But if the owner of the subsoil excavates it without leaving proper support for the owner of the surface, the latter has no right of action until some actual damage has been sustained by him; for every man may use his property as he pleases, provided he does not injure his neighbour. (*Add. Torts.* p. 47. *Acton v. Blundel*, 12 *M. A. W.*: 353, *Humphries v. Brogden*, 12 *Q. B.* 744; and *Bonhomi v. Backhouse*, *Ell. Bl. and Ell.* 622-7: 28, *L. Q. B.* 327, *affd. in 7 Jur. N. S.* 809.)

Servitude of support to the surface from the subsoil.

Natural servitudes derived from the situation of places are appurtenant to the land, and cannot be alienated from the land like usufructs; but pass with the land to the owners and possessors of the dominant tenement. (*Add. Torts.* p. 48.)\*

Transfer of natural servitudes.

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\* Although it would seem, from one case, that the owner of the surface may effectually curtail, by grant in favour of the owner of subjacent mines, the right to support therefrom. (*Rowbotham v. Wilson*, 30 *L. J. O. B.* 965.)

Land servitudes in the nature of easements.

Illustrations of easements.

We now come to such land servitudes as, in the English law, come under the term of easements.

The servitudes *naturally* incident to the ownership and occupation of land, and the legal restrictions upon the proprietary rights, may, within certain limits, be enlarged and extended by express and implied contract, by grant, and, in certain cases, by custom and prescription. Thus, one proprietor may acquire by grant, or from long continued and uninterrupted enjoyment, a right to take water from a neighbour's well, or to wash and water cattle at a neighbour's farm. (*V. der L.* i, 11, § 2, p. 168: *Race v. Ward*, 4, *Ell. and Bl.* 702; 24, *L. J. Q. B.* 153: *Manning v. Wusdale*, 5 *Ad. and E.* 758); a right to hang and dry clothes on lines on a neighbour's land (*Drewell v. Sowell*, 3 *B. and Ad.* 735); or to hang and dry nets thereon; or to turn the plough in ploughing (*Vin. Abr. tit. Custom*); or to discharge rain water upon another's land from the eaves and roofs of houses, termed *jus stillicidii* (*Grot.* ii, 34, § 10, p. 208, *Thomas v. Thomas*, 2. *C. M. and R.* 34); or to have the privilege and benefit of a neighbour's fence or hedge maintained and repaired at the expense of such neighbour. (*Boyle v. Tamlin*, 6: *B. and C.* 338-9: *D. and K.* 437.) Such privileges and benefits (not being natural servitudes), unaccompanied by any profit or interest in the soil itself, are called, in the English law, easements, and are claimable by custom, grant, and prescription (*Add. Torts.* p. 63). And, similarly, these

easements are, in the Roman-Dutch law, looked upon as rights cut off from the *dominium plenum* by repudiation, donation, or prescription; such servitudes not being claimable at common law. (*Grot.* ii, 32, 33, and 34.)

The most important of land servitudes is "right of way." They consist of the right of footpath (*iter*); the right of bridle road (which also includes a footpath); the right of house way; the right of cattle way, or of driving beasts over another's land (*actus*, including both foot and bridle path); and the highest right of way (*via*), that is a right to pass over another's land with horses and carts (this includes *iter*, bridle path, and *actus*). Rights of way must be exercised fairly, and with the least possible injury to the neighbour. They may be created by mutual agreement or consent under a notarial deed, by last will, by prescription, or by necessity. (*Grot.* ii, 35, p. 211-12: *V. der Ldn.* i, 11, § 2, p. 167.)

Ways by  
necessity.

If a man's land does not come to the high road, nor to a neighbour's road, the law confers upon him a necessary road, whereby he can pass to the highway most shortly and with the least injury; but it would seem that he must not use the road beyond the necessity; as, for example, if *iter* is sufficient, he must not claim *via*. (*Grot.* ii, 35, § 7-12, p. 212.)\*

\* Blackstone says the Roman and English law on ways of necessity seem to agree; but they so far differ that, in the Roman law, a way of necessity is of the nature of a natural servitude, which can make even

Every owner entitled to a way from his dominant tenement through an adjoining servient tenement is entitled, in the civil law, to enter upon the servient inheritance to repair the way, and bring thereon materials necessary for the purpose, making compensation to the servient tenement for all damage done in the progress of the repairs. (*Gale on Easements*, 325a.)

Right of watercourse, or *jus fluminis*.

A person may have a right of passage for waste water through an artificial drain or watercourse in another man's land, without having an interest in such lands. This is not a natural servitude, but must be created by deed or prescription. This is called *jus fluminis*, and would apply only to clean water, and not to filth. (*Grot. ii*, 34, §§ 15-17: *Add. Torts. c. 3*; *Gale*, 54.)

House servitudes (*praediorum servitudes*.)

The servitudes of urban immoveables are those which appertain to *buildings*, and are said to be servitudes of urban immoveables, although really built in the country. (*Inst. B. 2, tit. 3*: *Sandars*, § 3, p. 201.)

Wall.

Thus a man may acquire a right to build upon, or against, another's wall (*i. e. jus oneris ferendi*), which he has not at common law. He is only permitted to build on half when the wall is common—that is, a wall placed between the boundary by either of the neighbours. No one may make an opening in a common wall without

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the inheritance of a stranger servient; whereas in the English law, a way of necessity is an easement lying in grant; and it would seem that only the inheritance of a grantor could be servient. (*Add. Torts. 68-9*: *Smith's Leading C. 4th Ed. p. 113.*)

consent, though he may in a wall standing on his own ground, unless a prescriptive right has been acquired against such an opening (8094, *C. R. Galle; Lorenz*, R. p. 90); nor may he attach anything injurious to the common wall. (*Grot.* ii, 34, p. 207: *V. der L.* i, 11, § 3, p. 168.)

A man may acquire a right to have a beam or sup- Beams.  
port in another man's building (*jus immittendi*), though, at common law, he may not build beyond his own line of limit. (*Idem.*)

Where a number of houses built together (by one Adjoining  
owner, or, by consent, by several) require mutual sup- houses.  
port, the right to such support continues, notwithstanding alterations in the ownership of the houses by sale, mortgage, devise, &c. (*Sm. M. C. L.* 101; *Add. Torts.* 73: *Smith v. Rose*, 9 *Exch.* 221); but one house has no easement from another, built and standing independently, with a separate wall and foundation (*ePyton v. Mayor of London*, 9 *B. and C.* 736); though it would seem that a person may not take away from the owner of a house or building the benefit of lateral support from the adjoining land or building, after having acquiesced in the enjoyment of the benefit for a prescriptive period. (*Sm. M. C. L.* p. 101.)

There is a right of continuous support of the upper Support of  
stories of a house from the lower, where they are vested upper stories.  
in different owners: the owner of the lower rooms and

foundation is bound to repair the main walls and supports; and it would seem that the owner of the upper rooms must repair the roof. (*Sm. M. C. L.* 101: *Add. Torts.* 74: *Gale*, 98, 322.)

Eaves droppings (*jus stillicidii*.)

*Jus stillicidii* is the right to allow the rain-water of a building to fall upon another's ground. The owner, subject to the *jus stillicidii*, may not build upon the *praedium dominum*; but must leave five inches for the dropping of the water, or more or less, according to custom or statute. (*Grot.* ii, 34, §§ 10-12, p. 208: *V. der L.* i, 11, § 3, p. 168.)

Drop-vang.

Drop-vang is the right to take the rain-water coming from another man's land.

Light and air.

Every one has a right to forbid his neighbour from erecting his building any higher: this is the *jus non altius tollendi*. (*Grot. Idem*: *Sandars*, p. 199.) *Jus luminibus non officiendi et prospectus*; the non-obstruction of light and prospect is a right to forbid a neighbour from obstructing, with his building, or even his trees, the transmission of light, or even of the open view. (*Grot. idem*.) On the sale of a house, without the adjoining land of the vendor, a free passage for necessary light and air across such adjoining land is impliedly granted. (*Sm. M. C. L.* 99; citing *Add. Torts.* 75: and *Gale*, 100.) The right to light and air is confined to windows existing at the time of the conveyance, grant, or demise, and does not extend to windows subsequently

opened where there were none before, or to new windows of a different size or position from the old ones, except as far as regards the space of the new windows which may have been occupied by the ancient structure. (*Sm. M. C. L.* 99: *Add. Torts.* 75: *Broom. Com.* 760.)

If a new house is erected contiguous to another's ground, the latter may, at any time within the prescriptive period, erect any kind of building on purpose to blind the lights of that house, and no suit will lie, even if it were done of mere malice. (*Broom's Com.* 74: *Gale.* 283.)

Window right is a right to have a window looking over another's ground, and can only be acquired by grant or prescription: and if a person grant a license to open a window, unless the grant is by deed, he may build a wall on his own land, and exclude the light and air from it. (*Sm. M. C. L.* p. 99: *Add. Torts.* 75: *Gale,* 23: *Grot.* ii, 34, § 22.)

Sewerage is a right to have a sewer running through or discharging itself into another's grounds; but the sewer must not be raised or sunk, so as to create a further incumbrance. (*Grot.* ii, 34, §§ 23-25.)

The ownership of a tree standing in a hedge follows the ownership of the hedge. Where all the roots are in a person's land and the branches hang chiefly or entirely over another person's land, it belongs to the person in whose lands the roots are. But where the trunk stands on one person's land, and the roots are in

another person's land, it belongs to the person on whose land the trunk stands. (*Sm. M. C. L.* p. 102; citing *Add. Torts.* 154; *Dixon's Law of the Farm*, 81-2.)

Hedges and  
ditches.

In general, a boundary hedge belongs to the owner who has been in the habit of cutting and repairing it. But in some cases the owners of the adjoining lands are tenants in common of the hedge; and in such cases each has a right to cut the hedge, but not to destroy it. (*Sm. M. C. L.* 102, citing *Add. Torts.* p. 154; *Dixon*, 96.)

A person may make a ditch, and widen it as much as he pleases, so far as he can do so by cutting into his own land. No man, making or widening a ditch, may cut into his neighbour's soil; but he may, and usually does, cut to the very extremity of his own land: and he is bound to throw the soil on his own land; and he often plants a hedge on the top of the soil so thrown up. And hence, where adjacent lands of two distinct proprietors are divided by a hedge and a ditch, the legal presumption is that both the hedge and the ditch belong to the owner of the field in which the ditch is *not* situate. (*Sm. M. C. L.* p. 103, citing *Add. Torts.* p. 154, and *Dixon's Law of the Farm*, p. 92.)

Easements,  
how acquired.

Easements by lands, as well as houses, are acquired by agreement and mutual consent (and as they are interests in land, that is by notarial deed), also by last will, and by prescription. (*V. der L.* i, 11, § 4, p. 169: *Gale*, 23: *Dixon*, 55.)



For the law on this point, see the chapter on Prescription, p. 177.

Prescription of an easement.

If, by the act of the owner, one part of his land becomes dependent upon another for water, light, and air, these easements pass to the grantees of the land to which they are annexed, together with the land. And where a person buys one or more adjoining houses belonging to the same owner, the purchaser becomes entitled to the benefit, as an easement, of all the drains from it, and is subject as a servitude to all the drains necessary to the adjoining house. (*Sm. M. C. L.* 103: *Add. Torts.* 75: *Gale*, 81, 85.) Conversely, no easement can be transferred unless appendant or appurtenant to land, nor remain appendant or appurtenant unless accessory to the enjoyment of the land. *There must always be both a dominant and a servient praedium to found or continue a servitude.\** (*Sandars*, p. 201.)

Implied grant of an easement.

As with natural servitudes (see *supra*, p. 271), so with easements, a right which is accessory to the enjoyment of a house or land passes to the successive assigns of the house or land, by a grant of the house or land. (*Add. Torts.* p. 48.)

Transfer of rights.

The grantee of a right of way, or of an artificial drain, sewer, or watercourse through the grantor's land,

Repair of easements.

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\* These servitudes are called servitudes of immoveables, because they cannot exist without immoveables. For no one can acquire or owe a servitude of a rural or urban immovable, unless he has an immovable belonging to him. (*Inst. lib. 2, tit. 3, § 3, de servitutibus.*)

or the use of a pump in the grantor's land, is bound to repair the way, drain, sewer, watercourse, or pump, if he desires to have it kept in order for his own use; or, if repairs are necessary to prevent its becoming an annoyance to the owner of the servient *praedium*; but a common wall, as also a common sewer, must be repaired at the common expense, unless one party renounces the common property. The owner of the dominant *praedium* may enter on the servient *praedium* to repair, unless the latter's owner has undertaken to repair himself. (*Grot.* ii, 34, §§ 6-26, p. 207-10: *Add. Torts.* 118: *Gale*, 424-41: see also *Tudor's Real Pr. Ca.* 127.)

Easements,  
how lost.

An easement ceases when the purpose of the servitude can no longer be accomplished; thus, a right of way to church would cease with the removal of the church to another place; or when the *praedium dominans* is destroyed, *i. e.* when the thing to which the servitude was accessory ceases; thus, a right to ancient lights would cease with the *permanent* removal of the house; or by merger, that is when the ownership of the dominant and servient *praedia* become vested in fee-simple in the same person; or in the case of personal servitudes of the remainder of the *proprietas* and the servitude;\* or by release or abandonment by the owner of the *praedium dominans*; or by permitting or suffering anything repugnant to the servitude, as, for example, a building on a

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\* A fee simple of one *praedium* and a life estate of the other would not be sufficient.

right of way; or by failure or expiration of the right of the grantor; or non-occupation or non-user by the owner of the *praedium dominans*, or those claiming, through him, for the period of prescription when free opportunity was offered.\* (*Grot.* ii, ch. 37, p. 216: *V. der L. B.* i, § 4, p. 169: *Add. Torts.* ch. 3, § 1: *Sandars*, 210.)

The period of prescription is in general the third part of a century (Voet, vol. i, p. 409: *V. der Lwn.* p. 190.) Prescriptive period.

A right of way (or rather a liability of a right of way) is immoveable property. Accordingly the words "possession of right of way," in § 2 of Ord. 8 of 1834, applies to the enjoyment of right of way, and its prescriptive period is therefore gain or lose ten years. To save a right of way by prescription, there must be actual enjoyment, not mere claim, or title, or abstract right. (41, *C. R. Point Pedro*, 5 Nov. 1860, overruling 22909, *D. C. Colombo*, 1858.)

A suit for obstructing a right of way may be sued for in the Court of Requests, if the damages are under £10. Nothing in No. 8 of 1848 abridges the common law right to sue. (903, *C. R. Matara*, 24 March, 1857.) Suit for right of way.

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\* There is a difference in this respect between land and house servitudes, as the use of the former is not continuous—mere non-user breaks the servitude; but in house servitudes the user is continuous, as in the case of lights or caves-dropping; in that case, therefore, the owner of the *res serviens* must break the servitude (*usucapere libertatem*) i. e. stop the lights, &c. for the period of prescription. (*Sandars*, 210.)

## CHAPTER XVII.

## USUFRUCT. •

Usufruct.

A PERSONAL servitude is a *jus in re*, where a portion of the *dominium* is detached from the rest for the benefit of a person.

Usufruct is the right of using and reaping the fruits of things belonging to, without destroying their substance. It is a right over a corporeal thing: and if this thing perish, the usufruct itself necessarily perishes also. (*Inst. i, 4, tit. 4, de usufructu.*)

The way in which this right is lost or acquired is substantially the same with those above mentioned. This servitude is incident to a person, not a thing; it is a use for life, and expires with the life of the grantee.

The right of usufruct includes two rights, *jus fruendi* and *jus utendi*. The *jus fruendi* confers such a *dominium utile* as to make the owner of that usufruct apparently the life owner of the property. The holder of a *jus fruendi* takes *quicquid in fundo nascitur*, which includes natural products and natural increase, such as grass, calves, &c.;

artificial products, as corn and rents; but not treasure trove and the like. The right is confined to the enjoyment of the fruits of the thing; so that the usufructuary must take care that the thing, after the expiration of his term, is returned in a good state to the owner, for which he is also bound to give security, and therefore he may not alienate or incumber the thing; but, on the contrary, is liable to the usual costs and charges of keeping it in a proper state.

The *jus utendi* gives the right of making every possible use of a thing short of consuming it, or taking the fruits of it; as, for example, the right to live in a house, or of employing beasts of burden. The usufructuary could not take a rent of the house, or the calves of the beasts.

The usufructuary, having *jus fruendi*, may sell, or let, or give his right of taking the fruits to another; but it seems that he, having only the *jus utendi*, may not transfer the usufruct.\*

The usufruct is detached from the property; and this separation takes place in many ways, as by agreement, or subsequent sufferance. For example, if the usufruct is given to any one as a legacy; for the heir has then the bare ownership, and the legatee has the usufruct: conversely, if the estate is given as a legacy, and the usufructuary has the bare ownership, and the heir has the usufruct. Again, the usufruct may be given as a legacy

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\* Grotius and the Institutes appear to differ on this point; but Grotius is plainly speaking of *jus utendi* only.

to one person, and the estate, minus this usufruct, may be given to another. So that usufruct is acquired:—  
 1. By testament. 2. By agreement, and subsequent sufferance, or *quasi-traditio*. 3. By prescription. 4. By decree, in the case of separation of property or division of land. 5. By operation of law. (*Inst. L. 2, § 4, p. 1: Sansiars, p. 206: Grot. ii, 39, §§ 8-12, p. 221.*)

A usufruct may be constituted not only of lands and buildings, but also of beasts of burden and everything else, and a right analogous to usufruct even of those which are consumed by being used. But, in the case of consumable things, the legatee or usufructuary must give security to the heir or owner for the replacement of the *res serviens* in case of his death. (*Inst. L. ii, § 4, p. 2.*) Consumable things include such things as oil, wine, garments, and money.

Termination  
of usufruct.

Usufruct terminates by the death of the usufructuary, and absolutely, so that his representative does not even take fruits on trees, or emblements, though he does take rents accrued but not paid. Usufruct also terminates by surrender to the owner of the property; and by the usufructuary acquiring the dominium, which is called consolidation, or merger; also by the destruction of the *res serviens*, as in the case of a house falling by fire, earthquake, or decay, no usufruct then remains, not even of the soil on which it stood. (*Inst. L. 2, § 4, p. 3: Grot. ii, 39, §§ 13-17, pp. 221-3.*) Usufruct may also be lost by not using it in the way agreed

on by the parties during the time fixed by law, or by non-user for the third part of a century, or when its enjoyment may be considered possession of immoveable property, for ten years. (*Grot. idem: Sandars, 209, ante.*)

When the usufruct is entirely extinguished, it is remitted to the property; and the person who had the bare ownership begins thenceforth to have the full power over the thing. (*Inst. L. 2, § 4, p. 4.*)

Usufruct by a corporation.

If the usufruct belongs to a corporation, it expires on the dissolution of the corporation, or otherwise, for one hundred years. (*Grot. idem.: Sandars, 208.*)

#### USE AND HABITATION.

Usufruct includes *jus fruendi* and *jus utendi*; but a man may have the *jus utendi*, or naked use, without the *jus fruendi*. This right is constituted in the same manner as usufruct, and is terminated by the same means that make the usufruct to cease. It lasts for the life of the grantee, and, as far as concerns lands, entitles the usufructuary to nothing more than the right of taking herbs, fruits, flowers, hay, straw, and wood sufficient for a daily supply. He is permitted to establish himself upon the land, so long as he neither annoys the owner, nor hinders those who are engaged in the cultivation of the soil. He cannot let or sell, or give gratuitously his right to another; while a usufructuary may. The owner of the use, however, is allowed, in cases where the right would otherwise be of no benefit whatever, or where it seems right to put a favourable construction on the

words of a testament, to take as much of certain kinds of produce as is sufficient for his daily wants. Thus, if he have the use of animals, he has not only a right to work them, but to use the manure and take the milk for subsistence; but not the wool or progeny: and he may even let a house of which he has the use, if it is too large for one family.\* (*Inst. L. 2, § 5, p. 1: Sandars, 211: Grot. ii, 44, §§ 1-6, p. 250.*)

*Profits à prendre.*

According to the Roman-Dutch law, the *jus utendi* may either be limited or extended, according to circumstances. (*Grot. ii, 44, § 7, p. 251.*) Such a use thus becomes identical with the English *profit à prendre*, which is a right vested in one man to enter upon the lands of another and to take therefrom a profit of the soil; such as the right of depasturing cattle, rights of common, of cutting fuel, of gathering minerals, stones, or sand; rights of fishing, of cutting wood for building and repairs, and the like: and such rights must originate in grant, testament, or prescription, and are appurtenant to the land. (*Add. Torts. 63 et seq.*)

*Habitatio*, or occupation of a house.

*Habitatio* is the right to reside gratuitously in the house of another. Those who have this right of habitation may not only themselves inhabit the place over which it extends, but may also let to others the right of inhabiting it. (*Inst. ii, 5, § 5.*) This right of habitation does not cease by non-usage. It is generally left by

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\* Though, generally, the user can only exercise his right personally, and cannot sell, let, or give it away to another. (*Mackenzie, R. L. 182.*)



will, in the form of a specific legacy; and, in England, many of what are called dower or dowager houses are occupied in this manner. Of course it is a right that may be bought, and is in a manner bought when a party pays a premium to occupy a house under lease, in addition to annual rent.

## EMPHYTEUSIS.

Emphyteusis is a contract whereby a proprietor, without abandoning the property, gives over to another the real right to the land, generally in perpetuity, in consideration of a certain annual return in money or produce. Emphyteusis alienates all rights, except that of bare ownership; so it does not confer the dominium utile or right of property. (*Sandars*, 45: *Mackenzie*, *R. L.* 184: *Grot.* 357.)

Emphyteusis defined.

Emphyteusis may be established both by convention and by testament, and can be made for a time, or upon condition.

Emphyteusis, how constituted.

Both lands and buildings can be subject to emphyteusis. The grantee enjoys all the rights of an usufructuary. In addition, he can make changes in the substance, by reclaiming waste lands, by building, by planting, and other operations, provided he does not deteriorate the subject. He can create a servitude over it, mortgage it, sell his rights over it, and dispose of them by will.

Rights of the grantee.

The rent or *pensio* must be paid under any circum-

Rights of the dominus.

stances, even if the tenant obtains no benefit by the emphyteusis, at the end of each year, and the dominus cannot be compelled to receive his rent in anticipation. In the case of a sale, the proprietor has the privilege of pre-emption, if he is desirous to purchase the subject on his own account, and to pay the price offered for it.

Emphyteusis,  
how lost.

Emphyteusis is lost by failure of the issue of the first *emphyteuta*, by effluxion of the term, or by operation of the condition, if any. The dominus, however, if requested by the descendants or nearest relatives of the last possessor, and before failure, cannot refuse renewal of the grant. It is also lost by *non-user* for the period of prescription, and by merger of the emphyteusis into the dominium. This merger takes place when the emphyteuta and the dominus are the same person, and also when the emphyteuta holds the land as his own freehold, without payment of rent, for the prescriptive period.

The right is also forfeited by the grantee deteriorating the subject, or neglecting to pay the annual duty for three years; except where there is no rent reserved, or the emphyteuta had been dispossessed of the property, or is not in enjoyment of it. But the Roman-Dutch law does not seem to favour forfeiture for non-payment, but opens doors of escape; and as the forfeiture is evidently only to secure the payment of rent, it is one of those cases in which equity will relieve from the forfeiture, and allow a compensation in damages. The right may be extinguished also by the consent of

the parties, or the total destruction of the subject of *emphyteusis*. This total loss would fall on the dominus; but any partial loss falls on the grantee. (*Inst.* iii, 24, 3 : *Grot.* ii, 40, p. 224, and iii, § 18, p. 357 : *Mackenzie, R. L.* ch. 7, p. 184.)

*Superficies* is a real right, arising on the alienation *Superficies.* by the owner of the surface of the soil of all rights necessary for building on the surface, a yearly rent being generally reserved, or a price paid for the grant. The property of the building remains with the proprietor of the land, but the grantee acquires a real right to the full possession and enjoyment of the edifice, either in perpetuity, or for a definite period, or until such time as the dominus pays the value of the building (except where it has been acquired by purchase or other similar title—*V. der K.* 410) according to the original grant or contract. The right is acquired and lost in the same manner as immovable property, and is sufficiently understood to be granted when the proprietor of the ground suffers another person to build thereon. The right is transferable during life, and may be the subject of will or other inheritance. Most of the houses in the Dutch forts of Ceylon are said to be held under ancient grants of superficies. (*Grot.* ii, 46, § 8, *§c.* p. 257 : *Sanders*, 45, 215 : *Mackenzie, R. L.* ch. 7, p. 185.)

*Census* is the privilege to receive a certain yearly *Census.* irredeemable income, and appears to have been similar to a rent-charge; it is created by being reserved on

alienation, or by testament. Like a rent-charge, it carries no right of forfeiture; and though not leviable by distress, it contains a right of pledge. It is acquired, transferred, and lost in the same manner as other immoveable property. (*Grat.* ii, 46, p. 256. *Bl. Com.* 2, 42.) •

## CHAPTER XVIII.

## MORTGAGES.

THE fourth and last sort of real rights is the right of pledge, whereby anything is specially bound to the creditor for further security of his debt. (*V. der L.* p. 173.)

The oldest form of the contract of pledge was that of *mancipatio*, or absolute sale of the thing, subject to a contract of *fiducia*, or agreement of redemption. (*Sandars*, 418.) This closely resembles the English legal mortgage, which is a security created by means of a transfer by a debtor to his creditor of the legal ownership of real and personal estate, subject to be defeated on the discharge of the debt. (*Sm. Law of Prop.* 340.)

Mancipatio  
and English  
mortgages.

There are, however, so many things to which *mancipatio* was considered inapplicable, that the more simple contract of *pignus* quite superseded, in Roman law, the *mancipatio contracta fiducia*. A further simplification of the contract or pledge was the *hypotheca*, in which the thing pledged remained with the pledger. The *manci-*

*patio*, it may be observed, transferred both the property and possession of the thing pledged; the *pignus* gave the possession to the creditor, but left the property in the thing with the debtor; the *hypotheca* left both the property and the possession with the debtor. (*Sandars*, p. 418.) In speaking of "mortgage," we mean *hypothec*, not *pignus*; for that which is legally a pledge is strictly no mortgage, as it does not give to one creditor any right above another (*Grot. ii*, 48, § 9, p. 261). Mortgage is a right over the property of another which tends to the security of a *jus in personam*; so that a person lending money on the mortgaged property shall receive satisfaction from it before another who has no older or better right for his debt. (*Grot. ii*, 48, § 1, p. 260: *V. der Ln. i*, 12, p. 173.)

What may be mortgaged.

All property possessed either in full or qualified dominion may be mortgaged. This, then, affects all things immoveable and moveable; and all income derived from them, such as personal usufruct, *emphyteusis*, quit-rents, and rural servitudes, may be mortgaged; except, according to Grotius, urban servitudes and agricultural instruments. (*Grot. idem*, §§ 2 and 3: *V. der Ln. idem*, § 2.)

Who may mortgage.

All persons capable of alienating may also mortgage; as, for example, the master of a ship may in certain cases sell the ship, and he may also charge it with bottomry; and minors and bankrupts who cannot alienate cannot also mortgage. (*Grot. idem*, §§ 4-6: *V. der Ln. idem*, §§ 2 and 3.)

Mortgages are either legal or conventional: a right of mortgage given by operation of law is termed a *legal mortgage*, and also a *tacit hypothec*. Mortgages arising from the agreement of the parties themselves are termed *conventional mortgages*. (*Grot. idem*, §§ 8 and 9: *V. der Ln.* i, 12, § 1, p. 173.)

Legal and conventional mortgages distinguished.

The right of legal mortgage appertains: 1. To a receiver of rents or *census* over the tributary property, for the recovery of his *census*. 2. To persons entitled to fines, or quit-rents, &c. as being a right reserved by the original owners of the property. 3. To those who have lent money for, or furnished materials for, or have contributed their skill to (as masons, carpenters, builders, and others) the *repairs* of a house or ship (but not for ornaments and improvements).\* 4. To him, also, who has become security for the necessary preservation or support of the property placed under his care. 5. To any one who has advanced money for medical attendance or funeral expenses, over all the deceased's property; and he possesses this privilege even before mortgage creditors.† 6. To the Crown, on the goods of those employed in collecting the revenue; and also on the goods of its debtors, except in cases of fine; though, according to Van der Linden, if the estate is insolvent,

Legal mortgages.

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\* Grotius includes the "building" of a house or ship also; but Van der Linden and Van de Keesel contradict his opinion.

† Van de Keesel (318) says this is not a tacit mortgage; but, on the terms of his own ruling, it clearly is so.

the Crown has no further right than other creditors.\*

7. To wards, on the property of the guardian to make good loss accrued by mal-administration, and even for debts due by the guardian himself previous to his guardianship. The same rule applies to curators, and also to a stepfather or stepmother, with whom the guardian-mother or guardian-father has contracted a second marriage, in all cases where community of property has been admitted in the second marriage. (*V. der K. Art. 422.*)

8. To the landlord of a house or lands, upon all the moveable property brought thither by the tenant, as also upon all the emblements and fruits of the land, even those which have been carried into barns. Van der Keesel says (*Art. 423*), "This right should be exercised, or, in order to preserve it, the things should be put under arrest, before they are carried away from the land. At some places it may be exercised even within a month after the removal."

9. To bleachers of linen, or the like, for their charges. They may detain the linen for wages previously due to them, and have also a right of preference if they have delivered them (as they ought) to the assignee of an insolvent's property to be sold with his other effects.

10. To towns and villages, on the property of their receivers.

11. To churches, on the goods of the administrators of the church property.

12. To the master of a

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\* See also Van de Keesel, Articles 219 and 220.



ship, on the ship and cargo, for his freight. 13. To the freighter or merchant, on the ship belonging to the master, for compensation of his property sold by the master in cases of necessity. 14. To a factor or agent, on the goods of the principal, for previous advances to the owner on these goods; conversely, a merchant should be preferred to other creditors, in respect of the price which his factor or agent has realized from his merchandize, and in respect of merchandize which the factor has purchased with the merchant's money, even in his own name, as long as the same is to be found in his estate. 15. To a woman who has married without community of goods, on the property of her husband, for the restitution of the property brought by her on marriage, or acquired by her during marriage. 16. To legatees, on the property of the testator, for the security of their legacies. 17. To the transferee of property, under an invalid transfer, for the expenses he has been put to for the support of the transferor on payment of his debts. (4380, *D. C. Kandy*, 9 Oct. 1833: *Austin*, 20.)

A conventional mortgage is that which is not like a legal mortgage, induced by operation of law, but takes place by express agreement of the parties, and relates either to moveable or immoveable property. Conventional mortgages. Conventional mortgage is of two kinds, either general or special.

A general mortgage affects both moveables and immoveables, if properly effected, and continues in force so long as the property which is liable remains in the

hands of the mortgagor or his heirs; but if the property should come into the possession of a third party, then the mortgage would be inoperative, if the possessor had acquired the same property for a valuable consideration, *titulo oneroso*; but if he had acquired it by a lucrative title, then the property would remain subject to the general mortgage.

Special mort-  
gage.

There may be a special mortgage, both over moveables and immoveables; and in the case of moveables it can be effected either with or without delivery of possession; it is valid in the case of possession, however effected, so that it is clearly manifest.

Conventional  
mortgages,  
how effected.

No mortgage of land or other immoveable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or encumbrance affecting land or other immoveable property, is of force or avail in law, unless in writing and signed by the party making the same, or some person duly authorized by the party, in the presence of a notary and two or more witnesses present at the same time; and unless the execution of such writing, deed, or instrument, is duly attested by such notary and witnesses. (*Ord. No. 7 of 1840, § 2.*) Such mortgage or deeds may be also executed in the same manner before a District Judge, or Commissioner of a Court of Requests of the district where the party making the deed, or his attorney signing for him, resides; or in the presence of some justice of the peace of such district appointed

by the governor in that behalf, and duly gazetted. The execution of such mortgages and deeds must be certified at the foot by such judge, commissioner, or justice. (*Ord. No. 17 of 1852, § 1.*) In consequence of these ordinances, the Supreme Court has refused to give effect to parole mortgages. (296, *C. R. Pedro, 17 Jan. 1863.*) Yet if land has been mortgaged by parole, the land can be reclaimed (20057, *D. C. Kandy: Austin, 116*); but it is a question whether in equity the owner ought to have relief, unless he submits to the equitable claims of the mortgagee, when the mortgagee is in legal possession of the land. (See 296, *C. R. Point Pedro, above, and Lorenz. R. 278.*)

A special mortgage (*pignus praetorium*) may be created by order of a court, without previous proceedings at law, to secure a thing in litigation, and in such case is termed a *judicial hypothec*. It gives no preference as long as effectual execution does not follow it. Thus, in the security bond given by an administrator to perform his duty, the administrator may, instead of giving personal security, mortgage property in the bond by way of security, by omitting what relates to the sureties, and inserting the usual (or other) clause of hypothecation. Such a mortgage is valid without notarial execution, as the provisions of the Ordinance of Frauds and Perjuries refers only to conventions between parties: nor need the words of hypothecation be strict; they are not material, as long as the intention to mortgage appears. (4011, *D.*

Judicial  
hypothec.

*C. Jaffna, 12 July, 1843; Coll.: 137, D. C. Colombo, 6 Dec. 1859.*) Similar remarks apply to the "bond to prosecute appeal." (*Form 2, p. 104, R. and O.*)

The provisions in clause 2 of the Ordinance No. 7 of 1840, refer to conventions between parties, and not to judicial hypothecs constituted by order of a court. (*137, D. C. Colombo, 6 Dec. 1859.*)

Mortgage of  
moveables.

A mortgage of moveables can only be effected with actual delivery of possession (7 of 1840, § 21); but it is no matter how the same is otherwise effected, provided the intent to pawn is clearly manifest. The latter kind of mortgage is more properly treated of under *pignus*, or pawn. (*Grot. ii, 48, § 26-9, p. 265.*)

A vendor may stipulate for a right of pledge in the property sold, on default of payment. (*Grot. ii, 48, § 30, p. 266.*)

The effect of a mortgage is the *right of preference*.

Preferent  
right over  
subsequent  
sale.

1. Thus a mortgage has preference over a subsequent sale, which must be considered subject to the previous incumbrance, and as to which it is the duty of the purchaser to make enquiry; if the purchaser is defrauded by the seller, his remedy is against him, and not against the mortgagee. (*3149, D. C. Amblangodde, 6 Sept. 1834; Morg. D. 22.*) Similarly, the mortgagee can, upon such sale, proceed against the seller, who is the party liable under the mortgage, or against the mortgaged property. (*Nell's R. pp. 113-22.*)

Over subse-

The holder of a mortgage prior in date to a judg-

ment is entitled to a priority of payment; and the property is first liable to discharge such mortgage, if the money due on it was really advanced, and the mortgage duly executed. (2437, *D. C. Galle*, 2 Nov. 1836; *Morg. D.* 103.)

quent judgment.

A special mortgage (and also a tacit or legal mortgage) of immoveable property, if properly effected and of a more recent date, is, by the general law of Holland (though not in the civil law), preferred to a prior general conventional mortgage. (*Grot. B. ii*, ch. 48, § 34: *V. der K. Art.* 436-7: *V. der Ldn. B. i*, § 4, 178: *Domat, B. iii*, tit. 3, § 2, p. 5.) Where the mortgages are of equal force, by the universal and long established practice of Ceylon, a mortgage with transfer of the possession of the title deeds of the land mortgaged is, though more recent in date, to be preferred to a mortgage by mere contract. (3435, *D. C. Galle*; *Coll.* 3 Jan. 1838; *Morgan*, 204.)

Over other mortgages.

A prior security by general mortgage and notarial bond is held to have a prior lien on the debtor's property, and preference of payment over a subsequent notarial bond. (8142, *D. C. Kandy*; *Austin*, 35: 6679, *D. C. Colombo*, 19 Sept. 1840.) But in the case of the mortgage of a moveable effected by delivery, it would seem that such a mortgage does not take precedence of a subsequent special mortgage, or of a prior general conventional mortgage. (*Van der K. art.* 437.)

With these exceptions, the rule with regard to mortgages is, "*qui prior est tempore potior est jure.*" Where

Priority the foundation of preference.

there are several general mortgages, the oldest ranks as first, unless the older is by a private, and the latter by a notarial instrument. The older special mortgage is preferent to the younger; and, since a tacit or legal mortgage has the same force as a special mortgage, it is preferred to a subsequent special mortgage. This rule obtains, even if the subsequent mortgagee had no notice of the prior mortgage. (*Grot. B. ii, ch. 48, § 36: 35, V. der K. art. 437: V. der Ldn. B. i, ch. 12, § 4, p. 279: No. 13026, D. C. Cultura: Lorenz, R. p. 5.*)

Claims prefer-  
ent over  
mortgages.

The preferent right of mortgages is subject to certain exceptions.

The Crown's  
preference.

It has been shown before that the Crown has a legal mortgage on all property of officers employed in the collection, charge, receipt, or expenditure of the revenue. This right of legal mortgage accrues over all the public officers' or accountants' property he possesses at the time of his appointment, on the day of his appointment, and over property subsequently acquired the moment he acquires it. (*Ord. No. 14 of 1843, § 4.*) And the Crown has an absolute preference of payment over all other debts contracted, subsequent to appointment, by its public officers or accountants. (*Ibid. § 5.*)

And if the public officer's sureties make good to the Crown his default, they acquire the same remedy as the Crown against the defaulter, *without* any cession of action. (24825, *D. C. Colombo, 30 Dec: 1859.*)

Over Crown  
debtors.

The Crown also possesses a general hypothec over

the property of its debtors, and has, at common law, a right to prevent all alienation of such property; but this right does not commence until the debt has actually accrued due, except in an extreme case; as where a party is endeavouring to alienate his property obviously with the fraudulent intent of defeating a debt about to become due. (6975, *D. C. Kandy*, 29 July, 1835: 28, *Austin*: 56, *Morgan*.) But when the debt has accrued, the government agent, or his assistant (or some person authorized in writing by the former), within his province or district, *may*, upon his own knowledge of any default of payment by a Crown debtor, or on notice given him of any Crown debt, immediately seize, take, and keep in safe custody, though without removal (except where there are no adequate means of safe custody at the place of seizure, and no sufficient security given for the value of the property), all the property of any Crown debtor to an amount computed to be sufficient to cover the debt and the costs attending the same.\* (*Ord. No. 14 of 1843*, § 2.) And, within seven days at the farthest (exclusive of Sundays and holidays) after seizure, a libel or information of the debt must be filed in a competent court; and the court, on the filing of the libel or information, together with the certificate of the property seized, signed by the person making the seizure, is required to deliver to the fiscal a warrant to

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\* Query, the debt, the seizure, or both?

sequester the debtor's property. Further proceedings are in the ordinary course. (*Ibid.* § 3.) It is discretionary for the government agent to proceed under these clauses, and not imperative upon him; and if recourse is not had to the remedy given, the remedy at common law remains. (16417, *D. C. Kandy*, 3 Dec. 1844.)

Previous mortgages and liens not affected above Crown rights.

These rights of the Crown do not affect any special mortgage of immoveable property of a date prior to the claim of the Crown, if duly executed before a notary, or person appointed by government to pass deeds; and do not affect any legal lien, mortgage, or privilege entitled to preference over such prior special mortgage according to Roman-Dutch law. (*Ibid.* § 6.)

Previous transfer of moveable property not affected by these Crown rights,

No sale, pledge, transfer, or alienation of moveable property, upon good consideration and *bondā fide*, prior to the date of the execution of the Crown upon any judgment or award of any debt, fine, penalty, or forfeiture, is invalidated by anything in the cited ordinance. (*Ibid.* § 7.)

unless mortgages and transfers are fraudulent.

All gifts, grants, sales, transfers, mortgages, bonds, suits, judgments, and executions in fraud of the Crown are void; and the parties thereto, knowing the fraud, are liable to a fine of one year's value of the immoveable property, and the whole value of the moveable property, as well as the consideration given for the same, and to a year's imprisonment, with or without hard labour. (*Ibid.* § 8.)



When the debt secured by mortgage becomes due, the creditor is not at liberty to sell the pledge or thing mortgaged without a decree of the court, or judgment to that effect: he may not even stipulate, by contract, for a right of forfeiture of *dominium* in case of non-payment (24714, *D. C. Kandy*, Nov. 4, 1853: *Austin*, 168: also *Grot.*)<sup>o</sup>; but he may produce to the court an act of *willing condemnation*, if the obligation contains this clause, or default thereof, he may sue the debtor for payment, and conclude that, on default thereof, the mortgage may be declared bound and executable; so that, being sold on judicial decree, the mortgagee may obtain his due. (*Grot.* ii, 48, § 41, p. 268: *V. der Ldn.* i, 12, § 5, p. 180.)

The remedy  
of the  
mortgagee.

Even should the mortgaged property come into several hands, the mortgagee holds his full right over each portion. (*Grot.* ii, 48, § 42, p. 268.)

If, in addition to mortgage, it is agreed that the mortgagee shall hold the land in lieu of interest, he may sue to eject a person holding by a title subject to the mortgage. (18348, *D. C. Kandy*, 23 Feb. 1847; *Austin*, 95.) Moreover, the mortgagee can follow the land specially mortgaged to him. (29689, *D. C. Kandy*, 13 Aug. 1858.)

With respect to the sale of things given in pledge, such as life rents, annuities, rent-charges, &c. deposited with the creditor as security, among which are also included government securities, a judicial decree is also

necessary; for, although the mortgagee is generally accustomed to insert in the mortgage deed a covenant that, in default of payment, he shall be entitled to sell, which covenant is lawful, yet it is more prudent, in this case, previously to proceeding to a sale, to obtain the authorization of the court. (*V. der Ldn. B. i, ch. 12, § 5, p. 181.*)

By the Roman-Dutch law, a subsequent creditor, and in equity a stranger, by advancing money to pay a mortgage debt, stands in the place of the original mortgagee. (*Grot. ii, 48, § 43, p. 269: 17054, D. C. Callura, 21 July, 1859.*)

How mortgage is terminated.

The right of mortgage is put an end to:—

1. By payment of the debts; by *novation*, or accepting another security; by compensation, or set off; release of the debt; merger (*i. e.* when the mortgagee becomes owner of the *dominium*), or the like.

2. By release of the thing mortgaged; the debt then becoming only a concurrent and simple contract, or unprivileged debt.

3. By alienation of the thing mortgaged (either by sale or mortgage to another, without reservation of his right), with the express or tacit consent of the mortgagee. There must be consent; the bare knowledge of the mortgagee that his mortgaged property is going to be sold is not such tacit consent as will discharge his mortgage. (*V. der K. 442.*) And it by no means follows, that, because a creditor does not assert his right

at a fiscal's sale so earnestly as he might have done, he has forfeited his right to recover the debt due on the mortgage of the land sold. (2507, *D. C. Chilaw*, 13 *Jan.* 1836: *Morgan*, 72.)

4. By the destruction of the thing mortgaged.

5. By effluxion of time when limited by the mortgage deed.

6. By prescription.

## CHAPTER XIX.

## OBLIGATIONS.

Obligations  
defined.

WE now pass to personal rights, that is, rights which one person has against another, termed *jus ad rem vel personam* (see *ante*, p. 151). Such a right is generally spoken of as an obligation. An obligation is a tie of law which binds us, according to the rules of civil law, to render something, by making some payment, or doing or not doing something; conferring, of course, on the person in whose favour the obligation is made a right by law to exact the performance of it. (*Inst.* 3, 13, p. 1.)

Natural  
obligations.

Obligations may, in the first instance, be divided into natural and civil. A natural obligation exists where one person is bound to another by any law of nature, as duty, good faith, gratitude, &c. though he cannot be compelled by a civil action to its performance. Natural obligations give no right of action; yet they are so far of force, that when a party under this obligation has made a voluntary payment, he cannot recover it

back by any action. (*D. 12, 6, 19: V. der Ldn.* p. 200.)

Civil obligations are of four kinds: those arising— Civil obligations.  
 1. *Ex contractu.* 2. Those *quasi ex contractu.* 3. Those arising *ex maleficio*, or *delicto.* 4. Those *quasi ex maleficio*, or *delicto.*

And a civil obligation, to be perfect, must have these requisites:—

1. A lawful cause or origin.
2. That the contracting parties are capable of binding themselves.
3. That the thing contracted for be capable of being the subject of an obligation. (*V. der Ldn.* i, 14, § 1, p. 187.)

Obligations *ex contractu*, or contracts, are again Contracts. divided into four, according as they are formed “by the thing, by word of mouth, by writing, or by consent” (*Inst.* 3, 13, 2); but, before examining each kind separately, there are certain principles common to all contracts which it is necessary to examine.

A contract is an agreement, that is, a promise made on one side and assented to on the other. Contracts and consideration defined. In point of form it may be either *unilateral*, that is made by one party only; or it may be *inter parties*, *i. e.* between two or more parties. (*Sm. M. C. L.* 30: *Ste. Com.* 53-4: *Broom. Com.* 252-69: *Add. Cont.* 2).

The return that the promisor obtains for his promise is termed the consideration, and may consist in a bene-

fit to the person making the promise, or in some loss, trouble, detriment, or inconvenience to, or charge or liability upon, the person to whom it is made, without any benefit to the promisor. (*Sm. Contr.* 135-8.)\* When such a promise is made, the promisor becomes bound to the promisee in terms of Justinian's definition of an obligation. It will be seen afterwards that the civil law divides considerations, also, into four classes.

First, *a contract must have a lawful cause or origin*; so that every contract that grows out of an illegal act, or stipulates for an illegal act, or if it is founded on an illegal consideration, is void. So that even a notarial deed, which is on the face of it good, may be avoided by adducing evidence of such illegality. (*V. der Ldn.* p. 187: *Sm. Contr.* 167-8: *Broom. Com.* 350-5: *Add. Contr.* 888-9.)

Before proceeding, therefore, to examine the nature of legal contracts, those will be pointed out that are illegal.

Illegal  
contracts.

Where a contract promises several acts, some lawful and some unlawful, it is void as to the unlawful acts only, if they are separable from the lawful acts. But illegality in any part of the consideration renders the whole contract void. (*Sm. Contr.* 167-8, and see *Grotius*, B. 3, ch. 1, § 43, p. 280.)

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\* Van der Linden practically gives the same definition, drawing from the same authority as the English authors, namely, Pothier on Contracts. (*V. der Lind.* i, 14, § 2, p. 188.)

Contracts may be illegal either by statute or by general law.

Contracts are void by general law in the following cases.

1. *Impossibilium nulla obligatio est.* (D. 50, 17, 185.) Impossible contracts.

When the particular act that is the subject of a contract is impossible; as if a man were to engage to build a house on land over which neither party has any right or control; or to deliver a beast of burden that is dead; or anything forbidden by nature or natural law. (*V. der Ldn.* B. i, ch. 14, § 6, p. 195: *Grot.* B. iii, ch. 1, § 42, p. 280.)

2. As all contracts derive their validity from the mutual and free consent of the contracting parties, consequently contracts are invalid and not binding when the parties are in error with respect to the object of the agreement; as when one thinks he is giving money as a loan, the other that he is taking it as a gift; or where two, in good faith, contract for the sale and purchase of certain goods, believing them to be silver, but which turn out to be plated; or where there is error as to the person we are contracting with, as when we take him for another person. (*V. der L.* B. i, ch. 14, § 2, p. 188: *Grot.* B. iii, ch. 1, § 19, p. 274.) Contracts made in error.

3. Contracts over things dedicated to religion, or used for interment (as, for example, a contract to use the same for other purposes than interment), or which are appropriated to the constant use of the state or public (as, Contracts over church or public property void in some cases.

for example, a contract for building a house on land taken from a public road), without the consent of the authorities, are void. (*Grot.* iii, 1, § 40, p. 279.)

Contracts interfering with justice.

As a general rule, contracts which have a tendency to interfere with the due administration of public justice are void. (*Sm. M. C. L.* p. 43: *Sm. Cont.* 188: *Broom. Com.* 355-9: *Add. Cont.* 892.) Thus, no contract may be made by a person who has no other interest in the matter for a share in a law suit. This kind of contract is called champerty; and even a contract having a tendency to encourage champerty is void. (*St.* § 294: *Reynell v. Sprye*, 1, *D. M. and G.* 660: *Grot. B.* iii, ch. 1, § 1, p. 279.)

On the same principle, all agreements tending to secure persons against the consequences of illegal acts; agreements whereby a person who has no interest in a matter in litigation agrees to aid in it (which is called maintenance) are void. (*Sm. M. C. L.* p. 49.)

Contracts opposed to public welfare.

Contracts inconsistent with public duties; or to do anything wrong or wicked by morality, or proclaimed so by municipal law, to evade moral or municipal law (*St.* § 294-7); or to remit or release crime not yet accomplished; or generally tending to secure persons against the consequences of illegal acts (as, for example, agreements for the suppression of criminal prosecutions; *St.* § 294); or contravening the objects of legislative enactments, and all other contracts which are injurious to the public welfare; are also void. (*Grot. B.* iii, ch. 1,



§ 42, p. 280 : *Sm. Cont.* 191, *et seq.* : *Add. Cont.* 891-2, 894, &c.)

Thus, contracts for the buying, selling, or procuring public offices, as tending to introduce in public offices persons who are unfit for them in respect of character and other qualifications, are void, as opposed to the public welfare. (*St.* § 294-5.)

Marriage brokage contracts, which are agreements whereby a party engages to give another a remuneration if he will negotiate a marriage for him, are void, and incapable of confirmation, as being against public policy and tending to influence free will. The money paid under them may be recovered back again, whether the marriage is an equal or an unequal one. (*St.* § 260-3 : 2, *Lead. Cas. Eq. 2nd Ed.* 178, *et seq.*)

Contracts interfering with free will — marriage brokage contracts.

Similarly, all agreements entered into as a reward for using influence over another to induce him to make a will for the benefit of the promiser, are void, as tending to immorality and to interfere with free will. (*St.* § 265.)

Agreements to influence testators.

On a similar ground, secret contracts made with parents or guardians, or other persons standing in a peculiar relation to one of the parties, whereby, on a treaty of marriage, they are to receive a remuneration for promoting the marriage or giving their consent to it, are held void (*St.* § 266-7 : 2, *Lead. Cas. Eq. 2nd. Ed.* 178, *et seq.*)

Contracts to facilitate marriage.

So, also, as interfering with free will, a contract is Contracts in

restraint of marriage.

void if it is expressly in restraint of marriage generally; or if it is so restricted that it is probable that it may virtually operate in restraint of marriage generally (*Scott. v. Tyler*; 2, *Lead. Cas. Eq. 2nd. Ed.* 105, 198, *et seq.*): as, for example, that a woman shall not marry a man who has not an estate of £500 a-year (*St. § 280*); or shall not marry till fifty years of age; or shall not marry any person residing in the same town; or any person who is a clergyman, a physician, or a lawyer, or any person except of a particular trade or occupation. (*St. 283.*)

Contracts in restraint of trade.

Contracts in general restraint of trade are void, as tending to discourage industry, enterprise, and just competition; and, if allowed, would enable capitalists to buy up a whole branch of industry, to the injury of the public. But, in order that a person may make or get a money sale for a trade connexion that he has expended money and labour in gathering, that is, to enable him to sell the goodwill of his business, contracts for a partial restraint of trade are allowed; as, from carrying on trade in a particular place, or with particular persons, or for a reasonable limited time. And a person may lawfully sell a secret in his trade or business, and restrict himself from using the secret. (*St. § 292: Benwell v. Tims*, 24 *Beat.* 307.)

Contracts of an immoral tendency.

The parties to a contract of immoral tendency cannot sue upon it. (*V. der Ldn.* i, 14, § 2, p. 190.) Thus, future illicit cohabitation is an illegal consideration, and

a contract founded on it is illegal, because it stipulates for an illegal *act*. In England, however, a deed given for past cohabitation, or previous seduction, is not void; and, though not an illegal consideration, is no consideration on which a simple contract can be founded; it is, in fact, no consideration, not only on account of its immorality, but because it cannot be estimated in damages; and being an executed consideration (if any), can only be supposed to be supported by a prior request. An English deed is good without a consideration; and, if therefore given on the ground of past cohabitation, is in fact a deed without any (not with an illegal) consideration; but a deed, in Ceylon, must be supported by a consideration that would support a simple contract; and, therefore, here, a deed founded on past cohabitation would be void; besides, in Ceylon, illicit cohabitation is utterly illegal, being punishable as an offence, and therefore in all views an illegal consideration; besides, we have already seen that agreements to secure persons from the consequences of crime are void.

When the consent of one of the parties has been extorted by undue violence, or fear of loss of life or limb, or of being deprived of liberty, the contract is void. The degree of violence must be determined by the circumstances—the violence or fear that would coerce a woman, child, or old man, could not be sup-

Contracts by  
persons not  
free agents  
void.

posed to intimidate a man in full vigour of life. (*V. der Ldn.* i, 14, § 2, p. 189: *Broom. Com.* 590-1.)

But equity goes a step further, and does not require so rigid a test, and protects a person, not a free agent, and not able to protect himself; as when the party is under duress, or the influence of extreme terror, or of threats, or of apprehensions short of duress, or even of imaginary terrors. (*Boyse v. Rossborough*, 6, *Ho. of Lords*, 2, 49.) Equity watches with extreme jealousy all contracts made by a person under imprisonment; and if there is the slightest ground to suspect oppression or imposition in such cases, it sets the contract aside. Also, circumstances of extreme necessity and distress may so entirely overpower free agency as to justify equity in setting aside a contract on account of some oppression or fraudulent advantage attendant on it. (*St.* § 239.)

As contracts require a free and mutual assent, therefore neither children, persons of unsound mind, nor persons in a state of intoxication, are capable of contracting as long as they remain such.

Contracts by  
minors.

All persons not of full age are legally termed minors, or infants; and, having in law no free will, cannot make a contract, except for profit alone. So that a contract by a minor to his own prejudice—as, for example, a sale of his reversion (14649, *D. C. Badulla*, 10 *Jan.* 1859)—is void; but contracts which are neces-

sary, as for his food, &c. (854, *D. C. Negombo*, 7 Feb. 1835; *Morg. D.* 32) (which is to his profit) and which are to his benefit, as a contract for wages, or for the absolute sale of his bodily or mental labour, are valid. Contracts which are neither certainly to his prejudice, nor necessary and for his benefit, are neither void nor absolutely valid, but are voidable; these he may, by confirmation, or in some cases by mere acquiescence, after he becomes of age, render himself liable to perform. (*Add. Cont.* 941-3: *St.* § 341.)\* So that, if an infant enters into a contract, except for necessaries, no action can be maintained against him during infancy; but the contract, *if it may be* for his benefit, is not absolutely void, but voidable. If he does not confirm it after he attains his majority, it cannot be enforced against him. But if he confirms it, he becomes liable to an action upon it. (*Marshall*, 419: *Sm. Cont.* 273: *Add. Contr.* 442-3: *Broom. Com.* 566.)

There is, however, one exception to the above. If a minor has engaged in trade, at the time of his contracting, he is liable; the law considering that if a man has understanding and experience enough for commerce, he may safely be left to his own protection in the ordinary

Minors  
engaged in  
trade liable.

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\* Marshall asserts that, whatever be the nature of the debt contracted during minority, the minor, on attaining full age, can ratify it; but, by English equity, which latter is law in Ceylon, contracts entailing a certain loss, and entered into during minority, are void. This is consonant too with Grotius, who makes all contracts of an infant, except for profit alone, absolutely void; but yet permits the infant to contract validly in commerce.

concerns and dealings of life. (*Marshall*, 421 and 854 : *D. C. Negombo*, 7 Feb. 1835 ; *Morgan*, 32.) "The claim to relief from contracts founded on inexperience in business appears utterly inconsistent with following commerce as a vocation." (*Voet*, iv, tit. 4, par. 51.)

When minor  
not liable.

So, also, there is one case where the infant is never liable ; that is where he is living with his parents, and under their authority ; they, and not the minor, are liable, even for necessaries, as the law assumes that these are provided for him. (*Marshall*, 429.) But if he is an orphan, or is residing at a distance from his parents, and is not provided with necessaries by them, he may bind himself for necessaries. (*St. Eq.* § 240 : *Sm. Cont.* 260-9 : *Broom's Com.* 566, 569-71.)

An infant (not engaged in trade) cannot bind himself by borrowing money, nor by any mercantile contract, such as a bill or note ; nor by stating an account ; nor by a bond in a penalty, even for necessaries. (*Sm. Cont.* 270 : *Add. Cont.* 937 : *Broom. Com.* 567 : *Sm. Merc. Law*, 18.)

An adult who contracts with an infant is bound, although the infant be not. (*Sm. Cont.* 279 : *Add. Cont.* 937.)

Contracts and  
other acts of  
persons of  
unsound  
mind.

Neither idiots nor lunatics, so long as they remain such, are by the Roman-Dutch law capable of contracting, except by the interposition of their guardians and curators. (*V. der L.* i, 14, § 3, p. 190 : *Grot.* iii, 1, § 19, p. 274.) But this broad statement must be modi-

fied by the consideration that a person of unsound mind may not be under guardians or curators; and that, if he could not contract, he could not live. Also, there are certain cases in which it would be unjust to set aside the contract; and the English law accordingly provides as follows:—

1. A person of unsound mind is liable for the price of necessaries. (*Broom*. 609: *St.* § 228: *Manby v. Scott*, 2 *Sm. L. C.* 252-3.)

2. When a person of unsound mind, who is apparently of sound mind, and not known to be otherwise, enters into a fair and *bonâ fide* and *executed* contract for the purchase of property, and it has been paid for and fully enjoyed, and cannot be restored so as to put the parties in *statu quo*, such a contract cannot afterwards be set aside, either by the alleged lunatic or those who represent him. (*St.* § 228: *Moulton v. Camroux*: 4, *Exch.* 17, s. c. 18 *L. J. Exch.* 68, 358: *Beavan v. Mc Donnel*; 9, *Exch.* 309, 23 *L. J. Exch.* 94.)

3. This rule, which applies to an *executed* contract, does not altogether apply to an *executory* contract, especially where notice is given of lunacy before breach. (*Broom. Com.* 612.)

As these rules of the English common law are consistent with equity, the Supreme Court would probably hold them to be Ceylon law. In equity, contracts or other acts, however solemn, of persons who are idiots, lunatics, or otherwise of unsound mind, are set aside on the

ground of fraud. (*St.* § 227.) Whenever, from the nature of the transaction, there is not evidence of entire good faith (*uberiunde fidei*), or the contract or other act is not seen to be just in itself, or for the benefit of those persons, equity will set it aside, or make it subservient to their just rights and interests. (*St.* § 228: *Manby v. Bewicke*: 3 *K. and J.* 342.)

Contracts by  
intoxicated  
persons.

Those, also, who are in such a state of drunkenness as to have entirely lost the use of their reason, are incapable of contracting whilst in that state (*V. der L.* i, 14, § 3, p. 190), even though the intoxication is voluntary (*St.* § 233.) But the drunkenness must be such excessive drunkenness as to deprive him of the use of his reason and understanding. (*St.* 231-2, citing the civilians.) But if it is not that degree of excessive drunkenness, equity will not interfere, unless there has been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication, to obtain an unreasonable bargain or benefit from him. (*St.* 232.) Equity has, indeed, by refusing relief, indirectly sustained agreements fairly entered into by intoxicated persons, especially where the agreement was to settle a family dispute, and was in itself reasonable; but has not expressly sanctioned such contracts. (*St.* § 232.) But as a man cannot take advantage of his own wrong, the contract is not void, if made for goods which the party consumes or keeps and uses after he becomes sober. (*Add. Contr.* p. 91.)



The acts and contracts of persons of weak understandings, and who are liable to imposition, are void in equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, or artifice, or undue influence. (*St.* § 238. See also *Longmate v. Ledger*, 2, *Gif.* 157 : *Nottidge v. Prince*, 2, *Gif.* 246.)

Contracts by imbecile persons.

Alien friends may enter into any contract with any British subject in Ceylon, whether for lands (23754, *D. C. Negombo*, 28 *Jan.* 1860) or personal property, and may sue on such contract. If the contract is made in Ceylon (when it concerns personal property), it is expounded according to the law of Ceylon; but if out of the island, according to the law of the country where it was made; but only such remedy can be had in Ceylon as the law of Ceylon affords. (*British Linen Company v. Drummond*; 10, *B. and C.* 903 : *De La Vega v. Vianna*, 1, *B. and Ad.* 284.)

Contracts by aliens.

All contracts with alien enemies are wholly void, if made during war (*Brandon v. Nesbitt*; 6, *S. R.* 23), even upon the return of peace. (*William v. Pattison*; 7, *Lancet*, 439.) And a contract made with an alien friend is suspended during war (*Flindt v. Waters*; 15, *East*). Save that the alien enemy can be sued, if within the jurisdiction of our courts; but he cannot sue, unless he is a prisoner of war, and the contract is for his livelihood. (*Add. Contr.* 73.)

Contracts  
express or  
implied.

A contract may be either express or implied. (*Grot.* iii, 1, § 49, *et seq.* p. 281: *V. Lwn.* iv, 1, § 1, *et seq.* p. 314: *Marshall*, p. 454.)

An express contract is one in which one contracts with another, either by word of mouth or by writing. An implied contract is one in which one contracts with another by acts, other than by word of mouth, or by writing. The terms of an express contract are of course expressed verbally or in the writing. The terms of an implied contract, not being expressed, are implied by the law, on principles of reason and justice, from the acts of the parties. Thus, if one man, without any express agreement, render a service to another, which the latter accepts or adopts, the law implies that the latter will pay the former the value of his service. (*Ibid.*)

Contracts  
executed, or  
executory.

A contract may either be executed\* or executory, or executed as to one of the parties, but executory as to the other. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. An executed contract is one in which the main object of contract is actually performed. (*Sm. M. C. L.* 30: *Broom. Com.* 253.)

Express contracts are either written or verbal. Written express contracts are either by public or private instruments. Public instruments are also either judicial

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\* A deed is also said to be executed when it is notarially executed, or signed, sealed, and delivered; but "execute" is meant here to do, perform, or fulfil.

or notarial; therefore express contracts comprise judicial instruments, notarial instruments, private instruments, written contracts that are not solemn instruments, and verbal contracts. But verbal express contracts and implied contracts are called simple contracts; so that contracts are not only express and implied, executed and executory, but are also divided into written and simple contracts; so that we have:—

1st. Judicial instruments.

2nd. Notarial instruments.

3rd. Private instruments.

4th. Written contracts not solemn instruments.

5th. Simple contracts.

The latter two classes are generally called “parole agreements,” whether written or verbal, not being speciality instruments. Instruments relating to land, and executed before a District Judge, Commissioner of a Court of Requests, or Justice of the Peace, under No. 17 of 1852, instruments notarially executed, and private instruments executed as deeds, are generally, in professional phrase, called “deeds;” so that contracts may be also classed as:—

1. Contracts of record.

2. Deeds.

3. Parole agreements.

Judicial instruments (called, in England, contracts of record) are instruments acknowledged or executed in open court, and recorded in the presence of the party

making the acknowledgment. The only form used in Ceylon is the recognizance; that is, a public bond which a man enters into before some court or magistrate, with condition to do some particular act: as to appear at the sessions, to keep the peace, to pay debt, or the like. A recognizance does not create a fresh debt.

A recognizance is otherwise defined as a judicial instrument, or obligation of record, either to the Crown or a subject, before some Court of Record, or magistrate duly authorized, containing a condition to do some particular act. (*Broom's Com.* 261.)

Judicial instruments or contracts of record have this peculiarity, that they prove themselves; *i. e.* the bare production of the record is sufficient evidence of the existence of the contract. (*Sm. Contr.* 3, 4: *Add. Contr.* 2.)

Notarial acts are instruments in writing, signed by the party making them, or by some person lawfully authorized by him, in the presence of a District Judge, Commissioner of a Court of Requests, Justice of the Peace, or notary and two or more witnesses, and the execution of which is duly attested by the notary and the witnesses. (*V. der Ldn.* i, 17, § 2, p. 256: *Ord. No. 7 of 1832*, § 2: *Ord. No. 17 of 1852*, § 1.)

Consideration. By the law of Ceylon, all contracts whatsoever made in Ceylon (except perhaps recognizances) must have an adequate consideration, otherwise no obligation can be said to exist. (*Marshall*, p. 451: *V. der Ldn.* i, 14, § 2, p. 190.)

This rule applies even to deeds; but deeds have this Deeds. advantage, that the consideration is in the first instance presumed; *i. e.* the deed itself is *prima facie* evidence that it was given for an adequate consideration, only to be rebutted by satisfactory evidence to the contrary, which may be either written or verbal. This right to rebut cannot be taken away, even by a receipt on the deed for the consideration. (14502, *D. C. Galle*, 18 June, 1851: 33604, *D. C. Kandy*, 15 Jan. 1863: 191053, *C. R. Galle*, 28 July, 1859.)

A deed must not only be signed\* and attested, Delivery of deeds. but it must also be delivered; and so requisite is delivery, that of several deeds the one first delivered will prevail, though in point of date it is the last. In old deeds the delivery is presumed to have been at the time of execution. (10157, *D. C. Seven Corles (N.) Morg. D. 20.*)

The date of a deed is of itself quite immaterial to its validity. The important part is the delivery, and the object of the notarial attestation is to vouch for such delivery. (1863, *D. C. Matura*, Sep. 7, 1836; *Morg. D. 94.*)

Deeds of thirty years standing are, when accompanied with possession, to be generally considered as requiring no proof; but this rule is open to exception when the deeds are of a suspicious nature. In such cases, the best proof that can be got must be produced. Deed thirty years old. If the notary, writer, and all the witnesses are dead, the

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\* It need not of necessity be sealed.

party must prove them dead, and then prove their handwriting, or at least of some of them. (2657, *D. C. Batticaloa*, 15 *June*, 1836; *Morg. D.* 88: 2986, *D. C. Ruauvella*, 26 *Sep.* 1836; *Morg. D.* 246.)

Attesting witness.

One of the attesting witnesses is sufficient to prove a deed. (9548, *D. C. Colombo*, 24 *Aug.* 1836; *Morg. D.* 93.)

Unstamped deed.

A deed prior to 1823 is *void*, if not properly stamped under *Reg. No. 2 of 1817*. (2734, *D. C. Batticaloa*, 14 *Sep.* 1836; *Morg.* 95.)

Cancelling deeds.

The court will cancel a deed of gift signed under a wrong impression of the consideration and where the supposed consideration fails, but will give compensation to the other party for profits and expenses. (23, *D. C. Matelle*, 2 *March*, 1837; *Morg.* 141: *Smith's Eq. M.* 372.)

Execution.

A deed executed on a Sunday and not numbered, and no duplicate copy of which is filed in the District Court, is not invalid, but is suspicious. (5036, *D. C. Colombo*, 6 *March*, 1838; *Morg. D.* 261.)

Simple contracts.

A simple contract is a contract by writing (not being a deed), or by word of mouth, or by implication from conduct. (*Sm. Contr.* 32, 34: *Add. Contr.* 3.)

Their characteristics.

Simple contracts differ from deeds in the following particulars:—That, except in the case of bills of exchange and promissory notes, the consideration required to support them must be proved, and is not presumed *primâ facie*. They do not create an estoppel, except in

some cases, though they operate as an admission. They form no ground of action against the heir or devisee, even though he be expressly named in them, but bind the personal representative only. And they may be put an end to without a deed, a judgment, or a statute. (*Sm. M. C. L.* p. 33: *Sm. Contr.* 34, 127, 128: *Broom's Com.* 272, 303, 421, 422: *Add. Contr.* 4, 5.)

If, after a simple contract, a security by deed between the same parties is given in relation to the same subject matter, the right of action on the former becomes merged in the right of action on the latter, if the remedy by the latter is co-extensive with the remedy by the former, except, perhaps, where there is an intention, expressed on the face of the deed, that the previous security should remain in force (*Broom's Com.* 278-82: *Sm. Contr.* 23); and generally an express contract, if it can be proved, overrules an implied contract. (*Marshall*, 457.)

Merger.

In order to constitute the grounds of a legal right, the terms of a contract must be definitely and completely arranged. (*V. der Ldn.* iv, 1, §§ 2, 8, p. 314: *Broom's Com.* 303-5.) Except that it is not necessary in all cases to specify the mode or time of payment, or even the price itself. (*V. der Ldn.* i, 14, § 3, *et seq.* 201: *Marshall*, 454, and *Broom's Com.* 303-5.)

Requisites to a contract. Terms definitely settled.

In every contract, whether unilateral or inter partes, there must be a mutual and free assent, express or implied. (*V. der Ldn.* i, 14, § 2, p. 188: *V. der Ldn.* iv. 1,

Mutual assent necessary.

§ 1.) Consequently, contracts are invalid and not binding on persons who cannot by law assent, as minors and persons *non compos mentis*; or when the parties are in error with respect to the object of the agreement; or when the consent of one of the parties has been extorted by violence or fear; or when the assent has been obtained by fraud; or contracts that the law forbids a man to assent to, as being repugnant to justice, good faith, or good morals. These points have been more fully treated of under the head of illegal contracts. (*Grot. iii, 1, § 19, p. 274: V. der Ldn. iv, 2, § 2, p. 316: V. der Ldn. i, 14, § 2, p. 188-90.*)

Mutual  
assent.

If a contract merely professes to be an agreement by one person for the benefit of another, and there is no assent or acceptance, expressed or implied, on the part of the latter, it will not bind. And the assent must be to the same thing, and to the precise terms offered; so that where one party makes a proposal, and the other accepts, subject to some variation or condition, the former is of course not bound by the acceptance. (9645, *D. C. Colombo, 8, 7 May, 1836; Morg. 80: Sm. Contr. 120-22: Broom's Com. 255: Kerr's Bl. Add. Contr. 15, 16.*)

Rescission of  
an offer.

An offer may be withdrawn at any time before it is completely and unconditionally accepted, but not afterwards. (*Sm. Contr. 123: Add. Contr. 16.*)

Acceptance by  
post.

The contract is complete as soon as a letter containing an acceptance of a proposal is posted, though it may



never reach its destination. (*Broom's Com.* 305: *Add. Contr.* 16.)

By the Ordinance of Frauds and Perjuries\* (No. 7 of 1840, § 21), no promise, contract, bargain, or agreement, unless it be in writing, and signed by the party making the same, or by some person thereto, is of any force or avail in law for any of the following purposes:

When the contract must be in writing, signed, when not a deed.

1. For charging any person with the debt, default, or miscarriage of another.

2. For pledging moveable property, unless the same shall have been actually delivered to the person to whom it is alleged to have been pledged.

3. For the purchase or sale of any moveable property, unless such property, or part thereof, shall have been delivered to the purchaser, or the price, or a part thereof, have been paid to the purchaser.

4. For establishing a partnership, where the capital exceeds one hundred pounds.

Where the contract rests upon correspondence between the parties, it is sufficient if such correspondence, upon a fair interpretation of it, imports that the agree-

What writing sufficient.

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\* This ordinance, as far as concerns the subjects alluded to, is nearly identical with the English Statute of Frauds, § 4, on the same subject, and the decisions upon it make it liable to similar rules of interpretation. It is, also, on these subjects identical with the repealed Ordinance No. 7, of 1834, which is in its turn a consolidation of No. 4 of 1817, No. 20 of 1824, and the Proclamation of 28 Oct. 1820, and in these subjects so closely follows No. 4 of 1817, that decisions on No. 4 of 1817, &c. and Marshall's remarks on No. 7 of 1834, may be accepted still as authorities.

ment is actually concluded, and no longer rests upon treaty and negotiation. (*Marshall*, 207.) And generally several documents may together constitute the contract, if sufficiently connected in sense among themselves, without the aid of parole evidence. (*Sm. Contr.* 113: *Add. Contr.* 167.)

What signature sufficient.

The signature of the party sought to be rendered liable on such a contract is sufficient. (19954, *D. C. Colombo, Lorenz*, 165.) And a writing in the hand of the party himself, amounting to an agreement (in cases of sale or purchase), is sufficient, though not literally signed by him. (*Marshall*, 207.) So that if an offer (as by letter) is made, containing an agreement, &c. within the statute, and signed by the party making it, the assent (if unconditional) may be verbal. (*Marshall*, pp. 205-6; where it was held, that an offer of land by letter, followed by a survey ordered by the receiver of the letter, was sufficient. *Vide. Etiam Sm. Merc. Law*, 503.)

Signature by agent.

It is to be observed, that, though the signature must be in writing, the authority given to "some person lawfully authorized" need not be in writing, but may be verbal. (109, *D. C. Cultura*, 27 Aug. 1834: 8249, *D. C. Colombo*, N. 29 June, 1836; *Morg.* 20 and 89.)

Three ingredients in a simple contract.

In a simple contract there must have been a consideration moving from the contractee, or some one influenced by him, to the contractor—a request to the contractee by the contractor to do, or to induce some one else to do, the thing constituting the consideration;

a promise to the contractee by the contractor grounded on such consideration. (*Broom's Com.* 308, 317, 331-2 : *Sm. Cont.* 137.) The request and the promise are sometimes implied by law.

A consideration, capable of supporting a simple contract, may consist of any benefit to the person making the promise ; or any loss, trouble, detriment, or inconvenience to, or charge, or liability upon, the person to whom it is made, though without any benefit to the promisor. (*Sm. Cont.* 135-8.)

What is a consideration.

The forbearance of proceedings at law, or in equity, grounded on a legal or equitable right of suit, though it be only a doubtful right, is a sufficient consideration for a promise, by either party liable. (*Sm. Cont.* 146-7, 150 : *Add. Cont.* 12.)

Adequacy of consideration.

The consideration of natural affection, or a mere moral consideration, is not such a consideration as will support a contract. (*Sm. Cont.* 163 : *Add. Cont.* 5 : *Schw. N. P.* 45, 52-3.) Yet natural obligations are so far of force that, when the party under this obligation has made a voluntary payment, he cannot recover it back by any action. (*V. der Ldn.* i, 14, § 9, p. 200.)

As regards the consideration, there must be a privity (civil intercourse—*V. der Ldn.* 314) ; that is, a connexion, as regards the transaction to which the contract relates, between the party charging and the party charged ; or the party to the contract in whose behalf any act is stipulated must have an interest (capable of estimation

From whom consideration must move.

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From whom consideration must move.

in damages) in its being done or not being done. (*V. der Ldn.* i, 14, § 6, p. 196.) So that the consideration must proceed from the party to whom the promise is made, or from a third person moved or affected by him. (*Sm. Cont.* 137: *Broom's Com.* 317.)

Considerations may be executed, or they may be executory, contemporaneous, or continuing. An executed consideration is one that has already taken place, as if one has done a service for another at the latter's request; the service so done is an executed consideration, and will support a promise subsequently made; an executory consideration is one which is yet to take place at the time of the making of the contract; as, for example, future works and labour that are to be paid for at a given time. A contemporaneous consideration arises where two persons simultaneously and reciprocally promise to do certain things; the promise of the one party being the consideration for the promise of the other. (84, *D. C. Manacr*, 1 *March*, 1837; *Morg. D.* 140.) A continuing consideration is one which, though commenced at a past time, continues to subsist at the date of the contract.

An executed consideration must be founded on a previous request, express or implied, to the promisee by the promisor, to do the act constituting the consideration; for it would not be right to place another under a legal obligation grounded on a mere gratuitous act. An executory consideration implies a previous request by

the contractor ; as where A promises to remunerate B, if B will perform a certain thing. (*Sm. Cont.* 155-6 : *Broom's Com.* 308-10.)

An implied contract being one in which one contracts with another by acts other than those by word of mouth, or by writing ; it is plain that, if the contract is made up of a request, executed consideration, and a promise, that both the request and the promise may be derived—*i. e.* implied—from acts.

Where the request or promise is implied.

A prior request is implied (though the promise must be express) in the following cases :—

1. Where one person has voluntarily done that which another was compelled to, and the latter has afterwards expressly promised to repay, or indemnify him ; as if A pays a debt for B, and then B promises to repay A.

2. Where A lends money for B, and B afterwards promises to repay A.

A prior request is implied ; but the promise may be express or implied, according to circumstances, in the following cases :—

1. Where the consideration, moving from one party, is simultaneous with the promise of the other party.

2. When the consideration is continuing.

Both a prior request and the promise are implied in the following cases :—

1. Where a person has been compelled to do that which another person ought to have done, and was com-

pelled to do. As if A and B are jointly and severally (or *in solidum*) bound to C, and B being unable to pay his share, C compels A, by a suit, to pay the whole; the law then implies that A has requested B to pay to him (A) his (B's) share, and that B has promised to do so.

2. Where a person takes the benefit of an executed consideration, or otherwise adopts a contract, both request and promise are implied.

In the following cases, a promise is implied, the request being expressed:—

1. If one requests another to pay money for him to a third person, whether in discharge of a debt, or as a gift, or as a loan, a promise from the first to the second to repay to the second that money is implied.

2. If one requests another to make himself legally liable to pay money for him to a third party, the law implies that that express request contains also a request actually to pay the money when necessary; and, when it is paid, a promise to repay it.

These eight examples of implied contracts will be found, but differently classified, in *Sm. Cont.* 158-65: *Broom's Com.* 309-11, 313, 315-16: *Add. Contr.* 11-23.

Two separate and distinct promises cannot be supported by one and the same executed consideration; for if the consideration is an equivalent for the first promise, there is nothing of it left to support the second, and the second is a *nudum pactum*. This is obviously



true, whether the promises are express or implied; so that, when the law implies a certain promise from a consideration exacted, the consideration will not uphold an express promise as well as the implied promise; or the consideration is said to be exhausted.

## CHAPTER XX.

## REAL CONTRACTS.—DONATION.

THAT which Justinian calls a “contract formed by the thing,” are called by the moderns “real contracts,” because they are not perfected until something has passed from one party to the other. These were by the Romans limited to *loan*, *deposit*, or *pledge*; but to these the Dutch jurists have added *donation*.

Justinian treats them merely as a means of acquiring property (*Inst.* 2, 7, pr. 1, 2); but as they create that “tie of law” (*vinculum juris*) between the parties themselves which constitutes an obligation, they are not improperly transferred to this head by Grotius and his followers.

*Donation*, or *gift*, is an agreement whereby any one, through benevolence or generosity, gives or grants something irrevocably to another who accepts it. (*V. der Ldn.* i, 15, § 1, p. 213: *Grot.* iii, 2, § 1 and 2, p. 283.) Gifts made so as to be complete and effectual during the life of the giver, are called gifts *inter*

*vivos*; but sometimes they are made on the condition that they are not to take effect until the death of the giver, or upon the event of his death happening in some great peril; such gifts are called *donationes mortis causa*.

In general, all persons can make donations in favour of others, except those prohibited by law. These are—

Who may  
make gifts.

1. Parents in favour of children who are still minors and under their tutelage. (*V. der Ldn.* § 214, quoting *Grot.* iii, § 2, p. 8, and *Voet, de donat. n.* 6: 1, *Donat.* 186: 4347, *D. C. Jaffna*, 25 Feb. 1851.) Though Van der Keesel asserts that, "since the reason of the rule regarding *patria potestas* is different amongst us from what it was among the Romans, there is nothing to affect the validity of a donation made by a father to a son whom he has *in potestate*, and accepted by the son, if he has attained puberty, or, if below infancy, by some public officer." (*V. der K.* 485.)

2. Husband and wife to each other, except so far as the donation is confirmed by death; that is, that after the husband's death (without revocation) the gift can be sustained. (*V. der Ldn.* i, 15, § 1, p. 214; 1, *Burge*, 275: *Grot.* iii, 2, § 9, p. 284: 10164, *D. C. Colombo*, 20 Nov. 1852.) This arises from the community; and although the reason disappears when the community is excluded, yet the Roman law that all gifts between husband and wife are strictly prohibited, seems to have been fully adopted by the Dutch jurists.

3. Gifts by a married woman without the consent of her husband, although the husband may give without the consent of the wife, unless, from the special circumstances, his object appears purposely to prejudice her.

4. No minor to his guardian: no prodigal to his curator: no sick person to his physician; particularly when these donations appear at all extravagant. We have seen before that equity impeaches even contracts, and, consequently, gifts that are an abuse of a confidential relation.

5. No minor who may have married without lawful consent of parents, or others, can make a legal gift to the spouse or betrothed. (*Grot.* iii, 2, § 7-10, pp. 284-5: *V. der Ldn.* i, 15, § 1, p. 214: *V. der K.* 485-6: *Sandars*, 232.)

Donation of  
all property,  
how far valid.

Everything that may be the subject of commerce may be the subject of donation. Not only of part of a particular thing, but also the entire whole; as, for example, an inheritance which has fallen to the donor. If the donor gives the whole of an inheritance, he having but a share, his gift is valid to the extent of his share, and the heirs are shut out; but if he give less than his share, the heirs take the overplus. (1026, *D. C. Ratnapoora*, 6 May, 1837; *Morg. D.* 153.) A donation *inter vivos* of all property, present and future, is not good in law, even if it be for charity, because the power of making a last will is thereby impeded. (*Grot.* iii, 2, § 11, p. 285: *V. der Ldn.* i, 15, § 1, p. 214.)

\* The English statutes, common law, equity, and the civil law, are almost identical as to the avoidance of fraudulent gifts; and it may be laid down for Ceylon also, that if a person makes a gift of any property which is liable to the payment of debts (unless for a valuable consideration, and *boná fide*, to a person who has no notice of a fraudulent intent), and at the time, or immediately afterward, he is indebted to such an amount that he has not ample means available to pay the debts, such a gift is fraudulent and void, as against the creditors, to the extent to which it may be necessary to apply the property conveyed in payment of debts. (*Sm. Eq. Man.* 88.) But another part of the same doctrine is not so clearly imported into Ceylon, because it depends more on statute than on equity; that is, that a gift is deemed void, as against a subsequent purchaser or mortgagee, whether with or without notice, and even after suit to establish the prior gift, if not on *valuable* consideration, although it may be *boná fide* and on *legal* consideration, or on divers valuable considerations, not naming them; for the 27, Eliz. c. 4, statutably infers fraud, and will not suffer the presumption to be rebutted: but certainly the courts of Ceylon would in such a case be very ready to infer fraud. As between the parties, such gifts are good; and of two such gifts, if

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\* A party to a fraudulent deed is estopped from disputing the rights accruing under it. (608, *D. C. Tenmoratchy; Morg. D.* 134.)

and *Ald.* 551: *Shower v. Pilch*; 4, *Exch.* 478: see also *V. der Ldn.* p. 215.)

Acceptance of  
gift.

No donation is complete unless accepted by manifest intent; as by receiving the gift actually, by words or suitable tokens, when both parties are present; or by letter, agents or attorneys, when either party is absent. (*Grot.* iii, 2, § 12, p. 285: *Sande. v.* 1, *def.* 1: *Voet*, xxxix, 5, § 11: 2, *Burge*, p. 143: *V. der Ldn.* i, 15, § 1, p. 215.)

Any proof of the will to accept on the part of the donee, although no form be used, is sufficient to sustain the grant. If the deed of gift is all that can be accepted, its production by the donee is sufficient proof of acceptance. The acceptance need not appear on the face of the deed; nor does the ordinance of frauds and perjuries (1834) apply to the case. (1174, *D. C. Tungalle*, 3 *Jan.* 1851.)

If a valid donation is completed, the donor is bound to make delivery of possession, and the donee has an action against the donor, to put him in possession of the thing given; thus the acceptor acquires a first claim to property in the gift, and, on delivery, the full property, without, however, subjecting the donor to warranty. (*Grot.* iii, 2, § 14, p. 286: *V. der Ldn.* i, 15, § 1, p. 215.)

Donation,  
when  
revocable.

A donation is by its nature irrevocable, with certain exceptions:—

1. It may be revoked before it is fully accepted by

the donee; it is also revoked by the death of the donor prior to full acceptance. (*Grot.* iii, 2, § 12, p. 285)

2. Also if the donation is conditional, as to take place at a particular time, or for a period, or upon some contingency, the donation is revoked if either donor or donee dies *pendente conditione*. (*Voet*, xxxix, 5, § 21.)

3. A donation may also contain an implied condition to perform certain duties, and the non-fulfilment of the condition is sufficient ground for revocation. (540, *D. C. Cultura*, 11 Feb. 1835; *Morg. D.* 32.)

4. On the ground of gross ingratitude or misbehaviour, as refusing to support the donor in his utmost need, or violence to, slander of, or injury to the donor. (*Grot.* iii, 2, § 17, p. 287: *Voet de donat*, xxxix, 5, § 22: *V. der Ldn.* p. 216.)

5. Also when a donation of great value is made by a childless person; on his begetting lawful or legitimate children, the donation may be revoked, but the right of revocation belongs solely to the donor, and not to his children or heirs. (*Grot.* iii, 2, § 18, p. 287: *Voet*, xxxix, 5, § 27: *V. der K.* 490.)

A donation *mortis causâ* is that which is made to meet the case of death; as when anything is given upon condition that if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor

Donations  
*mortis causâ.*

shall receive back the thing given. (*Inst.* 2, 7, 1.) These donations *mortis causá*, says Justinian, are now placed exactly on the footing of legacies; but it differs from a legacy in these respects:—1. It takes effect, *sub modo*, from the delivery in the lifetime of the donor, and therefore cannot be proved as a testamentary act. 2. It requires no assent or other act on the part of the executor or administrator to perfect the title of the donee. It differs from a gift *inter vivos*, in certain respects in which it resembles a legacy:—1. It is revocable during the donor's lifetime. 2. It may be made to the wife of the donor. 3. It is liable to the debts of the donor on a deficiency of assets; and if the donor dies wholly insolvent, it is revoked.

It may be conditional upon death, in three ways. The donor may say:—1st. If I die in this enterprise, I give you my horse; or, 2nd. I give you my horse, and if I survive this enterprise, you are to give it me back. The former is a conditional delivery; the latter, a present delivery, subject to a conditional re-delivery. 3rd. The donation may also be made when in no fear of present peril, but in general contemplation of death.

The donation may be made conditional on the death of a third person; as of a husband in a gift to a wife.

All those who may make a will may make a donation *mortis causá*. It is made by actual delivery, or by writing, and, according to Van der Keesel, as it has the effect of a last will, it must be made with the solemnities



of a last will; but this is very disputable, and is mentioned by no other author. In equity, it is made by delivery of the property itself, or of the means of obtaining the property, or by writings by which the ownership is credited, and conditioned to take effect absolutely in the event of his not recovering from his existing peril, and not revoking the gift before his death. Thus, negotiable notes, promissory notes payable to order though not indorsed, bills of exchange though not indorsed, bank notes, cheques, policies of insurance, bonds and mortgages, may be the subject of such donations, and goods in a warehouse may be given, in like manner, by delivery of a key. (For the above principles, see *Inst.* ii, 7, 1: *Sandars*, 229-30: *Grot.* iii, 2, § 22, *et seq.*: *Voet*, xxxix, 6: *V. der K.* 292-3: *St. Eq.* §§ 606-7 *a*, &c.: 1, *Sp. Eq.* 196: 2, *Sp. Eq.* 657 and 912.)

## CHAPTER XXI.

## REAL CONTRACTS.—LOAN.

THERE are two sorts of loan: one of things that may be used without destroying them, and the other, that are consumed by the use of the thing.

The first kind was called by the Romans *commodatum*, or loan for use; and the second, *mutuum*, or loan for consumption.

*Commodate*, or  
loan for use.

Commodate is a contract whereby the owner of a thing gives it in loan to another for a certain use without payment, with the condition that it shall be restored after the purpose is served. A thing is properly said to be a loan, when you are permitted to enjoy it without any recompense being given or agreed upon; for if there is any recompense, the contract is that of hiring and letting (*locatio*); as a thing to be a loan must be gratuitously lent. The thing lent is not given to the borrower that it may become his property, and he is bound to return the identical thing he received.

He who receives a thing lent for his use is indeed

bound to employ his utmost diligence in keeping and preserving it; nor will it suffice that he should take the same care of it that he is accustomed to take of his own property, if it appear that a more careful person might have preserved it in safety; but he has not to answer for loss occasioned by superior force or extraordinary accident, provided the accident is not due to any fault of his. If, however, you take the thing lent on a journey with you, to make use of, and you lose it by the attack of enemies or robbers, or by shipwreck, you are undoubtedly bound to restore its equivalent. (*Inst.* 3, 14, 2: *Coggs v. Bernard*, 2, *Raym.* 915.) But the borrower, though answerable for the least neglect, is not answerable for reasonable wear and tear. And the lender is responsible for defects known to him, and not to the borrower, which make the loan perilous. (*Handford v. Palmer*, 5, *Moore*, 76: 1, *Sm. L. C.* 193.)

The borrower can only use the thing for the purpose lent; the purpose must be strictly observed, or the party is guilty of a species of theft. Thus, if a horse is lent for an ordinary ride, it must not be hunted; or if jewels are lent for a certain festival, they must not be worn at another festival. (*V. der Ldn.* i, 15, § 4, 220: *Coggs v. Bernard*: *Voet*, v, 8, *de commodatum*: *Grot.* iii, 9.)

Not only moveable things, but also immoveable things may be lent for use, and are subject to similar doctrines. (*Inst.* 3, 15, 2.) But things which are not allowed to be sold cannot be lent, such as prohibited

4. The borrower is bound to return a like quantity of the thing lent, however much the price of the thing may have risen or fallen in the mean time.

5. Both the contracting parties must mutually agree, and be of accord in all these points. (*V. der Ldn.* p. 217.)

It is only necessary to remark on these points that as *mutuum* passes the property, it can only be effected by one who can alienate; that it is held by the borrower at his own risk; and that it cannot be taken from the borrower in an execution against the lender, but must be recovered by action against the former. (*Grot.* iii, 10: *Noy's Maxims*, ch. 43: *Turner v. Ford*, 15: *M. and W.* 212.)

Interest on  
loan.

A loan of money under *mutuum* is not in general a case in which agreement to pay interest can be inferred under § 2 of Reg. 18 of 1823. If it is intended that interest shall be paid, a special agreement to that effect by the debtor is indispensable; and then the interest becomes exigible, not under *mutuum*, but in virtue of express contract, by stipulation or otherwise. However, if the payment of a loan is fixed at a day certain, then interest runs from that day; but if no day is fixed, then it runs from the day when the lender makes a demand in writing, or brings his action; and he is entitled to make his demand after a reasonable time. (*V. der Lind.* pp. 218-19: *Reg. No. 18 of 1823*: 4, *Grot.* ii, 10, § 8, p. 323.)

A person, also, who receives a payment which is not due to him, and which is made by mistake, is bound *in re, i. e.* by the thing; and the plaintiff may have against him an action to recover what he has paid, as if he had received a *mutuum*, provided that he is a person against whom an action can be brought. (*Inst.* 3, 14, 1.) But as, in this case, it is the law that imposes conditions, and not the contract, the obligation in this case is properly *quasi ex contractu* (*Sandars*, 415); as also would be actions for "money paid," and for "money had and received," for the same reason.

Money paid to the wrong person creates a *mutuum*.

Deposit is a contract whereby any one gives over any *corporeal* and *moveable* property to another, who on his part charges himself to keep and take care of it *gratuitously*, and to restore it on demand.

Deposit defined.

There may be special stipulations in the contract of *depositum*; but if there is any with an object beyond mere deposit, or for any recompense, or if the thing deposited is not a *corporeal* and *moveable* thing, it is some other contract, and not deposit.

*Immoveable* and *incorporeal* things cannot be deposited. The deposit of the key of a house is a mere deposit of the key and the furniture, but not of the house itself.

The contract of deposit requires a delivery of the thing placed in deposit. (*V. der Ldn.* i, 15, § 5, p. 222 : *Grot.* iii, 7, §§ 1-12, pp. 314-16 : 7184, *D. C. Kandy*, 2 Dec. 1835 ; *Morg. D.* 65.)

A person with whom a thing is deposited is bound in *re*, and must give back the identical thing that he received. But he is only answerable if he is guilty of fraud, and not for a mere fault, such as carelessness or negligence; and he cannot, therefore, be called to account if the thing deposited, being carelessly kept, is stolen. For he who commits his property to the care of a negligent person should impute the loss to his own want of caution. (*Inst.* 3, 14, 3.) But the depositary is bound to preserve the thing with reasonable care, and to exercise the same vigilance as he does in his own affairs. He is not entitled to make any use of the deposit, unless expressly or tacitly authorized to do so, and the deposit can be reclaimed at the will of the owner. Justinian says he is only liable for *fraud*; but that includes such gross neglect as shall be a dishonest performance of his trust. But he is held responsible for ordinary neglect, if he come under a special undertaking for safe custody, or officiously propose to keep the subject without being asked to do so. The depositary is bound to return the deposit with all its fruits and accessories, and is entitled to be reimbursed all expenses. From the exuberant trusts implied in deposit, the subject deposited cannot be retained as a set off for any separate debt or claim due to the depositary by the owner. (*Coggs v. Bernard*; i, *Sm. L. C.* 191-2: *Sandars*, 417: *Mackenzie, R. L.* 209: *Add. Torts.* 268: and see 1741, *D. C. Ratnapoora*, 12 *Sept.* 1838; *Morg. D.* 241.)

Two actions arise from this contract; the first lies for the depositor against the depositary or his heirs, to compel the return of the deposit, or for compensation for damage to the deposit by his fault or neglect: the other action is given to the depositary and his representatives for indemnification; as, for instance, all costs and charges that he has been put to for the preservation of the deposit; and, further, for indemnification for all the damage occasioned by the thing without any fault on his part. For obtaining which, he has a right to retain the thing until he is satisfied. (*V. der Ldn.* i, 15, § 5, p. 223: 7184, *D. C. Kandy*, 2 Dec. 1835; *Morg. D.* 65.)

Pledging is a contract by which a debtor places any property in the hands of his creditor as security for his debt. (*Grot.* iii, 8, § 1, p. 317: *Code Napoleon*, p. 560, adopted by the Supreme Court in 2914, *C. R. Galle*, Aug. 28, 1849; *Nell's R.* 137.) It is a deposit for money lent, and does not comprehend every deposit in security. A deposit, or bailment of property, as a security for some engagement, is properly a mortgage accompanied with delivery, not strictly a pledge. (Same authorities; and see *V. der Ldn.* p. 176.) It is a deposit of *any property* that is moveable or immoveable, belonging either to ourselves or to another. A pledge of a moveable thing is called a "pawn." A pledge of an immoveable thing is called an "hypothec." (*Grot.* iii, 8, § 3, p. 317; *Nell*, 137.)

Pledge—*contractus pignoris.*

Rights of the  
pawnee.

The pawnee is only bound to restore the pledge when satisfied of his debt; but not until the whole of the money advanced by him upon it has been paid: he can refuse, on the tender of a smaller sum, to deliver the pledge. (*Grot. ii, 8, § 4, p. 317: 1828, D. C. Chilaw, 22 Dec. 1834; Morg. D. 28.*) The pawnee may sue the pawnor for the debt, though he retain the pawn; for the pawn is only a collateral security. (i, *Sm. L. C. 194.*)

If the pawn be such as will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will never be worse, as if jewels for the purpose were pawned to a lady, she might use them at her own peril, for if she is robbed of them when wearing them abroad she is answerable; whereas if she keeps them in her locked cabinet, and it were broken and the jewels stolen, she would not be liable; and the reason is, because the pawn is in the nature of a deposit, and as such, not liable to be used. But if the pawn is of such a nature as that the pawnee is at any charge about the thing pawned to maintain it, as a horse, cow, &c. then the pawnee may use the horse in a reasonable manner, or milk the cow, &c. in recompense for the meat given it. (*Per Ld. Holt, Coggs, and Bernard.*)

The pledge thus passes a qualified or special property or ownership to the pawnee, with a right to sue for power to foreclose and to sell the pawn, in case of non-payment at the stipulated time. And when the



pawn is sold, to be paid out of the proceeds his principal, stipulated or legal interest, and all necessary expenses. And if the proceeds of sale do not cover these items, he may sue the pawnor for the balance. He has also a right of action against the pawnor for indemnification, when the pawn does not belong to the pawnor or has been previously pledged to another; or when it, from some intrinsic defect, is not of sufficient value as a pledge. (*V. der Ldn.* 226.)

The pawnor has a right to have the pawn returned to him, on tendering the amount due to the pawnee; and if the pawn is lost after such a tender, the pawnee becomes responsible as a wrong doer, and is answerable for them *at all events*. It is the right, also, of the pawnor that the pawnee should use the strictest care and diligence for the safeguard of the pawn (*Grot.* iii, 8, § 4: *Sandars*, 418. On this point the civil and Roman-Dutch law differ from the English law\*); and, therefore, if he alleges that the pledge cannot be restored on account of accident, it is for him to prove the accident which has occurred; and even that he has used proper diligence, if it be a case in which neglect gives a cause of action. But, on the other hand, if the accident is of an extraordinary nature, and has been occasioned by extrinsic

Rights of the  
pawnor.

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\* Under that law, the pawnee is only required to use ordinary care for restoring the chattels, *unless* a tender of money has been made. But if he retains them after such tender, he will be responsible for them at all events. (*Sm. M. C. L.* 229: *Add. Torts.* 271: *Sm. L. C.* 194: *Broom. Com.* 779, 785.)

violence, he is *primâ facie* presumed to have used proper diligence. (*V. der Keesel, Art. 504.*) The pawnor is, also, entitled to have the fruits of the pawn paid to him, or accounted for in reduction of the capital debt, unless it is covenanted that the fruits are to be taken in lieu of interest (*pactum autichreseos*). If the pawn is misused by the pawnee, the pawnor is entitled to other security for the safety of the pawn. (*Grot. iii, 8: V. der Ldn. pp. 225-6.*)

Persons receiving gold, &c. in pawn within police limits, without showing to the police, guilty of an offence.

All gold, silver, brass, and copper goods, or jewels received in pawn, within police limits, must be shown by the receiver to the principal officer of the police of his division; and any such receiver who neglects to show such gold, &c. accordingly to such officer is guilty of an offence. (*Ord. No. 17 of 1844, § 25.*) The above applies to towns and limits where a police force has been established under that ordinance; but it will not only apply to police limits other than in large towns, when section twenty-five is included in the proclamation, it will also apply to any rural police. (See *Ord. No. 5 of 1863, §§ 1 and 2.*)

In certain cases, goods pawned not recoverable.

No person giving any such goods or jewels in pawn, unless under deed or other instrument duly executed, or unless such act be duly witnessed by such officer of police, who shall make a written memorandum of such transaction, to be carefully preserved by him, in order to be produced when called for, shall be entitled to recover back the articles so pawned. (*Ord. No. 17 of 1844,*

§ 25 : see also *Marshall*, 94-5 : 2744, *C. R. Jaffna* ; *Nell*, 118.) Nevertheless, a proved acknowledgment of the receipt of the articles by the receiver would probably be held to take the case out of the ordinance. (*No.* 12199, *D. C. Colombo, N. Oct.* 29, 1836 ; *Morg. D.* 101, on similar clause, § 21 of 1834.)

Neither in Ceylon nor in England (except under the Pawnbrokers' Act) can the pledge be sold without a suit ; but, to facilitate justice in Ceylon, when a defendant is not to be found, or is dead, a process by way of edictile citation is provided in Regulation No. 11 of 1825, § 2, for the foreclosure of the pledge, to which the reader is referred, as it is too long to be copied into this work.

Process of foreclosure by citation when defendant not to be found, or dead.

## CHAPTER XXII.

## PURCHASE AND SALE.

THE contract of *purchase and sale* is an agreement whereby one person binds himself to make over to another a certain thing\* for a certain fixed price.

There are, therefore, five things essential to the contract of sale :—

1. The thing sold.
2. The price agreed.
3. The mutual consent of the parties.
4. The mode of sale.
5. And the warranty attending the sale.

What may be sold.

Anything, either freehold or emphyteusis, corporeal or incorporeal, present or future, whether the property of the seller or of some one else (but not of the purchaser, and no matters which are extinct), may be sold. (*Grot. iii, 14, § 9, p. 335.*)

The thing sold must have an existence, so far as that a thing that has never existed and is not expected to exist, or which has ceased to exist, cannot be sold. But a thing which has never existed, but, in the course of nature, is expected to exist, that is things *in future*,

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\* According to Grotius, "a transfer or warranty of anything." (*Grot. iii, 14, § 1, p. 333.*)

may be sold; as, for example, a coming crop: and the sale is good even if the crop fails, or is ever so much more abundant than it was reasonably expected to be. No person can purchase that which is already his own; but yet he may purchase the property in a thing of which he has only the use, or which he enjoys in common with another; for example, as joint tenant. (*V. der Ldn.* i, 15, § 8, p. 227.)

But no one can purchase or sell any thing sacred, or public property. Also, according to the Roman-Dutch law, houses cannot be sold to be *broken down*—that is, sold as old materials—without previous permission; but, as Van der Keesel explains, in Art. 629, that that existed on account of certain house taxes peculiar to Holland; it can scarcely be expected that this rule of law would be carried out in Ceylon. (*Grot.* iii, 14, § 10, p. 335.)

Also, there can be no valid sale of stolen goods; but these, when traced, revert to the owner, and the vendee can recover the purchase money from his vendor. (6095, *C. R. Madura*, 2 Nov. 1863.)

Nor of contraband of war to the Queen's enemies. (*V. der Ldn.* i, 15, § 8, p. 229.)

Property in dispute may be sold, saving the rights of the third parties litigant, who, if he succeeds, may recover the property by execution, without further proceedings. (*V. der K. Art.* 630.)

An inheritance may be sold; and, unless stipulated, the seller is not bound to warrant it item by item, but

must transfer all right in it at the time of the decease, with profits therefrom until the day of sale; and although the purchaser stands in the shoes of the seller, yet the seller may be sued by the creditors, reserving his right against the purchaser. (*Grot.* iii, 14, § 11, p. 336.)

*Jura in personam* may also be sold; in which case the seller must guarantee that the claim is just, but not that the debtor is able to pay. (*Idem*, § 12.)

Annuities and  
rent-charge.

Money cannot properly be bought or sold; yet rents, annuities, and mercantile funds, which, according to the usages of trade, vary in value, can be sold. (*Idem*, § 13, and *V. der K. Art.* 631.) Rent-charges secured upon land, payable in money, must not exceed the legal rate of interest; this is not the case where the rent is paid in kind. (*V. der K.* 632.) The creditor or purchaser cannot regularly claim the redemption of an annual rent-charge. A stipulation, by which the vendor is bound to redeem the annual rent-charge on a given day, is not valid. (*Grot.* iii, 14, § 14, p. 337: *V. der K. Art.* 633.) As to the right of the redemption of annuities, see also *Grot.* iii, 14, §§ 15 to 21, pp. 337 to 340, and *V. der K. Articles* 634 to 636.)

Sale of lands,  
water, &c.

When land is sold, the fruits or profits which are upon the land are also considered to be sold; and if a house is sold, all that is attached to the soil, or fastened by nails. In the sale of vivaries are included the animals; and in the sale of waters, the fish. (*Grot.* iii, 14, § 22, p. 340.)

Must be for a  
price.

The second essential in a sale is a *certain price*: the

sale would be void if the price is uncertain, or left to the discretion of either party to the sale. The price can consist only of money, since the giving of any thing else is not sale, but *exchange or barter*. The price must be *real*, and not imaginary or pretended, otherwise the transaction is a *donation*. It must also be *defined*, either directly or in reference to something else; as, for instance, when I sell you my land for the same price per acre as Peter sold his. It may also be at intervals, or in parts; that is, to be paid in instalments; or it may be left to be determined by a third party, but not to one of the contracting parties. (*V. der Ldn.* i, 15, § 8, p. 288: *Grot.* iii, 14, §§ 23-5, p. 341.)

In reference to the mutual consent of the parties, it may be laid down that no one without his own will can be constrained to sell, except in cases where the state deems it necessary to purchase the property for the public use, in which case he is obliged to part with it on a reasonable compensation. (*V. der Ldn.* i, 15, § 8, p. 228.)

Mutual consent of the parties.

This last privilege of the state is regulated by an ordinance, namely, No. 2 of 1863.

Sales of land for public purposes.

Whenever it shall appear to the Governor that it is necessary for the public advantage that Her Majesty should obtain possession of any land not belonging to the Crown, and the owners thereof are unable to agree with the government in respect of them, the Governor may direct the Surveyor General to make surveys thereof, and to report to him whether the possession will

Governor may require a survey of the lands.

Governor  
may issue a  
commission to  
assess lands.

be necessary for the above purposes: and if then it still appear to the Governor necessary that such land should be taken possession of, he may issue a commission, directing it to a person therein named, to summon, within a time limited, and after having affixed on the said lands a notice in writing (see *App.*), and after having caused the notice to be published in the town or village within which the land is situate, for three weeks, to summon a jury of seven men in the district, not in the service of Her Majesty, and on oath, to assess the amount of compensation in respect of the land, with the build-  
ings thereon, and all other appurtenances thereof, and to return such assessment, within the period specified in the commission, to the Governor, under the hand of the commissioner. (§ 2.)

Commissioner  
may enter on  
land.

The commissioner is to enter upon the land with necessary assistants, for the purposes of the assessment, and take all evidence desired. (§ 3.)

Take posses-  
sion of the  
land.

On the return of the assessment, the Governor and the Executive Council may direct that the land be taken possession of by some officer of the Crown, for and on behalf of Her Majesty, and payment to be made. The officer signs a certificate (see *App.*) which, with payment, vests the land and the possession thereof in the Crown, free from all incumbrances, and is conclusive against all persons. (§ 4.)

How compen-  
sation is to be  
assessed.

In assessing the compensation, regard must be had by the jury, not only to the actual value of the land, but also to the damage to be sustained by the owners. (§ 5.)



Every person required to attend as a juror or witness failing duly to attend, or refusing to perform the duties of a juror or witness, is liable to a fine not exceeding five pounds. (§ 6.)

Penalty on juror or witness not obeying notice.

Every witness knowingly and wilfully making any false statement relevant to the enquiry, is guilty of perjury. (§ 7.)

Penalty on witnesses making false statement.

Every person who corruptly influences, or attempts corruptly to influence, or threatens a juror, and every juror acting dishonestly or corruptly in his office, is liable to a fine not exceeding twenty pounds, or to imprisonment, with or without hard labour, for two years. (§ 8.)

Penalty on corrupting or intimidating a juror.

Whenever it appears to the Governor and Executive Council that any private party cannot obtain sufficient access to his property, except through the property of some other private party, and that it is necessary (with the view of introducing, if need be, a legislative enactment for that purpose) to assess the remuneration to which the latter would be entitled for giving such access, the Governor may direct the Surveyor General to make surveys of such lands, and to report how far access is required, and along what line, and over what extent of land it ought to be given; and if, after report, it still appear necessary to the Governor, &c. that such access should be given, they may issue a commission for assessment, and the commissioner has the same authority and shall proceed in the same manner as above. The expenses of the commission and proceedings are to be borne

Access through private properties.

by the party applying for access, and, if required, must be deposited in the grand treasury beforehand. (§ 9.)

Payment for lands taken.

The compensation, as assessed, must be paid to the owners, or, in case of death, disability, or incapacity, to their legal representatives. If the lands belong to any church, chapel, or temple, or are held in trust for charitable or other purposes, the amount must be paid to one or more of the trustees, if any; and in case there is no trustee, then to the officiating minister, chief incumbent, holder, or manager; and, on payment, the person paid must execute a conveyance to the Crown. (§ 10.)

When the amount may be deposited in the general treasury.

If, upon tender by the government agent, or any party authorised by him, the amount is refused, or a conveyance is refused or neglected to be executed; or if the person alleged to be entitled, or to whom the amount may be paid, fail to adduce a good title; or if, before payment, dispute or adverse claims arise; or if the owners are persons under disability or incapacity, and not duly represented, or absent from the island, or if no such persons can be found; then the amount must be deposited in the treasury, to the credit and for the use of the persons entitled to receive the same, accompanied with a statement showing why the same was deposited. (§ 11.)

Disposal of amount deposited in the treasury.

The deposit must remain in the treasury until a competent court adjudges who is to receive the same; but if the person raising dispute or making claim, or for whom the same was done, does not, without labouring

## OF LANDS FOR PUBLIC PURPOSES.

under any disability or incapacity, prosecute his claim within one year from the deposit, it must be paid to the party who first alleged himself entitled to the lands, or to receive the amount in any of the capacities before mentioned, as being the capacity in which the amount may be paid to him. If the deposit is made by reason of absence from the island of the person entitled to receive it, or that he cannot be found, the amount is forfeited to the Crown, if not claimed within ten years from the date of deposit. (§ 12.)

If any such lands taken possession of as aforesaid are subject to mortgage, the sum due must be paid to the mortgagee, if not more than the value assessed as aforesaid, if the mortgage is not disputed; and if it is, the sum alleged to be due, though not more than the value assessed as aforesaid, must be deposited in the treasury to await judicial decision; and if the alleged mortgagee does not make claim before some competent court within two years after deposit, the amount must be paid to the alleged mortgagor or his representatives. If no person gives notice of claim of mortgage before directions are issued that any land shall be taken by the Crown, such lands shall, after direction issued, be free of every mortgage or incumbrance. (§ 13.)

If land affected by mortgage.

Whenever the Governor calls for a survey of lands wanted for public uses, or through which access is required, the Surveyor General or his assistants may enter upon them, by such persons as are necessary and duly

Surveys of lands.

authorized by them in that behalf in writing, to survey such lands. (§ 14.)

Proviso as to any injury done in course of survey, &c.

If, in the execution of any survey or of any commission, injury is done to any land or premises or to any thing thereupon, and such land, &c. is not eventually taken by the government, or access not eventually given to an applicant for the same, compensation must be made to the owner by the government, or by such party, as the case may be. (§ 15.)

Surveyor General, &c. may demand production of title deeds.

The Surveyor General, or any one authorized under his hand, may demand in writing of the person claiming to be the owner of such land, or of his agent, or of the occupier of such land, the production of every deed, document, and instrument upon which such first-mentioned person founds such claim. And if full information is refused within ten days after request, every such agent, occupier, alleged owner, and person so refusing is liable to a fine not exceeding five pounds. (§ 16.)

Penalty on obstructing Surveyor General, &c.

Every person molesting, resisting, or obstructing the Surveyor General, or any person under his orders, or any commissioner of valuation, or juror, or any person acting in the execution of any duty or authority imposed or vested in him, is liable to a fine not exceeding five pounds. (§ 17.)

Penalty on abuse of power by Surveyor General.

If the Surveyor General, or any of his assistants, or any person acting under the orders of their assistants, or if any commissioner of valuation, or any person acting under his order; or if any juror or other person

## OF LAND.

shall, under pretence of performing any duty or exercising any privilege imposed on or vested in him by or under this ordinance, use unnecessary violence or wantonly do any injury, or give uncalled-for and vexatious annoyance; every such officer or person is liable to a fine not exceeding five pounds. (§ 18.)

No sale, transfer, assignment, or mortgage of land or other immoveable property, and no bargain, contract, or agreement for offering any such object, or for establishing any security, interest, or incumbrance affecting land or immoveable property (other than a lease at will, or for any period not exceeding one month); nor any contract or agreement for the future sale or purchase of any land, or other immoveable property; is of force or avail in law, *unless* the same is in writing, and signed by the party making the same, or by some person lawfully authorized by him or her, in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notaries and witnesses. (*Ord. No. 7 of 1840, § 2.*) Or unless the same be signed *by the party making the same, or by some party lawfully authorized by him, or by two or more witnesses present at the same time, in the presence of some District Judge, or Commissioner of a Court of Requests for the district in which such party making such writing, deed, or instrument, or the person signing the same as such attorney, resides; or in the presence of some Justice of the Peace for such district,*

Modes of sale  
—immoveable  
property.

pecially authorized by the Governor to act in that behalf, and of whose appointment notice shall have been given in the Government Gazette; and if the execution of such writing, deed, or instrument shall have been certified. (*Ord. No. 17 of 1852, § 1.*)

This clause includes all things affixed or appertaining to land, such as houses, trees, fruits, and grass. But it does not include corn, paddy, and other growth of the earth, which are produced, not spontaneously, but by labour, and contracted to be sold while growing, whether mature or not; though these emblements, or *fructus industriales*, must be in actual existence at the time of the contract. (30502, *D. C. Colombo, 27 Jan. 1841; Morg. D. 304: 1056, C. R. Ratnapoora, 31 Oct. 1861.*) It does not include the sale of a government paddy rent, or an agreement to plant land. (*Lorenz's R. pp. 19-146.*)

Sale of moveable property.

No promise, contract, bargain, or agreement, unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorized by him or her, is of force or avail in law for the purchase or sale of any moveable property, unless such property or part thereof shall have been delivered to the purchaser, or the price or part thereof has been paid by the purchaser. (*Ord. No. 7 of 1840, § 21.*)

Written agreement.

So that a purchase of moveable property may be made with or without writing. A purchase by writing is not complete until or unless the writing is complete. So that if several documents together constitute the con-

tract, as they may do, the contract is not complete unless they are sufficiently connected in sense amongst themselves without the aid of parol evidence. (*Grot.* iii, 14, §§ 26-7, pp. 341-2: *Sm. Contr.* 113: *Add. Contr.* 167.)

A mere offer in writing made by one party, and not assented to by the other, is not a sufficient compliance with the ordinance. Mere offer.

According to the ordinance, immoveable property may also be sold by a mere verbal agreement, either to be completed *in praesenti*, coupled with payment of the whole or part of the price, or a delivery of the property or part, or to be completed *in future*, coupled with a present part payment or part delivery, or both, with a future payment of the remainder of the price, or a future delivery of the remainder of the goods, or both. Also, from the wording of the ordinance, it will be seen that if a person agrees to pay a certain sum of money for goods *in praesenti*, or indefinitely, and the owner agrees to take it, and then they separate; this does not amount to a binding agreement, unless the goods or a part, or the price or a part, were *actually* delivered or paid. A tender is not sufficient, as in the English law. (*Sm. M. C. L.* 118.) Verbal agreement.

A purchase may be entered into under a condition; and, so long as the same condition remains unfulfilled, the purchase will remain in abeyance; but when it is fulfilled, the matter will then have a retrospect to the time of the transaction, or contract; but in the case of Conditional purchase.

immoral or forbidden conditions, the transaction becomes void. It can also be stipulated that purchase shall commence or take effect on a particular day, in which case the purchase is *de facto* completed; but the execution is only suspended. In like manner, any thing may be sold to last until a particular day. (*Grot. iii, 14, § 29, p. 342.*)

Sales by  
auction.

An auctioneer is usually the agent of both parties until the deposit is paid; the contract is made through him, and on the payment of the deposit it is complete under the ordinance. Also a signature by the purchaser in the sale book, opposite the lot bought by him, constitutes an agreement in writing, signed by the party making the same; and, as the auctioneer is agent for both parties, his signature, or his clerk's, is the signature of a person lawfully authorized, and is sufficient to complete the contract. (*Sm. Merc. Law. 506; Broom. Com. 414-16.*) Both parties are bound by the conditions of sale, if insisted on, and the purchaser by his bidding also. (*Grot. iii, 14, § 30, p. 343.*) An auctioneer is entitled to detain the purchase money until the transfer is completed. (4599, *D. C. Colombo, 24 June, 1835; Morg. D. 52.*) Goods sold and paid for at an auction remain in the auction room at the purchaser's risk. (1541, *C. R. Galle; Nell, 121.*) And the seller has the right to refuse to deliver until payment is tendered. If it is a sale by auction, and the auctioneer holds the purchase, delivery and payment should be simultaneous



acts. (*Ante*, p. 368 : 4599, *D. C. Colombo*, 24 June, 1835 ; *Morg. D.* 52.)

A broker is also the agent of both parties, and he Brokers. binds them by making and signing an entry of the contract in his book, and he transmits to them copies of this entry, which are called bought and sold notes ; the bought note being transmitted to the buyer, and the sold note to the seller. (*Sm. M. C. L.* 119 : *Sm. Merc. Law*, 507 : *Broom's Com.* 417-18 : *Add. Contr.* 169.)

The consequences of sale are fulfilment, delivery, Consequences of purchase and sale. and rescission, and thus different with respect to the buyer and the seller.

Before delivery, although the sale is complete by Delivery. mutual consent, the right of property remains in the seller, and the buyer and seller have against each other only a personal action for the fulfilment of the contract. This, it must be observed, is different from the English law. In that law, if the thing sold is ascertained and completed, and nothing remains to be done on the part of the seller as between himself and the buyer before the delivery, and nothing is said as to the time of delivery, and either nothing is said as to the time of payment, or the goods are sold on credit, then, in the absence of special reasons to the contrary, the property in the goods immediately passes to the buyer, and that in the price to the seller. (*Sm. M. C. L.* 124.)

The first of the actions that arise from sale lies for the purchaser and his representatives, against the seller

and his representatives; the other for the seller and his representatives, against the purchaser and his representatives.

The seller is bound to deliver and the purchaser has a right to demand and receive the goods sold when demanded, upon payment or tender of the price, and performance of all other conditions (if any) on the purchaser's part, and this directly, or at the time limited in the contract. If delivery is not made at the time stipulated, he is liable in damages. (2, *Burge*, 537 : 10823, *D. C. Colombo*, 30 *Nov.* 1850.)

So also with goods, he must give up all that appertains thereto. For example, with a house, all its fixtures. In case the goods sold have any substantial defect, or are burthened with any secret incumbrance, he is bound to reduce the price accordingly, or even cancel the sale, if he purposely misled the buyer.

The seller is not entitled to the price until he delivers the goods; nor is the purchaser entitled to the goods until he tenders the price; unless, in either case, it is otherwise agreed. But in a present contract of sale upon credit, the right to the delivery of the goods passes immediately to the purchaser, unless there is an apparent intention to the contrary.

Delivery to the purchaser's agent is in general equivalent to a delivery to the purchaser himself. (*V. der Ldn.* i, 15, § 9, p. 230 : *Grot.* iii, 15, p. 346 : *Sm. M. C. L.* pp. 124-26.)

The chief obligation of the buyer is to pay the purchase money, with interest from the time he is in default (*in mora*); also to reimburse the seller the costs he has been at, with respect to the thing sold, after the sale.

Obligations of  
the buyer.

The purchaser is also bound to accept the goods, if the seller has performed all conditions on his part. If he does not, the seller may sue him specially on his contract for damage sustained. He must sue on the breach of contract and cannot sue for the price as for "goods bargained and sold," as no property passes without complete tradition.

In the case of a purchaser neglecting to pay for goods delivered, he may be sued in an action for goods sold and delivered.\*

When a debt, a right of action, or a claim against a third party, is sold, the seller is bound to give the purchaser an assignment, or *cession of action, und procuracion in rem suam*, or an irrevocable power of attorney, to sue in the seller's name for his own benefit.

Sometimes the respective obligations of the buyer and the seller undergo some variations, in consequence of particular conditions annexed to the contract, which give it a more special nature, so far as these conditions are not improper and repugnant to the nature and essence of the contract itself.

Although no property in the goods passes until de-

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\* As to the purchase and sale of an inheritance, see *Van der Ldn.* i, 15, § 9, p. 232.

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livery, yet, after the sale is perfect, and before the goods are delivered, everything that happens to them is to the profit or loss of the seller and buyer respectively, subject, however, to some exceptions :

1. In the sale of things which must be weighed, measured, or counted.

2. When by the neglect or fault of the seller some damage has happened to the thing sold.

3. When the damage is occasioned by some defect in the thing, which existed before the sale.

4. When a special condition has been inserted in the contract, respecting the profit and loss.

How a sale is annulled.

Purchase and sale having taken place, they are cancelled in different ways :

1. When the buyer and seller mutually release one another by mutual consent; though, if delivery had taken place, this would be a new contract of sale.

2. Also by a stipulation, or enactment, that a sale shall be void on breach of a condition by one party; but such breach only renders it void at the election of the other party.

3. When anything is sold for ready money, and payment does not follow, the seller may reclaim the goods within a reasonable time, generally six weeks, and so annul the contract.

4. When it is agreed that the sale shall be void, if within a certain limited time a higher offer is obtained, or if within a fixed time the purchase money is not paid.

5. By the deceit of the seller; as by the concealment of such a defect, that, if the buyer had known of it, he would then have refrained from purchasing. The purchase may then be annulled, on the application of the purchaser. Generally, if a person who offers an article for sale at the ordinary market price is aware of any material latent defect and does not disclose it, and knows that the purchaser is deceived by its appearance, he is responsible in damages for deceit. But if a defect can easily be discovered, and the purchaser has the opportunity of discovering it at the time, then, in the absence of special reasons to the contrary, the maxim *caveat emptor* will apply. Deceit.

Allied to the question of deceit is that of warranty. Warranty is express or implied. Warranty.

Every affirmation at the time of the sale of personal chattels is a warranty, if it appears to have been intended as such, and if also the contract and affirmation are both oral. But even an express warranty, if after a sale, is void for want of consideration. And no oral allegation previous to a sale by written contract, and no private communication previous to a sale by auction, can possibly operate as a warranty. An affirmation, or representation, in order to be a warranty, must be made pending the negotiation ending in the sale, or pending the contract. (*Sm. M. C. L.* 120: *Sm. Merc. Law*, 518-19, 522: *Add. Torts.* 638: *Broom's Com.* 347-49.)

If the vendor has peculiar or exclusive means of information, and he pretends to know the truth, he will

be taken to warrant his knowledge of the fact. Hence every representation as to the qualities of a horse made by the owner to the buyer, pending the negotiation which results in the sale, amounts to a warranty. And so, where a jeweller sells a glittering stone as a diamond, he impliedly warrants it to be a diamond. (*Sm. M. C. L.* 120: *Add. Torts.* 639, 641, 643: *Broom's Com.* 348-9.)

A person who undertakes to supply an article to answer a certain purpose, is deemed to warrant that it will answer such a purpose. And where a person agrees to furnish manufactured articles, he is deemed to warrant them to be of a merchantable quality. (*Sm. M. C. L.* 121: *Sm. Merc. Law*, 5, 7: *Add. Contr.* 228-9: *Morton's V. and P.* 347.)

If a person by whom, or whose order, an article is made, or by whom an article is sold to a person who has no opportunity of seeing it, represents that it is of some superior or peculiar quality, or that it is fit for a particular purpose, he is deemed to warrant that fact. And if a purchaser gives a shopkeeper reason to believe that he relies on the skill and judgment of the shopkeeper to supply an article fit for a particular purpose, the shopkeeper is deemed to warrant that the article supplied is fit for that purpose. But when the article is not made by, or by order of, the vendor, and the means of examination are afforded to the purchaser, the representations of the vendor, if not made to induce the purchaser to forbear inspection or examination, and if believed to be true by the vendor, do not constitute a



fraud in law, though untrue. (*Sm. M. C. L.* 122 : *Add. Torts.* 643-6 : 2, *Ste. Com.* 75.)

A warranty does not extend to defects obvious to all mankind and known to the purchaser at the time of the purchase. But a purchaser who relies upon a warranty is not bound to make any particular examination of the article before he buys it. (*Sm. M. C. L.* 122 : *Add. Torts.* 637 : *Morton's V. and P.* 353-5.)

Where a horse does not answer to a warranty, and the purchaser immediately tenders it back, and the seller refuses to take it, the purchaser need not resell it at once, but may keep it a reasonable time, in order to resell it at the best advantage, and may oblige the seller to pay the expenses of its keep as part of the damages. (*Sm. M. C. L.* 122 : *Add. Torts.* 668 : *Oliphant on Horses*, 170.)

On a sale by sample, there is an implied warranty that the sample has been fairly taken from the bulk; but there is no implied warranty that there are no latent defects in the bulk unknown to the seller. (*Sm. M. C. L.* 124 : *Add. Torts.* 646 : *Morton's V. and P.* 131-3.)

A contract of purchase and sale is also capable of rescission when the buyer or seller has been prejudiced in more than half in respect of the purchase money; that is, if a thing worth £100 has been sold for £45, or, on the contrary, if a thing worth £45 sold for £100. However, the annulling of the contract on this head is not permitted when the other party is prepared to increase or reduce the price of the thing to its true

Rescission by  
disproportion-  
ate price.

value. (*Grot.* iii, 17, § 5, p. 357: *V. der Ldn.* 1, 15, § 10, p. 235.)

A contract of sale can also be rescinded when, after it, any one comes forward and shows a right of property, or other real right in the thing sold. In this case, the seller must guarantee the thing sold, and so take up the cause of the buyer; and if the thing is adjudged to the claimant, the seller must refund to the buyer the purchase money, with interest, and indemnify him for all costs and damages. (*V. der Ldn.* i, 15, § 10, p. 235.)

If it is stipulated that in case of non-payment on a given day the thing shall be *unbought* (*lex commissoria*), the seller may either stand to the purchase or take the thing back, retaining the earnest and other things paid on the purchase. If he does not exercise this right, but makes some other agreement, even a *nudum pactum*, that is a waiver of resumption. (*Grot.* iii, 14, § 32, p. 343: 1735, *D. C. Kandy*, 9 Dec. 1835; *Morg. D.* p. 66.)

Resumption  
and resale.

In the sale of lands there is often a condition for resale on failure of payment; from which arise these points: 1. The defaulting purchaser forfeits all title from the time of resale. 2. He is not entitled to any overplus on resale, if he was aware of the condition. 3. The vendor exercising his right of reselling can only recover a loss, but not the whole purchase money, from the first vendee. (857, *Pr. C. Jaffnapatam*, 3 Sept. 1834: 2563, *D. C. Ruanwelle*, 3 Feb. 1836: 191, *D. C. Colombo*, 20 Feb. 1841; *Morg. D.* 22, 74, 305.)

## CHAPTER XXIII.

## LETTING AND HIRING.

THE contract of letting and hiring is an agreement whereby one party binds himself to suffer another to have the use of a certain thing, moveable or immoveable, during a fixed and limited time, in consideration of a certain sum of money, as hire, or rent, which the other binds himself to pay. (*V. der Ldn.* i, 15, § 11, p. 236: *Grot.* iii, 19, §§ 1, 2, p. 360.)

Letting and hiring.

Under § 2 of Ord. 7 of 1840, any letting and hiring of immoveable property (other than under a lease at will, or for any period not exceeding one month) is of no force or avail in law, unless the agreement relating to the letting and hiring is in writing, and signed by the party *making the same*, or by some person lawfully authorized by him or her, in the presence of a licensed notary and two or more witnesses, present at the same time, and unless the execution of such writing or deed is duly attested by such notary and witnesses.

Of immoveable property.

The writing will also be valid, if executed in the

same manner before a District Judge, or Commissioner of a Court of Requests for the district in which the party making such writing, &c. or the person signing the same as attorney, resides; or if in the presence of some Justice of the Peace for such district, specially authorized by the Governor in that behalf, and of whose appointment notice shall have been given in the Government Gazette, and if the execution of such writing, &c. is certified at the foot or end of it under the hand and seal of such Judge or Commissioner of Justice. (*Ord. No. 17 of 1852, § 1.*)

The things requisite to the contract of letting and hiring are:

1. A thing capable of being let on hire, whether moveable or immoveable, corporeal or incorporeal, as the farming of tolls or duties, labour of man or beast, or the use of anything. The hirer or lessee must be assured of a certain use or enjoyment, which is usually limited by a clause in the lease. For instance, land which is let as pasture may not be ploughed or sown. The use of the thing is not unlimited, but only for a certain time. If the thing let is land, the lease must be notarially or judicially executed.

2. A definite rent, or hire, payable generally in money, but sometimes partly in produce. (*V. der Ldn. i, 15, § 11, p. 256: Grot. iii, 19, § 1, p. 360.*)

The lessor must give the lessee possession of the thing let at the time fixed by the agreement. To enforce

this, the lessee has a right of action against the lessor, which also extends to damages when the thing let is, by the lessor's fault or neglect, not put into the possession of the lessee.

The lessee has a right of action for his quiet enjoyment of the thing let, both on the part of the lessor and others.

The lessor (unless it is otherwise covenanted) is bound to maintain and keep the thing let in a proper state, so that the lessee may have full enjoyment of it.

The lessor is also bound to indemnify the lessee for all damages occasioned by any material defect in the thing let.

Also to perform all the covenants in the lease. (*V. der Ldn.* i, 15, § 12, p. 237.)

The lessor also, in case of unexpected misfortune, such as war, fire, *extraordinary unfruitfulness*, or something of a like nature, which has hindered the lessee in the use of the thing hired, is bound to allow a reduction in proportion to the parts which have been destroyed, and the time of *non-user*. (*Grot.* iii, 19, § 12, p. 365.)

On the other hand, the obligations of the lessee consist in :

The punctual payment of the rent, according to the particular covenant in that behalf fixed; or, if there is no covenant, then according to the custom of the place. Whatever is not hired for a year, the lessor can claim at

Duties and liabilities of the lessee.  
Rent.

the end of the time; otherwise, at the end of each year; and in case of default of payment for two years, it is a question whether he may not eject the lessee, and the latter can also be sued for loss of profit. (*V. der K.* 675.)

If a landlord gives a receipt for the rent last due, it is to be presumed that all former rents have been paid. (21839, *D. C. Colombo*, 16 Jan. 1838; *Morg. D.* 254.)

The lessee is entitled to demand the entire remission of the rent, or an abatement of part, according as that he has no use of the thing let during the whole or part of the time of the lease, unless this had been occasioned by his own act. To this head appertain the cases of inundation, tempest, or such like unavoidable misfortunes, under which the land has produced nothing.

The lessee is bound to use the thing let for no other purpose than that for which it was let to him.

He is also bound to take care that the thing is kept in a proper state, and it is not misused. (*V. der Ldn.* i, 15, § 12, p. 238: *Grot.* iii, 19, § 11, p. 363: *V. der K. Art.* 675.)

If the thing let is a house, the tenant must use it in a tenant-like manner; and if it is a farm, or field, to occupy it fairly and in a husband-like manner, and to cultivate it according to the usage of the country where the land is situate. (*Woodfall*, 434, 448.)

Liability as to  
fire.

If premises are destroyed by fire, without any gross negligence on the part of the tenant, and the tenant has

not covenanted to repair, the landlord will be without remedy; though, if the fire is caused by gross negligence, the party guilty of such negligence will be liable. (*Grot.* iii, 19, § 12, p. 365: *Add. Torts.* 128, 130: *Woodfall*, 435.) If the fire be pure misfortune, the lessee will be entitled to a reduction of hire in proportion to non-user (*Grot. idem*); but if it is the lessee's fault, he must pay the rent, though he may have lost the enjoyment of the premises. (*Grot.* iii, 19, § 11, p. 364: *Woodfall*, 344, 439-40.)

The lessor is bound to keep the thing let in a proper state, so that the lessee may have the due enjoyment of it. The lessor must do this at his own expense; and if he neglect to do so, the lessee may deduct the repairs from the amount of his rent, or he may abandon the use of what he has hired to him, and he may pay less rent, in proportion to the time that he has not had the use of it, or even reclaim what has been over paid. (*V. der Ldn.* i, 15, § 12, p. 238: *Grot.* iii, 19, § 12, p. 365: 3271, *D. C. Jaffna*, 28 Aug. 1849, *Coll.*)

Liability to repair.  
English law different from Ceylon law.

At the expiration of the lease, the lessee is bound to return the thing let, undamaged, to the lessor.

He is also bound to perform the covenants imposed by law or local custom, or by the lease; for all of which an action lies for the lessor against the lessee.

The lessor or landlord has a *lien* upon the crop produced from the land, and on the moveable property brought upon the premises, for his arrears of rent; for

which the law gives him the privilege of a legal and preferent mortgage, whereof he may avail himself by *arrest* or *distress*.

Determina-  
tion of letting  
and hiring.

The term for which a thing is hired ceases or stops :

1. When the term of the lease expires. The lessee cannot discharge himself against the lessor's consent, by paying compensation in lieu of rent. Of course, in all cases of hiring of land, &c. over a month, the lessee would be bound by the writing. (*V. der K. Art.* 678, and *Ord. No. 7 of 1840.*)

2. By a surrender *in pais*, as by giving up the key with view to surrender.

3. When the thing let is by unforeseen misfortune destroyed; as, for example, when a house is burnt.

4. By *merger*, when the lessee succeeds to the inheritance of the lessor.

5. When the lessor himself has an absolute necessity for the thing.

6. The sale of the thing let does not avoid the lease, as *hire goes before sale*. (*V. der Ldn.* i, 15, § 12, p. 238.)

Subletting.

A lessee may in general sublet to another person property which is leased, unless it is otherwise stipulated; except with regard to country lands, which cannot be sublet without the consent, in writing, of the proprietor. (*Grot.* iii, 19, § 10, p. 363: *V. der K. Art.* 674.)

Altering a  
house.

According to Van der Keesel, by some statutes it is permitted to a lessee to adapt a house let to him for a shop or workshop, according to his trade; provided the



house is not deteriorated, and at the end of the term he restores it, at his own expense, to its original state. (*V. der K. Art.* 667.)

A tenant remaining in possession after the expiration of a lease, may be taken to hold upon any of the terms of such lease as are consistent with a *monthly* tenancy. (*Woodfall*, 523: *Ord. No. 7 of 1840*, § 2: *Grot.* iii, 19, § 2, p. 360: *V. der K.* 671.)

Tenant holding over.

In the above we have been chiefly regarding tenancies for expiring terms more than a month; but there may also be leases in perpetuity, or by the month, or at will.

The first of the three is called an emphyteutical lease. It must, of course, be in writing under No. 7 of 1840, though, in the Roman-Dutch law, it could be by parol. It may be made subject to certain forfeitures, as for non-payment of the rent or canon, subject to the doctrines of equity regarding forfeitures. If not otherwise stipulated, the rent is payable yearly; and all yearly charges are borne by the tenant, others by the proprietor, though land taxes are borne by the tenant. The lease terminates by the destruction of the thing, and other emphyteutical modes (see *Emphyteusis*), and by the consent of the owner and tenant. If terminated without any fault of the tenant, he is entitled to all buildings and improvements, or compensation for them. (*Grot.* iii, 18, pp. 357-9: *V. der K. Arts.* 667-9: 20810, *D. C. Galle*, Oct. 20, 1863; *Coll.*)

Lease in perpetuity.

Monthly  
tenancy.

A tenancy for a month, or by the month, may be by parol, and notice must be given to leave at the same period of the month as the tenancy commenced upon.

Tenancy at  
will.

A tenancy at will may be created by parol; but must be specially created by distinctive agreement; for, if not so created, the tenancy will be held to be a monthly tenancy. If, however, a man build a house upon another man's land by permission of the owner, he will be held to be a tenant at will. (14240, *D. C. Galle*, 5 Nov. 1850.)

A tenant at will is entitled to no particular notice; but is entitled to a *reasonable* notice to quit: he cannot be turned out neck and crop. (5435, *C. R. Negombo*, 14 Jan. 1854; *Nell*, 231.)

Tenant cannot  
dispute land-  
lord's title.

When the landlord claims the land from his tenant, it is not necessary for the landlord to prove his title to it; for it is a rule that a tenant, or any one claiming under him, shall not be allowed to dispute his landlord's title; that is, the original right of the person who admitted him into possession; but he may show that it has since expired, or been parted with. (*Sm. M. C. L.* 113: *Marshall*, 369; citing 11934, *D. C. Colombo*, and 691, *D. C. Colombo*, 30 Apr. 1834.)

Master and  
servant.

The contract of letting and hiring is not confined merely to corporeal things, but is frequently extended to work and labour. For example, when I give my silver to a silversmith to make me thereout a pair of candlesticks; or my cloth to a tailor, to make me a

coat; this is a contract by which, on his part, he hires his labour to me at a certain price. To this especially pertains the hire of servants, against whose misconduct various provisions have been made by the Ord. No. 11 of 1865, as follows:—

In this ordinance, the word “servant,” unless otherwise expressly qualified, extends to menial, domestic, and other like servants, pioneers, kanganies, and other labourers, whether employed in agricultural, road, railway, or other like work. Interpretation.

Every verbal contract for the hire of any servant, except for work usually performed by the day, or by the job, or by the journey (unless otherwise expressly stipulated, and notwithstanding that the wages under such contract shall be payable at a daily rate), is a contract for hire and service for the period of one month, renewable from month to month, and deemed to be so renewed, unless one month’s previous notice or warning be given by either party to the other of his intention to determine the same at the expiration of a month from the day of giving such notice. (§ 3.) Verbal contract of service to be a contract for one month.

The wages of a servant are payable monthly, except where the service has been determined by notice on a day other than the last day of the month, in which case the wages for the broken period are payable to the day the service is so determined; and such wages, where they are not payable at a monthly rate, are computed according to the number of days on which Wages, when payable.

such servant has been able and willing to work; or, if payable at a monthly rate, in proportion to the number of days on which he has been so able and willing as aforesaid. An employer may discharge a servant from his service under any such contract, without previous notice, provided such servant be instantly paid his wages for the time he has served, and also for one month from the time of such discharge. Any such contract may be determined by the misconduct of either party in their relative capacity of master and servant, which may be proved by either party against the other.

(§ 4.)

Term of verbal contract for a journeyman artificer.

Every verbal contract for hire according to time of any journeyman artificer (where no special contract or agreement has been made and duly proved) is a contract for the hire of such artificer for one day, and no longer.

(§ 5.)

Proviso, if service be continued after the time agreed upon.

Though nothing can prevent any servant, or journeyman artificer, who may continue in the service of his employer beyond the period for which any verbal contract is binding, from recovering his wages according to the full period of time of his service; nor, any similar subsequent verbal contract being implied, from the continuance of such service. (§ 6.)

Written contracts with servants and journeymen artificers for terms of service exceeding one

No contract for the hire and service of any servant, or journeyman artificer, for longer than one month is valid in law, so as to subject any party thereto to the provisions of this ordinance for not performing the

same, unless such contract is in writing, and clearly expresses the terms and conditions thereof, and is signed or acknowledged by the parties thereto in the presence of a Police Magistrate, or a Justice of the Peace, or other person expressly authorized by the governor; such justice or other person not being himself the employer of such servant or journeyman artificer, or the agent of such employer. The Police Magistrate, Justice of the Peace, or other authorized person, must see that the contract is fully explained to the parties, and certify on the contract that they fully understand its terms and desire to fulfil it. Such contract, bearing the certificate of the Police Magistrate, &c. is *prima facie* evidence of the matters and things contained therein. It must be executed in triplicate; and the Police Magistrate, &c. must give or cause to be given one copy thereof to the servant, and to send or to cause to be sent, within ten days of the execution thereof, another copy thereof to the Police Magistrate of the District wherein such contract shall have been executed; and in default thereof, such Magistrate or Justice shall be liable to a penalty of five pounds. And the Police Magistrate is required to preserve the counterpart, and to allow any person interested in the contract to inspect it. No contract (excepting contracts made under the 8th section of the ordinance) for the hire and service of any servant or journeyman artificer (whether made in Ceylon or in India, as provided by the 9th section) is valid under the

month, but not exceeding three years.

provisions of this ordinance, if made for more than three years. (§ 7.)

Contracts for the hire of pioneers, &c. to be employed in the service of government.

The Civil Engineer, the Commissioner of roads, the Surveyor General, or any other person expressly authorized thereunto by the Governor, may contract, on behalf of Her Majesty, for any servant or artificer, for any period not exceeding five years. Such contract, if for more than one month, must (if entered into in Ceylon) be in writing, and executed in the manner above indicated. (§ 8.)

Contracts entered into in India for hire and service in this island.

Every contract entered into in India for the hire and service in Ceylon of any servant or journeyman artificer is valid, so as to subject the parties thereto to the ordinance, notwithstanding that it be not executed in the manner prescribed by the ordinance. Such contract must be in writing, and signed or acknowledged by the parties thereto, or their agents respectively, and clearly express the terms and conditions thereof; and also be valid according to the laws of India in force at the time of the contract. Such contract, when produced in any court of Ceylon, is deemed valid according to such laws, unless the contrary be proved. It is the duty of such employer, or his agent, to give, at the time of entering into the contract, a copy to the servant or the journeyman artificer. (§ 9.)

Written contracts, how determinable.

Unless provision to the contrary be expressly made therein, no contract in writing under the ordinance is determinable before the period specified therein, except

by mutual consent, expressed in writing, signed or acknowledged by the parties in the presence of two witnesses, or except when the servant, &c. shall have been convicted of an offence, or have become a prisoner, or permanently disabled, and his employer elects to determine the contract, or except for some reason sufficient in law to set it aside. In case of disability to serve, the employer is bound to furnish the immigrant from India, who has contracted in India for service in Ceylon, or, in Ceylon for service for not less than one year, with adequate means of returning to his own country. (§ 10.)

Any servant, or journeyman artificer, who, without reasonable cause, neglects or refuses to attend at and during the time and hours, or at the place, when and where he has contracted to attend, in commencing or carrying on any work; or, in case of no special agreement in that behalf, during such hours as, according to the trade or occupation of such servant or artificer, it is usual so to attend; or who, without reasonable cause, leaves unfinished or refuses to finish any work contracted to be done, or who shall be guilty of any drunkenness, wilful disobedience of orders, insolence, or gross neglect of duty, or other misconduct in the service of his employer; or who quits such service without leave or reasonable cause before the end of his term, or previous warning, as required by the third

Servant refusing to work, &c. is guilty of misconduct.

clause of the ordinance, or for such longer period as may be specially stipulated in his contract, is punishable, by the Police Court, by forfeiture of all wages due, if not exceeding the wages of one month, or for the period of warning specially stipulated for, or by imprisonment, with or without hard labour, not exceeding three months, or by such forfeiture together with such imprisonment. (§ 11.)

Punishment for desertion, &c. of servant engaged to go upon a journey.

Every servant engaged to go on a journey, who, without just cause, deserts, or refuses, or neglects to proceed on such journey, or any stage thereof, or shall be guilty of any misbehaviour above mentioned, is punishable by the Police Court of the District wherein the offence is committed, or wherein the offender is apprehended, by forfeiture of all wages advanced or contracted for, or by imprisonment, with or without hard labour, not exceeding three months, or by such forfeiture together with such imprisonment, at the discretion of the said court. No servant engaged for a journey is obliged to travel on foot more than twenty-five miles during every twenty-four hours; nor is to carry more than forty pounds, unless otherwise expressly agreed upon for a short distance only; nor to proceed in case of illness or injury rendering him incapable to travel. Any person obliging any servant or coolie to act contrary to these regulations is punishable by such Police Court, as aforesaid, by a fine not exceeding five pounds, or by

Proviso as to distance to be travelled, and weight carried by such servant.



imprisonment, with or without hard labour, not exceeding three months, or by such fine together with such imprisonment. (§ 12.)

Upon a complaint by any servant or journeyman artificer for non-payment of wages, or damages for breach of contract or misconduct by his employer, the court may make a proportional abatement out of any sum to be awarded as the wages or damages due to such servant or artificer for such time as he shall have, without the consent of his employer, been absent from or neglecting his service, and also for any breakages or damage to the property of his employer by or through misconduct, or gross negligence, or carelessness. (§ 13.)

Court may make abatement of wages or damages in case of misconduct.

If an employer, not having reasonable cause of complaint, refuses payment of wages when due; or, not having given such notice, or made such payment as required by the 3rd and 4th sections of the ordinance, refuses to continue full payment to any servant or journeyman artificer during the whole term of a contract, he, in addition to payment of wages due, or of all that would have become due, or both, is liable to a fine not exceeding five pounds, or to imprisonment not exceeding three months, or to such fine together with such imprisonment. (§ 14.)

Penalty on employer refusing without cause to act up to contract.

Any person knowingly and wilfully giving a false character of a servant or artificer, is liable to a fine not exceeding ten pounds, or to imprisonment, with or with-

Persons giving false character.

out hard labour, not exceeding twelve months, or to such fine together with such imprisonment. (§ 15.)\*

Servant, &c.  
making false  
statement of  
former em-  
ployment or  
altering  
character.

Any servant or journeyman artificer offering himself, asserting or pretending that he has served in any service in which he has not actually served; or with a false certificate of his character; or adding or altering any matter in any certificate of any former employer, or by any other person authorized by such employer to give the same, is liable to a fine not exceeding three pounds, or to imprisonment, with or without hard labour, not exceeding three months, or to such fine together with such imprisonment. (§ 16.)

Servant, &c.  
denying  
former  
employment.

Any person, before in service, offering to hire himself, falsely and wilfully pretending not to have been hired in any previous service, is liable to a fine not exceeding three pounds, or to imprisonment, with or without hard labour, not exceeding three months, or to such fine together with such imprisonment. (§ 17.)

Wages, &c.  
made a first  
charge on  
estate.

All wages due on any contract of service, and all liabilities arising therefrom, as respects the employer, are a first charge against the estate or property in which the servant or artificer under such contract shall have been employed, and is recoverable by suit against the party for the time being in possession of the estate or property. Such charge is limited to three months'

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\* See ordinance.

wages only, and must be enforced within three months after the termination of the service for which such wages are due. Claims for wages may be enforced before a Court of Requests, having in other respects jurisdiction in that behalf, although the amount exceeds ten pounds. (§ 18.)

Any person wilfully and knowingly seducing or attempting to seduce any servant or journeyman artificer from his service; or who wilfully and knowingly takes any servant or journeyman artificer, while bound to another, into his employment; or harbours or conceals any servant, &c. who has absented himself without leave from his service; or retains in his service any servant, &c. bound under contract to another, after notice in writing that such servant, &c. is so bound, is liable to a fine not exceeding five pounds, and to imprisonment, with or without hard labour, for any period not exceeding three months, if the court sees fit to impose imprisonment. Every such offence is cognizable before the Police Court having jurisdiction in the District wherein the offence was committed, or the offender apprehended. (§ 19.)

Penalty for seducing servants, or employing them when bound to others, or harbouring, or concealing them.

Jurisdiction of Police Court in such cases.

Any person who takes into his service, or harbours, &c. any servant, &c. bound to another, without reasonable precautions to ascertain whether or not such servant, &c. is so bound, or knowing him to be, or after notice that he is so bound, if the servant, &c. be at the time so taken, &c. under advances from the person to whom he was so bound, is liable civilly to pay to such

Persons employing, &c. labourers under advances, liable in double such advances.

person, as liquidated damages, *double* the amount of such advances. (§ 20.)

Servants not liable to punishment if wages unpaid for one month.

No servant, &c. is liable for neglect of duty, if, at the time of the alleged offence, his wages shall have been unpaid for longer than a month. In computing the wages due at any time, such servant or journeyman artificer shall be debited with all advances of money made to him, and with all food, clothes, or other materials supplied to him, and which the employer is not liable, under the ordinance, to supply at his own expense. The fact of such wages being so due does not affect the liability of such servant, &c. to punishment under the provisions of the ordinance, unless he, at least forty-eight hours previous to such alleged offence, has demanded from his employer the payment of his wages due, and the employer has refused or failed to pay them. (§ 21.)

Kanganies, &c. fraudulently disposing of advances, guilty of an offence.

Every kangany, or other agent, entrusted with any money or valuable security, for the purpose of engaging for service any servant, &c. who, with intent to defraud, converts any part thereof to his own use, or for any purpose other than such purpose as aforesaid, is liable to be transported for any term not exceeding seven years, or to be imprisoned for any term not exceeding three years, with or without hard labour. (§ 22.)

Deserters may be directed to return to

Whenever any servant, &c. is brought before any Court or Justice of the Peace for quitting his service, or

for refusing or neglecting to work, without cause, such court or justice may, if the employer or his agent so requires, and the labourer consents thereto, instead of punishing or committing to trial the offender, direct him to return to service. And the court or justice must keep a record of the proceedings had before him, and certify at the foot thereof that the servant has, of his own free will, consented to return to service. (§ 23.)

work, instead of being imprisoned or committed.

If any servant, &c. is, during the subsistence of a contract, imprisoned, or absents himself without leave, the court before which he is tried must award that no part of the period of such imprisonment or of such absence be deemed or taken to be a part of the period of his service; but that he be compellable, at the option of his employer, to serve for the full period defined as aforesaid, for which he shall have contracted to serve; and until such extended service shall have been completed, he shall continue subject to the ordinance. (§ 24.)

Period of absence without leave, or of imprisonment, not to be counted as part of the period of service.

If the estate, upon which any agricultural servant or journeyman artificer is employed to serve for a period exceeding one month, becomes vested in, or be transferred to, or placed under the superintendence or management of, any person other than the person with whom the contract was entered into, such contract is deemed to be transferred to the person in or to whom the estate becomes vested or transferred, or

Transfer of contract of service to new proprietor or manager of estate.

under whose superintendence or management the estate may be placed; and such last-mentioned person, and such servant, &c. is respectively bound to perform all the terms and conditions of the contract in the same manner, or as near thereto as the nature of the case will admit, as if the contract had been originally entered into between such person and such servant or artificer. In case such estate shall become vested in or transferred to any person other than the person with whom such contract shall have been entered into, such servant, &c. is thereupon entitled to determine such contract, if he so elects, and give notice to the person in whom the estate shall have become vested or transferred, and shall receive all wages due under the contract. Except where estates are held in partnership, and where one or more of the partners retire from the partnership; or when, on such retirement, other partner or partners shall take the place of the retiring partner or partners, one or more of the original partners who were parties to the contract continuing in the partnership. (§ 25.)

Penal provisions of this ordinance not to affect civil actions.

Neither the alleged commission of any offence by any person, nor the conviction nor acquittal of any person of any offence under the ordinance, is a bar to any civil action. (§ 26.)

Employer bound to find lodging, food,

Any servant incapacitated from labour whilst in service is entitled to lodging, food, and medical care, at

the expense of his employer. The employer is to pay to the servant, during such period, his wages in addition. and medical care to sick coolies.

The employer may nevertheless determine the contract, under the 10th section of the ordinance, in case the servant becomes permanently disabled.

## CHAPTER XXIV.

## PARTNERSHIP.

Partnership  
defined.

PARTNERSHIP (*societas*) is the voluntary association, by agreement, of two or more persons who bring, or engage to bring, into community, money or effects, or who contribute, or engage to contribute, labour or skill, for the purpose of carrying on, as principals, a common undertaking for a lawful object, for their common profit, and with the mutual obligation of fairly accounting to each other. (*Grot.* iii, 2, 21, p. 383: *V. der Ldn.* iv, 1, § 11, p. 570: *Sm. M. C. L.* ch. 5, p. 136: *Broom's C. L.* 555.)

Contract of  
partnership.

A partnership may, at common law, be entered into verbally, or may be inferred by the conduct of the parties. (*Grot. id.*: *Sm. M. C. L. id.*) But this is now limited by the Ordinance of Frauds and Perjuries, which enacts "that no promise, contract, bargain, or agreement, unless it be in writing, and signed by the party making the same, or by some person thereto lawfully authorized by him or her, shall be of force or avail



in law for the purpose of establishing a partnership where the capital exceeds £100. Provided, that this shall not be construed to prevent third parties from being partners, or persons acting as such, and offering evidence of circumstances to prove a partnership existing between such persons; or to exclude parol testimony concerning transactions by, or the settlement of any account between, partners." (*Ord. No. 7 of 1840, § 23.*) This clause has been construed not to extend to mere joint speculations which are daily entered into by mercantile firms in other respects perfectly independent of each other;\* nor, if one person acts as the agent of another, would there have been anything unusual or irregular in his having stipulated for a share in the profits in lieu of commission. (7331, *D. C. Kandy, 24 May, 1837; Morg. 155.*)

An agreement in writing for a partnership is designated by the name of articles of partnership. (*Sm. M. C. L. ch. 5, p. 136.*)

Each of the partners must be competent to contract; and, therefore, if the contract of partnership is attempted to be entered into by an infant (unless emancipated), it

Articles of  
partnership.

Who may be  
partners.

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\* Yet it would be difficult to keep clear of a partnership, as there may be a partnership in a single transaction. (*Inst. L. 3, tit. 25, p. 6.*) At the same time, every community of profit does not create a partnership (*V. der K.*); but as an agent may receive profits in lieu of commission, so, conversely, a capitalist may agree for a share of the profits in lieu of interest (retaining his claim to the capital, if he can get it) without partnership.

will be avoidable at his full age; and if by an alien enemy, it will be void; and if by a married woman, it will be void, except by special custom, or upon the civil death, transportation, or judicial separation of the husband and wife, or in respect of separate estate. (*Sm. M. C. L.* ch. 5, p. 136: *the Roman-Dutch authorities.*)

Criterion and  
requisites of a  
partnership.

A community of profit is the true criterion of partnership. This is the principle laid down by Mr. Smith, in his *Manual of Common Law*, and there can be no doubt that it is the true one. It is the more happy for the purposes of this work, that it fully agrees with the idea of partnership in the Civil and the Roman-Dutch Laws.

Both Marshall (460) and Broom (555) distinguish between a partnership *inter sese*, and partnership *quoad third persons*, alleging that "traders become partners by a mutual participation of *profit and loss*; but as to *third persons*, they are partners if they share the profits of a concern." Yet, at the same time, both appear to acknowledge a partnership regarded *inter sese*, in which one or more of the partners shall not share the loss, but only the profits; and the same principle will be found in the Roman-Dutch authorities. (See, also, *Story on Partnership*, p. 28.) *A community of profit* (is then) the true *criterion of partnership*. This is essential, and generally each one's share in the profits ought to be proportioned to his contribution; but neither this nor an equality of profit is necessary; nor is it necessary

that there should be a community of that which produces profit, or a community of loss. For, though each of the partners ought to have his loss apportioned to that which he would derive from the profits, yet, by express stipulation, one partner may bear a smaller proportion, or even be exonerated from all loss, as between himself and his companions, though still remaining liable to strangers; and one partner may contribute all the money, all the stock, or all the labour. But the only partnership *inter sese* mentioned in the civil law as being void, is where a partner is totally excluded from profit; such a partnership (termed *leonina societas*, or a lion's share partnership) being void. (*Inst. L. 3, tit. 25, pp. 1 and 2: Sm. M. C. L. ch. 5, p. 137: Grot. iii, 21, § 5, p. 384: Marshall, p. 460: Sandars, p. 463: V. der Ldn. p. 570: Broom's Com. 555: V. Lwn. 409.*)

A person may be a partner with only one member of a firm, in respect of that member's share, without being a partner with the other members. And persons may stand in the position of partners as to third persons without being partners *inter se*; where they hold themselves out, or at least are held out by the party sought to be charged, as partners to third persons, who give credit to them accordingly. (*Story on Partnership, p. 82: Marshall, 461.*) These persons are called nominal partners. A very refined distinction exists as to partnership *quoad* third persons in the English law; that is, a servant paid by a share in the profits is a partner *quoad*

Different positions of persons interested in the profits.

third persons; but a servant paid a sum proportioned to the gross profits is not such a partner. Both are paid out of the profits; for neither can be paid until the profits are ascertained; and as the whole of the law relating to partners *quoad* third persons is borrowed from the English law, the distinction probably obtains in Ceylon. (*Sm. M. C. L.* 138.)

So that a person having a virtual interest in the profits may, in respect of that interest, be a partner, both as regards the whole firm or one of them, and as regards strangers; or he may be a partner as regards strangers only; or he may not be a partner in any respect. (*Sm. M. C. L.* 138.) Partnership *inter sese* must be by writing; partnership *quoad* third persons, generally not.

General and special partnerships.

The Roman-Dutch lawyers divide partnerships into general and special partnerships.

A general partnership may be one of all the goods of the respective parties; or only of *all* the profits or gain acquired during the partnership. In the former (*societas universorum bonorum*) the parties bring into common all the goods, present or future. One partner may be richer than another. All the goods of either party become common at the time of the contract, without delivery, whether then possessed or afterwards acquired, by whatever title, whether by inheritance, gift, or legacy; unless acquired under express condition of not coming into partnership, or unlawfully acquired.

Each partner is liable for the debts of the other due at the time of the contract, or acquired during the partnership, for necessaries, as for the support of himself, his wife and children.

The other form of general partnership, viz. the partnership of general profits (*societas universorum quae ex questu veniunt*), is a partnership of all profit acquired by either, by any kind of trade during the partnership; it extends to profit only, and not to things belonging or accruing in other ways, such as inheritances or legacies. These partners are only liable for debts incurred in relation to the partnership.

Special partnerships are :

1. *Societas rei unius*, which is entered into to hold one or more particular things in common, and to share the fruits thereof.

2. A partnership formed to carry on a particular business, whether a handicraft, trade, or some branch of commerce (*societas negotiationis*).

When this latter kind is a trade or commercial partnership, it may be carried on as a firm, where each of the partners is liable for the whole debts of the company, made under proper authority, and in the name of the firm (*V. der Ldn.* 575-7 : *V. der K.* Art. 783); or it may be carried on *en commandite*, that is, when a merchant (including a tradesman) agrees with any particular person to carry on any trade or business in partnership, as to profit and loss, but to be conducted in the name

of the merchant alone, and the other merely brings money in as capital, in return for a share in the profits.

The *société anonyme* is where two or more agree to share in a business carried on in the name of one only. (*V. der Ldn.* pp. 575-6 : *V. der K. Art.* 704.)

These partners are in the English law termed dormant partners, and though they do not appear to the world as partners, yet they are responsible for the engagements of the firm; but under the Roman-Dutch law, partners *en commandite*, and *anonymous*, are liable to their co-partners, but not to a third person. (*V. der Ldn.* 578.) Lest, however, the persons contracting with the working partner should rely on the money partner to their injury, the latter must not publicly hold himself out as a partner, nor have his name in the style of the firm. (*V. der K. Art.* 704.) This is different from the English common law, where a dormant partner—that is, one who participates in the profits, but does not appear to the world as a partner—is responsible for the engagements of the firm. (*Sm. M. C. L.* p. 138.)

**New partners.** A new partner cannot be introduced without the consent of every member of the firm, though one member may admit a third person as a partner with him of his own share, but not as a general partner. (*V. der Ldn.* 577.) Even the executor of a partner does not become a partner in his stead, unless the partnership contract contains a stipulation that the executor shall be admitted in his place. (*Sm. M. C. L.* p. 139.)

But if an executor once becomes a member of his testator's firm, though only in trust for the persons interested in the testator's estate, he will render himself liable, both in person and estate, for its engagements; insomuch that he may even be made bankrupt in respect of such liability. (*Sm. M. C. L.* p. 139.)

Executors, &c.  
as partners.

The contract of partnership can also express, or not express, the shares; but unless the proportions of gain and loss have been specially agreed on, the shares of gain and loss are equal, that is, in proportion to contribution (*Inst. B. 3, tit. 25*); but if there is no evidence to the contrary (*i. e.* as to contribution), they are taken to hold *equales partes*, *i. e.* one equal share in the partnership stock, and effects and profits. Also, if shares only as to profits are mentioned, and nothing said as to losses, the losses follow the proportion of the profits; and *vice versâ*, as to profits, if losses only are spoken of. (*Inst. B. 3, tit. 25*.) Again, one partner may share the profit, and yet not bear the loss; or the profits may be in common, and one only bears the loss; though this is understood to mean, that if there is no profit on one transaction, and loss on another, the accounts must be balanced, and only the net profit be reckoned as profit (of course to save the partnership from degenerating into a *leonina societas*). (*Inst. L. 3, tit. 25*. See, also, *Sandars*, pp. 462-3: *Grot.* iii, 21, § 5, p. 384: *V. der Ldn.* B. iv, p. 572: *V. der K. Art.* 699.) Yet, in equity, a partner may have little or no valuable interest in the

Share of  
partners.

tion or repairs of the partnership immoveable property without the consent of the others; nor alienate, nor pledge the partnership property beyond his own share therein. (*V. der Ldn.* p. 577.) But it would probably be held that he would bind his partners, even if he applied the money so raised to his own use, provided the person dealing with him had no reason to suppose that a fraud was intended. Of course he would not bind his partners, if acting beyond the scope of his partnership authority; but if debts have been created by a person who has power to bind the partnership, and so acting, and in the name of the firm, each of the partners of a trade firm is liable for the whole debts of the firm. (*V. der Ldn.* p. 579: *Sm. M. C. L.* 141.) Probably it would be held that a dormant partner of a firm *en commandite*, or a *société anonyme*, could also bind the firm by declaring himself and becoming thus an open, liable, and acting partner. In England, dormant and nominal partners have the same power to bind the firm as actual and acting partners. (*Sm. M. C. L.* p. 141.)

On the same principle, that each partner is agent for the other, each acting partner may pay or satisfy a debt, so as to exonerate the firm, and give time to a partnership debtor, and execute a valid release in the name of the firm, and thereby preclude them from suing. And payment, release, or discharge to one partner, is payment, release, or discharge to all, even after a dissolution, and notwithstanding a clause in the deed of dis-



solution that another partner shall receive all the debts. On the other hand, in the same manner that a partner may be a customer of his own firm, a partner does not bind co-partners by any contract made between third parties and himself as an individual and on his own account. (*Sm. M. C. L.* 141.)

A partner cannot bind his firm by a deed, unless authorized by deed to do so; he cannot, therefore, affect the firm's landed property, unless so authorized. (*Sm. M. C. L.* p. 142: *Ord. No. 7 of 1840*, § 2.)

In those partnerships which carry on trade as a firm, the co-partners may bind each other by bills and notes in the name of the firm. (*Sm. M. C. L.* p. 142.)

Each partner must bear his share of the costs and charges necessary for the care and preservation of the partnership property. Also, each partner is bound to answer to his co-partners for all that he is indebted to the partnership, under deduction of what it is indebted to him. This debt of one partner to the firm is measured by the amount of capital which each is pledged to bring in, so far as he has not yet brought it in, and by the amount he has drawn upon the general cash of the firm for his own private expenses; and he is also bound to make good (see *ante*, p. 407) all damage done to the partnership property by his fault. And each partner is bound, in proportion to his share in the capital, to

Other liabilities of a partner to his firm.

satisfy the claims of his co-partners upon the concern, under deduction of what they, on the other hand, owe to the company. (*V. der Ldn.* 578.)

Remedies by one partner against another—suit.

From the obligations which arise out of the contract of partnership, there lies an action *in personam* for each partner against his co-partners, to enforce the performance of all those obligations which flow from the nature of the contract itself (as, for example, for a balance due, where a balance has been struck), or from the special covenants in the articles of partnership. (*V. der Ldn.* p. 578: *Sm. M. C. L.* 142.)

Specific performance.

The court may decree a specific performance of a contract to enter into a partnership for a specific period of time (for it would ordinarily be useless to enforce one which might be dissolved instantly at the will of either party), and to furnish a share of the capital stock (*St.* § 666). It will also (after the commencement of and during a partnership) decree a specific performance of other agreements in the articles of partnership; and, even after dissolution, will decree specific performance of agreements intended to operate after dissolution. (*St.* 667.)

Injunction.

The court will grant an injunction to prevent the firm from wilfully using any style (excluding a partner's name) but that lawfully agreed upon; or to stop any use of the credit of the firm contrary to the articles; or a partner from engaging in any other business contrary

to the articles\* (*St.* 667); and it will also, by injunction, prevent a partner from doing any acts injurious to the partnership (*St.* 669).

The liability of partners to third persons, in respect of the engagements of his co-partners, commences with his admission to the firm; so that he will not, in general, be liable on a contract effected before his admission. (*Broom's Com.* 566.)

Liability and responsibility of partners — commencement.

If one partner makes an admission, acknowledgment, or representation, his co-partners are generally bound by it. And if notice is given by or to one partner, it is tantamount to notice by or to all. And if one partner is guilty of a breach of contract, negligent wrong, or fraud in conducting the business of the firm within the scope of his authority, the others are generally liable. (*Sm. M. C. L.* p. 143.)

Notice by or to partners.

A retiring partner's liability ceases on the dissolution of the firm, or on his retirement from it, accompanied with due notice thereof in the usual mode,† and in particular to those who have generally dealt with the firm. (*Frceman v. Cook*, 2 *Exch. R.* 663-4.)

Cessation of liability.

The retiring partner will, however, still remain liable in respect of previous engagements, unless the creditor who seeks to charge him has ever expressly or impliedly agreed to the substitution of the credit of the new firm

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\* Any profits so made in other businesses will be decreed to belong to the partnership. (*St.* 667.)

† Generally, notice in the Government Gazette.

for that of the old; the onus of proof lying on the original debtors. (*L. Lyth v. Ault*, 7 *Exch.* R. 669; *Broom's Com.* 566.)

The liability of dormant partners *en commandite* and *anonyme* ceases with their retirement, except as to such persons who have made themselves partners *quoad* third persons by their acts: to these persons notice of withdrawal should be given; others are not entitled to it.

Dissolution—  
by renunciation.

A partnership at will continues as long as the parties continue to agree that it shall do so; but if one partner renounces these, the partnership is dissolved (*Inst.* L. 3, T. 25, p. 4); though the court will grant an injunction against a sudden dissolution about to be made in ill faith and irreparably injurious. (*St.* 6681: *V. der Ldn.* p. 579.)

By false representation.

A partnership may also be dissolved at the instance of one partner who has been induced to enter it by a false representation. (*Rawlins v. Wickham*, 1, *Gif.* 355.)

By decree.

A partnership (at will, or not) may be dissolved by decree where no real brotherhood longer exists (*societas jus quodammodo fraternitatis in se habet*, D. 17, 2, 63), if, by reason of the ill-feeling between the partners, or other circumstances, it is impracticable to carry on the undertaking, either at all or according to the stipulations of the articles, or beneficially, or on account of the insanity, permanent incapacity, or gross misconduct

of one or more of the partners (although the party applying committed the first wrong); but it will not be granted for trifling faults and misbehaviour *culpa levis* (*Sandars*, 466) which do not go to the substance of the contract. (*St.* § 673.)

A partnership not at will is dissolved also by the effluxion of the time fixed for its duration. (*V. der Ldn.* p. 579.) By time.

Also by the extinction of the subject matter, or the completion of the object of the partnership. (*V. der Ldn.* p. 579: *Grot.* iii, 21, § 8, p. 385.) By completion.

The entire partnership is also dissolved by a general assignment by one or more of the partners; or by an execution on the partnership effects by a creditor; or by the bankruptcy of any partner; or the loss of all his property by delict, or his conviction of a grave crime.\* (*Grot.* iii, 21, § 8, p. 384: *Sm. M. C. L.* p. 145.) By insolvency.

The death of a partner or the marriage of a female partner operates as a dissolution. But, in the case of a partnership of three or more persons, the other persons may, of course, come to a mere agreement to carry on the business upon the old terms. Death, however, does not extinguish the partnership when one of the covenants is that the partnership shall continue to his personal representatives, or other succession (as a son). By death, or marriage.

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\* In England, by attainder of treason, or felony, which carry forfeiture of goods; and, in Ceylon, by any conviction that would render the continuance of the partnership impracticable.

The personal representative is exonerated, however, if he does not choose to continue the concern (see *ante*, p. 404); though the estate of the deceased is liable until his debts have been discharged. (*Grot.* iii, 21, § 8, p. 385: *V. der Ldn.* p. 579: *Sm. M. C. L.* p. 145.)

According to Grotius, a partnership is dissolved by one beginning to trade for himself (p. 386); but this must mean contrary to the articles, as a man may be a partner in several concerns; and surely the court would not decree a dissolution that might be injurious to the other co-partners, when it can restrain by injunction, and declare the profits so improperly made to be the property of the firm.

Effects of a  
dissolution.

The following is the account given by Van der Linden of the effects of a dissolution of partnership; but in it the learned author is plainly referring only to voluntary dissolution. "The effect of a dissolution of partnership is, that all contracts thereafter entered into by either of the parties is to be considered as made on his own account, unless they necessarily have a relation to the affairs of the late concern. The late partners are entitled to demand from each other the liquidation of the partnership accounts, and a general account and division of the partnership property. For this purpose, a statement is first drawn out of what each owes to the concern, and his counter claims are set off. After this, a *statement* is made out of all the partnership property, in which are to be included the sums for which each,

on account taken, is found to be a creditor of the concern, and which they are to be paid before any division takes place. Every article, then, of the partnership is to be valued. After this, the division commences, and is decided by lot: he who draws the greater lot being discharged with a proportional payment to him who draws the smaller lot. Sometimes this division takes place by setting up the partnership stock to the highest bidder amongst themselves. The debts due to the concern, which are considered good (*solide*), are in like manner divided by lot; and those which are held bad or doubtful are given over to some one to collect, and the money accounted for. The costs of the division are borne in common." (*V. der Ldn.* pp. 579-80.)

This is the voluntary system; but when a dissolution is decreed (and even under a dissolution by consent), not only will an account be decreed, but, if necessary, a manager or receiver will be appointed to close the business and to sell the property (*St.* 172). But an account will not be decreed except under special circumstances, if there is no actual or contemplated dissolution, so that all the affairs of the partnership may be wound up (*St.* § 671).

Dissolution  
and division  
by decree.

On a dissolution, one of the co-owners of land cannot insist on a partition; but the whole must be sold. (*Wilde v. Milne*, 26: *Bevan*, 504.)

Partition.

During the partnership, the joint creditors have no lien until they have obtained a judgment; and before

Rights of  
creditors.

they have issued and registered process of execution, they cannot prevent the partners from effectually transferring the property by a *bonâ fide* alienation. (*Sm. M. Eq. 333.*)

Priority, as between joint and separate creditors.

The creditors of the partnership have the preference to have their debts paid out of the partnership funds before the private creditors of either of the partners. On the other hand, the separate creditors of each partner are entitled to be paid first out of the separate effects before the partnership creditors can claim anything. (*St. § 675.*)

Creditors may proceed against deceased partner's estate in the first instance.

Every partnership debt is several as well as joint; and, in the case of the death of one of the partners, the creditors may proceed against the executor or administrator of the deceased, leaving him to his remedy over against the surviving partner. (*St. 676.*)

Similar as to other joint debtors.

The rule equally applies where there is a joint loan to several persons not partners, whether it be in the course of mercantile proceedings, or otherwise; for the debt is treated in equity as joint and several. (*Ibid.*)

Right of creditors in inchoate partnership.

If a partner, who has not yet brought into the partnership what he was bound to contribute, makes a cession of his property, his creditors, or the curator or assignee of his estate have no rights as against the partnership, so long as the other partner has not received what he is entitled to. (*V. der K. 705.*)



## CHAPTER XXV.

## MANDATE.

THE contract of mandate is one where one man commits to another the care and management of one or more lawful affairs for his or another's account, and in his stead, who charges himself therewith gratuitously, and binds himself duly to account and answer. (*Inst.* iii, 26, §§ 1-6: *V. der Ldn.* i, 15, § 14, p. 242: *Grot.* iii, 12, § 2, p. 328.) He who gives the commission is called the mandant, or mandator; and he who undertakes it is called the mandatory.

Mandate  
definçd.

The affair to be done or executed must be some future thing not contrary to law, or *contra bonos mores*, nor altogether of such an indefinite nature as to be quite uncertain, nor of such a nature as to render it unfit to be executed by the principal himself; and, further, it must be of such a nature as not to be unfit to be executed by such a person as he who is charged with it. The mandator or principal, or some third person, must

What affairs  
may be  
committed.

have some interest in it. (*Inst.* iii, 26, § 7 : *V. der Ldn.* i, 15, § 14, p. 243 : *Grot.* iii, 12, § 3, p. 328.)

The parties  
must bind  
each other.

It is also requisite that it should be the intention of the mandator and mandatory to bind each other reciprocally, without regard to the way in which the agreement is made, whether verbally, by letter, or by regular power of attorney. (*V. der Ldn.* i, 15, § 14, p. 243.)

The business  
to be  
gratuitous.

The business undertaken must be done *gratuitously*, otherwise it is a case of contract of hire or service. However, it is not contrary to the nature of mandate for the mandatory to receive some recompense or honorary remuneration for his service; and remuneration may be recovered, not only where it is promised, but even where it has not been promised, provided the act or service done be such as it is usual to give remuneration for. (*Inst.* iii, 26, §§ 1-6 : *Grot.* iii, 12, § 6, p. 329 : *V. der K.* 570 : *V. der Ldn.* i, 15, § 14, p. 243.) In mercantile transactions, mandatories, generally termed agents, are usually remunerated for their services.

Extent of  
authority.

A mandate may be made to take effect from a particular time, or may be made conditionally. (*Inst.* iii, 26, § 12.) And if directed to a paid agent, it may be limited by instructions as to his conduct; or unlimited, leaving him to his own discretion. If limited by instructions, he ought to carry them into effect as fully and exactly as possible, consistently with pro-

priety. If unlimited, he ought to pursue the accustomed course of business; or, if prevented, to give notice to his principal. (*Sm. Merc. Law*, 120.)

Agencies, as regards their extent, are of three kinds:—1. Special; that is, an authority to do a particular, or carry out a particular matter. 2. General; that is, an authority to do everything which is requisite in relation to a particular business or employment. 3. Universal; that is, to do all acts for the principal which he may legally depute to another. So that a man may have both a special and a general agent; or one general agent in regard to one business, and another agent in regard to another business. (*Sm. M. C. L.* 243, citing *Broom's Com.* 517-18; 2, *Ste. Com.* 65; *Sm. Merc. Law*, 120, 134-5.)

Different sorts of authorities.

The obligations of the mandatory are to accomplish and bring to a conclusion the business which he has voluntarily taken upon him, according to, or in a manner obviously analogous or equivalent to, the terms of the mandate. However, a sudden and unexpected emergency wholly excuses a mandatory who either has not thoroughly fulfilled the mandate, or has exceeded its limits.

Obligations of the mandatory.

In the execution of the mandate he must use the greatest possible care, whether a gratuitous mandatory or a paid agent. He is also bound duly to account with the mandator, and to give over to him all fruits, gains, and profits that have come to his hands on account of

the mandate. (*Inst.* iii, 26, § 11: *Grot.* iii, 12, § 8, p. 329: *V. der Ldn.* i, 15, § 14, p. 244.)

Accounts of  
paid agent.

It is the duty of a paid agent to keep clear and regular accounts and vouchers, and to communicate the result to his principal from time to time; and if he does not, he will not be allowed the compensation which would otherwise belong to his agency. And if he mixes up his principal's property with his own, he is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated as the property of the principal. (*Sm. M. Eq.* 36.)

Mandatory  
not to exceed  
his authority.

A mandatory must not exceed the limits of his mandate. If, when an agent, he exceeds his authority, any loss arising therefrom will fall on him; but any benefit will accrue to his principal. (*Inst.* iii, 26, § 8: *Sm. Merc. Law*, 120-1.)

But may  
charge  
advances.

But an agent may charge his principal with all advances which he has made in the regular course of trade, or in some pressing emergency. (*Sm. M. C. L.* p. 247; citing *Sm. Merc. Law*, 130-1; *Story on Agency*, § 335-6.)

Agent's  
commission.

The agent's remuneration is called his commission. The amount is fixed by contract, or by usage, or statute; or, if not, may be determined by a court. He may stipulate for a share in the profits, in lieu of commission. (7331, *D. C. Kandy*, 24 May, 1837; *Morg. D.* 156.) He loses it by neglecting to keep an account, or by other

gross misconduct or negligence, or by gross unskilfulness. (*Sm. M. C. L.* p. 246.)

The mandator is bound to save the mandatory harmless, and reimburse him all costs incurred on account of the charge, and not occasioned by his own fault or negligence, and to guarantee him against all obligations and engagements which he has been obliged to enter into on account of the charge, provided that in these the mandatory has not exceeded the due limits; even if another have executed the mandate at a less expense, the expenses he has incurred *bonâ fide* must be allowed to him. (*Grot.* iii, 12, § 9, p. 330: *V. der Ldn.* i, 15, § 14, p. 244: *Sm. Merc. Law*, 131: *Story on Agency*, §§ 339-40.)

Duty and power of mandator.

The mandator may sue, even without cession of action, on the contract of the mandatory. In like manner the mandator may be sued thereon, in the direct action, by one with whom the mandatory has contracted in his name. (*V. der K.* 571-2.)

For the enforcement of these reciprocal obligations, the law has given to both parties the necessary actions.

Mandate determines—

1. By the death of the mandatory, or of the mandator. But if, after the death of the mandator, the mandatory, in ignorance of his death, executes the mandate, he may still recover from the representatives of the mandator. (*Inst.* iii, 26, § 10.)

Determination of mandate.

2. By such alteration in the condition or affairs of the mandator that he has no longer *legitimam personam standi in judicio*, or the right to sue.

3. By the revocation of the mandate before its execution. (*Inst.* iii, 26, § 9 : *Grot.* iii, 12, §§ 11-12, p. 330 : *V. der Ldn.* i, 15, § 14, p. 245.)

4. Also by the renunciation of mandate. Every one is free to accept a mandate ; but if it is once accepted, it must be executed, or else renounced soon enough to permit the mandator executing it himself, or through another ; otherwise the mandator may recover against his mandatory, unless some good reason, such as sudden and serious illness, deadly enmity between the parties, or the insolence of the mandator, has prevented the mandatory making the renunciation, or making it within a proper time. (*Inst.* iii, 26, § 11 : *D.* xvii, 1, 23 : *Sandars*, p. 474.)

5. By the agent's renunciation of it with the consent of the principal.

6. By the plaintiff's marriage, if a *femme sole*.

7. By the principal's insolvency, except in certain cases.

8. By fulfilment of the commission.

9. By the expiration of the time limited for the duration of the agency. (*Sm. Merc. Law*, 158-60 : *Add. Contr.* 587-8.)

As to the relation and liability of principal and

agents to third parties, little is to be found in the Roman-Dutch writers: the following points are taken from the English law.

Thus agents bind their principals in the following cases:—

Liability of principals to third parties.

1. Not only where the agent is expressly authorized, but in other cases where his authority is to be inferred from the conduct of the employer; the agent's authority, where not expressly defined, being measured by the extent of his usual employment, and inferred from facts connected with the employment; not from considerations of the utility or propriety of such authority.

2. A general agent can only bind his principal by acts in the usual way of business.

3. A particular agent exceeding his authority does not bind his principal; but if a general agent exceed his authority, his principal is bound, provided his acts are within the usual dealing and scope of the business. And a principal cannot, unknown to parties dealing with his general agent, restrict the agent's authority to perform all things customary in the business.

4. A contract for the purchase of goods in the possession of, or consigned to, an agent (even if known to be such), and from him, binds the principal, if the contract is made in the ordinary course of business, and if the purchaser has no notice disavowing the agent's authority.

5. Payment, tender, or delivery to an agent, in the

## MANDATE.

usual course of employment, is payment, tender, or delivery to the principal. (13046, *D. C. Negombo*, 2 *Apr.* 1834; *Morg. D.* 13.)

6. Notice to the agent is notice to the principal, and notice to the principal, generally speaking, is notice to the agent.

7. The agent's representation binds the principal; and his admission is evidence against the principal.

8. A principal is answerable for the negligence of his agent; but not for his wilful or malicious neglect, or for fraud not sanctioned by the principal, and of which he has not elected to take the benefit.

1. Agents (excepting masters of ships) professedly contracting as such for known and responsible employers, and acting within the scope of their instructions, incur no personal liability to third parties, except for losses incurred by their own fault or negligence. (11440, *D. C. Colombo*, 3 *May*, 1837; *Morg. D.* 149.)

2. If an agent contracts, without professing to act as an agent, the opposite party may, in most cases, at his option, charge either the agent or the principal, on discovering him. And the rule appears to be the same where, at the time of contracting, he states himself to be an agent, but does not disclose his principal.

If an agent lends money, or enters into any other contract in his own name, but in reality for an undisclosed principal, either principal or agent may sue upon it; unless it be by deed, in which case the agent alone

Liability of  
agents to third  
parties.



## SURETIES.

can sue upon it. (*Sm. M. C. L.* 251; citing *Sm. Merc. Law*, 161-7; *Broom's Com.* 527; 2, *Ste. Com.* 66; *Add. Contr.* 607; 2, *Sm. L. C.* 333-6.)

A mandate can be made for a mandatory to become surety for the mandator. (*Inst.* iii, 26, § 1.) Sureties defined.

A surety is one who, for greater security of the *jus in personam*, binds himself for a debtor, in behalf of his creditor, to pay the whole or part of that in which he is indebted, and becomes a party to the obligation. (*Grot.* iii, 3, § 12, p. 292: *V. der Ldn.* i, 14, § 10, p. 206.)

All persons capable of contracting may become sureties, except women, even when they become sureties for their husbands, unless they have laid a snare to defraud another, or are principal debtors; or have acquired anything by the transaction; or have been security for one to whom they owe money; or have confirmed their security by a new promise after two years; or if they have expressly and advisedly renounced this privilege by a public instrument. (*Grot.* iii, 3, §§ 13-18, pp. 292-3: *V. der Ldn.* i, 14, § 10, p. 209: *V. der K.* 496.) Also, a woman may, in her testament, desire her heirs to pay what she owes in respect of suretyship. (*V. der K.* 495.) Who may be sureties.

The obligation of surety arises either from special contract and agreement, or by operation of law; as, in the latter case, that which a usufructuary is bound to pay for the restoration of the property in which he has Suretyship, how created.

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a life interest ; or by order of a court, as when money deposited in court is taken by a party on security. When surety arises by operation of law, or by decree, the party must be solvent, and within the jurisdiction, either in person or by property. This is termed a surety, or bail which can be justified.

Consequences  
of suretyship.

From the nature of a surety by contract, it follows—

1. That there can be no binding obligation on the part of the surety, unless there exist a legal binding obligation on the part of the principal debtor.

2. That the surety does not release the principal debtor from his obligation ; but merely binds himself as a collateral security for the debt : wherein a surety differs from him who undertakes the debt of another—that is, a guarantor.

3. That a surety cannot effectually bind himself further than to the whole or part performance of the same thing to which the principal is bound.

4. That a surety cannot bind himself for more than the principal debtor is bound for (though he may for less), whether this excess respect the amount of the principal debt, or the condition of the debt. And even should he do this, he would be liable only to the extent of the principal obligation, and no further.

5. A surety who has been compelled to pay the debt can recover against the principals jointly and severally ; and if he is bound with another, so as to be liable

ultimately to lose half the debt only, yet he can recover the *whole* debt from his principals. (13525, *D. C. Galle*, 3 Jan. 1851; *Coll.*)

6. That the cancelling of the principal obligation extinguishes also, at the same time, that of the surety; and that all grounds of defence on the part of the principal debtor against the creditor, as fraud or violence, are available also to the surety, unless this defence be confined to the person of the principal debtor; as when he has made a cession of his property, and is thus freed from any personal action until he is in better circumstances, in which case the surety remains liable.

7. That the security is extinguished by the two characters of principal debtor and surety becoming united in the same person. (*V. der Ldn.* i, 15, § 10, p. 207-8: *Grol.* iii, 3, § 23.)

A security may be entered into either before a notary or a judge, or even by a private instrument, provided the intention of the party to bind himself as security clearly appears thereby.

Security, how entered into.

When the security is based on land, it must be in writing. (*Ord. No. 7 of 1840*, § 2.)

In construing the words of a security bond, the extent of their signification must be carefully attended to. If they are general, and unlimited, the surety is to be considered to have bound himself to all the obliga-

tions of the principal debtor arising from the original contract for which he has become security.

However extensive and universal a security may be, it cannot be extended beyond the obligations arising from the contract itself, or to any thing *dehors* the contract.

Securities,  
how ex-  
tinguished.

Securities are extinguished and become void in the same manner as other obligations do. A surety, however, is not released by the mere circumstance of the creditor having granted an indulgence, in the delay of payment, to the principal without the concurrence of the surety. Since, if he was willing to remain longer bound, he should have given notice to the creditor. (*V. der Ldn.* i, 15, § 10, p. 211.)

But a surety is discharged, if the principal debtor is released by the creditor, or if the debt or demand is by any means extinguished as between the principal parties. (*Burge*, 163: *Add. Contr.* 579-81.)

The discharge of the principal from gaol, without the consent of the surety, amounts, without doubt, to a discharge of the surety. Also, if a surety is collateral security to a mortgage, and the creditor and principal debtor agree to sell the property mortgaged without the knowledge and concurrence of the surety, he is of necessity released. (3617, *D. C. Galle*, Aug. 1837; *Morg. D.* 193.)

Prescription

Where one person is surety for another, and is called

on to pay, the money so paid may be recovered as a debt *in solido* against the debtor, or any of the principal debtors, even though the surety paid the money under a legal obligation, and not at the immediate request of any principal; such obligation being considered equivalent to a request. The proper form of proceeding is by action for money for and to the use of the defendant. The claim so created is prescribed in three years from the creation of the cause of action, under § 5 of Ord. 8 of 1834. (22542, *D. C. Colombo*, 19 July, 1858.)

as to surety's right to recover.

A surety is also discharged if he has been misled, to the knowledge of the person receiving it, by a material misrepresentation or concealment of the terms of the contract. Then the suretyship or guaranty is ineffectual, as entire good faith is required between a debtor, creditor, and sureties. (*Burge, Id. : Add. Contr. Id.*)

When surety has been misled.

A surety who discharges the debt of his principal is entitled to stand in the place of the creditor as to all securities for the debt, and to have any benefit therefrom and remedy which the creditor had against the principal debtor. (3787, *D. C. Colombo*, 16 Jan. 1839; *Morg. D.* 255 : 18162, *D. C. Galle*, 3 Dec. 1858.) And where a surety, not bound to pay the whole debt, does so, he is entitled to the whole from the principal debtor. (1352, *D. C. Galle*, 3 Jan. 1851; citing *Grot.* p. 297; *Domat*, i, p. 402.)

Privileges of the surety as to securities.

A surety has a right to delay the creditor until he has sued the principal; and if the principal is out of the

To delay the creditor until suit.

country, a reasonable time is allowed to the surety to bring him back, that he may appear *in judicio*. And if, after the principal has been sued, the creditor is still unpaid, he may have recourse to the surety. (*Grot.* iii, 3, § 27, p. 295.)

To be re-imbursed.

As a general principle, the principal debtor is bound to reimburse the surety for any payment which he is compelled to make as surety. But the surety cannot pursue his remedy before payment, unless it was so stipulated, or the principal debtor has parted with his property. (*Grot.* iii, 3, § 30, p. 297.)

*Beneficium ordinis seu excussionis.*

The *beneficium ordinis seu excussionis*, unless renounced in the surety deed, enables him to throw the creditor, on demand of payment, upon the goods of the principal debtor. (*V. der Ldn.* i, 14, § 9, p. 211.)

Of division.

The surety has, further, the privilege of division (*beneficium divisionis*); that is, where several persons are sureties for the same debt, each of them, when sued for the whole amount, can require the creditor to divide his claim, and bring his action also against the other co-sureties, each for his portion *pro rata*, in so far as the others are not insolvent; that is, insolvent at the time of the *litis contestatio*; for if any surety should subsequently become insolvent, that would be to the loss of the creditor. (*V. der Ldn.* i, 14, § 10, p. 211: *Grot.* iii, 3, § 28, p. 296.)

Of cession of action.

The surety has also the right, on payment to the creditor of the principal debt, in his own name, to



demand from him cession of action, not only against the principal debtor, but also against all other persons who are liable. If he paid in the name of the debtor, it would be unavailing against a co-surety, or third party holding a mortgage.

After a surety has paid, and has obtained a cession of action, he may proceed against the debtor the same as the original creditor. If he neglects to take this cession of action, he has, nevertheless, at law, a right to proceed in his own name against the principal debtor to recover back what he has paid on his account. He has also the right, when there are co-sureties, to proceed against them to recover, *pro rata*, their proportion of the whole debt paid by them. (*V. der Ldn.* i, 14, § 9, p. 212: *V. der K.* 506.)

Factors are mercantile agents who are entrusted with the possession and disposal of property. Brokers are mercantile agents who are employed to enter into contracts respecting property without being in possession of such property. (*Sm. M. C. L.* 251; citing *Sm. Merc. Law*, 118; 2, *Ste. Com.* 76.)

Factors and  
brokers.

It is the duty of a factor to keep the goods with the same care with which a prudent man would keep his own; and it is often, if not usually, his duty to insure them; or, if unable to insure, to give notice of his inability to his principal. (*Sm. M. C. L.* 251; citing *Sm. Merc. Law*, 124; *Story on Agency*, § 111; *Paley*, 15-16.)

If no price is fixed for the goods, the factor must sell them for their fair value. He may sell for credit, or not, according to the usual course of business. If he gives reasonable credit, where it is usual, to a person of good credit, he is discharged, and will be entitled to his commission, notwithstanding any subsequent insolvency of the purchaser; provided he informs his principal of the transaction within a reasonable and usual time (*Sm. M. C. L.* 251; citing *Sm. Merc. Law*, 126; *Paley*, 26-7.)

Power of attorney.

Another class of mandatories are "attorneys," or, as they are called in the civil law, *procuratores*. A person can conduct an action, either in his own name or in that of another, if the latter is a procurator, a tutor, or a curator. A procurator is appointed without any particular form of words, nor is the presence of the adverse party required. (*Inst.* iv, 10, § 1.)

Before any judgment whatever can be obtained by an attorney, he must prove his appointment, which can be done in a summary manner (23681, *D. C. Colombo*, 9 June, 1858), and file his power of attorney in court. (13682, *D. C. Kandy*, 31 Aug. 1840; *Austin*, 54.)

If a party sues as an attorney of partners, and, on reference to the power of attorney, it is found to be signed by only one of them, the power will be held defective. (18635, *D. C. Kandy*, 4 Nov. 1845; *Austin*,

98.) So, also, if two persons are appointed "attorneys or attorney," they must both sign an appeal petition. (Lor. R. 108.)

Commercial contracts.

An attorney cannot appear in court in person, as a principal can, but must appear by an advocate or proctor. (13884, *D. C. Kandy*, 16 Dec. 1842; *Austin*, 55: *Charter*, § 17.)

A bill of exchange is a written mandate, whereby one person charges another to pay money to a third person on behalf of his mandator. (*Grot.* iii, 12, § 1, p. 331; *V. der K.* 596.) However, the law now administered in Ceylon, in respect of all contracts and questions arising within Ceylon, upon or relating to bills of exchange, promissory notes and cheques, and in respect of all matters connected with any such instruments, is the same, in respect of such matters, as is administered in England in the like case, at the corresponding period, as if the contract has been entered into, or as if the act in respect of which any such question has arisen had been done in England. (*No. 5 of 1852*, § 2.)

Bills of exchange, &amp;c.

Commercial contracts are next to be noticed; but nothing more in this treatise, for the same reason that bills of exchange are alluded to only.

Commercial contracts.

The law now administered in Ceylon in respect of all contracts, or questions arising in it relating to ships, and to property therein, and to the owners thereof; the behaviour of the master and mariners, and their re-

spective rights, duties, and liabilities; relating to the carriage of passengers and goods by ships; to stoppage *in transitu*; to freight, demurrage, insurance, salvage, average, collision between ships; to bills of lading; and generally to all maritime matters; is the same as is administered in England in the like case, at the corresponding period, as the contract had been entered into, or the act in respect of which such question has arisen had been done in England: unless, in any case, other provision is made by any other ordinance then or thereafter in force. (*Ord. 5 of 1852, § 1.*)

The author has thought it needless to add chapters on these subjects, as excellent condensed treatises on commercial law are now so readily obtainable.

## CHAPTER XXVI.

## QUASI CONTRACTS.

THE Roman-Dutch law, besides the contracts already noticed, recognizes some kinds of dealings and transactions which, from their similarity to contracts, produce similar obligations and actions. These are termed *quasi* contracts.

The first of these are the obligations arising from the administration of guardianship: for although, as between the guardian and his ward, there is not, properly speaking, any contract, yet there is a *quasi* contract of mandate between them; and the minor is bound to the guardian, and the guardian to the ward as if an actual contract of mandate had passed between them. This, however, is fully explained in the chapter on *Guardian and Ward*.

Two other classes of *quasi* contracts, such as the community of estate by inheritance without contract,

and *adiation* to an inheritance, may be considered to be dealt with under the present system of executorship and administration.

*Negotia gesta.* Another class of *quasi* contract is *negotia gesta*: which is the labour a person devotes on the business or concerns of another; as, for example, an absentee without mandate, that is, without his order or knowledge, provided it is not against his will or positive order. Against such a volunteer the owner, although not bound by any direct contract, has an action for an account, and compensation for any damage occasioned by any neglect on the part of the person who has undertaken the business on his own head. On the other hand, this party has a right to demand from the other all the necessary costs, charges, and expenses which he has been put to for his benefit. (*V. der Ldn.* i, 15, § 15, pp. 243-5 : *Grot.* iii, 26, p. 505-7.)

Planter's  
share.

There exists in Ceylon a peculiar compact, which may be termed a *quasi* or customary contract, and which cannot be fully classed amongst any of the divisions of contracts before referred to; it is the "right of the planter's share."

It is an acknowledged custom of the country that persons who have entered upon land with the consent of the owner, and have actually planted it with coconuts, are entitled to a share of the trees when they come into bearing. They may claim this by operation of the law, and not as a consequence of the terms of any agree-

ment between the planter and the owner. If the planter can prove that he entered under such circumstances, he has a claim, notwithstanding any written agreement. (17716, *C. R. Calpentyu*, 5 Dec. 1861: 1238, *D. C. Negombo*, 19 July, 1837; *Morg. D.* 180.)

The owner of the soil cannot insist on buying up the planter's share, unless by way of preemption, on the planter being willing to sell his share. (2692, *D. C. Galle*, Oct. 14, 1835; *Morg. D.* 60.)

The planter is also entitled to live on the land planted by him. For this purpose he may build a sufficient house on the land; but, in repairing the house, he must not encroach on the soil, and can be made to pull down any encroachment. (14952, *D. C. Galle*; *Lor. R.* 201: see also *Lor. R.* p. 19.)

Owners of planter's share are, with regard to partition, in the same position as the owners of the soil. (20086, *D. C. Matura*, 19 June, 1863.)

Any *express* agreement for a planting share must be in writing, as coming within Ord. No. 7 of 1840, § 2. (5670, *C. R. Negombo*, 16 Aug. 1853; *Nell*, 212.)

## CHAPTER XXVII.

## ON OBLIGATIONS ARISING FROM CRIMES AND QUASI CRIMES.

ANOTHER source of obligation is *crime*, whereby we understand the voluntary committing or omitting anything contrary to law, and punishable under that head.

Out of crimes arise two obligations; one to suffer the punishment affixed by the law to the act, which is of a public nature; the other to make good the damages occasioned by the criminal act, under the compulsion of a civil action.

For this latter purpose crimes are distinguished into the following classes:—

1. Crimes against the *person*, including those against life, liberty, and security.
2. Against the *reputation*.
3. Against the *property* of our fellow men.

Right to life,

Life is the immediate gift of God; a right inherent



by nature in every individual (1, *Bl. Com.* 129-34); and every one is entitled to the full enjoyment and use of the life so given, and is consequently entitled to immunity from all corporal insults and injuries.

freedom, and  
corporal  
security.

Injuries to corporal security are either direct or consequential. (*Sm. M. C. L.* 2.)

Injuries to  
corporal  
security.

Every adult has an inherent right of personal liberty, which consists in the power of locomotion without restraint, other than by the due course of law; all persons, when not subjected by the law one to another, are equal in freedom, and possess a right that no one should do any wrong or injury against their freedom. (*Grot.* iii, 34, § 1, p. 443: *V. der Ldn.* iv, 34, § 1, p. 478.)

Of corporal  
liberty—  
corporal  
liberty  
defined.

Besides corporal security, corporal liberty, and security to character and reputation, every one has an inherent right to an exemption from vexatious annoyance generally. Most forms of vexatious annoyance are arrested by the law of police; and it is here only necessary to mention one form, and almost the only form that is made a ground for civil remedy, namely, that of the malicious suing out of legal process.

Of exemption  
from personal  
annoyance  
generally.

A person is liable to an action, if he puts the criminal law in motion, or causes a search warrant to issue maliciously and without probable ground for such proceeding.

Next to life (says Van Leuween), nothing is more precious than our honour, and the good opinion which

Of security to  
character and  
reputation.

another has of us. In this respect, we may be injuriously affected either by words or deeds. Injury by words is of two kinds, by writing, or by word of mouth; the former is, in the English law, termed "libel;" the latter, "slander." And under that law a distinction is taken between the two which does not appear in the Roman-Dutch law. According to the latter law, that which would, if written, be libel, will also be slander if spoken; which is not the case in the English law.

Injuries to corporal security, according to the Roman-Dutch law.

According to the Roman-Dutch law, this right arises from the second head, or origin of the *jus in personam*, which may take place amicably or inimically. (*Grot.* iii, 1, §§ 9-16.) Inimically, by taking place where a person has suffered injury, against his will, by another man's misfeasance. (*Id.* § 18.) This inimical wrong is of two sorts, *ex maleficio*, or *ex quasi ex maleficio*. *Maleficio* is the doing, or permitting to be done, something which is either lawful in itself, or not permitted by any law, international, municipal, public, or local. (*Id.* §§ 2, 34, 506.)

*Maleficio*, or crime, is therefore the voluntary committing or omitting anything contrary to law, and therefore punishable under that head. And out of crime arises two kinds of obligation: the one to suffer the punishment affixed by law to the act, and the other to make good the damages occasioned by the criminal act. (*Grot.* iii, 32, § 7: *V. der Ldn.* i, 6, § 1, p. 243.)

This includes crimes against the life, the person, the reputation, and the property of our fellow men, and are equivalent to *direct injuries to corporal security, corporal liberty, and to the security of character and reputation* under the English law.

Corporal security may be directly affected by threats, assault, battery, wounding, or mayhem. Direct injuries to corporal security.

1. Threats of bodily hurt, through fear of which a person's business is interrupted, are a ground of action. Threats.  
But they do not constitute a ground of action where they produce no inconvenience. (3, *Ste. Com.* 459.) This form of injury is not specifically mentioned in the Roman-Dutch law books; but would, on principle, appear to form part of the Roman-Dutch law as an *obligatio ex maleficio*.

2. An apparent attempt to offer, coupled with a present ability to do, hurt to the person of another, constitutes an assault; so that even the holding up a fist, or shaking a whip, when near enough to be able to hit, or advancing with a whip or a fist uplifted, is an assault. Assault.  
(*Smith, M. C. L.* p. 3.)

3. A battery, as distinguished from an assault, is the actual and unwarrantable striking a person, or touching him in a violent, angry, rude, or insolent manner. Battery.  
(*Ibid. v. 2: V. der Ldn.* 36, p. 478: also 36, p. 471.)

4. Wounding is an aggravated species of battery, Wounding.

amounting to a bodily hurt. (*Ibid.* and *V. der Ldn.* ii, § 4, p. 339.)

Mayhem.

5. Mayhem (or maim) is the depriving a person of, or injuring, a member of the body which is available for fighting (such as a leg, an arm, an eye, or a foretooth) in such a manner as to diminish his power of fighting, or defending himself. And for this, and for wounding, the party can recover his surgeon's charges, as well as heavy damages for the loss of time and labour, for pain, suffering, and personal disfigurement, unless the act can be justified or excused. And if a person is wounded in a riot, he has this action against all the parties engaged therein. (*V. der Ldn.* i, § 3, p. 250: *Sm. M. C. L.* pp. 3-4: *V. L.* iv, 35, p. 477: *Grot.* iii, 34, § 2.)

Parties acting  
in concert.

So (says Grotius) whenever any parties having been acting in concert, and it is *uncertain who inflicted the wound*, then all are culpable; or any one may be selected. (*Grot.* iii, 34, § 6.) But perhaps it would not be held that they must be shown to be acting in concert for some unlawful purpose, and that the wound must be the natural consequence of such concert; and that the right against all the wrongdoers would not arise from the uncertainty as to who inflicted the wound.\*

Assault and  
battery in  
defence.

If one is struck, or even only assaulted in the first instance, an assault and battery in self defence is justi-

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\* As to suing one of several wrongdoers, see 26656, D. C. Kandy, 6 Oct. 1860.

fiable; and an assault and battery, when in actual defence of a wife or husband, parent or child, master or servant. But if a blow be struck after all danger is past, it is not justifiable. (*Smith's M. C. L.* p. 4: *Grot.* iii, 34, § 4.)

Unforeseen misfortune, or mischance, causing injury to the person, is not the subject of any action. (*Grot.* iii, 34, § 4: *V. der Ldn.* i, § 3, p. 250.) Mischance.

A churchwarden or beadle may, if necessary, lay hands upon a person and turn him out of church for improper behaviour during Divine service. (*Sm. M. C. L.* p. 4.) Forcible  
ejection or  
entry.

An assault and battery in defence of a house, or its possession, is justifiable (*Sm. M. C. L.* p. 4: *Grot.* iii, 34, § 4), or in defence of the possession of a close, or of chattels. If a person forcibly enters a house, he may be forcibly ejected; but if he enters quietly, he must be requested to retire before he can be lawfully turned out; and then, if he refuses to retire, the owner may use as much force as is necessary to expel him. But in neither case may an unnecessary degree of force be resorted to. (*Sm. M. C. L.* 5: *Add. Torts.* 397-8: *Broom's Com.* 665: *Roscoe on Ev.* 597.)

A forcible entry is not lawful even where the law gives a right of entry, and may be prevented by force. (*Sm. M. C. L.* 5: citing *Add. Torts.* 398: *Cole on Eject.* 69-70, 686-90: *Woodfall*, 858-60, *v. e.*: 30909, *D. C. Kandy: Lorenz*, 128: 13946, *P. C. Bentotte*, 6 *May*,

1857: *P. C. C.* 107: *Brown's C. L.* 405: *Wood's C. L.* 257.)\*

Putting down  
an affray.

In case of an affray, any person is justified in interfering and using such a degree of force as may be necessary for separating the combatants. (*Sm. M. C. L.* citing *Add. Torts.* 398-9: 1, *Burn's Justice*, 56.)

Where  
mayhem is  
excusable.

When a person has been assaulted in such a way as to put him in grievous bodily harm, mayhem inflicted in self defence is excusable; and particularly if a man is attacked in his house, he is exempt from penalty on account of wounds or damage he may inflict outside. But a person may not make a return, in defence, wholly disproportionate to the injury he has received. (*Grot.* iii, 34, § 4: *Smith's M. C. L.* 5, citing *Add. Torts.* 339: *Roscoe on Evid.* 394-5.)

Assault on  
adulterer.

Killing (and therefore an assault on) an adulterer discovered in the act by a father or a husband, is to be excused on the ground of justifiable anger. (*Van der Kl. Art.* 799.)

Of conse-  
quential  
injuries to  
corporal  
security.

These consequential injuries form a portion of that subject termed by the Roman-Dutch writers *quasi*

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\* The case in *Lorenz* was a criminal charge, which contained also a charge of an assault, upon which the conviction was affirmed. This case (No. 4591, *D. C. Jaffna*, 30 June, 1852) goes the length of deciding a forcible entry to be unlawful by the Roman-Dutch law, but does not finally decide that it is an offence. But, if it is unlawful, it must be a trespass at least, and therefore ground of action. But this must not be confounded with the right of a landlord to dispossess a tenant.

crimes, or inequalities arising out of inimical transactions of the sort *ex quasi maleficio* ; *i. e.* from causes similar to crime.

*Quasi* crime occurs when damage is occasioned to another, or another suffers loss from or by any act, not amounting to a crime, of ourselves, or of those whom we have in our power and service ; which, though not punishable by law, calls for indemnification ; or when a person is injured from any, or by anything of ours. (*Grot.* iii, 38, § 1 : *V. der Ldn.* i, § 6, p. 253 : and *V. Lwn.* iv, 39, p. 491.)

This definition is nearly identical with consequential injuries ; and the examples arising from it are still more nearly identical.

Consequential, as distinguished from direct injuries, frequently arise from nuisances or from negligence.

\*A nuisance is something done, or omitted to be done, which has the effect of unwarrantably marring the enjoyment of the rights of another person. (*Smith's M. C. L.* p. 6 : *Marshall*, 445.)

Definition of nuisance.

Redress cannot be granted for a thing, as a nuisance, where it involves merely a reasonable use of the rights of the person charged with creating it, and it merely abridges the pleasure of the person suffering from it : it must, at the least, unwarrantably render the enjoyment

Where redress is not granted.

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\* We are not here dealing with public nuisances, but only those of a private nature.

of life or property uncomfortable. And hence the carrying on an offensive trade may be actionable, if carried on in one locality and not in another. (*Smith's M. C. L.* p. 6; citing *Add. Torts.* 74; *Roscoe on Evid.* 514-15; *Schwyn N. P.* 1129-31; *Beaufort v. Turnley*, 10, *W. R.* 803.)

Some nuisances affect the enjoyment of rights concerning the person; others affect the enjoyment of proprietary rights. Marshall classes annoyances to the person as "specific offences"; yet it is clear from Grotius that the Roman-Dutch law did not regard them as offences, but only as acts similar to offences or crimes (*quasi ex maleficio*). (*Marshall*, 445: *Grotius*, iii, 38.)

Nuisances are either public or private. Public or common nuisances are those things which prejudicially affect the public; *i. e.* all persons who come within the sphere of their operation, though they may affect some more than others. Private nuisances are things prejudicial to the enjoyment of private rights. (*Smith's M. C. L.*: *Broom's Com.* 693: *Kerr's Bl.*)

Public nuisances are prosecuted criminally; for it would be unreasonable to subject the author of the nuisance to a separate action by every member of the community. But if a person can show any special damage sustained by himself individually, he may bring an action, even though the nuisance be a public one.



If a person, lawfully traversing land, falls into an unguarded well or mining shaft, without negligence or misconduct on his part, the occupier of the land is responsible in damages. But if the person injured were trespassing, and the well or shaft were more than twenty-five yards from a public carriage way, the occupier would not be liable. (*Add. Torts.* 80-95.)

Wells or shafts.

If a landowner suffers a path to his house to be used, he is responsible for any act of his whereby injury arises to other persons, without giving them timely notice or revoking the license to use it. (*Add. Torts.* 81.)

Dangerous paths.

• If a householder leaves a cellar, vault, area, or sewer unguarded, so close to a highway as to be dangerous to passengers in the dark or in foggy weather, he is responsible for any injury occasioned thereby. (*Smith's M. C. L.* citing *Add. Torts.* 89-96: *Roscoe on Evid.* 528-9.)

Dangerous vaults, areas, or sewers.

Whoever keeps an animal *ferae naturae*, does so at his peril, and is answerable for any damage it commits. (23568, *D. C. Kandy*, Sep. 11, 1851: *Austin*, 153: 25869, *C. R. Jaffna*, 29 Oct. 1860.) But if he keep an animal reduced to subjection (*mansuetae natura*), he is liable to make compensation not exceeding the value of the animal, or to surrender the animal (*V. L.* iv, 39, § 7, p. 494); and if he knows it to be wont to attack mankind, he is liable to an action for full indemnification by any person injured by it. But a person may

Ferocious animals.

allow a fierce dog to be let loose at night for the protection of the premises; yet not contrary to custom (as before a customary hour), nor in the open approaches to a house, so as to injure persons lawfully coming to it. (*Grotius*, iii, 38, § 10 : *V. L.* iv, 39, § 7, p. 494 : *Austin*, 135 : 2066, *C. R. Calpentyn*, May 19, 1846; *Nell*, 94.) The trained elephant and the agricultural buffalo, though not entirely *ferae naturae*, are not, also, entirely *mansuetae naturae*; but in the position of animals of whose dangerous propensities the owner is held to have perpetual notice of, and requiring proper caution: thus, if they are allowed, without attendance, to stray into the highway and injure any person, damages can be recovered. (2356, *D. C. Kandy*, Sep. 11, 1851; *Austin*, 153 : see also *Smith's M. C. L.* p. 8, citing *Add. Torts.* 96 : *Roseoe on Evid.* 525-6 : *Dixon's Law of the Farm*, 110-21.)

When the owner is not liable.

The owner is not liable for an injury by a brute animal when the injury is provoked and caused by the wrongful act of the injured party, or immediately caused by the wilful act of a third party; and, it would seem also, when the injury is *mere accident*. (25869, *C. R. Jaffna*, 29 Oct. 1860.)

Injuries from negligence or carelessness.

An action may be maintained for injuries to corporal security arising from negligence or want of proper care in other cases besides those of nuisances. (*V. der Ldn.* i, § 6, p. 253 : *Smith's M. C. L.* p. 8.)

Injuries from furious or

Thus, where a coach is overturned, and a passenger

is thrown out, owing to the carelessness of the driver, the passenger may bring an action against the coach proprietor. (*Kerr's Bl.* iii. 129: *Roscoe on Evid.* 518.) And a person, walking or riding on a road, who sustains an injury in consequence of the furious, careless, or negligent driving of another, may maintain an action, unless his own want of reasonable care conduced to the injury. (*V. L.* iv, 39, § 5, p. 494, and *Smith's M. C. L.* p. 8; citing *Oliphant on Horses*, 225.) According to Grotius, a waggoner or countryman whose horses run away is bound to make compensation, even were it without his fault. (*Grot.* iii, 38, § 12.)

careless driving.

A person driving is not bound to keep on the regular side of the road; but, when on the other side, he must use greater care to avoid a collision. A person driving over a crossing for foot passengers, or in a crowded thoroughfare, ought to drive slowly and carefully; but it is also the duty of a foot-passenger to use due care, so as not to get recklessly among the carriages. (*Smith's M. C. L.* p. 9; citing *Add. Torts.* 240; *Oliphant on Horses*, 241-3; *Roscoe on Evid.* 520-1. As to the rule of the road in Holland, see *V. L. B.* iv, 39, § 8, p. 495.)

Duty of persons driving and walking.

By the English law, redress may be had by action for injuries to the health of an individual by the sale of bad wine or provisions; and, although this case is not mentioned in the Dutch authorities, on analogous principles this rule would probably be held to apply to Ceylon. But by both laws compensation can be de-

Injuries to the health.

manded for the neglect or unskilful treatment of a medical attendant. (*V. L. B.* iv, 39, § 4, p. 494: *Broom's Com.* 692-6.)

Compensation  
for the death  
of a person  
killed by a  
tort.

When one person illegally causes the death of another, the slayer is bound to make compensation to the widow, children, and others, if there be any, who were usually supported by the labour of the deceased, for losses, and loss of profits, calculated upon the principle of annuity. The circumstances which are taken into consideration in the criminal prosecution of homicide, are not necessarily so in cases of compensation for death. It is sufficient for that purpose that it has been occasioned by the fault of some one, in which is included the neglect or unskilfulness of a physician or midwife; and the neglect, ignorance, or incapacity of a person driving any vehicle, or riding, or managing horses; or of any skipper in the management of any ship. So every one who has a wild or other animal accustomed to do mischief, which, not being well secured, causes death, must make reparation. Those also are liable from whose house anything is thrown or cast down upon a public highway whereby any one is injured. The action, in fact, lies whether the death be occasioned by malice prepense or by carelessness. (*Grot.* iii, 33, §§ 2-5, pp. 437-9: *V. Lavn.* iv, 34, § 15, p. 470: *V. der L.* i, § 2, p. 249.)

This power of compensation was introduced into England by statute, in imitation of the civil law (ix and

x Vict. c. 93). And no doubt Lord Campbell, who framed that act, intended in it to summarize the civil law on the subject. And although the Dutch writers only give examples, they clearly mean that which the English act expresses; viz. that when the death of a person is caused by a tort which would have entitled the person to damages (if he or she had survived the injury), the tortfeasor is bound to make compensation.

Accordingly, the slayer is not liable, if he has a lawful defence to such tort; as if, without any act of negligence, he does what is lawful, at a lawful place, in a lawful manner, and thereby another meets his death; or if he acts in lawful defence of his wife, his children, or property, against force or violence; or kills the ravisher of his wife or daughter in the act, he is not liable. (*Grot.* iii, 33, §§ 7, 9, pp. 439-40.)

When the slayer is not liable.

The measure of damages are the losses, and loss of profits, calculated upon the principle of annuity, expressed in the English law to be "the actual or contingent pecuniary loss to the family from the death." The widow, children, and others are not entitled to recover funeral expenses, or mourning, or for the mental suffering of the family in that capacity; but those bound in law to bury the body may recover the expenses of the funeral, and any further expenses resulting from the death, as a crime. (*Grotius*, iii, 33, § 2, p. 437: *V. der L.* i, 16, § 2, p. 249.)

Damages.

All those who have been accomplices in the murder,

Who else liable.

or accessories, although it cannot be satisfactorily ascertained which of them gave the deadly stroke, are liable in this action. (*V. der L.* i, 16, § 2, p. 249: *Grot.* iii, 33, § 4, p. 438.)

For the English law, see *Smith's M. C. L.* p. 9: *Broom's Com.* 689-91: *Wms. on Executors*, 710-11: *Add. Torts.* 254-67: ix and x *Vict. c.* 93.

By the Dutch jurists, crimes against and wrongs to freedom are termed "injury," and include those violations of the right of personal liberty usually termed false (*i. e.* wrongful) imprisonment, and malicious (*i. e.* wrongful) arrest; but also the civil injury arising from rape, seduction, and adultery, which are for civil purposes considered to be restraints on the freedom of the persons injured.

Definition of wrongful or false imprisonment.

False imprisonment is the arrest, confinement, or detention of a person without legal grounds, or without lawful warrant, duly executed, whether it be a confinement or detention in a prison or in a private house, or a mere forcible detention in the street or elsewhere. (*Marshall*, 227: *Kerr's Bl.* iii. 136: *Smith's M. C. L.*; citing *Add. Torts.* 400; *Broom's Com.* 696; 3, *Ste. Com.* 471-2; *Schwyn's N. P.* 919.) And an imprisonment, originally lawful, may become wrongful by extension beyond the period legally prescribed, or by cruelty or unnecessary severity. (*Marshall*, 227.)

In what it consists.

To constitute imprisonment, it is not necessary that the person said to be imprisoned should be under any

physical restraint or confinement. Any restraint on the free power of locomotion, though it be only by a show of authority or force, constitutes imprisonment (*Add. Torts.* 400); and this imprisonment in all cases includes an assault, and is therefore an offence as well as a civil injury. (20876, *P. C. Galle*, 13 Feb. 1856: *Lorenz, R.* 25.)

If a Justice of the Peace has knowledge of any offence, by having seen it committed within his district, he may personally apprehend the offender, or verbally command any other person to apprehend him; and all persons so authorized are required to follow the offender and to arrest him within the district, at any time within twenty-four hours after the offence. (*Ord. No. 1 of 1864*, § 4.) But if the offence is committed in his absence, he must issue his warrant, in writing, to apprehend the offender. (*Smith's M. C. L.*; citing *Broom's Com.* 705; 1, *Burn's Justice*, 272.)

Authority of Justice of the Peace to arrest.

The 20th section of Ordinance No. 15 of 1843 enacts "that every peace officer, or officer of the law, and every private person frivolously or vexatiously arresting any person, shall, over and above his liability to any action for false imprisonment, or other liability, be guilty of an offence, and be subject, on conviction thereof, to such punishment by fine or imprisonment, with or without hard labour, as the court before which such conviction shall be obtained shall think proper to award."

Frivolous and vexatious arrest.

An arrest, to be frivolous and vexatious, must be an arrest malicious in its nature, or without substantial ground of suspicion, or upon a charge plainly not an offence in law; but excess of force in an arrest does not make it frivolous or vexatious, but an assault. (16546, *P. C. Kaigalle*, 30 Aug. 1861; *P. C. Ca.* 153.)

When a peace officer may arrest without a warrant.

Every fiscal, and his deputy, and others his officers, and all headmen, constables, superintendents, and officers of police, and all peace officers within the limits for which they are respectively empowered to act, are authorized and required to arrest every person who shall commit any crime or breach of the peace in their presence. As, also, every person whom they shall see engaged in committing any affray; or whom they shall find attempting to commit a crime, or clearly manifesting an intention so to do. (*Ord. No. 1 of 1864*, § 7.) A threat to commit an offence would probably be held to be such a manifestation, thus bringing the ordinance in accord with English common law. (*Sm. M. C. L.* p. 11.)

Arrest by peace officer without warrant, but on reasonable grounds.

None of the above officers have, when acting in the capacity of constable, power at common law to arrest a person without a warrant, on suspicion of his having committed an offence of minor magnitude; such as would, in England, be a misdemeanor. (*Add. Torts.* 488; *Broom's Com.* 700-2.) But if any of the above officers is authorized and required to arrest every person whom he has reasonable grounds to suspect of having



committed any treason, misprision of treason, murder, culpable homicide, rape, robbery; or assault with intent to commit any of those crimes; or an assault in which a dangerous wound is given; or arson: house-breaking to commit any crime; theft of cattle; or any other crime of equal magnitude with any of the crimes aforesaid (*Ord. No. 1 of 1864, § 7*); as the officer is only called upon to be provided with reasonable grounds of suspicion before he arrests, he is secure, even if it turn out that no crime of such magnitude has been committed. There is no standard or fixed rule as to what is reasonable ground of suspicion; but the officer must be guided by ordinary reason, care, and caution in such arrests. (*Hogg v. Ward, 27 L. J. Ex. 443.*)

For the purpose of arrests, such as above, the officer is authorized (as upon a justice's warrant) to break open doors, and even to kill the offender (if his crime be of the higher magnitude), if he cannot otherwise be taken. (4, *Com. 344: Levy v. Edwards, 1 Car. and P. 40.*) Also, as on a warrant, he is bound, after apprehending such offender, immediately to take him before some competent Justice of the Peace or Police Magistrate, as the case may require, to be dealt with according to law. (*Ord. No. 1 of 1864, § 7.*)

A private person may arrest for a crime without warrant—

Arrest by  
private  
persons.

1. When called upon by any of the aforesaid officers to assist in making an arrest which the officer is author-

ized to make; or in suppressing any riot or affray; or in prevention of a breach of the peace. (*Ord. No. 1 of 1864, § 8.*)

2. And when a grave crime (as enumerated above) is committed or attempted in his presence; and when also he has knowledge of such a crime having been recently committed. (*Ord. No. 1 of 1864, § 9.*)

3. And when he is a private person joining in pursuit and coming up with a person having stolen property in possession, or tracked after a recent crime (*Ord. No. 1 of 1864, § 9.*)

Any private person may arrest another upon reasonable suspicion of any such grave crime; but at his peril if the prisoner is innocent. (*Ord. No. 1 of 1864, § 10.*) And he may lay hold of any person he sees engaged in a riot or an affray, to prevent the continuance of the affray or to suppress it. (*Ord. No. 1 of 1864, § 11.*) In English law, he may arrest to prevent the continuance or renewal of a breach of the peace. (*Add. Torts. 489-90.*)

Arrest for  
malicious  
injuries to  
property.

Any person found committing any offence against the Malicious Injuries Ordinance may be immediately apprehended without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before any competent Court, or Justice of the Peace, to be dealt with according to law. (*Ord. No. 6 of 1846, § 29,* same as 24 and 25 *Vic. ch. 97, § 61*: see, also, *Parring-*

*ton v. Moore*, 2 *Exch.* 225 : and *Simmons v. Millingew*, 2, *c. b.* 530.)\*

Except in the special instances cited above, to justify a private individual in arresting another, he must prove the commission of a grave offence, and that the individual arrested committed the offence. (*Ord. No. 1 of 1864*, § 10.)†

False imprisonment.

A private individual who, without legally sufficient grounds, directs a police officer to take a person into custody without a magistrate's warrant, thereby renders himself liable to an action for false imprisonment, in which, if it is successful, heavy damages are usually given. But when a person is arrested under a warrant, the person making the charge will be safe, unless he acted maliciously, and without probable cause. (*Smith's Com. Law*, p. 14, citing *Broom's Com.* 701: *Burn's Justice*, 277.)

A private person has the right to procure the arrest of another whom he believes about to leave Ceylon for the purpose of avoiding a debt to the former. But to warrant an arrest against a defendant *in meditatione fugae*, there must be a debt due, or some enormous personal wrong done to the complaining party by the

Arrest, *meditatione fugae*.

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\* In several other instances private individuals are allowed, in England, to arrest under certain statutes which have no corresponding ordinances yet in Ceylon.

† In English law, he need only prove the commission of a felony, and the existence of reasonable grounds for fairly suspecting he either committed it or was implicated in it.

defendant; and in the case of debt, the complaining party must aver that he does verily believe, and also show by the oath or affidavit of a third person, that he has good ground for believing (setting forth facts indicative of his intention to leave, 10833, *D. C. Galle*, 23 Dec. 1844) that the defendant intends to abscond, or to leave the jurisdiction of the court.

1. There must be an averment of the debt due to the plaintiff by the defendant, or of such enormous personal wrong done by the defendant to the plaintiff as to render the arrest of the defendant necessary for the purposes of justice—something, perhaps, on which an indictment would lie; or some punishment to the defendant for a crime, not (as for example) an action for slanderous words (25440, *D. C. Kandy*, 3 Feb. 1852, *per Carr. C. J.*); or to give security for contingent and untaxed costs (10833, *D. C. Galle*, 23 Dec. 1844). According to the law of England (no case yet reported in Ceylon), the person arrested may apply to the court or judge for a discharge, which will be granted if he satisfies the court or judge that he has not, nor ever had, an intention of leaving Ceylon. Yet, notwithstanding the discharge, the party procuring the arrest will not be liable to an action, if the order for the arrest was fairly obtained. But if the applicant imposed on the judge, by a *suggestio falsi*, or a *suppressio veri*, the party arrested may bring an action against the other for a malicious arrest. (*Smith's Com. Law*, 15.)

The arrest of persons disturbing divine service; or of vagrants, and persons found committing acts of public indecency; or under the Merchant Shipping Acts; or of a principal by his bail; or for offences committed under local or other ordinances, or by servants of the Commissioner of Railways; or the detention of recruits or deserters, are cases that may be mentioned, but need not be enlarged upon in this chapter.

Miscellaneous cases.

By English common law, any individual is authorized to confine a person of unsound mind who appears likely to harm himself or any other person (*Add. Torts.* 496); and no doubt such a right will, when the case arises, be conceded in Ceylon; but, at the same time, the party arresting would have to follow the provisions of the Lunatics' Asylums Ordinance No. 11 of 1840, and as soon as possible to bring the lunatic before a competent court.

Arrest of lunatics.

Generally speaking, as a matter of practice, the Supreme Court in appeal does not interfere with the discretion of the Court below as to the amount of damages for false imprisonment, unless they are grossly excessive, or clearly founded on a mistaken or improper view of the facts, or other matter.

Damages.

Any circumstances of aggravation on the one hand, and any circumstances of extenuation, not pleadable as a defence, on the other hand, ought to be taken into account, to increase or lessen the damages. (*Smith's Com. Law*, 15, citing *Add. Torts.* ch. 22: *Mayne*, 263.)

Malicious  
prosecution.

To enable a man to maintain an action for malicious prosecution, he must show :

*First.* That the charge must have been false, by showing that nothing was found; or that the case was abandoned; or that he was acquitted; or, in fact, that the proceeding was determined substantially in his favour. (*Marshall*, 408 : *Smith's M. C. L.* citing *Add. Torts.* 455 : *Selw. N. P.* 1073 : *Broom's Com.* 717 : *Mayne*, 259.)

*Secondly.* That there must have been want of probable cause to justify the informant in making the accusation. (*Ibid.*) No action lies for a mere vexatious prosecution without probable cause. (2107, *E. R. Pantura*, 15 Aug. 1861.)

*Thirdly.* There must have been malice on the part of the informant. The law implies malice where no probable cause is shown for the charge; and as nothing but malice could induce a man to prefer a charge which he thinks to be unfounded, even if there were probable cause, yet if the accuser did not know it, or did not believe the accused guilty, legal malice may be inferred. (*Marshall*, 409 : *Smith's M. C. L.* 27, citing *Add. Torts.* 435-41 : *Broom's Com.* 715-7 : *Selw. N. P.* 1071-3, 1079-80 : *Roscoe on Evidence*, 580-1.)

*Fourthly.* The damage which the plaintiff may have sustained by the false accusation is to be considered, whether suffered in person, in reputation, or in pecuniary loss. (*Marshall*, 409 : *Smith's M. C. L.* 28 : *Add. Torts.*

455 : *Selv. N. P.* 1073 : *Broom's Com.* 717 : *Mayne*, 259.)

A person who petitions for an adjudication in bankruptcy maliciously and without reasonable and probable cause, and knowingly and wilfully, or recklessly, swears to depositions false in fact, is liable to an action for a malicious prosecution, if the proceedings were superseded or set aside before the commencement of the action. (*Smith's M. C. L.* 28, citing *Add. Torts.* 443 : *Broom's Com.* 715 : *Selv. N. P.* 1077.)

In cases of bankruptcy.

There is a remedy by fine, afforded under statute in Ceylon, for the annoyance of bringing false and frivolous charges ; and, although the subject properly belongs to offences, it is convenient to notice it in this place.

Fines for a frivolous charge.

By the 21st clause of the Police Courts Ordinance, 1861, "Whenever it appears to the satisfaction of the magistrate that any prosecution has been instituted therein on false, frivolous, or vexatious grounds, such magistrate may adjudge the party who has instituted the same to pay a fine not exceeding £1, as well as the reasonable expenses of the defendant, and of such witnesses as shall have attended at such prosecution, as to the magistrate shall seem fit."

On this enactment the Supreme Court has decided the following points :

1. It should not only appear that the charge, when investigated, proved to be erroneous, but that it was false to the prosecutor's knowledge at the time when he

instituted proceedings. (41179, *P. C. Galle*, 29 Oct. 1861 : *Coll. P. C. Ca.* 158.)

2. Even if a charge is erroneous, it is not frivolous if the prosecutor has fair and reasonable grounds for the charge. (29419, *P. C. Jaffna*, 27 Aug. 1860.)

3. The charge must be false, but it is not necessary that the evidence supporting it should amount to perjury; but the evidence must contain something more than a mere suspicion of falsehood. (28925, *P. C. Galle*, 24 April, 1860.) And the power of fine should only be exercised in clear cases. (596, *P. C. PANGEWELLE*, 15 April, 1861 : *H. B. P. C.* 152.)

4. A false and frivolous charge ought to be regularly adjudicated upon; as it ought to appear that the complainant had been called upon to show cause or a defence why he should not be fined, and the magistrate should adjudicate upon the question in a separate judgment, as if the fine were the result of a separate and distinct complaint. The finding by the court should be express, and in the terms of the ordinance, "that the complainant instituted the charge on false, frivolous, or vexatious grounds," as the case may be. (2767, *Pantura*, *P. C.* 5 Dec. 1861 : *P. C. Ca.* 164 : 4705, *P. C. Harrispatiao*, 3 March, 1863 : 18166, *P. C. Kaigalle*, 15 June, 1863.)



## CHAPTER XXVIII.

## OBLIGATIONS FROM INJURY TO REPUTATION.

DEFAMATION is maliciously publishing, either by word Definition of  
defamation. of mouth, by writing, by printing, or by pictorial or other representation, either in his presence or his absence, publicly or secretly, anything whereby a person's honour or good name is injured or damaged. (*Grot.* iii, 36: *V. L.* iv, 37, § 1, p. 481: *V. der Ldn.* i, 16, § 4, p. 250: *V. der K.* § 802: *Marshall*, 402.)

Grotius recognizes a slander that may be true, but Defamation  
need not be  
false to be  
actionable. improperly brought forward; but this form of slander is not referred to either by Van Leuwen or Van der Linden, and appears to be expressly controverted by Van der Keesel, who says the rule "that the truth of a libel or accusation excuses the offender from the punishment for verbal injury has not only been adopted by the law of Zeeland, and in certain parts of Holland, but should, it seems from the reason of our law, be received everywhere, unless an uninterrupted custom to the contrary can be proved at any place." But Grotius says that

slander is an injury, "even were the same true;" and "in case the assertion is not at variance with truth, but only improperly brought forward, then the slanderer would be bound to make satisfaction, by acknowledging the same to have been wrongfully done. In this respect a certain pecuniary compensation is made, the same as in injury, and with a similar declaration concerning the party slandered or injured as was stated under that head."

The Supreme Court of Ceylon has adopted the view of Grotius in this matter.

In the English civil action, the truth may not only be given, if pleaded, but is, under all circumstances, in itself, if proved, a complete reply to and justification of the libel.

The Roman-Dutch law does not admit that the truth alone is of necessity a sufficient reply to any libel, and therefore it does not allow the truth to be pleaded in justification (12838, *D. C. Colombo, Coll. 4 Jan. 1837; Mory. D. 117: 25990, D. C. Kandy, 29 June, 1854; Austin, 179*); although it will be seen that the truth is considered, in the law of Ceylon, an important element in forming a right judgment of the motive, and therefore of the legal culpability of the slanderer; but it is only an element, and cannot therefore be exclusively a reply to any defamation.

Written  
slander.

Libel, or written slander, is plainly a greater injury than oral slander, inasmuch as oral slander is sudden

and fleeting, whereas libel is deliberate, permanent, and in general propagated farther. Hence very small damages are given for vague imputations of dishonesty in words, unless the imputation has reference to the business of the person defamed, and had the effect of damaging him in it. The Supreme Court has discouraged petty complaints for defamation in words spoken, and not in writing, and in many instances has awarded no damages,\* but has only decided for the party in the wrong to pay the costs of suit. District Courts have gone further, and have dismissed such suits, as being of too trifling a nature to justify occupying the time of the court; but the Supreme Court has referred such cases back for regular inquiry. Every wrong, however trivial, entitled to a remedy has a right to enquiry; and injury to character has the same right to redress as injury to property. (*Marshall*, 407: 2507, *Calpentyu*, *C. R.* 30 Oct. 1846; *Nell*, 103: *Marshall*, 413.) But a slanderous imputation, if published in writing, or in print, even without reference to a man's business, and without proof of any evil resulting from it, calls for full compensation.

A person defamed is not entitled to maintain a Publication. suit unless the defamation is published; and it may be published in the absence or presence of the injured

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\* It would be more regular to award nominal damages. (*Marsh.* 413.)

party, or publicly or secretly. But parting with a libellous print or writing, in order that it may become known, or the making a libel known to any third person, becomes a publication (*Smith's M. C. L.* p. 17, citing *Broom's Com.* 719, 729-30: *Selv. N. P.* 1062); and even an answer to an enquiry, though the defamatory answer be made in belief of its truth, is a slanderous publication. (*Add. Torts.* 604.)

What publications are defamatory.

All publications that actually do or are intended to injure a person's honour are defamatory; which may be taken to be all publications to prejudice the private character or credit of another; or to render a person contemptible or ridiculous: or to cause him to be feared or avoided; or to injure him in his business; or to expose him to punishment.

Thus, to affirm that a person has a contagious disease is actionable, because it may cause the person to be avoided, and excluded from society.

So, also, words spoken of a professional man or tradesman, in reference to his profession or business, imputing misconduct, or gross ignorance, or incapacity, and calculated to do him an injury, are actionable.

Thus, if a man says or writes of a proctor that he is ignorant of law, or of a physician that he is ignorant of medicine, such assertions have a direct tendency to injure the proctor or physician in their respective professions; and are, indeed, indirect attacks on the honour and moral honesty of such persons, since it is dishonest

to practise a profession without being duly qualified so to do. But the same imputation of ignorance of physic made against a person who is not engaged in the profession to which the imputation refers, inflicts no injury upon him, because it is not his duty to be so learned. (*Marshall*, 410.)

And words directly tending to injure a priest or clergyman in his profession, and to subject him to a loss of emolument, are actionable; as to say of a Bhuddist priest that he is irreligious. (*Marshall*, 410.) Words are actionable when they impute to a person in office some specific misconduct or unfitness. If they amount only to a vague imputation of general misconduct, or unfitness for his situation, they will fail to support an action without proof of special damage. (*Kerr's Bl.* 131-3; *Add. Torts.* 597-600.)

Words calculated to expose a man to punishment are actionable. Thus, in England, words imputing adultery or unchastity are not actionable, except in London (where an unchaste woman is punishable); but such words would probably be held to be actionable in Ceylon, as unchastity is punishable under the Roman-Dutch law, though the punishment is seldom awarded. (*V. der Ldn.* ii, 7, § 2, p. 353, and §§ 6 and 7, pp. 257-8: and see, also, *Grot. and V. L.: Kerr's Bl.* 1255, *Schw. N. P.: Add. Torts.* 599: *Smith's M. C. L.* p. 22.) But imputing heresy to a layman (for example) is not actionable, though it might be if imputed to a clergyman. (*Ibid.*)

Special  
damage.

All communications published with a wrongful intention, or improperly put forward (Grotius), which are not actionable in themselves, become so where it is alleged and proved that some special damage has resulted from them. (*Kerr's Bl.* 131-3 : *Smith's M. C. L.* p. 22, citing *Ste. Com.* 464-5 : *Add. Torts.* 597-612 : *Selw. N. P.* 1259-60.) This rule of the English law is plainly contained in the definitions of slander as laid down by Grotius and Van Leuwen.

Even mere gross abuse of mouth is so far an injury to a man's honour that it is ground for a suit, but will obtain only nominal damages, or a simple apology, unless upon allegation and proof of special damage; or that it is spoken of a professional man or tradesman in reference to his profession or business; or unless it imputes an offence punishable at law; or unless it amounts to *scandalum magnatum*; i. e. certain words spoken of a spiritual or temporal peer, or a great officer of state, which would not be deemed defamatory in the case of an ordinary person. (*Grot.* iii, 36 : *V. L.* iv, 37 : *V. der Ldn.* xvi, § 4, p. 250 : *Marshall*, tit. *Libel* : *Smith's M. C. L.* pp. 17-21, citing *Add. Torts.* 578-9, 597-9 : *Broom's Com.* 718-9 : 3 *Ste. Com.* 465-8 : 1049, *Selw. N. P.* 1253-5 : *Roscoe on Evidences*, 569.)

Thus an action was brought for calling the plaintiff's father, since deceased, "a whore's son." It appeared that the defendant held a bond of the deceased, and being angry because he could not obtain payment, exclaimed, tearing the bond, "I cannot get the money

from this whore's son." As these were mere thoughtless words, that did not either actually nor were intended to impute base birth to the plaintiff, the defendant was decreed to pay his own costs. Though Sir Charles Marshall thinks it would have been more regular to award nominal damages, and more just to decree the payment of the costs of both sides. (*Marshall*, 413: see, also, 2507, *Calpentyn*, 30 Oct. 1846: *Nell*, 103.) In another action, the plaintiff and his family had been called slaves. The plaintiff's family were not slaves. No damages were awarded, but the defendant was decreed to pay costs on both sides, on the ground that if a man took upon himself to call another his slave, he did so at his own risk; and if he could not prove his assertion, the least that the person whose freedom was questioned had a right to expect, was that he should be indemnified for the expense of publicly contradicting the assertion. (*Marshall*, 413.) In all the above cases a suit is maintainable against the writer and publisher, unless the publication is a privileged communication.\*

The defamatory matter must be maliciously published, and accordingly words of mere suspicion, opinion,

Where the circumstances rebut the pre-

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\* There are two cases in which mere angry and intemperate abuse has been held to be no defamation, and properly, if it appeared from the circumstances that there was no legal malice, i. e. no wrongful intention to injure the honour of the other party, but simply to give vent to an ill-governed temper. (See 1430, *North Court*, *Kandy*, March 18, 1839; *Austin*, 13: 1872, *Kandy*, 27 July, 1836; *Austin*, 17.)

sumption of malice.

enquiry, advice, warning, or real regret, will not create any cause of action, as the circumstances rebut the presumption of malice. (*Smith's M. C. L.* p. 21, citing *Add. Torts.* 598 : 3, *Ste. Com.* 466 : *Roscoe on Evidence,* 572-4.)

Malice.

The defamatory matter must be published maliciously, that is, with the intention of doing a wrongful act. Malice is the gist of an action for defamation. This word malice, however, is not used in the popular sense of ill-will, but in the legal sense of the intentional doing of a wrongful act (*Smith's M. C. L.* p. 17, in accord with *V. der Ldn.* i, 16, § 4, p. 250 : and see 22269, *D. C. Kandy*, 18 June, 1861, *Coll.*) ; and unless the injurious communication is privileged, the law implies malice in the legal sense ; and though evidence of malice may be given to increase the damages, it is never deemed necessary. This doctrine of the English law, though so explicitly stated by the Dutch writers, is a principle apparent in all questions of obligations arising from *quasi* crimes.

Privileged communications.

Where a person speaks or writes anything *in form* defamatory, but fairly in pursuance of any duty legal or moral towards the person to whom he writes or speaks, or where he has by his situation to protect or to investigate the interests of that person, or upon some other reasonable occasion or exigency, in belief of its truth, and without actual malice, that which he writes or speaks is clearly not written or spoken with the intention of



doing a wrongful act; that is, it is spoken or written without legal malice, and therefore, although in form defamatory, it is wanting in the sting, and is not defamation. Such a communication is termed a privileged communication; nor can it support an action, unless a wrongful intention or malice is added to it, by showing that such a communication was prompted by real ill-will; in other words, *actual* malice must be proved to maintain a suit on a privileged communication. (22269, *D. C. Kandy*, 18 June, 1851, *Coll.*: *Cockaigue v. Hodgkinson*, 5 *Car. and P.* 543, *per Parke B.*: *Smith's M. C. L.* p. 18, citing *Add. Torts.* 580: *Selw. N. P.* 1049, 1054, 1062: *Roscoe on Evidence*, 567.) It is plain that it is on a similar principle that Grotius regards even a true communication damaging to a person's honour, as an injury when "improperly brought forward." The English law regards in effect a true communication as conclusively privileged. Grotius regards it as a communication, privileged indeed, but which may become defamation of a lesser kind by a publication actually malicious.

As an illustration, defamatory letters written and published by a minister of religion, even though under the strongest sense of duty, are not privileged, because they are not in pursuance of his legal or moral duty as a clergyman, which is to warn the sinner himself, and not third parties against him. (*Add. Torts.* 584.)

Written or *viva voce* pleadings, examinations as a Defamatory

matter in  
judicial  
proceedings.

party, or as a witness, depositions or statements in the course of a judicial proceeding before a court of competent jurisdiction, are privileged. (*Voet*, xlvii, 10, § 20 : *Marshall*, 403 : 628, *C. R. Calpentyu*, 1 July, 1845 : *Nell*, p. 87 : 14667, *D. C. Badulla*, 8 Aug. 1857 : *Smith's M. C. L.* citing *Add. Torts.* 581 : *Roscoe on Evidence*, 571.) But it is the duty of the court to expunge scandalous matter improperly introduced into pleadings before it, and to commit for contempt if persisted in, especially in oral pleadings ; and if the scandalous matter has been stated on oath, the libeller can be prosecuted for perjury. Generally, defamatory statements are privileged if *bonâ fide* made on an enquiry into a supposed crime. (*Add. Torts.* 605.)

Defamation in  
the pursuit of  
crime.

Liberty of  
counsel,  
judges, and  
magistrates.

As to the statements of counsel, magistrates, and judges in court, it is laid down by *Voet* as follows : " A man may be guilty of slander, not only when he is engaged in a legal act, or in the performance of a positive duty, if he wantonly exceeds the limits prescribed in that duty, and makes use of his authority to bring others into contempt. (*Voet*, xlvii, tit. 10, par. 2.) So that counsel may make any calumnious imputation which his duty and the circumstances before the court, even though untrue, appear to warrant ; and they must not maliciously, or even wantonly, utter words wholly unjustifiable, or which are beyond the limits of their duty. (*Ibid.* : *Add. Torts.* 605.)

Judges and  
Magistrates.

Judges and magistrates are not responsible for de-

famatory expressions uttered by them, if material and relevant to a cause or matter in issue before them which is within their jurisdiction; but must not heap up words of obloquy and censure without cause, and beyond what the occasion requires, not for the purpose of vindicating public authority, or of correction, but to expose the party to hatred and disgrace: if a judge or magistrate so acts, he is liable in a suit. (*Ibid.*: *Add. Torts.* 607.)

Petitions and memorials to the proper authorities, complaining of the serious misconduct of magistrates and public officers, and officers of the army and navy, and containing statements *honestly* believed to be true, are privileged communications. (*Marshall*, 404; see also fuller remarks, pp. 405-40: *Smith's M. C. L.* p. 19; citing *Add. Torts.* 582; *Roscoe on Evid.* 571.) But the communication must be made to the proper authority only. If the petition is published to any one else, though ultimately properly presented, that first publication is not privileged. (*Marshall*, 405.) Also, the petition is not privileged that is not honestly believed to be true; and the petitioner ought to be prepared to prove his charge; and cannot justify his petition on the warrant of mere general reports; nor is such a privileged petition necessarily confidential. (*Marshall*, 405.)

Petitions  
against public  
officers, when  
privileged.

Letters imputing grave misconduct to clergymen, addressed to the bishop of the diocese, are privileged,

Letters to a  
bishop.

if sent *bonâ fide* for the purpose of obtaining an enquiry into the matter by the bishop. (*Smith's M. C. L.* p. 19; citing *Add. Torts.* 585; *Schw. N. P.* 585.)

Communica-  
tion between  
friends.

If a confidential communication between friends and relatives is purely to prevent an injury, it is privileged. (*Smith's M. C. L.*; citing *Add. Torts.* 585-6; *Roscoe on Evid.* 567, 571-2.)

Reports of  
legal proceed-  
ings.

Reports of legal proceedings, in some instances, have been held to be actionable; as in the case of statements of counsel unsupported by evidence; or untrue, or unfair, or exaggerated accounts, published after a trial is concluded; or disparaging comments, allegations, and opinions of the reporter himself, or of any person other than one whose duty required him to make them; or matters of a grossly scandalous, blasphemous, or indecent nature. (*Smith's M. C. L.* p. 20; citing *Add. Torts.* 592; *Broom's Com.* 727-8; *Schw. N. P.* 1052; *Roscoe on Evid.* 574.)

Information  
for members  
of Council.

Information printed merely for the use of the members of the Councils is privileged, so far as its circulation is confined to them.

Speeches in  
Parliament  
and Council.

A member of Parliament (but not necessarily a member of the Legislative Council also), when speaking in his place, may freely remark upon the character of others; but he will be responsible in damages if he prints and publishes speeches of a libelous nature. (*Smith's M. C. L.* p. 20; citing *Add. Torts.*; *Broom's Com.* 728; *Schw. N. P.* 1052; *Roscoe on Evid.* 571.)

Those who print and publish what passes at public meetings are responsible for any defamatory matter. Reports of public meetings.  
 (*Marshall*, 403; *Smith's M. C. L.*; citing *Add. Torts*. 594; *Broom's Com.* 728-9; *Schw. N. P.* 1053; *Roscoe on Evid.* 575.)

Fair and candid criticism, however severe, on a book or paper, or a work of art, or an entertainment, is allowable; but if the comment is malevolent, and exceeds the bounds of fair opinion, it is actionable. Criticisms and comments.  
 (*Smith's M. C. L.*; citing *Add. Torts*. 594-5; *Broom's Com.* 727; *Schw. N. P.* 1050-1; *Roscoe on Evid.* 575.)

Comments on the public acts of public men are allowable, so long as they are not made a medium for private malice. Comments on the acts of public men.  
 (*Smith's M. C. L.* p. 21; citing *Add. Torts*. 596; *Broom's Com.* 727; *Roscoe on Evid.* 562; *Schw. N. P.* 1055.)\*

In suits for defamation, words are now construed according to their popular meaning; and that meaning, and not the meaning of the person uttering them, is the test of their being actionable. Interpretation of defamatory words.  
 (*Smith's M. C. L.*; citing *Add. Torts*. 607; *Schw. N. P.* 1256.)

The Roman-Dutch law provides both a criminal action for a public penalty, a civil action for damages for defamation by writing, printing, &c.; and for slander or verbal injury, it provides civil remedy, consisting of two actions, usually, but not necessarily, conjoined; Remedy for defamation.

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\* As to false characters of servants, see chapter on Master and Servant.

namely, an action for recantation (*actio ad palinodiam*), and an action for damages *actio ad injuriæ aestimationem*. (Voet. xlvii, tit. 10, par. 17: *V. der Ldn.* 16, § 4, p. 251: *V. L.* 37, § 1, p. 481: *Grot.* iii, 36, § 3, p. 448.) The three latter authorities imply that an action for "honourable amends" as well as "profitable amends" lies both in the case of libel and slander; but Marshall, citing Voet, says:—"One of the remedies pointed out by the civil law for *merely* verbal injury is the *Palinodia*." (Marshall, 414.) And it is laid down in the judgment of Mr. Justice Stoddart (in 12838, *D. C. Colombo*, before cited) as follows:—

"By the Roman-Dutch law, the civil remedy against slander consists of two actions, usually, but not necessarily, conjoined; the *actio ad palinodiam*, and the *actio ad injuriæ aestimationem*. The former was unknown to the Roman-Dutch law; but the latter is in every respect the same as *the civil action of damages* under the Prætorian edict in the general case of slander, and under the *lex cornelia de injuriis* in the instance of defamation by writing. \* \* \* \* This Dutch action for profitable amends, when it arose out of *written* slander, was governed, in the courts of Holland, and must be governed here, by the Roman practice under the *Lex Cornelia de injuriis*, \* \* which provided a double remedy—a criminal action for a public penalty, and a civil action for damages proportioned to the injury."

Marshall says that it is believed that the Supreme Court has, even in an action for damages, directed a recantation to be made; or, where it has been voluntarily offered by the defendant, has considered (where no *special* damage has been sustained) that these honourable amends have taken away all pecuniary amends. (*Marshall*, 411, and cases there cited.)

Honourable  
amends.

Profitable amends, or damages, may be given, not only in respect of any loss arising from the libel, but also for the mental suffering caused to the person libelled; any damages may be given which are not manifestly outrageous. (*Smith's M. C. L.* p. 25; citing *Add. Torts.* 627; *Mayne*, 273.)

Profitable  
amends, or  
damages.

One written defamation cannot be set up against another as a defence; nor can it be set off in reduction of damages, unless the libel by the plaintiff may be regarded as the provoking cause of the libel by the defendant. (*Smith's M. C. L.* 26: *Add. Torts.* 628-9: *Broom's Com.* 721: *Roscoe on Evid.* 577.) But no one is prohibited from returning injuries by word of mouth, with injuries by word of mouth: no action arises therefrom; and such abusive words are considered as adjusted and finished. (*V. Ln.* iv, 37, § 1, p. 481: 1012, *D. C. Kandy*, 15 *Aug.* 1834; *Austin*, 11.)

Defamation  
against  
defamation.

Even in an action for damages solely, an apology may be given in evidence in reduction of damages. (See *ante*, and *Smith's M. C. L.* p. 26; citing *Add.*

*Torts.* 628-9; *Broom's Com.* 721; *Roscoe on Evid.* 577.)

Criminal  
prosecution  
for libel.

Criminal prosecution for libel forms part of the criminal law.

Seduction.

An action lies (in the Roman-Dutch law) for seducing a virgin, even with her consent. First, to compel the party to marry her, or for compensation for loss of honour in money. Some proof must be given\* that she never had carnal knowledge with any other man; so that a widow cannot maintain this action. The choice between marriage or payment lies entirely with the man, provided no previous promise of marriage can be proved against him.

The lying-in charges, and the cost of burial, if the child dies, may be included in the compensation, or be separately sued for.

Also, for a reasonable allowance for the maintenance of the child, which ought to be maintained at the common charge of father and mother; but if either is not able, then the other must bear the whole charge.† (*V. D. L.* i, 16, § 2, p. 249: *Grot.* iii, 35, § 8, p. 445: *V. L.* iv, 37, § 4, p. 482.)

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\* According to Van der Linden, she must swear that she is a virgin; but as, by the English law of evidence, she could not be a witness in this action, some other evidence must be substituted for her oath, as she must still have her remedy.

† Grotius gives rules as to the value of the oath of either party; but, under the English law of evidence, neither can be examined.



## CHAPTER XXIX.

## INJURIES TO PROPERTY IN LAND.

INJURIES to property in land have no special divisions in the Roman-Dutch writers, though impliedly acknowledged in many parts of their treatises, and used in argument and decisions in the Supreme Court. I shall, therefore, here take the English classification of injuries to land as accepted in the broad outline by the Supreme Court of Ceylon.

The injuries affecting land are principally six:—1. Ouster. 2. Trespass. 3. Nuisance. 4. Waste. 5. Subtraction. And 6. Disturbance. (3, *Kerr's Bl.* 179.)

Ouster, or dispossession, is an injury whereby a wrongdoer gets into actual occupation of the land, and obliges him that has a right to seek his legal possession, in order to gain possession and damages for the injury sustained. Dispossession can be effected in five ways:—

Dispossession  
or ouster.

1. Where a person dies in possession of land, and Abatement

before the heir, devisee, or executor can enter, a stranger, who has no right, enters and gets possession of the land. This is termed abatement.

Intrusion.

2. Where a tenant for life dies possessed of land, and a stranger enters and takes possession after the death of the tenant for life, and before the entry of the owner in reversion or remainder. This is termed intrusion. And any wrongful entry on the demesnes of the Crown, and taking the profits thereof, is also termed intrusion.\*

Actual dis-  
possession, or  
*disseisin*.

3. The two former species of injury were by a wrongful entry where the possession was vacant; but there is the case where a man enters by force or fraud upon the land of another, and turns or keeps him out of possession. This is termed in England *disseisin*; and when done with force, is, in Ceylon, termed forcible entry. It is dispossession in deed, as the former instances were dispossession in law.

Deforcement.

4. The fourth species consists in detaining land from the person rightly entitled, where the entry of the present tenant or possessor was originally lawful, but his detainer has become unlawful. An example of this is where a tenant holds over and refuses to give land at the expiration of a lease. (3, *Kerr's Bl.* 10, pp. 176-82: *Sm. Law of Prop.* 485-6.)

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\* There can be other intrusions, under the English system of entailed estates; but the examples mentioned are those that generally occur in Ceylon.

TRESPASS. The second species of injury affecting land is that of *trespass*. Trespass, in English law, in a wide sense, means an injurious act against a man's person or property, not amounting to a criminal offence of a higher nature; as, for example, an assault, or detaining a man's goods. But in the sense in which we are at present to consider it, it means no more than an entry upon or use of another man's land unwarranted by lawful authority, either personally or by one's servants or cattle. (3, *Kerr's Bl.* 12, pp. 217-20.) The persons wronged by a trespass are the actual owner in possession, or his tenant or other occupier, or the reversioner; and therefore to claim redress for a trespass one must have a property (absolute or temporary), and actual possession of the soil, or the herbage, or other produce of the land: and if the trespass is to buildings which are wrongfully and permanently injured by a third person, the tenant also has legal redress in a residential point of view; and the reversioner for the diminution in the saleable value of his property. And if trees are injured, damages are recoverable by the occupier (as, for example, the manager of a coffee estate who has actual occupation and possession—30033, *C. R. Kandy*, 2 Dec. 1862) and the reversioner: damages for the loss of shade, shelter, and fruit by the former; and damages for the loss of timber by the latter. (*Add. Torts.* 158-81: *Mayne*, 238.) Thus planters who are joint occupiers with the land-owners (17716, *C. R.*

*Calpentyn*, 5 Dec. 1861; *Marshall*, 370), would be entitled to a direct redress for an injury to their part of the fruit of the trees. Even bare possession will entitle a person to maintain trespass against a wrongdoer, though not against the lawful owner of the land. (3350, *P. C. Malagam*, 19 Nov. 1850; *P. C. Ca.* 32.)

Every man's land is, in the eye of the law, enclosed and set apart from his neighbour's; and if not by a material enclosure, then by an invisible boundary, to pass which is as much an unwarrantable entry, as if an actual fence were broken through; so that even the mere walking on another man's land, without damage to the soil or herbage, is a trespass. As, also, would be such simple acts as throwing a heap of stones, or pouring out a pail of water, or planting posts or rails upon another man's land. (3, *Keri's Bl.* 218: *Add. Torts.* 139-43.)

A mere trespasser may be forcibly ejected, though not with more violence than is necessary for his removal, unless he is permitted to remain without effort to remove him for more than a year; in which case he will gain a possession. (*V. L.* ii, 8, § 1, p. 129: 6504, *D. C. Ratnapoora*, 3 July, 1855.)

Damages for  
trespass.

Damages for trespass are not limited to the actual injury inflicted; but all the circumstances of aggravation may be taken into account. Thus, substantial damages may be recovered against an intruder into a dwelling house, though no actual injury has been done

either to person or property ; the aggravation being that the place trespassed on was a dwelling house. If, however, there are no circumstances of aggravation in a simple trespass, moderate or nominal damages ought to be given ; but if the wrongful act was done maliciously, insolently, or with deliberate wilfulness, exemplary damages may and ought to be given, though no pecuniary loss had been incurred. (30033, *C. R. Kandy*, 7 July, 1863.)

We now come to that class of injuries to land termed "Nuisances." Very little is said of this in the civil law ; but as the injuries exist, and remedies must be found, the author will follow Sir Charles Marshall in applying the English law to them. (*Marshall*, 446.)

Private nuisances being things prejudicial to the enjoyment of private rights, anything done to the hurt or annoyance of the land of another, or which interrupts him in the legal enjoyment of his land, is a nuisance. (*Kerr's Bl.* p. 225 : *Marshall*, p. 445.)

A person will become liable to an action for a nuisance, unless he possesses a servitude or a prescriptive right, by erecting a building which overhangs another's house or land ; or by fixing a spout or projection which tends to cause a quantity of water to descend on another's house or land ; or by setting up a noisy, noxious, or offensive trade, such as a cooperage or a smith's forge, unless it is in a place where it does not amount to a nuisance to the party complaining. (*Marshall*, 445 :

Injuriously affecting another's property, or his reasonable enjoyment of it.

*Sm. M. C. L.* p. 57; citing *Add. Torts*, 74-5, 78-9: *Broom's Com.* 757-8: *Schw. N. P.* 1129: 3 *Ste. Com.* 491-2: *Gale on Easements*, 388, 404, 406-8: *Bamford v. Turnley*, 10 *W. R.* 803.)

By erecting buildings.

If a man erects a building so close to the house or other building of another as to prevent the latter from enjoying the light so freely as he used, he may have redress, if he has been in the enjoyment of the light to his house or other building for the prescriptive period, or if the person affecting his light were the person from whom he purchased the house or other building. (See *ante*, pp. 276-7.)

Remedy in damages.

The remedy, in all these cases, is by action for damages.

No action for reasonable customary use of a right:

But an action cannot be maintained for the reasonable use of a right in a place where it has been customary to exercise it, as in the case of a butcher's shop, although it may be to the annoyance of another. (*Schw. N. P.* 1129: *Sm. M. C.* 58; citing 3 *Bl. Com.* 13: *Broom's Com.* 757-8: *Gale*, 406, 408.)

nor for diminishing another's pleasure.

Nor can an action be maintained on the mere ground that the cause of action diminishes the pleasure of the party affected by it. So that the building of a wall which merely shuts out a prospect (unless the subject of *window-right*, *ante*, p. 277), without obstructing the light, or the opening of a window, which destroys the privacy of another, is not actionable. (*Marshall*, 445: *Sm. M. C. L.* 59; citing *Schw. N. P.* 1130: 3 *Ste. Com.* 491-2: *Gale*, 285.)

A person who pulls down a house or wall which touches the house or wall of another person, is liable for any damage arising from want of due care and skill, and proper precautions. And if a person makes an excavation on his land, close to his neighbour's house, in an improper manner, or without giving his neighbour notice and opportunity to protect it, he will be responsible for any damage thereby occasioned, if his neighbour's house has been erected long enough to have acquired a right of support. (*Sm. M. C. L.* 59; citing *Add. Torts.* 86-7; *Roscoe on Evid.* 526-28; *Gale*, 314.)

Endangering another's buildings.

Whenever the enjoyment of a right incident to the possession of land has been tortiously obstructed, and the repetition of the tortious act would tend to establish an adverse legal right, substantial damages are recoverable, even though no actual damage of any other kind has been sustained. (*Add. Torts.* 14; *Mayne*, 256.)

Damages for the obstruction of a right.

Damages are recoverable by a lessee in respect of an injury to his possessory interests; and if the repetition of the act would tend to the establishment of a prescriptive right permanently injurious to the inheritance, or if the nuisance is otherwise permanent or injurious to the reversioner, damages are also recoverable by the reversioner. (*Sm. M. C. L.* 60; citing *Add. Torts.* 15; *Roscoe on Evid.* 513; *Mayne*, 256.)

Damages recoverable by lessee and reversioner.

Waste is that which tends to the permanent depreciation of the value of the inheritance, and creates an

Waste.

obligation arising out of delict. It is either voluntary, which is an offence of commission, as by pulling down a house; or it is permissive, which is an offence of omission only, as by suffering it to fall for want of necessary repairs. (*Sm. M. C. L.* 60; citing *Co. Lit.* 53, a; 2, *Bl. Com.* 281; *Burton*, § 718.)

Different kinds of voluntary waste.

Voluntary waste chiefly consists in these things:—  
 1. Felling or destroying trees. 2. Destroying or injuring buildings. 3. Altering the property.\* 4. Destroying heirlooms. (*Grot.* iii, 37, § 4, p. 449: *Sm. M. C. L.* 61; citing 1, *Cruise T.* 3, 2, § 1.)

If glass windows, though put in by the tenant himself, are broken or carried away, it is waste. So it is of doors, floors, and the like, annexed or fixed to the house, either by the reversioner or the tenant. (*Sm. M. C. L.* 63; citing 1, *Cruise T.* 3, 2, § 13; 2, *Bl. Com.* 181; *Co. Litt.* 53, a.)

Altering the property.

If a tenant converts one kind of land into another, or makes alterations in the premises, though they greatly enhance the value of it, it is waste, because he has the use, and not the dominion: and the owner has a right to have the old features and associations of the property unaltered. So that an action may be maintained even for inclosing and cultivating waste land, or pulling down old buildings and substituting new ones of greater

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\* Termed, by Grotius, "Damage."



value. (*Grout*, iii, 37, § 4, p. 449 : *Sm. M. C. L.* 63 ; citing *Add. Torts.* 120-1 ; *Sm. Law of Prop.* 1040-2 ; *Cooté's Landl. and Ten.* 232-3.)

The destruction of heirlooms is waste. (1, *Cruise*, Destruction of heirlooms.  
T. 3, 2, § 20.)

The actual owner may commit every kind of waste. Who are liable for waste.  
But a person having only a life interest is punishable for waste, whether voluntary or permissive, unless his estate is made without impeachment of waste.

A tenant for years is liable for commissive waste ; and he is bound to take reasonable care of the property.

Compensation was decreed by the Supreme Court in a case, by a second lessee against a prior lessee, for wasteful damage whilst the prior lessee's term was still current ; but after the second lessee's lease (the term of which was to commence *in futuro*) had been executed. The damage was such as to prejudice and injure the second lessee when he came into possession. The second lessee, having a lawful interest at the time of the waste, had a cause of action. (14938, *C. R. Matura*, 3 July, 1863.)

A tenant at will, or from month to month, is not liable for permissive waste. (*Sm. M. C. L.* 64 ; citing *Add. Torts.* 119 ; *Sm. Law of Prop.* 1042-3 ; *Ord. No.* 7 of 1840, § 2.)

A tenant for life, or years, is liable for commissive waste by a stranger. (*Add. Torts.* 127.)

A lessor has a right of inspecting the premises, to Inspection of

premises by  
lessor.

see if there is waste ; and if the lessee prevents the inspection, he may be made to pay substantial damages, even though no waste may have been done. (*Add. Torts.* 128-38.) This would especially apply to the usual monthly tenancies of houses in Ceylon, where the landlord usually repairs.

Disturbance.

Disturbance is usually a wrong done by hindering the owner of land or servitude in the regular and lawful enjoyment of it; such as the disturbance of a right of way, for which an action for damages will lie; or the

Tenants.

disturbance of tenants, by the driving them away from the estate, for which a landlord has an action for damages:

#### OF INJURIES TO PERSONAL PROPERTY.

Deprivation of  
possession,  
and damage.

The rights of personal property in possession are liable to two species of injury: the deprivation of the possession; and the abuse or damage of the moveables, while the possession continues in the legal owner. The deprivation of the possession is also divisible into two

Unjust taking  
or detainer.

branches: the unjust taking them away, and the unjust detaining them, though the original taking away might be lawful. (*Sm. M. C. L.* 67; citing 3, *Bl. Com.* 144; *Broom's Com.* 776: see *post*, chapter on actions.)

Redress for  
unjust taking.

There are two descriptions of redress for the unjust taking. The first is the restitution of the specific moveables taken, with the payment of damages for the loss

or injury occasioned by the temporary deprivation of the possession. The second is the giving a pecuniary equivalent in the shape of damages for the permanent loss of the articles taken. (See 2, *Bl. Com.* 145: and see the chapter on Actions, *post.*)

## CHAPTER XXX.

## EXTINCTION OF OBLIGATIONS.

OBLIGATIONS are extinguished in the following modes:

Payment. First, by *Payment*.\* Every obligation is dissolved by the actual fulfilment of that which the party has bound himself to give or do, or by giving something else in its place, with the consent of the creditor. For a payment to be valid, it is not necessary that it be made either by the debtor himself, or by some one in his behalf by his order; for payment is good by whomsoever made, although the person making it has not been authorised by the debtor so to do, or though he should do it even against his will; for, provided he does it in the name and on behalf of the debtor, and provided he is entitled to transfer the property in the thing thus paid for, it annuls the obligation, and frees the debtor even against his will. (*Inst.* iii, 29, *Pr.* : *V. der Ldn.* i. 17, § 4, p. 262 : *Grot.* iii, 39, §§ 7-14, pp. 456-7, and subsequent pages.)

This, however, takes place only in obligations which consist in giving something; since, where the obligation

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\* See, also, pp. 295-6, vol. i.

is to do a certain act, it may sometimes make a material difference to the obligee by whom the act is performed.

The payment, to be valid, must be made to the creditor, or some one empowered by him to receive it.

When the creditor dies, leaving several heirs, payment to one is only good as to his portion of the debt, unless he has been empowered by the co-heirs to receive the whole. But payment to one partner of a firm is in general a good payment to all the partners. (4788, *D. C. Uttuan Kandy*, 17 May, 1837; *Morg. D.* 154.) So, also, if two or more creditors are present when a debtor brings the money, and the debtor places the money in the hands of one creditor in the other's presence, and that other's share is immediately handed over to him; this is a payment to both. (3340, *C. R. Ratnapoora*, 29 Sept. 1863.)

Payment to whom made.

In case of the assignment of a debt to a third person, with notice to the debtor, payment must be made to the assignee; and payment in such case to the original creditor is not good.

Payment to third persons.

Sometimes a clause is inserted in the contract whereby payment is conditioned to be made to a third person therein mentioned, and to be equally good as if made to the creditor himself.\*

Payment made to a person not authorised by the creditor to receive it, is good, in the following cases :

Payment to unauthorized person.

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\* If A contracts with B to pay to C a sum of money for B, A cannot sue B until he has paid C. (*Marshall*, 85.)

1. When the creditor afterwards confirms it.
2. When the money paid is applied to the use of the creditor.
3. When the person to whom it has been paid becomes heir or legal representative to the creditor.\*

What to be paid.

According to the general rule, the precise thing stipulated for must be given or paid, and the debtor cannot oblige his creditor to accept anything else instead. No creditor is bound to receive against his will a partial payment, unless by the agreement the payment is to be made by instalments.

Effect of payment.

The effect of payment is the extinction of the obligation and of all its consequences, as also the exoneration of all the co-debtors. The latter point, however, is subject to an exception when one of the several debtors or sureties pays under *cession of action* from the creditors against the co-debtors or co-sureties.

Part payment.

Part payment extinguishes the debt *pro tanto*, and also the interest.

Crediting payments.

With respect to the crediting of the payments made, the following rules must be observed :

1. The debtor, when he makes a payment, is at liberty to declare under what head or to what account he wishes it to be entered.†

\* See also *Marshall*, pp. 88-89; and "Principal and Agent."

† In one case, *Rough, J.* laid down the following rule: "That if the creditor does not mean to receive the payment in the manner offered, the objection should be made at the time of the payment, and the money should not be received at all, as the creditor still has remedy by action. (10423, *D. C. Colombo*, 8 June, 1836; *Morg. D.* 83.)

2. When the debtor neglects to do this, the creditor is at liberty, when he has different accounts against the debtor, to specify by his receipt the account to which he means to place it.

3. When this is not specified by either debtor or creditor, it must be carried to that account which it is most beneficial to the debtor to reduce.

4. When the accounts are of the same nature, so as to make no difference to the debtor, the payment must be carried to the oldest account.

5. In case the debts are of the same date and of the same nature in every respect, then the payment is to be placed to the account of each, *pro rata*.

In debts which bear interest, the payment must be applied in reduction of the interest in the first place, and afterwards to the principal.

Of equal effect with payment is *consignation* of the debt or thing due when payment has been tendered to the creditor and refused. The debtor is thereby freed, and the thing consigned, or money paid into court, lies there on the account and at the risk of the creditor. (But see "Tender," vol. i, p. 296, and *Marshall*, p. 472.)

Consignation,  
or payment  
into court.

When a man has paid money voluntarily, he cannot recover it back merely on the ground that the person receiving it could not have enforced his claims in a court of law.\* (58, *D. C. Hambantotte*, 22 Dec. 1834; *Morg D.* 28.)

\* As, for example, where the remedy has been prescribed; but the debt still exists morally, and can be legally revived.

## Novation.

The *Novation* of debt is the creation of a new debt in place of the old one; either by taking a new and different obligation in extinction of the old one, whether this is done between the same debtor and creditor, or whether a new debtor takes upon himself entirely my debt; or when the debtor, in order to be released from his original creditor, enters by his order into an obligation with a new creditor.\*

In order to constitute *Novation*, the express and declared will of the creditor to make a novation is requisite.

Conjectures and suppositions are not sufficient, but a new contract or obligation is rather presumed in such case, for the purpose of strengthening the original contract or obligation rather than of annulling it.

The effect of *Novation* is, that the first or original debt is cancelled as effectually as it would be by actual payment, and, consequently, the mortgage or security for the debt, unless this be expressly transferred as security for the new debt.

The sureties also for the old debt are not bound for the new without their express consent.

## Release.

*Release of the Debt.* This may take place not only

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\* It would appear that there cannot be a novation by the substitution of a higher instrument for a lower; as, for example, by giving a bill of exchange in place of a bond, unless the bond is legally cancelled. (6854, *Prov. C. Jaffna*, 16 Dec. 1833; *Morg. D.* 12.)



by express, but also by tacit agreement, to be inferred from certain acts which raise this presumption. For example, when the creditor returns to the debtor his acknowledgment or obligation, he is supposed thereby to have remitted the debt.

However, restoring the things given in pledge as security, though it releases them, does not release the debt itself.

Releases or acquittances are of several kinds: sometimes the entire debt is considered as released, and all the co-debtors freed; sometimes it only extends to one of the debtors, and co-debtors remain bound.

Thus, in the case of two persons being each a debtor, *Of Debtors.*  
*in solidum*, for the same debt, or bound jointly and severally, the release to one frees him only, and not his co-debtor or co-obligor.

The release to the principal debtor induces that *Of sureties.*  
 of the surety; but not *vice versa*, for a release to the surety does not free the principal debtor, no more than a personal release to one of the sureties frees the others.

No one but the creditor himself, when he has the *Who can release.*  
 right of disposing of his property, can release a debt, except those who are specially empowered by him for this purpose.

An attorney, acting under a general power, a guardian, curator, or administrator, has not this right, since all such persons have only the power to administer and not to give away.

Compensation, or set-off.

*Compensation, or set-off*,\* by which is understood the reciprocal extinguishment of mutual debts by setting one against the other. For example, if I owe you five hundred pounds for money borrowed, and on the other hand I am your creditor for the like sum, on account of rent, then is your debt against me extinguished by being set against my demand on you for a like sum: and, again, the debt for which you may be sued on my account is cancelled by the debt which you have against me.

In order to constitute the right of set-off, or compensation, it is necessary, first, that the debts or obligations to be set against each other be of the same nature, as money against money; but not money against grain.

2. That the debt brought in compensation, or set-off, has become due and payable.
3. That the debt be of a liquid nature.
4. That the debt be due to the party himself who claims the set-off; and,
5. That the debt be due by the very person against whom we claim to set it off.

The effects of *set-off*, by operation of law, are—

1. That in case a creditor, with whom effects have been deposited as a security, afterwards becomes a debtor to the same person, the latter can demand

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\* See vol. i, p. 299.

those effects back, provided he offers the balance due to him.

2. That when a debt carries interest, and the debt to be set off against it does not bear interest, the debt bearing interest is extinguished to that amount, and the interest in the same proportion.

3. That although my creditor is not bound to accept a partial payment, yet, however, when he becomes my debtor for a less sum than I owe him, he is obliged to abate his demand *pro tanto*, as the legal consequence of *set-off*; and,

4. That having paid a debt already extinguished by set-off, we are entitled to recover back the money so paid, as not being due unless such payment be made in satisfaction of a judgment.

*Merger, or confusion of claims*, is when the title of Merger. creditor and debtor with respect to the same debt are united in the same person: for example, when one becomes heir to the other. By this event the obligation of the surety also becomes extinguished; for, as the principal debt or obligation no longer exists, the accessory obligation ceases also. But when the creditor becomes heir to the surety, or *vice versá*, the principal obligation does not thereby cease to exist. In order that this merger should take place, the party must be creditor or debtor for the entire debt; since, if he is such only for a part, the merger extends only to that part. In the same manner, if he is heir only to a part,

the debt, with respect to his co-heirs, continues to exist as to their portions.

Loss, or  
destruction of  
the thing.

*The perishing or destruction of the thing itself bound*, as the subject of the obligation, extinguishes the obligation; provided the destruction is entire, and not occasioned by the act or neglect of the debtor; otherwise he is then, as well as his heirs and sureties, bound to make good the value.

Lapse of time.

*The lapse of the time* for which the obligation was entered into: for instance, if I become surety for any one on condition of not remaining bound beyond the term of three years. To this head also pertain all loans made upon annuities for lives which crop by the death of the parties for whose lives they were granted.

In like manner, when an obligation is entered into on condition of lasting no longer than until the occurrence of a certain event: for example, in case I become security for any one until a certain vessel, in which he has considerable interest, shall have arrived, the arrival of the vessel releases me from this obligation.

Prescription.

*Prescription* also extinguishes obligations, so far that, after the lapse of a certain time, limited by law, the right of action on them is lost. As to this head, see the chapter on "Prescription."

Transaction,  
or release.

*Transaction, accord, or release*, cancels or annuls the obligation to which it relates, it being with respect to its effect of equal force with a sentence or decree in which both parties have acquiesced.

*Relief*, or replacing the party in his original state before the contract (*restitutio in integrum*), cancels the obligation against which relief is sought. Relief.

This remedy is by virtue of *letters patent*, issued by the court of justice (*mandament of relief, or civil petition*), addressed to the judge of the domicile, who, after a previous suit at law, and proper inquiry into the circumstances of the case, affords this relief; provided there be good reasons, which by law are limited to fear, violence, fraud, minority, absence, excusable error, and prejudice in above half the value of the thing; and further, such equitable grounds as may justify the resolution or cancellation of the contract.

*Cession*, or *cessio bonorum*, or giving up one's property to one's creditors, was also a mode of extinguishing obligations under the Roman-Dutch law; but this is now abolished by Ord. No. 7 of 1853, § 3. *Cessio bonorum.*

new evidence has arisen which was not before in the plaintiff's possession. (*Marshall*, 243-4.)

The first point, then, to enquire into is, are the parties in the first trial the same with those now litigating, or are the former parties, parties whose interests are identical with those now litigating.

Of course, if the parties are alleged to be the same, it must be shown, or admitted, that the several parties on each record are the same. (3257, *D. C. Colombo*, 10 July, 1841; *Morg. D.* 313.) But a former decision, if not between the same parties nominally, however identical their interests may be in reality, will not prevent evidence being gone into, in a subsequent suit, as to the respective rights of the parties. (*Semiral v. Welligalle*; *G. A. Matelle*, 26 Nov. 1833; *Morg. D.* 7.)

As to the question of parties' identical interests, a final decree between ancestors may be pleaded in bar of a second suit by the heir of the ancestor who succeeded in the first, against all persons claiming title by descent through the unsuccessful ancestor. (3053, *D. C. Colombo*, 10 July, 1841; *Morg. D.* 314.)

Further, in a Kandyan case, where a son had been a party to a suit, and whose interests were identical with those of his mother, she was held to be barred, on the ground that it was the same thing as if the parties were individually the same. (1855, *D. C. Kandy*, 2 May,

1836; *Morg. D.* 41; *Austin*, 17; *Marshall*, 246: 7064, *D. C. Kandy*, 20 Feb. 1836: *Austin*, 29, is a similar case, with the above relationship reversed.) The question in these cases is, does the second plaintiff claim *by the same title* as the plaintiff in first suit. And the same question applies also to the case of a defendant; if the title is the same, the party in the second suit is debarred from setting up a title already conclusively dealt with. (26146, *D. C. Kandy*, *Coll.* 31 May, 1855; *Austin*, 183.)

On the same principle, a vendor cannot maintain an action for land after his vendee has already tried the title to the same land and failed. (656, *D. C. Kandy*, 14, Aug. 1834; *Austin*, 9.)

But, on the other hand, the first suit between the same parties is no bar to the second suit, if it turn out the parties are not legal representatives as professed. (15519, *D. C. Galle*, 14 Nov. 1853.) So, also, a suit as *son* is no bar to any claim set up as *adopted son*. (12985, *D. C. Kornegalle*, 14 Nov. 1853.) And when a wife claims in her own right, she is not debarred, even if her husband had previously tried his right to the same land, as her title was not put in issue; but she is debarred if she were cognizant of the former suit. (19472, 14 Dec. 1847; and 20112, 24 Aug. 1847, *D. C. Kandy*; *Austin*, 109 and 117.)

The question to be looked at in these Kandyan cases, where the same land is sued that had been litigated previously by relations, is, "Does the plaintiff claim by a

title independent of the plaintiff in the first suit; if he does, he is not estopped. (See 23859, *D. C. Kandy, Coll.* 2 Nov. 1856; *Austin*, 159: *Lor. R.* 218: 28700, *D. C. Kandy*, 14 *Sept.* 1858; *Austin*, 209.)

The decree of a District Court in another suit which the defendant was not a party to does not bind him, even if he ought to have intervened in the previous suit and has not done so. That is matter for observation by the Court only. (452, *C. R. Pangwelle*, 30 *June*, 1863, over-ruling 7307, *D. C. Kandy*; *Austin*, p. 30.) So, also, the plea of *res judicata* is inapplicable where the intervention of the present plaintiff in a former suit was set aside before the court proceeded to hear the evidence of the co-defendant, who was plaintiff in that case, and to give judgment; so that the intervenients were no parties to the suit at the time the judgment was given, and cannot be affected thereby. (16743, *D. C. Callura*, 12 *Jan.* 1857.)

Issue the same.

The second point to inquire into, when the parties are the same, or their interests identical with those of parties in a former suit, is whether the issue is the same in the second suit as in the first; and it is for the court to determine whether or not the question which will be in issue in a second suit be different and distinct. (800, *D. C. Ratnapoora*, 8 *June*, 1836: 1806, *D. C. Callura*; *Morg. D.* pp. 84, 98: 90, *C. R. Jaffna*, 12 *Jan.* 1857.)

*Res judicata* does not arise where there has been collusion between the parties to both suits; or if a party



under disability to sue or defend has not been properly represented. (940, *D. C. Ratnapoora*, 26 July, 1837; *Morg. D.* 182.)

Also, where the law allows a civil action and criminal prosecution to be instituted for one and the same offence, a previous conviction cannot be pleaded as an absolute bar to the civil action; but it is discretionary with the court whether it will entertain a civil action or not. (*Marshall*, p. 248.)

Conviction not  
*res judicata.*

It is also necessary to point out, as—though it is a simple and obvious truth—it has often come before the Supreme Court, that a decree, though binding on the plaintiff and defendant, does not affect a third party; for otherwise no man's title would be safe, since it would be an easy matter for knaves to collude together; and the one as defendant to suffer judgment to go by admission or default in favour of the other as plaintiff, neither party possessing a shadow of right. (1584, *D. C. Seven Corles*, 1 Nov. 1835: 6311, *D. C. Ratnapoora*, 14 Jun. 1835: 3544, *D. C. Pantura*, 13 Aug. 1834; *Morg. D.* 62, 31, 19.)

## CHAPTER XXXII.

## RIGHT OF ACTION.

THE rights or causes of action have been, to a large extent, laid down in the previous pages; but there are yet four it is necessary to mention; namely: 1. *Reclame*, or *rei vindicatio*. 2. Actions respecting inheritance. 3. The hypothecary action, or foreclosure. 4. Possessory actions.

These actions are termed real actions, inasmuch as they are brought for the recovery of a particular thing, whether moveable or immoveable, and are founded on the *jus in re*, or a right in the thing.

*Reclame*, or  
*Rei vindicatio*.

The action which arises under the head of property is named *reclame*, or *rei vindicatio*. It is a real action, which lies for the owner of anything moveable or immoveable, corporeal or incorporeal, against the possessor or any person who has, *mala fide*, divested himself of the possession, to deliver it up to the owner, with all its fruits then in existence; and also those which the *mala fide* possessor has already enjoyed, or might have en-

joyed; under the deduction, however, of the costs and charges of the possessor in the thing. (*V. der Ldn.* i, 7, § 3, p. 121.)

The following points as to *reclame* are taken from Mr. Lorenz's Civil Practice, pp. 59, *et seq.* :—

In order to succeed in such an action, the plaintiff must show : 1. His title or right to the property claimed. 2. The identity of the property. 3. The possession or detention thereof by the defendant.

It is necessary that the plaintiff should have a title to the property *at the time of bringing the action*. If, having a title to the property at the commencement of the suit, he has lost it pending the suit, the defendant would be equally entitled to absolution.

The plaintiff, as owner, is entitled to recover it from any person who may be in possession thereof, whether *boná* or *malá fide*; and without refunding the price which a *boná fide* purchaser may have paid for it.

But, although an owner may recover the property stolen from him, yet, if it has already been sold, he cannot bring *rei vindicatio* for the price realized therefrom, or still due thereon, so as to recover it as his own, and in preference to other creditors of the seller; but he may maintain a personal action for such price, and will be entitled to concurrence with other simple creditors, not only against the party who stole the property, and his heirs, but also against those who have *malá fide* and

knowingly purchased the stolen property, and re-sold or consumed it.

Nor, on the other hand, can the owner of stolen money maintain *vindicatio* in respect of any property which may have been purchased with such money.

- A party cannot maintain *vindicatio* in respect of property alienated by himself, whether such alienation has taken place directly, or results from acts or circumstances whereby the owner has lost or forfeited his dominium therein; as where a person has used his own materials in building a house on another's ground; for, in such case, the building accrues by right of dominium to the owner of the soil.

An heir, or legal representative, cannot recover property alienated by the person whom he succeeds as heir; for he stands in the same position as the deceased (*una cum defuncto persona fingitur*), and is bound by his acts. And this applies even to the property of a minor alienated without authority by a guardian, and which the ward, if he has since succeeded as an heir to such guardian, cannot recover from the purchaser.

A party cannot maintain *rei vindicatio* in respect of property the dominium whereof has not yet vested in him; as where, though he has purchased and paid for the property, it has not been duly transferred to him.

Property purchased with another's money does not belong to the owner of the money, but to the person

who purchased it, or in whose name it was purchased; and the owner of the money cannot therefore maintain *rei vindicatio* for the property.

*Reclame* lies also against the heirs or legal representatives of the possessor, to the extent to which they are in possession.

It lies also against a party who has fraudulently deprived himself of the possession.\* (See *ante*, p. 506.)

It does not lie against a party who has purchased the property at an execution sale, after due proclamation and citation of creditors and claimants; nor against those who have purchased from the Crown.†

Nor for the recovery of things exempt from commerce.‡

Lastly, *Rei vindicatio* is not maintainable in respect of things joined or attached to the property of another, so that they are naturally or legally inseparable.§ *Rei vindicatio.*

If the defendant has not the power of restoring the property, the enquiry must be whether this has been the result of fraud, of neglect, or of accident. If he has lost the possession of the property by fraud, or, in other words, has fraudulently ceased to possess, he is bound to make good the loss to the extent to which the plaintiff swears he has been damnified.|| If he has lost the possession, not by fraud, but by neglect, he is bound to pay

\* Voet *ad Pand.* vi, 1, § 23.

† Greeneweg, *ad Cod.* viii, 45, 13. Voet, vi, 1, § 23.

‡ Voet, *ib.* § 29.

§ Voet *ad Pand.* vi, 1, § 29.

|| Voet *ad Pand.* vi, 1, § 32.

*Rei vindicatio.* the simple value of the property. Where the property has ceased to be in the defendant's possession, or has perished, not by fraud or neglect, but accidentally, if such accident took place before *litis contestatio*, neither a *boná fide* nor *malá fide* possessor is liable, unless such *malá fide* possessor had obtained the property by theft; but if after *litis contestatio*, a *malá fide* possessor who has not obtained the property by theft is bound to make good the loss only where the property would not have similarly perished if it had been in the possession of the plaintiff, as if he proves that he was about to sell it; so that it would not have been lost to him if it had been restored at the time he claimed it. And even a *boná fide* possessor is liable, if, after *litis contestatio*, knowing that the property did not belong to him, and that he was bound to restore it to the owner, he chose to carry on the suit instead of restoring the property.\*

If the property has perished by accident pending suit, the defendant is liable in respect of the fruits and profits, or of their value, up to the time when the property perished; but if it was lost by fraud or neglect, the plaintiff is entitled to the value of all the profits which, if the property had not perished, the possessor would have received up to the time of sentence.†

Since the right of succession or inheritance is a kind of real right, so it affords a real action.

Actions  
respecting  
inheritance.

\* Voet, *ib.* v, 3, § 17; vi, 1, § 34.

† Voet, *ib.* vi, 1, § 35.

This action is given to every one who is entitled to any inheritance or estate, or part thereof, against the possessor, whether he hold as heir, or simply as possessor, that the party suing may be declared heir, and admitted to the inheritance, with all the fruits and profits already enjoyed, or which might have been so.

As the person entitled to a special legacy obtains, by the heir's acceptance of the estate, the right of property in the thing bequeathed, he has, besides the personal action against the legal representative to deliver it, also a real action for the thing itself. (*V. der Ldn.* i, 8, § 3, p. 124.)

\*From *jus pignoris*, or the right of pledge or mortgage, whether acquired by contract or by operation of law, over the property of a debtor, a real action accrues to the creditor in respect of the property so liable, termed the *actio hypothecaria*. For a mortgagee cannot retain to himself the property mortgaged, or sell it of his own authority, even where such a condition may have been inserted in the contract of mortgage; but must first obtain a judicial sentence declaring the property bound and executable for the debt due to him, and then proceed to have it sold by the proper judicial officers. And it is in order to obtain such a sentence that the hypothecary action is instituted.

Hypothecary action, or actions arising from the right of mortgage.

As regards this action, there is no distinction be-

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\* See *ante*, p. 291.

Hypothecary  
action.

tween a *pignus*, or pledge, and a *hypotheca*, or mortgage: the hypothecary action is equally maintainable in respect of either.

This action lies not only against the debtor, or the party who has mortgaged his property on account of the debtor, but against any third party who is in possession thereof, or has fraudulently ceased to possess it.

The hypothecary action, to have the mortgaged property declared bound and executable, may be joined with the personal action against the debtor for the recovery of the debt. Where, namely, such property is in the possession of the debtor; and where the property, if specially mortgaged, is in possession of a third party, the creditor may elect whether to proceed first with the personal action against the debtor, or with the hypothecary action against the possessor of the property.

If the mortgage consists of moveables, and such moveables have passed into the possession of a third party, the hypothecary action is no longer maintainable in respect of them. A creditor cannot pursue a right of mortgage over moveables, unless they have been delivered to him, and are still in his possession, or, if left with the defendant, they have remained in his possession and have not been since pledged or otherwise alienated to another.

Although the hypothecary action lies equally against a third party in possession as against the debtor himself, yet, where the creditor proceeds against a third



party, he is bound to prove that the property, if on a special mortgage, belonged to the debtor at the time of the contract; or, if on a general mortgage, that it belonged to him at the time of the contract, or at some subsequent time: which he need not do as against the debtor (if no other party comes forward to claim it), for the debtor is bound to carry out his own deed. A debtor is not bound to tender more than is due by him, though by reason of his contumacy he may have been condemned in more; whilst a third party in possession is liable, on his contumacy, to the extent of the entire value of the property; from which, if it exceeds the amount due, the creditor is bound to restore the excess to the debtor.

The prayer of the plaintiff, in a hypothecary action, is generally "that the [property] mentioned or described in the mortgage bond may be declared bound and executable for the debt;" and the judgment, if pronounced in favour of the plaintiff, would be in the same terms. (*Lorenz's Civil Practice*, pp. 73, *et seq.*)

Under the head of Possession, there are different remedies, or modes of proceeding, according to our practice. Possessory actions.

1. The proceeding to obtain possession is termed a mandament, or writ of immission (*mandament van immissie*), which is scarcely ever used but in the case when one co-heir is ousted of his possession by another. To obtain possession.

2. The proceeding to retain quiet possession against To be quieted in possession.

all those who seek to disturb us therein. This is termed a *mandament van maintainue*. To found this writ, a possession obtained neither secretly, nor by force, nor on condition of quitting on first notice, is necessary on the part of the applicant.

To recover possession.

3. To recover possession when lost by the *mandament van complainte*. For this remedy a quiet and undisturbed possession of more than a year and a day is required; and, further, that we have been dispossessed by force \* within a year before the application. With respect to those who have been dispossessed by force, a remedy is given by the canon law, adopted in our practice, termed a *mandament van spoilie*. It is a summary remedy; and judgment given in it in no way determines the title to the land, but leaves that an open question. (*Van der Ldn.* i, § 3, p. 185 : 9163, *D. C. Ballepitty Modera*, 11 April, 1860.)

Possession restored by order of court.

In one case, possession can be restored by mere order of the court. That is, where possession has once been completely given, under the writ, the plaintiff cannot sue out another writ of possession, although he be disturbed in his possession by the same defendant, and thus make use of the re-issuing of the writ as a remedy for any trespass which the defendant might commit subsequently to the date of the judgment. Should, however, the disturbance take place recently after the possession is delivered, and before the fiscal has returned the writ, the court should order possession to be re-

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320

stored, and punish the defendant by attachment. (3940, *D. C. Jaffna*, 6 Aug. 1850.)

Similarly, if a plaintiff obtains a judgment, and is put in possession under that judgment, but which judgment is subsequently reversed in appeal, the defendant, or party, may move for a rule on the plaintiff to show cause why he should not be replaced in possession; and on the rule being made absolute, the court must order him to be restored. (22111, *D. C. Kandy*, 1 June, 1852; *Austin*, 135.)\*

A plaintiff, who had proved his possession of a church for many years before the defendant had turned him out, was held to be able to maintain the possessory action against a mere wrongdoer. (5632, *Manaar*, 16 Dec. 1862.)

The right of possessory action now holds, in the Kandyan provinces, under the fifth section of Ord. No. 5 of 1852. (6504, *D. C. Ratnapoora*, 3 July, 1855.)

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\* *Seemle*, that if, in a possessory suit, the defendant in his answer puts the title in issue, and the plaintiff raises no objection, the latter ought, if he can, to prove his title. (18792, *C. R. Calpentyne*, 7 Oct. 1863.)

## CHAPTER XXXIII.

## PARTITION AND SALE OF LANDS HELD IN COMMON.

The partition and sale of lands is regulated by the Ordinance, No. 10, of 1863.

It does not appear to be contemplated in this ordinance any more than in the former system of partition under 21 of 1844, now repealed, that a party applying for partition can make application for more than one property, where the other proprietors have an interest in some properties and not in others. (15001, *D. C. Galle*, 15 June, 1852.)

Differently from Ord. No. 21 of 1844, Ord. No. 10 of 1863 does contemplate cases wherein the right of a party claiming an undivided share of land is disputed. Formerly, where the rights of a party were disputed the course was to try the question of title in a separate suit before proceeding to partition. (See 23413 and 23558, *D. C. Kandy, Austin*, 149 and 153.) But now that question of title may be tried in the same suit. (§ 4. See *post*, p. 518.)

\* When any land is held in common one or more of the owners may compel a partition, or, should it be impossible or inexpedient, may apply for a sale thereof, and file in court a libel, particularly describing the property, and stating his or their share and interest therein; the names and residences of all the co-owners and mortgagees, and their respective shares or interests; and the improvements made on the property, and by which of the owners; and praying for a partition of the common estate among the several owners, or a sale. (§ 2.)

Any one of two or more owners may compel partition or sale.

On such application, the court summons the parties named by the plaintiff to appear and show cause why a partition or sale of the common property should not be decreed. The summons is served upon such of the defendants as can be found; or, if they cannot be found, upon the actual holders of the property; or, if there be no person in possession, as the court directs. (§ 3.)

Summons.

If the defendant default in appearance, the court fixes a day to hear evidence in support of the application, and hears evidence of the title of all parties, and the extent of their shares or interests, so far as may be practicable by any *ex parte* proceeding; and, if the plaintiff's title is proved, gives judgment by default, decreeing partition or sale, as may seem fit. If any of the de-

Proceeding on default of appearing.

On appearance.

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\* In this chapter, the word "Will" is held to include a codicil and any other testamentary disposition; and the word "Representative," to mean the party legally entitled to appear and act for and on behalf of another, as his guardian, tutor, curator or attorney, as the case may be.

defendants appear and dispute the title of the plaintiffs, or claim larger shares or interests than stated, or dispute any other material allegation in the libel, the court, *in the same cause*, examines the titles and several shares and interests of all the parties interested therein, and determines any other material question in dispute, and decrees a partition or sale according to the application, or as the court sees fit. The court may decree the sale of the common property, though not prayed for in the libel, if it appears to the court that, on account of the number or poverty of the owners, the nature, extent, or value of the land, or other causes, a partition would be impossible or inexpedient. (§ 4.)

Proviso as to  
sale.

Commission  
for partition.

When partition has been decreed, the court, on the application of any party, and on his depositing, if required so to do, such sum as the court considers sufficient to defray the expenses of partition, may issue a commission to such person or persons as are agreed upon by all the parties and willing to execute it; or, if the parties cannot agree, then to some fit person named by the court, willing, authorizing, and requiring him or them to make partition of the land, assigning to each owner his proper share, and otherwise conforming to such special directions as to the partition which the court may give. And the commissioners must, with all practicable speed, in the presence of all parties concerned (if they appear), make partition according to the ascertained proportions of the several owners, and with refer-

ence to the improvements ; and the party by whom they may have been made, and in conformity with any special directions, must make due return thereof, with a schedule, and, if need be, a survey, showing the name, situation, and estimated value of the land, the names of the owners, the nature and extent of their respective shares and interests, and, generally, the mode in which the commissioners propose that partition shall be made. The commissioners must, thirty days at least before making partition, affix on some conspicuous part of the land a written notice of the day on which they propose to make the same, and give further notice thereof by beat of tom-tom in the village or place where the land is situated, and in such other manner as may appear best calculated for giving the greatest publicity thereto. (§ 5.)

Return to  
commission.Proviso as to  
notice.

On receipt of the return, the court fixes a day, noticed to all the parties, the notice being served in the same way as the summons for considering the return : and on that day, or other day then appointed, the court, after summarily hearing the parties, and making such further reference as may be necessary, must either confirm or modify the partition proposed, and enter final judgment accordingly. (§ 6.)

Proceeding on  
receipt of  
return.

If it appears to the court that a partition of the share of the applicant can be made without interfering with the shares of other owners, and that such other owners are willing to hold in common, the court may abstain

Partition of  
share only of  
applicant.

from a partition of the entire land, further than necessary to ascertain and define the share in severalty of the particular applicant. (§ 7.)

Commission  
for sale.

When a sale has been decreed, the court may, on the application of any party, and on his depositing, if required so to do, in court, a sum sufficient to defray the expenses of the sale, and of any survey required, issue a commission (directed as in the case of a partition) for the sale of such property, And the commissioners must thereupon proceed to make a just valuation, and give notice of not less than six weeks, as the court directs, and best calculated for giving the greatest publicity thereto, that on the day noticed the whole of the property will be put up to sale, first among the owners, at the price of valuation; and if not purchased by some one of them, that it will be put up and sold to the highest bidder. And on that day the commissioners must sell the whole by first putting up the same for sale under such conditions as the court directs, and subject to any mortgage, charges, or incumbrance, amongst the said owners, at the upset valuation price; and if none of the owners purchase and comply with the conditions, then by public auction to the highest bidder. The commissioners must make a return of the name and abode of the purchaser, and the amount of the sale, and file therewith a survey in any case where a survey has been directed by the court. The purchaser must pay into court the purchase money, agreeably to the conditions

Return to  
commission.



of sale, to be paid over to the persons entitled thereto, under order, in the proportion of their respective shares; and the certificate under the hand of the judge of such court, that the said property has been sold under order of court, setting forth the name of the purchaser, and that the purchase money has been paid into court, is evidence of the purchaser's title, without any deed of transfer. If the premises are purchased by one or more of the co-proprietors, the share due to him or them is deducted from the amount to be paid into court. (§ 8.)

Certificate of court to be sufficient title.

Proviso.

The decree for partition or sale is conclusive against all persons whomsoever. Nothing in the ordinance, however, affects the right of any party prejudiced by such partition or sale to recover damages from the parties by whose act, whether of commission or omission, such damages have accrued. (§ 9.)

Decree of court to be conclusive of partition or sale and title.

Proviso as to damages.

The court may award to the commissioners a reasonable amount as remuneration for their labour, and expenses of survey of the property (if any), and of partition or sale; to be paid to them out of the money deposited in court. The persons making a deposit are entitled to recover from each of the co-proprietors, by proceeding *in the same cause*, a share of the costs of partition or sale proportionate to the share of such person in the said property. (§ 10.)

Remuneration to commissioners, and expenses of partition or sale.

No dilatory exception is admitted in any suit for partition or sale. (§ 11.)

No dilatory exception allowed.

Where property is subject to mortgage.

Nothing in the ordinance affects the right of any mortgagee of the land which is the subject of the partition or sale. If, at the time of any partition or sale, an undivided share, not the whole land, is subject to mortgage, the right of the mortgagee is limited to the share in severalty allotted to his mortgagor under the conditions in the mortgage bond, so far as they apply to a share in severalty; and the owner of the share so subject must, without a new deed of mortgage, warrant and make good to the mortgagee the several part after such partition as he was bound to do before partition. (§ 12.)

Where property is subject to lease.

If, at the time of any partition, the property is under lease, the tenants of any part thereof, before partition is made, are tenants of such part set out severally to the respective owners thereof, by and under the conditions they held by, before partition; and the owners of the several parts so divided and allotted must, without a new deed of lease, warrant and make good to the tenants the several parts, severally, after partition, as they were bound to do before partition. (§ 13.)

Persons having permanent right of property to growing trees distinct from the soil, or owners of soil apart from the trees thereon, to be deemed to have an undivided interest.

For the purposes of this ordinance, every one, having a permanent right of property in any trees, distinct from the ownership of the soil, and every owner of any land, apart from the ownership of the trees, has an undivided interest in such land; and the owner of the soil, as well as the person having right in the trees, may compel a partition or sale. In such cases, either party has the right to demand a sale, instead of a partition; and the

owner of the soil has a right of pre-emption upon, a just appraisement by the commissioners, of the planter's share, and of any buildings and improvements made by him. (§ 14.) .

Nothing in the ordinance extends to give to any co-proprietor the right to compel a partition or sale, if there is a deed of partnership binding him for the cultivation of the property, for selling the produce, or for carrying on any occupation having relation to or connected with joint possession; any of the conditions of which deed would be avoided by partition or sale, unless such deed expressly reserves to any of the parties thereto, their heirs, executors, or administrators, the right of compelling partition or sale. Any partition, sale, or conveyance of such property without the consent of the parties to such deed, contrary to the meaning of this § 15, is void. (§ 15.)

Proviso where a deed of partnership subsists as respects the property.

When any undivided share or interest in any land is seized under writ of execution or distress warrant, the fiscal must sell only the share of the debtor, unless the proprietors notify in writing to the fiscal their wish that the whole of the land should be sold; in which case the fiscal must cause a valuation to be made by two appraisers, one named by the debtor, and the other by the co-proprietors; or, on their failing to do so within fifteen days from the date of the notification, and in case of a difference between the appraisers, the fiscal must appoint a third person as umpire, whose valuation is

Proceeding where undivided shares are seized in execution.

final. The fiscal must insert in the notice of sale that on the day of sale the whole property will be put up, first among the co-proprietors, at the valuation price, and if not purchased by one or more of them, then to the highest bidder. On the day named the fiscal must sell the whole by first putting it up upon the usual conditions, subject to incumbrance on the same, among the co-proprietors, at the upset valuation price; and if none of them purchase and comply with the conditions, the fiscal must forthwith sell the same (subject as above) to the highest bidder. In case the premises are purchased by one or more of the co-proprietors, the fiscal must recover from him or them the amount of the purchase and the expenses of appraisement and sale, less the shares of such co-proprietors. But if such premises are purchased by any other person, the fiscal must bring the whole amount into court, to be paid over to the parties entitled thereto, under an order of the court, in the proportion of their respective shares. The sum awarded to the debtor as his share, or such part as is sufficient to satisfy the writ, is to be paid, under order of court, to the creditor, and the surplus, if any, to the debtor. If any dispute arises as to the amount due to the debtor, the creditor may, as soon as the money has been brought into court, apply for such portion thereof, not exceeding the amount of his writ, as he has reason to believe to belong to his debtor; and the court may order payment to him on his giving security for the re-

payment of any part thereof which may at any time within two years thereafter be found not to have belonged to his debtor. (§ 16.)

Whenever any legal proceedings have been instituted for a partition, or sale, no owner may alienate or hypothecate his undivided share or interest therein, until the court by its decree has refused to grant the application for partition or sale; and any such alienation or hypothecation is void. (§ 17.)

No owner may alienate, or hypothecate his share after commencement of legal proceeding.

All land belonging to two or more persons jointly, is deemed to be held in common: and upon the decease of any of such persons the property does not belong to the survivor; but the share and interest of the person dying forms part of his estate, and his devisees, representatives, or heirs, become co-proprietors with the survivor according to the share of the deceased; unless the instrument, under which the property is jointly held, or any agreement between the co-proprietors, expressly provides that the survivor shall have the whole estate. (§ 18.)

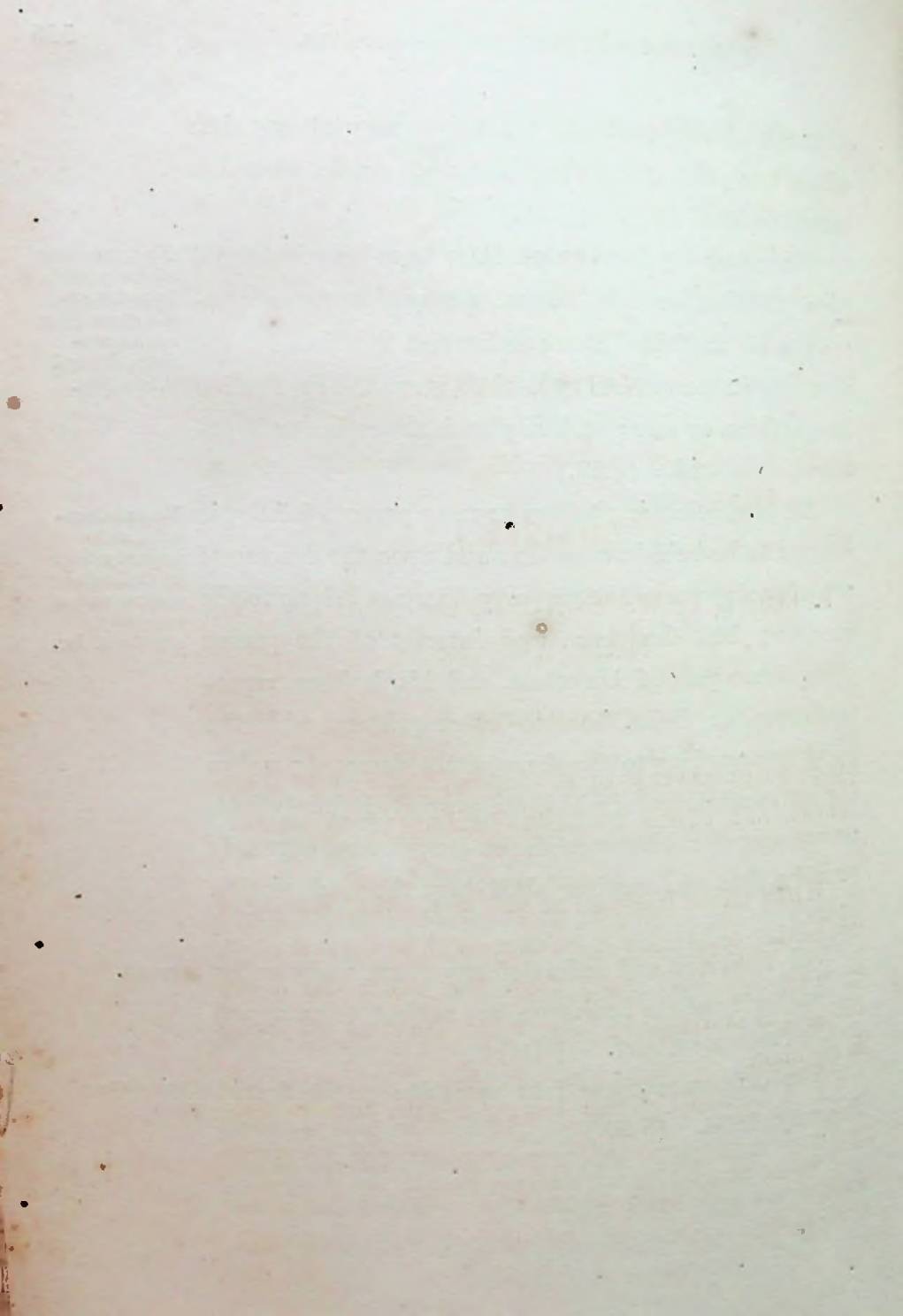
No survivorship, as to property held in undivided shares, unless expressly stipulated for.

All decisions and orders of any court, made under the authority of the ordinance, are subject to an appeal to the Supreme Court. (§ 19.)

Appeals.

The ordinance came into operation on the first of January, 1864. (§ 20.)

Commencement.



BOOK III.

NATIVE LAWS.

CHAPTER I.

SPECIAL LAWS CONCERNING MAURS OR  
MAHOMEDANS.\*

FIRST TITLE.

RELATING TO MATTERS OF SUCCESSION, RIGHT OF INHERITANCES, AND OTHER INCIDENTS OCCASIONED BY DEATH.

WHEN either husband or wife dies, either leaving or not having children, the survivor shall, in the first place, separate and take away from the estate the dowry brought in marriage by him or her, the same not being in common.

2. A husband dying; leaving a wife, but no chil-

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\* Maurs domiciled in the Kandyan provinces are governed by Kandyan law as to landed property. (31944, *D. C. Kandy*, 5 Nov. 1863: *Coll.*)

dren or relations, the estate shall, after deducting the burial charges and other legacies, be divided into four shares; viz. one-fourth to the wife, and the other three-fourths to the poor.

3. The husband dying and leaving a wife and one or more sons, then the estate is divided as follows; viz. one-eighth part to the wife, and to the son or sons seven-eighth parts:

4. The husband dying, leaving a wife and a daughter, the wife is entitled to one-eighth part, the daughter to the just half, and the poor to the remaining three-eighth parts.

5. The husband dying, leaving his wife and two daughters, then is due to the wife one-eighth part, two-thirds to both the daughters, and five twenty-fourth parts to the poor.

6. When the husband dies, leaving his wife and three daughters, one-eighth part goes to the wife, three-fourths to the three daughters, and one-eighth part to the poor; and should there even be more daughters, they shall not inherit more than three-fourth parts.

7. The husband dying, leaving his wife and a son and one daughter, the wife is entitled to one-eighth part, the son to seven-twelfths, and the daughter to seven twenty-fourth parts.

8. Should there be more than one son and one daughter, then the division is fixed as follows: one eighth part to the wife, and the son or sons twice as much as the daughters get.



9. The wife dying, leaving alone her husband, the husband is entitled to the half, and the poor to the other half.

10. The wife dying, leaving the husband and one son, the estate is divided as follows : one fourth part to the husband, and three fourth parts to the son ; should there be even more sons, they will get no more than three fourth parts.

11. The wife dying, leaving a husband and one daughter, the husband is entitled to one fourth part of the estate, the daughter to the just half, and the poor to one fourth part.

12. The wife dying, leaving a husband and two daughters, the husband is entitled to one fourth part, the two daughters to two-thirds, and the poor to one-twelfth.

13. The wife dying, leaving a husband and three daughters, the estate must be divided into thirty-three parts ; viz. three sixteenth parts to the husband, three fourth parts to the three daughters, and one sixteenth part to the poor ; and in this manner the estate shall be divided even if there are more daughters.

14. The wife dying, leaving a husband, one son, and one daughter, the estate shall be divided as follows : viz. to the husband one fourth part, to the son the just half, and to the daughter one fourth part.

15. The wife dying, leaving her husband, one son, and two daughters, the following is allotted : one fourth

part to the husband, three eighth parts to the son, and three eighth parts to the daughters. This manner of dividing the estate shall take place even if there be more sons and daughters.

16. Should the husband or wife die, leaving a father and mother, the father gets two-thirds, and the mother one-third.

17. Any one dying, leaving a father and mother and one son, the father is entitled to one sixth part, the mother to one sixth, and the son to two thirds.

18. Any body dying, leaving a father and mother, and one son, and one daughter, the father is entitled to one sixth, the mother to one sixth, the son to four ninths, and the daughter to two ninth parts.

19. A person dying, leaving a father and a mother and one daughter, the father is entitled to one third, the mother to one sixth, and the daughter to the just half.

20. A person dying, leaving a father and mother and two daughters, the father gets one sixth, the mother one sixth, and the two daughters two thirds; and although there be more daughters, they shall have no more than two thirds.

21. A man dying, leaving a daughter and a son's daughter, or granddaughter, they are entitled to the following: the daughter to one half of the estate, the granddaughter to one sixth, and the poor to one third.

22. Should even the husband leave, beside his afore-

said daughter, two or more granddaughters, their share shall, however, not surpass what is stated here above.

23. A grandfather or grandmother and father or mother dying, and a granddaughter surviving them, the one half of the estate shall go to the granddaughter, and the other half to the poor.

24. But in case two granddaughters have been left, then two thirds go to the two granddaughters, and one third to the poor.

25. If a person has only a grandson, he succeeds to the whole property.

26. A person dying, leaving a grandson and a granddaughter, the estate is divided as follows: to the grandson two thirds, and to the granddaughter one third; and although there be more grandsons and granddaughters, the division shall take place in the same manner.

27. Should any person die, leaving a daughter and a son's son, or grandson, one third of the estate devolves to the daughter, and two thirds to the grandson.

28. But in case two daughters and one grandson are left, each of them is entitled to an equal share of the estate.

29. But should there be a daughter, a grandson, and a granddaughter, the estate is then divided as follows: the half to the daughter, one third to the grandson, and one sixth to the granddaughter.

30. Should, however, there be two daughters, one

grandson, and one granddaughter, the estate shall be divided as follows: to the two daughters two thirds, to the grandson two ninths, and to the granddaughter one ninth.

31. Should there be one daughter, two granddaughters, and one daughter's son, the estate is to be divided as follows: to the daughter the half, to the two granddaughters one-fourth, and to the grandson one-fourth.

32. Should there be two daughters, two granddaughters, and one daughter's son, or grandson, the two daughters are to have two-thirds, the two granddaughters three-eighteenths, and the grandson one-eighteenth.

33. Should any body die, leaving one daughter and a sister, although he and the sister be of two mothers and the same father, the half of the estate shall go to the daughter, and the other half to the sister.

34. Should the deceased leave one daughter and two sisters, the daughter must have the half, and the two sisters the other half.

35. Should he have left two daughters and two sisters, the two daughters shall have two-thirds, and the two sisters one-third; the same division shall take place even if there be more daughters and sisters.

36. The husband dying, leaving his wife with one daughter and a son's daughter, and leaving also a mother and one sister, the estate shall be divided as follows: the wife shall have one-eighth, the daughter the half,

the granddaughter one-sixth, the mother one-sixth, and the sister one twenty-fourth part.

37. But should, as in the above case, the husband survive his wife, and remain with the above persons, then the estate is divided as follows: to the husband three-thirteenths, to the daughter six-thirteenths, to the granddaughters two-thirteenths, and to the mother two-thirteenths, and the brothers and sisters are in this case not to share in the inheritance.

38. The deceased, leaving one brother and one step-brother from the side of another father or mother, the full brother is entitled to five-sixths, and the step-brother to one-sixth.

39. A person dying, leaving two brothers or sisters of one mother, and two fathers, the two brothers or sisters are to have one-third, and the poor two-thirds.

40. The deceased leaving two half brothers or sisters, of one mother and another father, and one full brother, and one full sister, the estate is divided in the following manner: one-third goes to the two half brothers, or sisters, four-ninths to the full brother, and two-ninths to the full sister.

41. The wife dying, leaving her husband and her grandfather, each of them are entitled to one-half of the estate.

42. The husband dying, leaving his wife and his grandfather, one-fourth of the estate devolves to the wife, and three-fourths to the grandfather.

43. Should the deceased leave a daughter and grandfather, each of them shall be entitled to an equal share of the estate.

44. Should the deceased leave two daughters and a grandfather, each of them shall be entitled to one-third of the estate.

45. Should there be a grandfather of the father or mother's side, and a son, and a daughter, the grandfather shall be entitled to one-sixth, the son to five-ninths, and the daughter to five-eighteenth parts.

46. Should the wife die, leaving her husband, grandfather or grandmother, and a son, the husband shall be entitled to one-fourth, the grandfather or grandmother to one-sixth, the sons to seven-twelfth parts.

47. Should there be two sons, then the husband is entitled to one-fourth, the grandfather or grandmother to one-sixth, and the two sons to seven-twelfth parts.

48. Should there be also a son and a daughter, the husband is entitled to one-fourth, the son seven-eighths, the grandfather or grandmother to one-sixth, and the daughter to seven thirty-sixth parts.

49. Should the deceased leave a grandfather and grandmother of the father's side, the grandfather is entitled to five-sixths, and the grandmother to one-sixth part.

50. Should the deceased have left a grandfather and grandmother of the father's side, and a grandmother of the mother's side, then the grandfather of the father's

side is entitled to two-thirds, the grandmother of the father's side to one-sixth, and the grandmother of the mother's side to one-sixth.

51. The wife dying, leaving her husband, father, and a son, then the husband is to have one-fourth, the father one-sixth, the son seven-twelfths.

52. The husband dying, leaving his wife's mother and a daughter, the wife is to have one-eighth, the mother one-sixth, the daughter the half of the estate, and the poor five twenty-fourths.

53. The husband dying, leaving two wives and a son, then the two wives are to have one-eighth, and the son seven-eighths; and should there be more wives, the division shall take place in the same manner.

54. A grandfather or grandmother dying, leaving a son's daughter, or granddaughter, the granddaughter is to have one-half of the estate, and the poor the other half.

55. A person dying, leaving two granddaughters of his son's side, and a brother, each of them are entitled to one-third.

56. If the deceased has left a sister, she is entitled to the half, and the poor to the other half.

57. The wife dying, leaving her husband and two sisters, the husband is entitled to three-sevenths, and the two sisters to four-sevenths.

58. If the wife has left two full sisters, and an uncle

of her father's side, then each of these persons shall be entitled to one-third part.

59. An emancipated female slave dying, leaving her husband and one daughter, together with her late master or mistress, then the husband is entitled to one-fourth, the daughter to one-half, and the master or mistress to the other one-fourth.

60. An emancipated male slave dying, leaving his wife, daughter, and his master or mistress, then the wife is entitled to one-eighth, the daughter to one-half, and the master or mistress to three-eighths.

61. An emancipated female slave dying, leaving her husband and two daughters, together with her late master or mistress, then the property is divided as follows: one-fourth to the husband, two-thirds to the two daughters, and one-twelfth to the late master or mistress.

62. If such emancipated male slave dies, the wife will be entitled to one-eighth, the two daughters to two-thirds, and the master or mistress to five twenty-fourth parts.

Lastly. Agreeable to the same rule, all descendants are entitled to their respective shares of inheritances, according to the persons they represent, in the same manner as a wife or her descendants, a full brother or his descendants; paternal uncle and uncles and full aunts, and their children, and their descendants, if there be no near-



est kin : fathers' brothers, and mothers' sister's children are entitled to the same shares as sons and daughters.\*

SECOND TITLE.

CONCERNING MATRIMONIAL AFFAIRS.†

64. A person wishing to marry, application must be made to the bride's father and mother for their consent.

\* And where a daughter left a mother and uncles and aunts, it was the mother was entitled to one-third, and the five collaterals to the remainder, which was to be divided in the same manner; viz. the uncles taking six shares in eight, the aunts the remaining two. (10566, *D. C. Madewelletenne*, 19 July, 1837, *Morg. D.* 176.)

Heirs of a deceased daughter.

† In a suit brought by a Mahomedan woman, the defendant had pleaded that the husband of the plaintiff ought, in law, to have been joined as co-plaintiff; but the Mahomedan assessors in the court below having stated, as a matter of law, that the wife might sue alone, and it appearing further that the plaintiff had, previous to the filing of the plea, been examined under rule 31 of the *Rules and Orders*, touching a sequestration obtained by her in the case, the Supreme Court thought that the plea of the defendant was too late, and, "under all the circumstances of the case (the information tendered to the Supreme Court tending also to show that the wife is accustomed and has a right by Mahomedan law to sue alone), directed the court below to overrule the plea, and to proceed to the investigation and determination of the case; the plaintiff being, of course, liable to costs, should she fail in the proof of the allegations in her libel." (8237, *D. C. Kandy*, 20 July, 1836; *Morg. D.* 90.)

Right of wife to sue.

By 1056, *D. C. Madewelletenne*, a Mahomedan husband and wife can reciprocally sue each other without previous divorce. (*Morg. D.* p. 300.)

Husband and wife may sue each other. A Mahomedan, having once made a promise of marriage, is bound to fulfil it before he contracts another.

The evidence in this case has fully confirmed the opinion originally entertained by the Supreme Court; whilst the defendant's first witness, a priest, furnishes another satisfactory ground for adjudging damages. He says, "that if a man (a Mahomedan) has once made a promise of marriage, he should fulfil it before he contracts another." (2363, *D. C. Matura*, 31 July, 1839; *Morg. D.* 231.)

65. Should the parents of such bride be dead, the man must make his intentions known to the relations of the bride, and endeavour to obtain their consent.\*

66. And, after consent having been obtained, it is the custom that the bride and bridegroom interchange some presents; which, however, are reciprocally restored if the marriage does not take place.†

67. The parents, or nearest relations of the bride, shall then, with the knowledge of the bride, enter upon an agreement with the bridegroom concerning the marriage gift, called maskawien.

68. The matter being settled, the bridegroom is obliged to pay to the bride immediately what has been agreed upon.

69. But should the bridegroom not be able to pay such marriage gift immediately, it is, with special consent of the bride however, carried to a separate account.

Assent to  
marriage-con-  
tract implied.

\* Among Mahomedans, even supposing the assent of the bride's brother to be necessary for the validity of the marriage contract, such assent may be implied from his having been present at the execution of it, his making no objection to it, and his serving out cakes to the people after its execution. (*Ibid.* 904, *D. C. Trincomalie*, 30 Sept 1835; *Morg. D.* 58.)

Marriage con-  
tract—  
damages.

† The plaintiff having failed to show any damage sustained in consequence of a breach of a marriage contract, beyond the cost of the stamp on which the contract had been drawn, for which, however, he had brought a separate action, *held* that his suit had been properly dismissed. (604, *D. C. Trincomalie*, 30 Sept. 1835; *Morg. D.* 58.)

Claim for  
penalty and  
expenses.

A claim for the specific penalty imposed by a marriage contract, and any further claim for the expenses to which the party may have been put in consequence of the non-fulfilment of it, may be joined in the same action. (*Ibid.*)

70. The bridegroom is obliged to inform the commandant, or the headman under whose orders he stands, of his intended marriage.

71. The commandant will then, by means of the native commissioners, apply to His Excellency the Governor for his consent.

72. The maskawien, or magger,\* being paid, or remained owing, the priest, or lebbe, shall be informed thereof.

73. The priest and commandant are then obliged to record all such transactions, and to permit the marriage ceremonies to be performed.

74. Should, before the consummation of the marriage, it be discovered that the bridegroom laboured under any bad complaints, such as leprosy, insanity, or any other disorder, so that he is unable to perform the matrimonial duties, in which case a divorce is permitted.

75. The bride wishing to be divorced, is obliged to inform the priest thereof; who, after having deliberated with the commandants on both sides, in the presence of the native commissioners, accedes to the divorce, which they are obliged to record. Should the parties, however, not wish to abide by the decision, they shall be at

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\* Among Mahomedans, on the death of the husband, or upon a separation, the wife and, after her death, her children, are entitled to recover from the husband, or his representatives, her *magger, kaykooly*, &c. when recoverable. (7487, *D. C. Jaffna*, 12 Aug. 1835; *Morg. D.* 66.)

*Magger, Kaykooly, &c.*  
when recoverable.

liberty, according to custom, to lay their case before the competent judge.

76. The bride is, in such case, obliged to restore to the bridegroom the maskawien, or magger.\*

77. But should the disorder be discovered after the cohabitation, a divorce may take place; and the wife may, in that case, keep the maskawien or magger.

78. And, although such complaint should be discovered by the bride, either before or after the consummation of the marriage, the husband is entitled to the maskawien, or magger, if discovered before the cohabi-

Separations.  
Dowry-  
property.

\* In one case, the Supreme Court, having consulted eight Moorish Assessors, transmitted the following, as their opinion, for the guidance of the District Court of Madewelletenne in a case pending there:—

1. That if a wife leave her husband of her own desire, and contrary to his wishes, neither she nor any one on her behalf can claim any return of the dowried property.

2. But if the husband turn her out of his house, or desert her, she or any one duly authorized to act for her, may recover back such property.

3. If they separate by mutual consent, such separation should be made the subject of an agreement, which should specify the terms on which the separation is to take place, and the proportion of property to be restored by the husband to the wife. (98, *D. C. Madewelletenne*, 9 May, 1835; *Morg. D.* 43.)

In another case, it was decided that, if a wife run away from her husband and live with another man, he can bring an action against her to recover any property of his she may have taken away with her. The husband might claim an carrying out of her ear if it were his; but not the shift off her back.

The wife who so runs away forfeits a sum equal to the amount of the dower. If it has been paid, she ought to forfeit double that amount.

The husband may bring his action for this penalty, or for his goods taken away, without first going to the priest or arbitrators. (8163, *D. C. Chilaw and Pulam*, (Coll.) 3 Oct. 1840; *Morg. D.* 300.)

tation ; but the wife is entitled to the same if discovered after.

79. Married persons, whether they can allege any reasons or not, being with mutual consent divorced, the husband is obliged to allow his wife the moettelaak, or ready money, proportioned to the marriage gift, for the support of the house.

80. Should the husband and wife disagree, and live in continued dissension with one another, and wishing to be divorced ;

81. In that case, the priest and the commandants on both sides are obliged to inquire into the matter, and endeavour, if possible, to reconcile the parties.

82. But should the wife oppose a reconciliation, and the husband being inclined to a divorce ; in that case they shall be separately kept by their own relations.

83. After which, a meeting of the priests and the officers of the company shall be appointed.

84. And the matter in dispute shall be investigated for a second time, and endeavours made to bring the parties, if possible, to a reconciliation.

85. And if the parties cannot come to a reconciliation before the said assembly, the matter in question must be brought before the sitting magistrate.

86. And if the wife should oppose the reconciliation, she shall be held to restore to the husband twice the value of the maskawien.

87. The husband being desirous to divorce his wife,

he shall be obliged to give her the tollock, or letters of divorce, which is repeated a second time at the expiration of fourteen day; and at the end of one month she receives the third tollock, during which time the husband is obliged to maintain the wife and to furnish her with all necessaries.

88. Before the third tollok is issued, a reconciliation between the parties may take place: and it is not necessary that they should disclose to anybody the causes of their differences.

89. But should the third tollok have been issued, they must divorce: and it is in use, that should the husband be determined to divorce his wife, without any further consideration, to issue three tolloks or letters of divorce at once; but in that case he is obliged to furnish the wife with a dwelling place for the space of three months; and she shall not be allowed to marry before she has had three times her menses.

90. The husband is held to give notice to the commandant on both sides of such divorce, which shall be recorded by them, and nobody else shall meddle themselves therewith.

91. No wife is obliged to receive from the husband any interest money for her maintenance; but such maintenance must, according to the Mahomedan law, be the product of some trade or manual work of the husband.

92. A married man decaying into poverty, so as to

be unable to maintain his wife; such wife, if she should be possessed of any wealth which she is unwilling to share with her husband, may obtain a divorce, should she wish it, under the same provision as stated in the 76th Article.

93. The husband leaving his wife in order to repair to some place or other on business, he must, without giving occasion to divorce, provide for the maintenance of his wife in the presence of his relations.

94. A married woman disobeying her husband, shall suffer herself to be reprimanded by him for the first time with kindness, in order to bring her back to her duty.

95. Should the wife, however, fail in her due obedience for the second time, the husband is then permitted to inflict on her some gentle correction; but by no means to treat her in a rough manner, so as to occasion any marks either in her face or other parts of her body, much less is he permitted to beat her on any dangerous place of the body so that blood appears.

96. A divorced wife being pregnant, is entitled to be maintained, till she be delivered, by her husband, who is also obliged to pay the expense of her lying-in.

97. The wife, in the above case, is obliged to nourish her child during three days, without being at liberty to ask or receive anything.

98. But the husband is, after the expiration of that

time, obliged to fix a certain amount for the maintenance of the child, if the wife requires it.

99. Should the wife be unwilling to keep the child longer than three days, the husband is obliged to receive it.

100. A man is, according to the law of Mahomet, permitted to marry four wives; that is to say, only such men as are uncommonly addicted to the fair sex, who have abilities enough to acquit themselves of their duty, and who are possessed of wealth enough to maintain the same property.

101. Such men are also permitted to keep under their protection, besides their lawful wives, so many concubines as they are able to maintain.

102. The husband and wife being divorced, and the third tollok having been issued, are not permitted to reconcile and live as husband and wife, unless the wife has been married to another husband, and obtained from him also letters of divorce.

The shares allotted to the poor by several of the foregoing articles are not for the poor; but must go to the asewatoekares, aroegamoedeweigel, and people of the fathers' and mothers' side, who are entitled to the same.

Heirs who claim such inheritances make the same known to the headman of the maurs, the arbitrators, and the priests; who then, at the entrance of the gate



of the temple, enquire and decide the case, and cause the shares to which each is entitled to be given to them: and as, according to the Mahomedan custom, the women may not go out, it is therefore the custom that their cases are enquired into and settled in an amicable manner; but, not being contented therewith, both such cases and the criminal ones are brought before the Governor.

NOTE.—The grandmother of a Mahomedan child is entitled to the Guardianship custody of the child after the mother's death.

The obligation of providing for the child's maintenance is paramount on the father, although the grandmother has the child in her custody, and although the father wishes to have the child in his own.

This is the child's privilege, not the grandmother's.

An uncle supporting the child, then in the grandmother's custody, was held to have a right of action against the father.

No deduction can be made on account of the guardian or uncle receiving rents belonging to the child. "The money of the little child should not be expended, but kept until it comes of age." (29370, *D. C. Colombo*, and 9370, *C. R. Colombo*, 22 July, 1862.)

## CHAPTER II.

THE THESSAWALEME OR TAMUL  
COUNTRY LAW.\*

## SECTION I.

A MAN and woman being married, the descending heirs proceed from them, and by those the ascending heirs are ascertained, so as to point out their shares of inheritances.

Tamul law;  
Batticaloa.

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\* By 5 of 1835, the Proclamation of the 23rd of September 1799 is declared to be in force, in so far that the administration of justice and police within the settlements then under the British dominion, and known by the designation of the "Maritime Provinces," should be exercised by all courts according to the laws and institutions *that subsisted* under the ancient government of the United Provinces. And these laws and institutions are, by the said ordinance, to continue in force, subject, &c.

The court has every reason to believe that the laws and customs of the Tamils residing in Batticaloa, regarding the rights of succession to property, were never interfered with by the courts of judicature under the Dutch Government; and the special customs of the Moguas and Wannidles were recognized in a case at the last session holden at Jaffna, without its even being contended that they were abrogated. (8933, D. C. Batticaloa, 23 Dec. 1844.)

## DIFFERENT KINDS OF PROPERTY.

1. From ancient times it has been an established custom or law, that the goods brought in marriage, or acquired by such husband and wife, have from the beginning been distinguished by the denomination of *modesiom*, or hereditary property, when brought by the husband; and when brought by the wife it was denominated in the Tamil language *chidenam*, which in our language signifies *dowry*;\* and such property as is acquired during marriage is denominated *thadiathatam*, or in our language *acquisition*. On the death of the father, all the goods brought in marriage by him were inherited by the son or sons; and when a daughter or daughters married, they received dowry, or *chidenam*, from their mother's property; so that the husband's property always remained with the male heirs, and the wife's property with the female heirs; but the acquisition, or *tedijeteutom*, was divided among the sons and daughters; the sons, however, were always obliged to allow the daughters to get a larger share.

## OF DOWRY.

2. But in process of time, and in consequence of

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\* By the customary law of the Malabar Districts, dowry-property, and the rents and profits arising therefrom, are not answerable for the husband's debts, and need not, therefore, be included in the statement or schedule given in by the insolvent husband. (2089, *D. C. Jaffna*, 15 Oct. 1884; *Morg. D.* 24.)

Dowry-property not liable to husband's debts.

several changes of government, particularly those in the times of the Portuguese (when the government was placed by order of the King of Portugal in the hands of Don Philip Mascarenha), several alterations were gradually made in those customs and usages, according to the testimony of the oldest Modliars; so that, at present, whenever a husband and wife give a daughter or daughters in marriage, the dowry is taken indifferently either from the husband's or wife's property, or from the *acquisition*, in such manner as they think proper; that is to say, by parts and pieces, for there is scarcely any person who can say that he possesses the sole property of entire pieces of ground, gardens, slaves, &c. for it will generally be found that he is only entitled to the half, or to one-sixteenth part of the property.

OF THE MARRIAGE OF DAUGHTERS, AND THE DOWRY  
GIVEN WITH THEM.

3. The nearest relations, either on the father's or mother's side, from a particular regard to the bride, often enlarge the dowry, by adding some of their own property to it; and such a present should be particularly described in the *doty*, *marriage act*, or *ola*, which must specify by whom the present or gift is made, and the donor must also sign the act or *ola*; but such a donation or gift is voluntary. When the act of *doty* is executed, it is presumed that it is done without fraud;

but the donor does not point out therein what his share is of the pieces of ground, gardens, or slaves, which he gives by pieces to his daughter or daughters, but says merely "such and such part of such a piece of ground;" so that, frequently, the receiver or bridegroom finds himself deceived in his expectations, which always causes differences and disputes; for many often expect to get a sixth part, when they do not get more than one-sixteenth. For instance, a husband and wife having five children, viz. two sons and three daughters, and possessing a quarter or fourth part of a ground, called *Worlancooly*, of which they give as a dowry to each of their daughters, when they marry, a fourth part of their (the husband's and wife's) share in the said ground, which together is three-fourths, and retain the other one-fourth for themselves as long as they live. But after their death the two sons come and take each the half; consequently the daughters have no more than one-sixteenth part each of the said ground, and the two sons each but one thirty-second part; and it is the same with the donations of gardens, slaves, &c. from which often disputes also arise. The daughters must content themselves with the dowry given them by the act, or *doty ola*, and are not at liberty to make any further claim on the estate after the death of their parents, unless there be no more children, in which case the daughters succeed to the whole estate. And in case the new married couple, to whom one or more pieces of the said gardens, slaves, &c. have been

given in marriage, do not take possession thereof within ten years, they forfeit their claim thereto; for there has been of old, since the time of the Tamil kings, a proverb, *Ottioem chidanoem pattyaal*, that is, immediate possession must be taken of dowry and pawns. If this be not done, the lands, gardens, slaves, &c. again become a part of the common estate, in the same manner as if they had never been given to the young married couple; unless they can produce an act of their parents concerning their delay in taking such possession.

4. If a father or mother gives as a dowry to their daughter or daughters a piece of land or garden which is mortgaged for a certain sum of money, and say in the *doty ola*, “a piece of land called *Kalloenanpuende*, which is mortgaged to *Kandaapoedam* for sixty fanams, but which the bridegroom and his bride must redeem for that money;” and if they are unable to do it, and the mortgagee does not wish to retain any longer the mortgage for the money lent by him, the parents themselves are obliged to redeem it; and, notwithstanding (although it be fifty years afterwards), the said mortgaged land or garden devolves again to the child to whom it was originally donated by the *doty ola*, provided the money for which it had been mortgaged is paid by such a child.

5. If one or more pieces of land, garden, or slaves, &c. are given as a marriage gift, respecting which, at the expiration of some years, a lawsuit arises, and the young couple lose the same by the suit, the parents who gave

the same (and after their decease the sons) are obliged to make good the loss of the land, garden, or slaves, &c. for a well drawn up and executed doty ola must take effect; because it is by this means that most of the girls obtain husbands, as it is not for the girls, but for the property, that most of the men marry; therefore the dowry they lose in the manner above stated must be made good to them, either in kind, or with the value thereof in money. Should it happen that, after the marriage of the daughter or daughters, the parents prosper considerably, the daughters are at liberty to induce their parents to increase the doty, which the parents have an undoubted right to do.

If all the daughters are married in the manner above stated, and each has received the dowry then given by their parents, and if one or more of them dies without issue, in such case the property indisputably devolves to the other sisters, their daughters, and granddaughters; but if there should be none of them in existence, the property, in such case, falls in succession to the brothers, their sons, and grandsons, if any; if not, the property reverts to the parents, if alive; and if not, the father's *modesiom*, or hereditary property, and the half of the *tedijeteutom*, or acquired property (after deducting therefrom the half of the debts), devolves first to his brother or brothers, then to their sons and grandsons; and the mother's *chidenam*, or dowry, with the other half of the acquired property, after deducting therefrom also the

remaining half of the debts, devolves to her sister or sisters, their daughters or granddaughters, *ad infinitum*.

6. Although it has been stated, that where a sister dies without issue, the dowry obtained by her from her parents devolves to her other sister or sisters, yet it sometimes happens that her mother, having in the mean time become a widow, and poor, requests the sister or sisters of deceased to allow her to take possession of the property of the deceased daughter, and to keep the same as long as she lives, to which they sometimes agree, but are by no means bound to do it; but in order that they may not subject themselves to any loss, they ought to have the property described and registered; otherwise, on the mother's death, the son or sons will come and take possession of all that she has left.

#### OF THE MARRIAGE OF SONS, AND THEIR PORTIONS.

7. Having pointed out the manner in which the daughters are given in marriage, and what becomes of their property when they die, I will now proceed to state what relates to the sons. So long as the parents live, the sons may not claim anything whatsoever; on the contrary, they are bound to bring into the common estate (and there let to remain) all that they have gained or earned during the whole time of their bachelorship, excepting wrought gold and silver ornaments for their bodies which have been worn by them, and which



have either been acquired by themselves or given to them by their parents; and that until the parents die, even if the sons have married and quitted the paternal roof.

So that when the parents die, the sons then *first* inherit the property left by their parents, which is called the *modesiom* or hereditary property; and if any of the sons die without leaving children or grandchildren, their property devolves in like manner as is said with respect to the daughters' property, which devolves to the women as long as there are any. The property of the sons, therefore, devolves to the men, and, in failure of them, to the women: and although the parents do not leave anything, the sons are nevertheless bound to pay the debts contracted by their parents; and although the sons have not at the time the means of paying such debts, they nevertheless remain at all times accountable for the same; which usage is a hard measure, though according to the laws of the country.

#### OF RESIGNATION OF PROPERTY.

8. Should it happen that age renders the parents incapable of administering their own acquired property, the sons divide the same, in order that they may maintain their parents with it; and it will be often found that sons know how to induce their parents to such a division or resignation of their property, with a promise

of supporting them during the rest of their life : but should the sons not fulfil their promise, the parents are at liberty to resume the property which has been so divided among the sons, which is not done without a great deal of trouble and dispute. And the experience of many years has taught us that such parents (in order to revenge themselves on their sons) endeavour, by unfair means, to mortgage their property for the benefit of their married daughters or their children : and for this reason it has been provided by the *Commandeur* that such parents may not dispose of their property either by sale or mortgage without the special consent of the *Commandeur*, which is now become a law.

OF SUCCESSION TO PROPERTY, WHERE CHILDREN AND  
THEIR MOTHER ARE LEFT.

9. If the father dies first, leaving one or more infant children, the whole of the property remains with the mother, provided she takes the child or children she has procreated by the deceased, until such child or children (as far as relates to the daughters) marry ; when the mother, on giving them in marriage, is obliged to give them a dowry ; but the son or sons may not demand anything so long as the mother lives, in like manner as is above stated with respect to parents.

PROPERTY, HOW TO BE DIVIDED WHERE THE MOTHER  
MARRIES AGAIN.

10. Should, however, the mother marry again, and have children by her second marriage, then she does with the daughters as is above stated with respect to parents. But it is to be understood, that, if she has daughters by her first husband, she is obliged to give them, as well as the daughters by her second husband, their dowries from her own doty property: and if the son or sons marry or wish to quit her, she is obliged to give them the hereditary property brought in marriage by their father, and the half of the acquired property obtained by the first marriage, after deducting therefrom the dowry which may have been given to the daughters.

If the mother of whom we have just spoken also dies, the sons, both of the first and second marriage, succeed to the remaining property which the mother acquired by marriage; besides which, such son or sons are entitled to the half of the gain acquired during the mother's marriage with his or their father, and which remained with the mother when he or she married, and provided that therefrom are also to be paid the debts contracted by her or their father when alive.

But if any part of that property is diminished or lessened during the second or last marriage, then the second husband, if he still be alive, or, if he be dead, his son or sons, are obliged to make good the deficiency,

either in kind or in money, in such manner as may be agreed upon.

On the other hand, the son or sons of the second marriage are entitled to the hereditary property brought in marriage by his or their father, and also to the property acquired during marriage, after all the debts contracted by him shall have been paid from the same.

OF SUCCESSION TO PROPERTY WHERE CHILDREN AND  
THEIR FATHER ARE LEFT.

11. *If the mother dies first, leaving a child or children, the father remains in full possession of the estate so long as he does not marry again, and does with his child or children and with his estate in the like manner as is above stated with respect to the mother.*

If a father wishes to marry a second time, the mother-in-law or nearest relation generally takes the child or children (if they be still young) in order to bring them up: and, in such case, the father is obliged to give at the same time with his child or children the *whole* of the property brought in marriage by his deceased wife, and the half of the property acquired during his first marriage. When those children are grown up and able to marry, that is to say, the daughters (if any there be), the father must go to the grandfather or grandmother with whom the children are, in order to marry them, and to give them a dowry both from their de-

ceased mother's marriage portion and from the acquired property, which, as before stated, had been given to the relations with the children, and from his own hereditary property.

This being done, and if anything remains of what had been given to the relations with the children as above stated, and if the son or sons have acquired a competent age to administer what remains, they then take and possess the same without dividing it until they marry, when they divide it equally among themselves, together with the profits acquired thereon; but if they make a division immediately on taking possession of what remains, so that each possesses his share separately, then they are not obliged to share with each other what each has acquired.

But should there remain nothing of the mother's property, and of the half of the acquired property during marriage, the sons, whether young men or married, must do as well as they can until their father dies; for these sons by the former marriage cannot claim anything from this their father.

If such a father has by his second wife a child, or children, and among them a son or sons (for it is unnecessary to say anything further concerning daughters), and dies, his property which exists is divided into two equal shares, one of which the son or sons by the first wife take, and the other the son or sons by the second wife, although there should be but one son of the first and five

or six of the second. And what remains of the half of the acquired property during the first marriage must also devolve to the son or sons of that marriage; but if any part thereof has been diminished during the second marriage, then the sons of this marriage are obliged to make good the deficiency to the sons of the first marriage, in the manner above stated; and the son or sons of the second marriage divide the property acquired during that marriage, and also the remaining part of that which has not been given as a dowry to the sisters (but not before their mother is dead); in which case the sons are obliged to pay all the debts contracted by the father during his marriage with their mother.

OF THE DIVISION OF PROPERTY WHERE ORPHAN  
CHILDREN ARE LEFT.

12. If the father and mother die without being married more than once, and their surviving children are infants under age, then the relations of both sides assemble to consult to whose care the children are to be entrusted; and a person being chosen, the children are delivered to him, together with the whole of the property left by the parents, which remains with such persons until they attain a competent age to marry; and when they are grown up, it is to be supposed that it will be the turn of the eldest first to marry, when the friends must again assemble to consult what part of his

or her parents' property shall be given to him or her as a dowry, with which he or she must be content. In order to understand the following observations better, we will limit the number of brothers and sisters remaining unmarried to *three*, that is to say, two brothers and one sister, which last, on account of some misfortune or other, remains unmarried. If the brothers (having attained in the mean time a competent age) marry, and if she desires that the remaining property of her parents shall be divided, the relations and possessors thereof may not refuse it; but the brothers must, in such case, allow their sister who remains unmarried to have a larger share. This, however, the brothers often oppose, particularly when there is but little; because, when the unmarried sister dies, the married one succeeds to all that the unmarried one was possessed of.

But should it happen that both the brothers, after they have grown up and are married, possess the before-mentioned property without having divided it, and that the unmarried sister receives nothing else besides what is necessary to provide herself with subsistence and clothing until her death; in such a case, the whole of the property remains with the brothers, and the married sister has no right or claim thereto: and should it happen that the unmarried sister has allowed herself to be deflowered, and thereby had a child, she (in order to bring it up decently) ought to agree with the brothers and sisters to divide the estate of their parents, in or-

der to enable her to allot her child a certain portion thereof.

DIVISION OF PROPERTY WHERE THERE ARE HALF-  
BROTHERS AND SISTERS.

13. With respect to the succession of half-brothers and sisters, if a woman who has been married twice, and by the first husband has had a son, and by the second a son and daughter, and these all survive their parents, and act with their parents' estate as is above mentioned; and if the son of the second marriage dies without leaving a child or children, and the question is, who shall inherit the deceased's estate? respecting which the principal modliars and inhabitants have not agreed, many are of opinion that the full sister must be preferred above the half-brother; but this would be quite contrary to the old-established laws. Therefore I agree in opinion with the greatest part of the inhabitants who have been consulted on the subject, that the half-brother from the side he is brother, that is to say, from the mother's side, must succeed to the inheritance; and the sister, because there cannot be brothers from the father's side, must succeed to all that is come from the father's side; and the acquired property must be divided, half and half, between the half-brother and full-sister, provided that it has been acquired by means of the mutual property.



DIVISION OF PROPERTY WHERE THERE IS ISSUE OF  
BOTH MARRIAGES.

14. If the husband has been married twice, and has by his first wife had a son and daughter, and only one daughter by his second wife, and if the daughters have been married and received a dowry, and the father dies, it would be supposed, from what has been stated, that the son must succeed to the estate of the deceased; but, in this case, it may not take place: for the daughter of the second marriage must inherit equally with her brother, there being no full-brother to inherit. If a man has a child or children, and his brother and sister die, before or after him, without children, then this man's son succeeds both to his brother's and sister's property, as well as to that of his deceased father.

It is the same with a woman who has a child or children, and whose brother or sister dies afterwards without leaving children; for this woman's daughter or daughters inherit both from the brother and sister of her or their deceased mother; but if the said brother and sister die first, and if the mother of the before-mentioned daughter is still alive, then the mother inherits from the brother and sister, whereby the daughters remain deprived of that inheritance; for, when the mother afterwards dies, her son or sons are justly entitled to all that their mother leaves at her death.

PROPERTY, HOW TO BE DIVIDED WHERE IT HAS BEEN  
IMPROVED.

16. Should husband and wife, during marriage, considerably improve a piece of ground, whether it be the husband's hereditary property or the wife's dowry—for instance, by building houses, digging wells, and planting all sorts of fruit-bearing trees thereon—the heirs of the wife, should she die first, and should the improved ground be the husband's hereditary property, shall not be at liberty to claim any remuneration for the expenses made. In like manner, also, the husband's heirs cannot claim any remuneration should the wife's dowry ground have been improved.

HOW, WHERE A PAGAN MARRIES A CHRISTIAN WOMAN.

17. If a Pagan comes from the coast, or elsewhere, and settles himself here, and, being afterwards inclined to marry a Christian woman, procure himself to be instructed in the Christian doctrine, and being sufficiently instructed, is at last baptised and married, and by his industry acquires property by means of what his wife has brought in marriage, his heirs (should he die afterwards without leaving a child or children) shall not be entitled to anything: for, not having brought anything in marriage, they, consequently, shall not carry anything out, and being moreover Pagans. But should the wife

die first, without leaving any child or children, the husband is lawfully entitled to the half of the acquired property, it having been gained by his industry.

#### HOW, WHERE TWO PAGANS INTERMARRY.

18. If a Pagan comes here, as just stated, and marries a Pagan woman, and such Pagan dies without leaving a child or children, his relations inherit the half of the property acquired during marriage; because, should he have left any child or children, and should they or his relations claim the inheritance, they certainly would get it without his having brought anything in marriage, they being Pagans; but having once embraced the Christian religion, the Pagan relations are not entitled to anything. Pagans consider as their lawful wife or wives those around whose neck they have bound the taly with the usual Pagan ceremonies; and should they have more women, they consider them as concubines. If the wives, although they should be three or four in number, should all and each of them have a child or children, such children inherit, share and share alike, the father's property; but the child or children by the concubines do not inherit anything.

SECTION II.

OF ADOPTION.

CEREMONIES OF ADOPTION.

1. If a man and woman take another person's child to bring up, and both or one of them be inclined to make such child their heir, they must first ask the consent of their brothers and sisters, if there be any; if not, that of their nearest relations, who otherwise would succeed to the inheritance: and if they consent thereto, saffron water must be given to the woman, or to the person who wishes to institute such a child their heir, to drink in the presence of the said brothers or sisters, or nearest relations, and also in the presence of the witnesses after the brothers and sisters or nearest relations, and also the parents of the child shall previously have dipped their fingers in the water as a mark of consent. Although there be other witnesses, it is nevertheless the duty of the barbers and washermen to be present on such occasions.

If the brothers and sisters refuse to give their child, such a man and woman may take the child of another person, although a stranger; but they are not at liberty to drink saffron water without the consent of their brothers and sisters, or of those who conceive themselves to be heirs; although this litigious people, from

mere motives of hatred, often endeavour to prevent a man and woman, who have brought up a child with the same love and tenderness as their own, from adopting such child. Nevertheless, according to the testimony of all the *modliars*, such a man and woman may, in spite of the opposition, adopt such a child, and bequeath it one-tenth part of the husband's hereditary or wife's dowry property: out of the acquired property they may bequeath more than one-tenth, provided they have not many debts. But such an adoption may not be made without the consent of the magistrate, in order to keep them within the bounds of discretion, and also in order to prevent them from adopting children from motives of hatred towards their relations.

OF THE SUCCESSION TO, AND DIVISION OF, PROPERTY, IN  
THE CASE OF ADOPTION, WHERE THE PARTIES ADOPTING  
LEAVE OTHER CHILDREN.

2. But when the said man and woman have both together drunk saffron water, such or such a child shall inherit all that they leave when they die: and if, after such adoption, they have a child or children of their own, then such adopted child inherits, together with the lawful child or children. And it is to be observed, that such an adopted child, being thus brought up and instituted an heir, loses all claim to the inheritance of his own parents, as he is no longer considered to belong to

NATIVE LAWS.—THESSAWALEME.

that family, so that he may not inherit from them. If the adopting father alone drinks saffron water, then such a child shall succeed to the inheritance of his or her own mother; and if the adopting mother has alone drunk saffron water without her husband, then such a child inherits also from his or her own father.

WHERE THE ADOPTED PERSON DIES WITHOUT ISSUE.

3. If such an adopted person dies without leaving a child or children, then all that he or she might have inherited returns to the person or persons from whom it came, or to their heirs.

WHERE TWO CHILDREN NOT RELATED ARE ADOPTED.

4. If a husband and wife adopted two children, a boy and a girl, who are not related to one another by blood, so that they can marry together, and if both husband and wife together drink saffron water in manner above stated, and if both the said adopted persons be married together after they arrive to the age of maturity, and at the expiration of time one of them dies without leaving a child or children; then the survivor inherits the whole, on account of the adoption, which binds them as brothers and sisters, and not in the blood. It goes in the same manner, if husband and wife, after having adopted a boy, have a daughter of their own. Such a

boy is allowed to marry with the daughter, provided they are not nearer related by blood than brothers' and sisters' children, and they inherit from one another as before mentioned.

DIVISION OF PROPERTY AMONG ADOPTED CHILDREN, TO THE ADOPTION OF WHOM SOME OF THE RELATIONS OF THE PERSON ADOPTING CONSENT, WHILE OTHERS REFUSE THEIR CONSENT.

5. If a husband and wife wish to adopt another person's child, to which adoption some of his or her brothers and sisters or nearest relations consent, and others do not consent; in such case, the husband and wife are at liberty to adopt such child, and to make him the heir to so much as the share amounts to of those who have consented to the adoption, and who, as a token thereof, must have dipped their fingers in the saffron water drunk by the husband and wife, leaving the inheritance to which the non-consenting party is entitled at that disposal until such a time as husband and wife, or one of them, dies; when the child and each of them take the shares to which they are entitled. But if the said heirs, either through negligence or otherwise, permit or allow the adopted person to remain for several years in the peaceable possession of the property, the heirs by their silence forfeit their claim and title thereto.

## WHERE ONE OF THREE BROTHERS ADOPT A CHILD.

6. If there are three brothers, one of whom has two children, and the other two have none, and if one of these wishes, from pure motives of affection, to adopt one of his brother's children, which the other brother, who has also no children, wishes to approve, the two brothers may carry their design into execution, leaving to the third brother the action which he pretends to have on the inheritance. On the death of such adopting brother, all his property is divided between the adopted child and the non-consenting brother, share and share alike. If the non-consenting brother who has no children wishes to give some of his property to the child who has remained with the father unadopted, the question is, whether the adopted child can prevent it? The general opinion now is, that, on account of the right which he had thereto (as nephew and heir of his uncle) being lost by the adoption, he must allow the giver to do with his property what he pleases as long as he lives.

## OF THE ADOPTION OF A PERSON OF A HIGHER OR LOWER CASTE.

7. If a man adopts, in the manner above stated, a youth of a higher or lower caste than his own, such child not only inherits his property, but immediately goes over



into his adopted father's caste, whether it be higher or lower than his own. But if a woman adopts a child, such child cannot go over into her caste, but remains in the caste of his own father, and will only inherit the woman's property after death.

If a man adopts a girl of another caste, in the manner above stated, *she* (it is true) goes over into the caste of her adopted father; but not her children, or descendants: for, if she marries and has a child or children, they follow their father; except among slaves, in which case it has another tendency, for their fruit follows the womb.

### SECTION III.

#### OF THE POSSESSION OF GROUNDS AND GARDEN, ETC.

#### OF JOINT POSSESSION, OR TENANCY IN COMMON.

1. If two or more persons possess together a piece of ground without having divided it, and one of them incloses with a fence as much as he thinks he would be entitled to on a division, and plants thereon cocoanut and other fruit-bearing trees, and the other shareholders do not expend or do anything to their share of the ground until the industrious one begins to reap the fruits of his labour, when the other, either from covetousness or to plague and disturb, come (which is frequently the case among the Tamils) and want to have a

share in the profits, without ever considering that their laws and customs clearly adjudge such fruits to the person who has acquired them by his labour and industry; when, in such a case (not being able to obtain the fruits), they generally request to divide the ground, to know what belongs to each person, such division may not be refused. But care must be taken, in making it, that the part which has been so planted falls to the share of the brother who planted the same, and that the unplanted part falls to the share of the other joint proprietors: unless they wish to put off the repartition of the ground, and give one another time to plant an equal number of trees, and by proper attention to get them to bear fruit; in which case the repartition must be general, without considering who has planted the ground.

#### OF THE RENTING OF GROUND.

2. If a person has not a proper piece of ground of his own on which to plant cocoanut trees, and is allowed to do it on another man's ground, he gets two-thirds of the fruits which the trees planted by him produce, provided that he himself furnished the plants; and the owner of the ground receives the other third. But if the owner of the ground supplies the plants, the planter gets but one-third, and the owner of the ground the other two-thirds. If, however, they have *both* been at an equal expense for the plants, then they are each en-

titled to an equal share of the fruits and trees. This division mostly takes place in the province of Timmoratje; for, in the other provinces, they know better how to employ their grounds than to let strangers plant cocoanut trees thereon. If a labourer squeezes out his *pannegays* and sows the kernels in order to obtain plants, and on digging them out forgets some of them, which afterwards become full-grown trees, bearing fruit, the fruit which they produce remains the property of the owner of the ground, the trees having grown of themselves, without any trouble (such as watering them) having been taken.

DIVISION OF PRODUCE WHERE FRUIT TREES OVERHANG  
THE GROUND OF ANOTHER.

3. If any one plants on his ground, near the boundaries thereof, any fruit-bearing trees, which must be cultivated with a great deal of trouble, and if by a crooked growth the tree, or any of the branches, grow on or over the neighbour's grounds, the fruits of such tree nevertheless remain the entire property of the planter, without his neighbour having any right to claim the fruit of the branches which hang over his ground: but if any trees, such as tamarinds, illepe, and margosy, grow of themselves, without having been planted or any trouble having been taken, in such case the fruits belong to the person whose ground they overshadow.\*

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\* See Grotius, p. 209, § 21.

It seems that many customs have been invented here for the sole purpose of plaguing one another: for it is sufficient to say that the trees which stand on a person's own ground have grown up of themselves, without trouble or labour, and that he is not to be the owner of the branches and fruits which grow over his neighbour's ground, the fruits of such branches being indisputably his; and he is even at liberty to cut the branches, if they hinder him, and sell the same for his own profit, without the consent of the owner of the ground on which the trees stand. And the owner of the branches cannot also prevent the owner of the tree from cutting it down; but, in such a case, he must give the branches to the person over whose ground they hang. But, on account of the margosy oil, it has been ordered, since the company has had possession of the country, that the trees are not to be cut down without the special consent of the persons in power; and it is the same with all other fruit-bearing trees.

TO WHOM THE POSSESSION OF PALMYRA TREES BELONGS.

4. Although a piece of ground belongs to one person, and the old palmyra trees standing thereon belong to another person, the owner of such trees cannot claim the young trees, as they must remain to the possessor of the ground; excepting in the village of Araly, where it is an ancient custom that the owner of the old trees takes possession of the young trees; which is the reason

why only a few young trees are found in that village. For although a few ripe pannegays fall occasionally from the trees upon the grounds, from which young plants proceed, the owner of the ground, when he wants to cultivate it, has a right to extirpate such plants, in order to get rid of other persons' trees on his ground.

In the province of Tenmoraatje and Patchupalle, in so far as the trees and not the grounds stand mentioned in the company's thomboos, the owners of the old trees take the young ones; but where the grounds are mentioned and also the young trees, and for which rent is paid, then the young palmyra trees belong to the owners of the ground.

#### SECTION IV.

##### OF A GIFT OR DONATION.

1. When husband and wife live separately, on account of some difference, it is generally seen that the children take the part of the mother, and remain with her: in such a case the husband is not at liberty to give any part whatsoever of the wife's dowry away; but if they live peaceably, he may give some part of the wife's dowry away. And if the husband, on his side, wishes to give away any part of his hereditary property which he has brought in marriage, he may then give away one-tenth of it without the consent of the wife and children,

and no more; but the wife, being subject to the will of her husband, may not give anything away without the consent of her husband.

HOW FAR THEY MAY MAKE DONATIONS TO THEIR  
NEPHEWS AND NIECES.

2. If a husband and wife have no children, and are therefore desirous to give away some of their goods to their nephews and nieces, or others, it cannot be done without the consent of the mutual relations;\* and if they will not consent to it, they may not give away any more of their hereditary property and dowry; and, if their debts be not many, they may also give something from the property acquired during their marriage. If those nephews and nieces who have received such donation, die without issue, then the brothers inherit from brothers, and sisters from sisters; and the children and grand children succeed also, if there be any; if not, it devolves to the parents of those who obtained the donation, that is to say, to their father's side, and to his brother and his children; and, in like manner, on their mother's side, to her sister and her daughters, and on failure of them, to the brothers and their children; and, in default of heirs on his or her side, the gift returns to the donor and his nearest heirs.

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\* See Colcbrooke's Hindu Law, vol. ii, p. 246.

WHEN THEY RECEIVE A GIFT OF LAND FROM ANOTHER  
PERSON.

3. If a husband or his wife receives a present or gift of a garden from another person, so much of such gift or present as is in existence on the death of one of them when the property is divided remains to the side of the husband or wife to whom the present was made, without any compensation being claimable for any part of the gift that may have been alienated; but the proceeds thereof acquired during marriage must be added to the acquired property. But if any one has a present of a slave, cow, sheep, or anything else that may be increased by procreation, such present, together with what has been procreated, remains to the side where it was given, without any compensation being claimable for what might have been sold or alienated thereof.

HOW FAR GIFTS TO ONE OF TWO SONS ARE GOOD.

4. If a husband and wife have two sons and no daughters, and the husband, from a greater affection which he bears the eldest son more than the youngest, wishes to give him a part of his hereditary property, he may do it by executing a regular deed: and if, after the expiration of some time, the youngest son dies without issue, and afterwards the parents die one after the other, then it will be as if the gift never had been made, for

everything devolves to him who received the gift; and if he dies also without issue, his property is inherited in the manner above stated. The father's hereditary property, and the half of the acquired property, after deducting therefrom the debts, go to his brother or brothers, and the mother's dowry-property, and the other half of the acquired property (after deducting also therefrom the half of the debts) go to his sister or sisters, without the latter being at liberty to claim anything on account of what the father gave to his son, as above stated. The same also obtains if the grant or gift had been made on the mother's side; but if the gift has been obtained from any other person besides the father and mother, then it is divided both on the father's and on the mother's side.

If husband and wife have two, three, or more sons, and have given and delivered to them a piece of ground or garden; and if, after having possessed it for several years, the father and mother die, which causes a division of the estate, and if the above-mentioned son who has obtained the grant or gift demands that it shall be first delivered him from the estate, it may not be refused to him, if he can prove it by a written document; if not, the gift is considered of no value, and is equally divided.



PRESENTS TO SONS, BEING BACHELORS, BY RELATIONS, REMAIN TO THEM ON THEIR MARRIAGE, BUT NO OTHER PRESENTS.

5. We have stated above that all the property acquired by the son or sons while they are bachelors must be left by them to the common estate when they marry; but this is by no means understood to include the presents that have been made them by relations or others, which must remain to the persons to whom they have been given.

Should a husband and wife, who have no children, have acquired during their marriage any property; and should the husband, without the knowledge of his wife, give a part thereof to his heirs, and both afterwards die; in such case, on the division of the estate, the relations of the wife must receive beforehand a part equal to that which was given away by the husband to his relations when he was alive.

#### SECTION V.

##### OF MORTGAGES AND PAWNS.

OF MORTGAGE OF LANDS, ON CONDITION THAT THE MORTGAGEE SHOULD POSSESS THE SAME, AND TAKE THE PROFITS THEREOF IN LIEU OF MONEY.

1. When any person has mortgaged his lands or gardens to another for a certain sum of money, upon

condition that such lands or gardens be possessed by the mortgagee, and that the profits thereof should be enjoyed by him instead of the interest of his money; then the mortgagor of such lands or gardens cannot redeem the same whenever he pleases, but after the crop has been reaped he must give information of his intention to the mortgagee, so as to prevent any further trouble, labour, and expense to the latter. In such case, the mortgagor must, without failure, pay to the mortgagee the sum of money for which the said property has been mortgaged; namely, for the *warrego lands* in the months of July and August, and for the *paddy lands* in the months of August and September; but should the mortgagee have left the ground for the space of one year without sowing, for the purpose of having a better crop, in that case the mortgagor will be obliged to pay the money for which the grounds have been mortgaged in the month of November in the same year; and in the month of November also must be redeemed the *palmyra, betel, and tobacco gardens*. Yet, should the mortgagee conceive a dislike to the land or garden mortgaged to him, on account of the same not yielding so much profit as the interest of the money for which the lands have been mortgaged, and should therefore wish to get rid of the same and to recover his money, he shall be obliged, in that case, to wait for his money one year after the lands or gardens have been delivered to the proprietor or mortgagor: and if the mortgagor is, and remains, un-

able to redeem such land or garden, in that case the same must be offered for sale to his heirs; who then may purchase such lands or gardens, in case the same are worth more than the amount for which they were mortgaged; but should they *not* be worth so much, the mortgagee must then accept and keep the same for the sum advanced by him, provided he is confirmed in the full possession thereof by a title deed drawn up in proper form.

MORTGAGEE SO IN POSSESSION TO BE LIABLE TO ALL  
LAND TAXES OR DUTIES.

2. The mortgagee is to pay all such taxes and land duties to which the mortgaged land is subject, so long as he remains in the possession of the same, even for that year in which the mortgaged land is redeemed; for the payment of which taxes and duties the mortgagee must take a receipt from some person belonging to the Cutcherry, except in the province of Waddamoratchie, where the custom differs; because there the proprietor receives a tenth part of the fruits produced by the ground mortgaged by him, and he therefore pays the land duties and takes a receipt for the same in his own name; and for the palmyra trees, he receives the duties upon the trees from the mortgagee or possessor, which duties he, as mortgagor, then pays to the majorals, and takes a receipt for the payment thereof in his own name.

OF REDEMPTION OF A MORTGAGE WHERE DUE NOTICE  
HAS NOT BEEN GIVEN BY THE MORTGAGOR.

3. In case the mortgagor wishes to redeem his mortgaged ground, but, out of ignorance, informs the mortgagee too late of his intention—namely, after the ground has been dug or other labour has been bestowed on it—in that case the redeemer must give to the mortgagee his proper share from the fruits which the land has produced in that year, for the labour and expenses which he has bestowed upon such lands: in such case, the redeemer must observe the customs prevailing in the province and village.

Yet, when the mortgagee receives the money advanced by him, but cannot agree with the proprietor with respect to the profits expected by him according to the custom of the country, the proprietor in that case must permit the mortgagee himself to sow that piece of land; provided that he gives to the proprietor of the land, according to the custom of the country, the *terrewakom*, that is, the ground duty.

OF MORTGAGES FOR CERTAIN TERMS OF YEARS.

4. At present it is the prevailing custom here that many persons mortgage their lands for a fixed term of three, five, eight, or ten years; yet, in case the mortgagor, before the expiration of the stipulated time, shall

be compelled to sell a piece of mortgaged land, either for the purpose of discharging his debts, or for some other reasons, the mortgagee cannot prohibit such a sale, but must consent to it, and receive or accept the sum of money advanced by him, according to the custom of the country.

#### OF MORTGAGES OF FRUIT TREES.

5. If any person has mortgaged to another, in the manner above mentioned, any fruit-bearing trees, viz. cocoa-nut, mango, jack or areca trees, and is able to redeem the same, he must do so in the months of December or January; and the mortgagee may pluck such ripe fruits as are eatable from the said trees before he delivers over the same to the proprietor.

#### OF LOANS OF MONEY FOR THE USE OF BEASTS.

7. Should any person lend a sum of money to another, upon condition that the debtor, instead of paying the interest, should furnish the lender with one or more beasts for the purpose of having his land ploughed, without mentioning however what buffaloes or bullocks are to be delivered by him during the period that he keeps the borrowed money under him, and should a beast or beasts, so delivered to be used in ploughing the land, happen to die during the said pe-

riod, the debtor or the proprietor of such beast or beasts is obliged to furnish the lender of the money with one or more beasts instead of those which are dead, in order to be kept by the lender of such sums of money until his land has been ploughed; after which the borrower of the money may acquit himself from the said obligation by returning such sums of money as were borrowed by him.

#### OF PAWNS AND JEWELS, ETC.

8. Should any person take in pawn any jewels or wrought gold or silver for a certain sum of money, in order to receive a monthly interest upon the same, and should the proprietor of the pawned goods be able to prove that the pawnee has either worn them himself, or has lent out the same to be worn by others, the pawnee in such case will forfeit the interest of the sum of money lent by him;\* and such pawnee will be obliged, in such case, to return the pawn for such an amount as was lent by him to the pawner.

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\* See Colebrooke's Hindu Law, p. 149, vol. i.

## SECTION VI.

## OF HIRE.

## OF THE HIRE OF BEASTS.

1. When any person has hired one or more beasts, in order to plough his land, the proprietor of such beasts is not obliged to furnish the person who has hired the same with fresh beasts, in case such as were hired become sick or happen to die during the time that they were used to plough the land. In case any person borrows from another any beasts for his use, with the free consent of the proprietor, such proprietor, according to the custom of the country, may not demand from the borrower any indemnification for such of the beasts as are hurt or have broken their legs, but must consider the loss as accidental, and consequently bear the same.

## SECTION VII.

## OF PURCHASE, AND SALES.

## OF SALES OF LAND.

1. Formerly, when any person had sold a piece of land, garden, or slave, &c. to a stranger, without having given previous notice thereof to his heirs or partners, and to such of his neighbours whose grounds are ad-

jaçant to his land, and who might have the same in mortgage, should they have been mortgaged, such heirs, partners, and neighbours were at liberty to claim or demand the preference of becoming the proprietors of such lands.\* The previous notice, which was to be given to persons of the above description was to be observed in the following manner: viz. to such as resided at the village, one month; to persons residing in the same province, but out of the village, three months; to those residing in another province, six months; and to those who reside abroad, one year. The above periods having expired without such persons having taken any steps upon the information given to them, the sale was considered valid; yet this mode of selling lands underwent an alteration afterwards, in consequence of the good orders given on that subject during the time of the old commandeur BLOOM (of blessed memory): as, since those orders, no sale of lands whatever has taken place until the intentions of such as wish to sell the same have been published on three successive Sundays at the church† to which they belong; during which period such persons as mean to have the preference to the lands for sale, according to the ancient customs of the country, are to come forward and to state the nature of their preference, in consequence whereof they then became the purchasers of the same.

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† See also Grotius, p. 352.

\* See Vanleenvcen, p. 384.



It is customary, under this nation, that a piece of land which has been mortgaged to one person is sold to another, for which sale, according to the above-cited order, proper title deeds are granted, although the new purchaser is unable to discharge the amount of the purchase money, and in consequence thereof pays immediately to the seller only that part of the purchase money which exceeds the sum for which the land has been mortgaged, and afterwards leaves the same in possession of the former mortgagee for the amount for which it was mortgaged by the former proprietor, until the new purchaser has the means to pay the amount for which the said land has been mortgaged. This manner of dealing creates many disputes, as it occurs very often that such sums of money are not discharged before the expiration of eight, nine, or ten and more years; on which account I am of opinion (yet submitting mine to wiser judgment) that the passing of title deeds without the purchase amount being fully discharged should be prohibited, or at least that orders should be given that, in cases of the above-described nature, the mortgage deed made previously in the name of the seller should be repealed, and that a new one should be passed in the name of the purchaser, instead of that which has been repealed.

## OF SALES OF CATTLE.

2. If any person wishes to sell cattle, viz. bullocks, cows, buffaloes, sheep, &c. &c. the sales thereof are to

take place without any application or acts in writing, which sales are considered valid when the dry dung or excrement of such animals as were sold has been delivered by the seller to the purchaser; and in case the animals so sold happen to die or to get young ones before they are delivered up, the purchaser, being able to prove by witnesses that the seller has sold them to him for a sum of money, and that the dry dung or excrement of those animals has been received in token of their having been sold, obtains the right of a proprietor of such animals as were purchased by him, as well as of their young ones, without any claim whatever being made to them by any other person whomsoever, or any compensation for loss in case of death.

Should any person sell any of his bullocks or buffaloes, &c. &c. upon a statement that they are fit to be employed in ploughing lands, and should the contrary appear to be the case after the price has been agreed upon and paid for them, the purchaser may, in such case, within the period of fifteen days, deliver back to the seller such of the above-described animals, and may demand from him the price paid for the same, who, in that case, is also obliged to restore it to the purchaser.

Should any person sell a cow or a she buffaloe to another, stating that the animal sold has once or several times had young ones, and should it appear afterwards that the animal sold upon the above statement, instead of having had young ones once or several

times, is a cow which never bears a calf, and consequently unfit for generation, the purchaser may in that case deliver back to the seller the cow or such other animals as were purchased by him, and he may demand from the seller the restoration of the purchase money. But should any person, on the contrary, purchase a calf a year and a half or two years old, and should it appear afterwards that the calf so purchased grows up a cow which never bears a calf, or is unfit for generation, the purchaser is then obliged to keep the same, as no fraud whatever could have taken place in the sale thereof.

## SECTION IX.

## OF LOANS OF MONEY UPON INTEREST.

## OF LOANS FOR FIXED TERMS.

1. When any person lends a sum of money upon interest to another, upon condition that the borrowed sum should be restored within the time fixed by the lender, with such interest as was usually paid to others at the time that the money was lent by him; should such conditions not be fulfilled by the debtor, the creditor, in that case, must cause the pawn to be sold, if he has had the prudence to take any lands or any other goods whatever in pawn; and, in case the debtor does not consent to the said pawns being sold, the lender

of such sums of money must prefer his complaint to government, and request from the same that such mortgaged goods be sold for his benefit.

#### SECURITIES, HOW FAR LIABLE FOR DEBT.

2. Should there be securities, and should the debtor or borrower abscond, or be in reduced circumstances and unable to discharge the debt contracted by him, the creditor may then demand the payment of such debts from the securities, who, in such case, are obliged to discharge the debts for which they became securities; and such securities reserve the right of instituting an action against the debtor, should the latter be improved in circumstances. If two persons jointly borrow a sum of money from another, and bind themselves generally\* for the amount borrowed, the lender, in that case, may demand the payment of the amount so lent from such a debtor as he may happen to see first, provided that the following expressions are inserted in the *olay*, or bond; viz. *moonendaan*, *moon eurooca*, which signifies he who is present or before me must pay the debt; the consequence whereof then is, that the debtor who comes first before the creditor, when he intends to demand the money, must pay the whole debt; but such a debtor,

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\* See Colebrooke's Hindu Law, vol. i, p. 110. What follows shows that this is not intended to apply to a "joint bond," but to "joint and several bonds."

who pays the whole debt, has a right to demand the payment of half the amount paid by him from his fellow debtor, wherever he may find him.

WIFE OR CHILDREN, HOW FAR LIABLE FOR HUSBAND'S  
DEBTS.

3. When a man has contracted debts in his life time, without the knowledge either of his wife, child, or children, and happens to depart this life before he has discharged the same; his wife, child, or children, are obliged to pay such debts, provided the same be duly proved.

When husband and wife jointly cause a piece of land, or a garden, to be registered as a pawn for a sum of money borrowed by them, and do not deliver over such land or garden to the creditor, but keep the same in their own possession, and in consequence thereof give them afterwards to any of their daughters as a dowry, without specifying in the deed of gift that such a piece of land or garden has been mortgaged to another; if the debtors in the supposed case happen to depart this life without discharging a debt of the above nature, yet leaving behind some other goods, their creditors of the above description, who have neglected to prevent such mortgaged lands or garden from being given as a dowry, have a right to seize such other goods as might have been left behind by the debtors; and the son or sons

of such debtors are responsible for such debts, provided that the creditors (if such son or sons are unable to discharge the debt) do wait until they are in better circumstances.

INTEREST NOT TO EXCEED THE PRINCIPAL.\*

4. When a person lends money upon interest, and suffers the interest to exceed the principal, the debtor is not obliged to pay the interest exceeding such principal.

OF LOANS OF PADDY.

5. When a person lends money on condition to receive paddy on account of interest, he loses the interest when the harvest fails; and in the event of a bad harvest, the interest is to be calculated and paid according to the profits of that harvest.

When any person is in want of paddy, either as seed corn or for any other purpose, and borrows paddy to pay interest in kind, the borrower must stipulate the quantity which he agrees to pay; because it is not known what quantity is customary to be paid on such occasions; on which account the creditors take from two to five parrahs upon a quantity of ten parrahs of paddy. And the mode to be observed in paying paddy on ac-

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\* Van der Linden, p. 219.

count of interest, is that just stated in the event of a bad harvest, or of no harvest having taken place. In case the debtor has had a good harvest every year during the time that he keeps the borrowed money, and the creditor has neglected to come and demand his interest upon the harvest, the debtor is not obliged, in that case, to pay anything on account of interest exceeding the principal; but it is sufficient if he pays double the principal sum borrowed by him.

## OF EXCHANGES OF PADDY, ETC.

6. In case any person wishes to exchange grain, the paddy\* *seamic korackan*, *cooloe*,† *rice*, and *cadjung*, must be exchanged for an equal quantity, because they bear the same price; but any person wishing to exchange paddy for warego, must give one and a half parrah of warego for one parrah of paddy.

## WHAT PROPORTION OF PROFITS IS TO BE PAID WHERE ANY PERSON SOWS THE GROUNDS OF ANOTHER, WITHOUT STIPULATING ANY FIXED PORTION OF THE PRODUCE.

7. When any person sows the fields of another without a previous agreement what quantity the sower shall

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\* This must be a mistake. (Note by Mr. Mutukistna.)

† An old Tamil version has "Peas and rice are exchanged for an equal quantity." (Note by Mr. Mutukistna.)

give from the harvest to the proprietor of the fields, it is deemed sufficient if the sower pays to the proprietor the *terrevaram*; which signifies the ground duty, and is calculated to be one-third part of the profits, except the tenth part which is to be given to the proprietor previously. And when the sower has agreed to give a fixed quantity to the proprietor, and the crop happens to fail in the year for which the contract has been made, the sower need not pay to the proprietor the quantity agreed upon; but in case the other inhabitants of the village (in which such sower resides) have all had a good harvest, then the sower of the above description is obliged to pay such a quantity to the proprietor as was agreed upon by him; because, in such an event, the failure of the crop of the field sown by him is attributed to his laziness and negligence. Yet should it happen that he has had a tolerably good harvest, and the other inhabitants of his village a bad one, then the proprietor of the ground must be satisfied with the quantity produced by the field, and may not claim *any thing* more from the sower.

## ADDITIONAL NOTE.

By the law of *Jaffna*, a son is not liable for his father's debts, unless the latter has left property, and the son

The plaintiff and appellant, in this case, is a creditor of defendant's deceased father, and he claims the amount of his debt against the son. He alleges that the son inherited property from the father; but, he adds, whether he did or not, the mere circumstance of his being his son renders him liable for all the father's debts.

In this demand there can be no doubt that he is borne out by the *Thessawaleme*, which distinctly states that, "although the parents do



not leave any thing, the sons are, nevertheless, bound to pay the debts contracted by their parents;" and again, "although the sons have not at the time wherewith to pay the said debts, they nevertheless remain accountable for the same." has taken possession thereof.

The District Judge has, however, thrown out this action, on the ground that "there is no proof adduced that the defendant inherited or received any of his deceased father's property; and that, in fact, it appears that he died leaving no property, as per report of the headmen, made on the writ which was proved by plaintiff himself. Such being the case, it is indeed hard to make the defendant sacrifice what he has acquired with his own labour and industry for his father's debts. That although the country law directs that the sons are to pay the father's debt, it at the same time declares that it is a hard one. Under the foregoing circumstances and consideration, and with the opinion of the assessors, it is decreed that plaintiff's claim be dismissed, and he do pay defendant's costs of suit."

The Supreme Court, whilst it also admits the hardship of the law, would not have felt warranted in overlooking it on that ground alone; but as the *Thessawaleme* is, in fact, nothing more than a report of the customs and usages of the country, it conceived that it might occur in this as it often has in other instances, that the usage admitted of modifications which softened the rigour of the general principle, and reconciled it to the rules of natural equity.

For the purpose of ascertaining this point, it directed three special assessors, well acquainted with the Malabar usages as practised at Jaffnapatam, to be selected; and it further proceeded to examine several of the most experienced among the native inhabitants on the custom. The following questions were then put to the latter:—

1st. A father dies in debt, leaving no available property: are his sons liable to discharge his debts from the property accruing to them from their own industry; and if so, are they also liable to personal arrest for such debts?

2nd. Are lands given in dower to a daughter liable to these debts?

3rd. Was there any ancient or is there any known form by which, after the decease of the parent, the sons, by renouncing to his inheritance, could exempt themselves from this liability?

The answers were as follows:—

Three of the witnesses declared:

That the sons were liable in person and property.

That lands given in dower to the daughters were not: and that they did not know, nor had they heard of, any form by which the sons could exempt themselves from this liability.

It thus appears that the above passage in the *Thessawaleme*, though

correct as far as it goes, is nothing more nor less than a rule of the civil, or rather Roman-Dutch, law—the common law, not only of Jaffna, but throughout the Maritime Provinces—by which law the heir is responsible for the ancestor's debts, unless he had repudiated the inheritance, which he is at liberty to do whenever he is sued for any such debt; except he should, in the mean time, have intromitted or done any of those acts which show that he intended to appropriate the inheritance to himself.

Letters of administration have superseded the application for the benefit of an inventory.

Nor has this Law been in any way rescinded or modified up to this time. Formerly, indeed, where the heir entertained a doubt whether the estate could discharge all its liabilities, he was at liberty to apply for the benefit of an inventory, and now he applies for letters of administration. The latter form, as in many respects the more convenient and consonant with our present judicial institutions, having, in effect, superseded the former; but this has not done away with the doctrine of intromission, or removed the responsibility of the heir. Letters of administration are only requisite *for his protection*, and they are also requisite when a stranger, such as a creditor, or others having claims upon a vacant estate, are desirous of obtaining a title which will warrant them in recovering the assets and managing the property.

On these grounds the decree of the District Court is affirmed, unless the plaintiff shall undertake to prove that the defendant has appropriated to himself any portion of the property of his deceased father, without having obtained letters of administration. Should the plaintiff not undertake this proof, and should his debtor have actually left any property, the said plaintiff will still have his recourse against such property, on taking out letters of administration to that estate. (1531, *D. C. Wadimoratchy* (Coll.); *Morg. D.* 254.)

## CHAPTER III.

## KANDYAN LAW.\*

## OF LANDS AND THEIR TENURES.

SERVICE TENURE prevailed throughout the Kandyan Provinces. The possession of land was the foundation of the King's right to the services and contributions of the people; and persons not possessing lands were, in general, liable to no regular service or duties, but in some instances to light and occasional ones. Lands which, properly speaking, subjected the possessor to regular public services and contributions, were low paddy lands, which can be cultivated every year; but not (with some few exceptions) garden or high grounds. *Lekam mitiye*, or registers of persons liable to regular service, were kept by the chiefs of the provinces and of many departments to which they respectively belonged. He who openly abandoned his land was no longer called

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\* The following chapter is taken from Marshall, with additions from Armour, and the decisions referred to in foot notes.

upon to perform service or to pay duties. Service land abandoned became the property of the Crown; and in some instances the King exercised the right by taking the crops and re-granting the land. But, according to more general custom, the crop was appropriated or disposed of by the chief of the province, village, or department to which the land belonged; or it was re-granted by him to another, subject to the same service, and frequently on payment of a suitable fee. Land abandoned, if reclaimed by the proprietor or his heir, was usually restored on payment of a suitable fee, unless granted to another, or was possessed many years by another family performing service. No person retaining his land could, without the King's permission, change his service; that is, abandon his proper department and service and restore to another. All lands were alienable by the proprietor, but continued liable to the same service.

All service land might descend to, or be acquired by, females, who either paid a commutation in money, or, if required, provide a substitute to perform personal service. *Rajekarea*, which may properly be interpreted "king's duty," implies either the personal service, or the dues in money or in kind, to which any person or land was liable. Personal service was, in very many instances, commuted for a money payment, which was considered the legal perquisite of the chief. 1st. Universally, in the case of the Attepattoo and Hewawasum

people, and Koditowakku people of the Desawanies, the Lekam people, and persons of some other departments in the other districts, who performed in rotation regular *mura*, or duty, at the house of their chief, or at other fixed stations. All absentees beyond the number required to attend, paying a fixed sum, called *mura ridi*, which varied, in different places and departments, from one to five risis each for fifteen, twenty, or thirty days' service. 2nd. In the case of the same and other persons, who were bound to attend at public festivals in Kandy, and who paid to their chiefs a fixed sum each for failure. 3rd. In the case of the classes above mentioned, and some others, when called on to furnish timber, erect buildings, or perform other public service, all absentees, whether excused by favour, or disabled by sickness, or detained by urgent private concerns, paid a commutation in money, called "*game-heye*." The chief being held responsible for the expedition of the work assigned to him, the King seldom inquired minutely the numbers employed. And hence the reason of the practice above mentioned, of the chiefs receiving crops, or emoluments to be derived from vacant service lands. But he could only dispense with the *personal* service; for it was an invariable rule that the chief enjoying the benefit of the crops must deliver into the royal store the revenue chargeable upon the land. Every field, with few exceptions, has attached to it a garden and a jungle ground, called *hena* or *chena*.

## OF DIFFERENT SPECIES OF LANDS.

The Singhalese word *gama* probably implies village; but in the Kandyan country it is also frequently applied to a single estate, or a single field; the latter is often called *pruguwa*, or share. Villages, properly so called, are of these following kinds:—

*Gabadagama*, or royal village, may be described, generally, as containing *muttettu* lands, which the inhabitants cultivated gratuitously, and entirely for the benefit of the Crown, and other lands which the inhabitants possessed in consideration of their cultivating the *muttettu*, and rendering certain other services to the Crown.

*Wihara gama*, a village belonging to a temple of Budhoo.

*Dewale gama*, a village belonging to the temple of some heathen deity.

*Vidane gama*, a village under the orders of a *vidahn*, and usually containing people of low caste, liable to public service.

*Ninda gama*, a village which, for the time being, is the entire property of the grandee or temporary chief; when definitively granted by the King with *sannas*, it becomes *parveny*: it generally contained a *muttettu* field, which the inhabitants, in consideration of their lands, cultivated gratuitously for the benefit of the grandee,

besides being liable to the performance of certain other services for hire.

The *ninda* proprietor held his *ninda gama* on condition of furnishing a certain quota of men in war, &c. It would be impossible to define all the tenures upon which lands are held under a *ninda* proprietor, as these are different in every village, and as they rise from that of the *oligakkaria* (whose condition appeared to be little better than that of a slave) to that of a person who merely pays homage, by appearing in particular seasons or at festivals with a few beetel leaves, which he presents to the *ninda* proprietor.

The lowest are those just mentioned, who hold their portions of land for what is called *oligakkaria* service, who are generally *Padoowas*, and other low-caste people liable to carry the chief's palanquin, or any other low or menial service which general custom allows him to have performed for himself or family.

The *Nilakareyas*, who possess their portions on condition of cultivating a certain portion of *muttelu* field [as presently mentioned more fully], or any other defined service, which may have been attached to the service portion of land held by *Nilakareya*.

The *Hewannehaya* and *Pattabandias*, who always were of the *ralle* and village caste. Their services are various, according to original contract; but they are seldom liable to service of a mean character, and especially on the *Ninda gama* of Four Korles. Their duties are com-

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monly such as accompanying the *ninda* proprietor on a journey, carrying his *talipot*, watching his field, or keeping watch at his house. .

The *Wattukareyas*, who possess gardens, and pay a certain portion of the produce yearly to the *ninda* proprietor, and are generally liable to be called on to assist him, being paid or fed by him for their labour.

The *Asweddukkareyas*, who have brought pieces of waste lands into cultivation on certain conditions, which are so various as not to be defined. If such a holder has paid money for the *aswedduma*, he may emancipate himself from the control of the *ninda* proprietor, by having his *aswedduma* entered in the *lekam mittya* of any of the public departments as a service *pangoowa*.

Lastly, persons who possess lands within the limits of the village, subject to no service to a *ninda* proprietor beyond that of rendering him some slight token of homage as chief of the village.

All the above-named descriptions of tenants, except the last, either hold their lands in perpetuity, liable to the service due to the *ninda* proprietor; or they may hold at the will of the *ninda* proprietor only: viz. in the former class are all those who held their lands before the *ninda gama* was granted to the present proprietor, or who got possession of their service *pangoowas* from the same authority which originally granted the village to the family of the present proprietor; and they can only be punished for failing to perform the service due

for their *pangoowas*. In the latter class are those who have received their service *pangoowas* from the present proprietor, or from his family subsequently to the grant being made to him.

The *ninda* proprietor had both a civil and criminal jurisdiction over all inferior cases which occurred among the people of the village; but his jurisdiction was not well defined. It seemed to depend on the situation of the proprietor at the time being: if he happened to be a chief high in office, he adjudicated on all cases short of capital crimes, and decided all disputes about the hereditary right to the service *pangoowas* of the village, besides inflicting fines and imprisonment for the neglect of services due to himself.

If the *ninda* proprietor could not protect his *Nille-kareyas* and others from being called on by the headmen to perform public service in the *rattawassan* or *dissawassan*, or if he allowed them to perform it, he forfeited his own claim, as *ninda* proprietor, to services and dues. Latterly, therefore, he generally paid the tithe himself; the under tenants having in some instances attempted to get rid of their vassalage by paying tithe for their *pangoowas* to Government.

Lands within the limits of *ninda* villages, held and doing suit and service under any public department or temple, were taken out of the jurisdiction of the *ninda* proprietor. The proprietor of a *ninda* vilage was liable to furnish a certain number of persons for general public

services; and these services his vassals were liable to perform under his order as their chief, such as service in war, according to their caste and condition, dragging timber, making roads, &c.

By order in council of 12th April, 1832, all services to the Crown in respect of tenure, or of caste, or otherwise, are abolished; with a proviso that the order in council is not to affect the services due from the tenants of lands in royal or temple villages, or the service which tenants of lands in other villages in the Kandyan Provinces are bound to render to the proprietors of such villages as long as they continue tenants of such lands.

The penalty attached to refusal to perform services due to a *ninda* proprietor in a *nindagame* is, by the Kandyan law, the resumption of the land by the *ninda* proprietor. As to the right to these services being prescribed by a neglect to claim them for ten years, see title Prescription, par. 10, Marshall, 303.

And this even in case the defendant expresses, in open court, his willingness to perform the required services, and prays the court to restore him to the possession of the land, on condition of his fulfilling that offer.

It may be worth observing, though the Roman-Dutch law forms no part of the law of Kandy, that the course of ejectment pursued in these cases is similar to that which Voet describes as adopted against refractory vassals by the Roman feudal law, and tempered by the

same spirit of moderation in attending the tenant as "*locus pœnitentiæ*." (*Voet*, lib. 38. *Digressio de Feudis*, par. 113. *Marshall*, 304.) And, it may be added, by the equitable principle that, where a penalty or forfeiture appears to have been inserted merely to secure the performance of some act, equity regards that performance as the substantial object of the party interested therein; and if a compensation can be made for the non-performance, it will relieve against the forfeiture by simply decreeing a compensation in lieu of the same, proportionate to the damage really sustained. (*St.* §§ 1314-20.) And, in a recent case, the Supreme Court decreed damages for past neglect of services, and ordered the services to be performed in future. (31206, *D. C. Kandy*, 20 June, 1862.)

Service land cannot be inherited by a wife from her husband. Consequently a gift by a widow of such land, so supposed to be inherited, is void. (19161, *D. C. Matura*, 18 Dec. 1862.)

Service land does not go to widow.

All restriction against the sale of service land is removed by Ordinance No. 3 of 1852. (20077, *D. C. Matura*, 10 Nov. 1863.)

Sale of service land.

We now return to the description of the different species of lands.

*Yatatgame*, a species of village in the lower part of the Four Korles and part of Saffragam, and sometimes bearing that name.

Other villages and lands, which it is necessary to

specify here, are called from the department to which they belong, as *Kuruva Gāma*, *Muttange Gama*, *Attapatto Gama*, &c.

*Keta* is a royal village; it is the same as the *Muttettu*.

*Parveny* land is that which is the private property of an individual, properly land long possessed by his family, but so called also if recently acquired in fee simple. As all lands in the Kandyan country were subject to service, the distinction of service *parveny* is little known.\*

*Muttettu* lands—fields sown on account of the King, or the proprietor, or temporary grantee, or chief of a village, distinguished from the fields of the other inhabitants of the village who were liable to perform services, or to render dues—are of two kinds: 1st. *Ninda muttettu*, which is sown entirely and gratuitously for the benefit of the proprietor, grantee, or chief, by other persons, in consideration of the lands which they possess. 2nd. *Ande muttettu*, which is sown by any one, without objection, on the usual condition of giving half the crop to the proprietor.

*Nilla pangoowa* is land possessed on condition of cultivating the *muttettu*, or performing other menial service, or both, for the proprietor, grantee, or chief of a village: the possessor of such land is called *willakareya*.

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\* See *ante*, p. 248, vol. ii, as to *parveny* land.

In some instances he is proprietor, and cannot be displaced so long as he performs the service; in others he is a tenant at will, and removeable at pleasure.\*

*Aswedduma* or *dakipota*, is land lately brought into cultivation as a paddy field, or more recently than the original field. In the royal and *vidahn* villages, and in some other instances in the upper districts, the possessors of *aswedduma* lands performed some King's service; but not so much as the proprietors of original lands. If brought into cultivation by a stranger from the estate of another, particularly in the Dissavonies, he paid, by agreement, a small annual sum to the proprietor, and, besides, assisted him in country work and attended him on journeys, receiving victuals: unless in-

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\* The *nille*-proprietor may assert his right to cultivate the land on payment of the usual fees, and performance of the accustomed services; and the owner has no right to eject any such tenant, but on clear proof of his not paying such fees or not performing the usual services. And a court of equity will generally relieve against a forfeiture for non-performance of a condition or covenant of a lessee, where compensation can be made. (794, *D. C. Ratnapoora*, 26 Oct. 1836; *Morg. D.* 100.)

The custom of a succeeding or incoming tenant being entitled to the crop on the land when he takes possession, obviously applies only to those cases where the tenant has occupied the land for the full period of his term, viz. one year, according to the accustomed tenure. (794, *D. C. Ratnapoora*; *Ibid.*)

Rights of incoming tenant—custom.

Where a party, a *dessave*, claimed the power "to turn out the *nille*-holders of his estate whenever he pleased," the Supreme Court refused to recognize such a pretension, and held that the lord of the soil is bound to respect the rights of his tenants, whatever they may be, as fully and completely as they are to respect his; and that, even if the lands were his property in fee, the moment the tenant had entered with his consent, he could no longer eject him in the above summary manner. (794, *D. C. Ratnapoora*, 25 Jan. 1837; *Morg. D.* 131.)

scribed, which rarely happened in the *lekam mittya*, he performed no public service for it. If cultivated by the proprietor, who performed service [for the lands originally in cultivation], he was liable to no extra service for the *asweduma*.

*Piduvelte* is land offered by individuals to temples; and there are many of this description in all parts of the country. They are usually *aswedduma* of small extent, or, more rarely, small portions of the original service land. It is held that, in the upper districts, they could not properly be offered without the King's permission; but it was sometimes done with leave of the chief only. In the Dissavonies, they are usually offered with the consent of the *dissave*; but sometimes without it, if of trifling extent. As neither the King's service nor his revenues were diminished by the act [of offering], the King's sanction was deemed less important. (See par. 37.)

*Anda* land is what is delivered by the proprietor to another to cultivate on condition of paying the proprietor half the crop as rent: this is the condition on which fertile lands are usually let.

*Olu* is of three kinds: 1st. A portion of the crop equal to the extent sown, or to one and a half or double the extent sown, in some paddy fields or *chenas*. It is the usual share paid to the proprietor by the cultivator from fields which are barren, or difficult to be protected from wild animals, particularly in the Seven Korles,



Saffragam, Hewahette and some *chenas* in Harispattoo. In many royal villages in the Seven Korles, lands are paying *olu* to the Crown. 2nd. The share of one-third paid from a field of tolerable fertility, or from a good *chena* sown with paddy. 3rd. The share which the proprietor of a *chena*, sown by another with fine grain, cuts first from the ripe crop, being one large basket full, or a man's burthen.

*Hena*, or, as it is commonly called, *chena*, is high jungle ground, on which the jungle is cut and burnt for manure, after intervals of from five to fourteen years, and the paddy called *ell wee*, or fine grain, or cotton, or sometimes roots and other vegetables, are cultivated; after two, or at the most three crops, it is abandoned till the jungle grows again.\*

With regard to their future marriages, it was enacted that no future marriage should be valid unless registered and solemnized in the presence of the registrar for the district, and at such house or other place as the Government agent should from time to time direct (§ 2); nor to which the male party is under sixteen years of age, or the female under twelve years. (§ 3.)

Marriage not valid unless registered.

When marriage invalid.

\* There are also two descriptions of land, which obtain in the Maritime Provinces, which may be mentioned here: *mallepalle* is land formerly granted under a tenure subject to personal services to the Government, and which has reverted to the Government through want of male issue to perform those services.

*Mallepalle* land.

*Nillepalle* was granted under the same tenure as *mallepalle*, and which has reverted to the Government in consequence of the holders having failed to perform the services to which they were bound by the tenure. (2317, *D. C. Galie*, 6 Nov. 1839; *Morg. D.* 282.)

*Nillepalle* land.

What deemed  
full age.

The father, if living, of any male under twenty-one years, not being a widower, and of any female under sixteen years, not being a widow; or, if the father shall be dead, the mother; or, if both father and mother shall be dead, the guardian or guardians of the party so under age, lawfully appointed, or one of them; has authority to consent to, and to forbid such future marriage; and such consent is required for the marriage of a party under age, unless there is no person authorised to give consent. If the father, or the mother, guardian, or any one whose consent is necessary to the marriage, is *non compos mentis*, or not in the island, the person desiring to marry may apply to the judge of any court of record within the district in which such person resides, who may determine such application in a summary way: and if the marriage proposed shall appear to be proper, the judge may certify it to be so, and the certificate, unless set aside in appeal, is as effectual as if the father, mother, or guardian had consented to the marriage.

Consan-  
guinity.

No marriage is valid where either party is directly descended from the other: or where the female is the sister of the male, either by the full or the half blood, or the daughter of his brother, or of his sister by the full or the half blood, or a descendant from either of them, or the daughter of his wife by another father, or his son's, or grandson's, or father's, or grandfather's widow; or where the male is the son of the brother or sister of the female by the full or half blood, or a de-

scendant from either of them, or the son of her husband by another mother, or her deceased daughter's, granddaughter's, mother's, or grandmother's husband. Any marriage or cohabitation within the above enumerated degrees is incest, and punishable with imprisonment with or without hard labour for a period not exceeding one year. (§ 5.)

Any marriage, civil or religious, during the life of a former husband or wife is void, except where the party to the second marriage has been divorced, or where the first marriage shall have been decreed void. (§ 6.)

Polygamy, &c. illegal.

No future marriage is good, unless on proof of the registration of such marriage, and the subsequent cohabitation of the contracting parties. (§ 7.)

Evidence of marriage.

The Governor and Executive Council may proclaim the districts into which the Kandyan Provinces shall be divided for the purposes of registration under the ordinance. (§ 8.)

The Governor to define districts.

And the Governor must proclaim the number of registrars for each district, and must appoint them. (§ 9.)

Governor to determine number of registrars and appoint them.

Each registrar must dwell within his district, and cause his name to be placed on or near the outer door of his office, in the English and Singhalese languages. (§ 10.)

Registrar to dwell in his district, &c.

In case of future marriage by a registrar, each of the parties must give notice to some registrar of the District in which he or she has dwelt for not less than

Notice of marriage.

twenty-one days then next preceding, fully setting forth the names of each party, and those by which they are commonly known, and their respective abodes; and every registrar is to give, gratis, a form of such notice. Every party giving notice must sign or mark to the same, in the presence of two or more witnesses known to him or her. In cases of future marriage by a registrar, where both parties are of the same district, one notice signed by both is sufficient. (§ 11.)

Registrar to file notice.

The registrar, on receiving the notice, must forthwith file and record it, and enter a fair copy of it in a book, to be called "The Marriage Notice Book" (§ 12), and cause *one* publication of such entry to be made within seven days, by affixing a copy at places appointed by the Government Agent, and by continuing the same so affixed for fourteen days; and every person wilfully removing, altering, defacing, or destroying any such copy, is liable to a fine not exceeding five pounds. (§ 13.)

Publication of notice.

Mode of forbidding marriage.

If any future marriage be forbidden, the registrar must forthwith make report to the police magistrate, and suspend such marriage until decided whether it ought to take place or not: and such court, as soon as possible after report, must decide in a summary way whether such marriage should take place or not; and if the court decides not, then the notice of marriage and all proceedings thereon are void. And if it decides that there exist no grounds for stopping such marriage, then they are valid, and the registrar must forthwith, or as

soon as twenty-one days have elapsed since the entry of notice, solemnize the marriage. And if it appear to the court that the solemnization has been forbidden on frivolous and vexatious grounds, it may condemn the party forbidding the same to the payment of any fine not exceeding five pounds. (§ 14.)

No registrar must solemnize or register any marriage except at the office, nor except in the hours of business appointed by the Government agent. (§ 15.)

Marriages where solemnized and registered.

The registrar must ask of the parties to be married the particulars required to be registered (§ 16), and must, in the presence of the witnesses, say to the man (in the language of the parties, and causing him to take the woman by the hand): "Do you take this woman to be your wedded wife?" On the man answering in the affirmative, the registrar shall say to the woman (in the language of the parties, and causing her to take the man by the hand): "Do you take this man to be your wedded husband?" And on the woman answering in the affirmative, the registrar must forthwith register, in duplicate, in two of the marriage register books, the particulars relating to such marriage, and sign every such entry himself, and cause every such entry to be signed by the parties married and two witnesses. Every such entry must be made in order from the beginning to the end of each book, and the number of the place in each duplicate marriage register book must be the same, and a copy must be furnished to each party at the time of the marriage. (§ 17.)

Particulars to be asked of the parties.

As to the form of and particulars to be entered into the books of registry.

Power to re-  
fuse to register  
marriage.

In cases where the registrar ascertains, or knows of his own knowledge, that any marriage proposed to be registered will be void, he may refuse to register such marriage. (§ 18.)

Registration  
of future mar-  
riages omitted  
to be regis-  
tered.

Any person contracting marriage, which, without fault of the parties, may have been omitted or erroneously registered, may, before suit, or property affected by the marriage, or after suit, with consent of the court, demand to have such marriage correctly registered; and the registrar of whom such registration is demanded must require such marriage to be legally proved before some competent District Court; and such court, if it consider the marriage to be proved, must certify the same to the registrar, and the registrar must thereupon register such marriage. (§ 19.)

Register  
books.

The Government agent must cause to be printed a sufficient number of books for making entries of notices and marriages, and in them must be printed, on each side of every leaf, the heads of information required to be known and registered of marriages; every page and every place of entry must be also numbered from the beginning to the end, beginning with number one; and every entry divided from the following by a printed line. (§ 20.)

Government  
agent to fur-  
nish books.

The Government agent must furnish to each registrar books in duplicate, and a sufficient number of forms of certified copies, at a price determined by the Governor, to be paid for by the registrar. (§ 21.)

Duplicates,

Each registrar must, in the months of January,

April, July, and October, deliver to the Government agent, a true copy, certified under his hand, of all entries of marriages in the registry book since the last certified copy. The first of such certified copies must be made in the first of the above months next after the proclamation of the ordinance in the district to which the registrar is appointed, and must contain all entries up to the day prior to the first day of the month in which such first certified copy is made, inclusive. Every subsequent certified copy must contain all entries since the last certified copy then next previous, and up to and on the last day of the month previous to that in which such subsequent certified copy is to be delivered. If no marriage entered in a register book before the first day of the above-mentioned months, after the ordinance is in operation in any district, or in subsequent periods since the last certified copy, the registrar must, at the times aforesaid, certify the same under his hand to the Government agent. (§ 22.)

extracts and returns, to be made by registrars to the Government agent.

If it appear to the Government agent that the copy of any part of any book has not been duly delivered to him, he must cause the registry book to be inspected, and a certified copy to be taken. (§ 23.)

Government agent may order corrected copies.

The registrar must keep the marriage books safely until filled, and when filled, deliver one of the books to the Government agent, and the other he shall keep safely at his office. (§ 24.)

Books how disposed of.

The Governor and the Executive Council may make The Governor

to make regulations.

regulations for the registrars, and for the maintenance of officers or establishments, and in respect of fees for marriages and certified copies of notices and entries of marriage, and may amend the schedule to the ordinance.

(§ 25.)

Penalties to be imposed on registrars for breach or neglect of duty, and their suspension and dismissal.

The Government agent may suspend a registrar for breach or neglect of duty, or other act deserving of suspension; and must immediately report the suspension and the reasons thereof to the Governor and the Executive Council, who may remove such suspension, or suspend such registrar for a period, or dismiss him.

(§ 26.)

Any registrar carelessly losing or injuring any marriage register book, or carelessly allowing a marriage register book to be injured while in his keeping, or guilty of any breach or neglect of the duties laid down in the above provisions, and not otherwise specially provided for, shall be liable to a fine not exceeding twenty pounds.

And any registrar wilfully destroying or injuring any marriage register book, or wilfully permitting or causing any such book to be destroyed or injured; or falsely making or counterfeiting, or permitting or causing to be falsely made or counterfeited, any part of a marriage register book; or wilfully inserting or permitting or causing to be inserted in any marriage register book, or certified copy thereof, any false entry of any marriage; or wilfully giving a false certified copy of a



register book, or permitting or causing such false certified copy to be given; or certifying any writing to be a copy or extract of a marriage register book, knowing the said portion so copied or extracted to be false in any part thereof; is liable to imprisonment, with or without hard labour, for a period not exceeding three years, or to transportation for a period not exceeding seven years. Nothing, however, can absolve the registrar from responsibility in damages to any person aggrieved by negligence, irregularity, or abuse of authority. (§ 27.)

All existing marriages, if contracted according to the laws, institutions, and customs in force amongst the Kandyans, are valid. (§ 28.)\*

Existing marriages declared valid.

The district courts may hear suits respecting the dissolution or other avoidance of all marriages whatsoever (civil or religious) of persons resident in the Kandyan Provinces, and decree dissolution or other avoidance of marriage, and determine which of the parties to the suit shall pay the costs, or how the same shall be apportioned to be paid to both parties; and no marriage whatsoever can be dissolved or declared void in the Kandyan Provinces, except by the decree of some district court. (§ 30.)

District court to hear divorce suits.

31. No suit for divorce can be maintained, except upon the grounds of adultery by the wife after marriage, or of adultery by the husband after marriage,

Grounds of divorce.

\* The 29th section is repealed; but see *post*, p. 619.

committed with any person within such degree of consanguinity as aforesaid, or of adultery by the husband accompanied with gross cruelty, or on the grounds of complete and continued desertion for the space of five years. The court may decree the dissolution of any existing marriage (unless the same shall have been registered, as provided by the 29th clause) on proof that the parties to the suit mutually consent to such dissolution. (§ 31.)

Children legitimated by subsequent marriage of parents.

Every marriage contracted or registered under the ordinance renders legitimate any children procreated by the parties previous to their marriage; and such children are entitled to the same rights as if they had been procreated after marriage, provided that the children have not been born in adultery. (§ 32.)

Penalty on polygamy, &c.

Any married person resident in the Kandyan Provinces, who shall marry any other person during the life of the former husband or wife, whether the second marriage takes place in the Kandyan Provinces or elsewhere, and every person counselling, aiding and abetting such offender, is liable to be imprisoned, with hard labour, for a period not exceeding three years. And any such offence may be dealt with in the district where the offender is apprehended or in custody. This does not extend to any second marriage contracted out of Ceylon by any other than a subject of Her Majesty, or to any person marrying a second time, whose husband or wife shall have been continually absent from such

Where polygamy may be punished.

person for the space of seven years then last past, and shall not have been known by such person to be living within that time, nor to any person who, at the time of such second marriage, shall have been divorced, nor to any person whose former marriage shall have been declared void. (§ 35.)

The proceedings required before any court under the ordinance are regulated by rules made by the judges of the Supreme Court; and all decisions and orders of any police or district court made under the ordinance are subject to an appeal to the Supreme Court. (§ 36.)\*

A person having the absolute possession of [and right to] real or personal property, has the power to dispose of such property unlimitedly; that is to say, he or she may dispose of it either by gift or bequest away from the heirs at law. But to the unlimited power of

This ordinance has been amended.

1. The 29th Section of the above ordinance is repealed.

The registrar must register any existing marriage, if it be shown to his satisfaction that the same was contracted according to the laws, institutions, and customs in force among the Kandyans at the time of the contract, and that the man and woman, parties to such marriage, have respectively no other wife or husband living, except the wife or husband with whom they desire to register their marriage.

And before registering such marriage, if he sees fit so to do, require the parties to prove their marriage before some competent District Court, and such court shall take such proof as the parties may adduce; and if it shall consider such marriage to be proved, it shall certify the same to the registrar, who shall thereupon register such marriage.

The registrations of existing marriages heretofore made by registrars without the legal proof of marriage required by the 19th section of the ordinance, No. 13 of 1859, are good and valid registrations.

The two ordinances are to be read and construed as if they formed one ordinance.

Repeal of 29th Section of ordinance No. 13 of 1859.

Registration of existing marriages.

Registrar may require any existing marriage to be judicially proved.

Registrations under the 19th section of ordinance No. 13 of 1859, to be deemed good and valid.

This ordinance and No. 13 of 1859 to be read as one.

disposing of landed property there was this exception, that lands liable to any public service to the Crown or to a superior could not be disposed of, either by gift, sale, or bequest, to a *Wihare* or *Dewala*, without the sanction of the King or the superior to whom the service is due.\* But some of the principal chiefs, who have a strong bias in favour of the Church, say that though it was required to have such sanction before lands registered in the *Lekam Mettiya* and liable to service were made offerings of to temples, yet it was not customary to annul them when once made: and as in most instances it was only part of the service *Pangua* which was offered, the services for the whole *Pangua* became chargeable on the part of it which remained unoffered. If the whole was offered without sanction, the temple was obliged to perform the service, or pay the dues. On the subject of this right of disherison, the absolute exercise of which forms, almost to the time of Sir C. Marshall, a controverted question, the following opinions of Sir John D'Oyley are extracted from his observations:

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\* (Note by Marshall, C. J.) The reader cannot fail to be struck with the analogy between this restriction imposed by the Kings of Kandy on the power of alienation to Buddhist Temples, and the English Statutes of Mortmain, by which similar transfers to religious houses were prohibited without license from the King or from the intermediate Lords of whom the lands were held; nor is the analogy confined to the respective attempts to prevent alienation. The same desire to evade the law, both on the part of the superstitious donor and on that of the religious communities, is observable in the Kandyan landholders and in our Anglo-Norman ancestors, in the Temples of Buddhu, and in the Cloistery of the English Convents.

—“On deeds and transfers.”—Donations of land are made either by oral declaration or by writing; and oral gifts, if clearly and satisfactorily proved, are held to be of equal validity with written. The proprietor has full power to dispose of his whole landed or other property to his adopted son, or even to a stranger, in exclusion of his own children, but rarely does so without just cause. It has been alleged, I understand, by some chiefs, that a written deed is absolutely necessary to give a title to the adopted son or stranger, and to disinherit the legal heirs. But I conceive, from the decisions which have taken place establishing the validity of verbal gifts in favour of the wife of one of the children, that this opinion rather referred to the necessity of full and incontrovertible proof of the fact, which, after lapse of time, would otherwise be uncertain and difficult, than to any virtue in the writing. I find it generally admitted that such an oral donation to any one, proved recently after it took place by respectable and undoubted witnesses, must be held valid. The disinheritance of the legal heir (unless only remotely connected), with the motive of such disinheritance, is usually, and ought in propriety to be, specified whether it be a written or oral will; and if the legal heir be a son or daughter, or near relation, naturally dependant on the testator, the omission will scarcely take place; for it is held incumbent on the intended heirs and the witnesses to suggest their situation to his notice.” It is to be observed here,

that Sir John D'Oyley does not go the length of saying that the motive of disherison must absolutely be mentioned, and that the act of disherison will be void unless the motive be specified, but only that it ought to be, and usually is, mentioned; the omission, therefore, though it would naturally excite suspicion, and in a doubtful case would raise a presumption against the act of disherison, would not and ought not to be necessarily conclusive against the disherison, supposing the act to be satisfactorily established by other evidence.

The principle that the owner of landed property might dispose it away from his heirs, appears not to have been universally recognized by the Kandyan authorities, many of whom have held that the heir cannot be disinherited, unless for some good cause, which must be expressed in the deed itself; nay, some have insisted that the consent of the heir to his own disherison is necessary, and must even appear in the deed by which such disherison is effected. Of course this now all altered the ordinances. But if any question on the old law should arise, Marshall, p. 309, may be consulted.

On a claim of land transferred in consideration of assistance, it appeared that the deed of transfer was invalid, under proclamation of 28th October, 1820, from its bearing no mark, as the signature of a witness, but that the granter had lived in the house of the grantee, and had been supported by him for three years, though

she afterwards removed to the house of the defendant, with whom she resided for eight months till her death, and to whom she made over the land in question a few days before she died. Under these circumstances, the Kandyan assessors were of opinion that the plaintiff, though the deed could not be supported, was entitled to compensation for the assistance rendered by him; and in this opinion the S. C. concurred, decreeing the land to the defendant, he indemnifying the plaintiff according to the assessment made of his claim by the assessors *P. R. Ralle* and *Y. B. P. Mohandiram*. *Matelle*, 17th January, 1834, on circuit.

Transfers, donations,\* or bequests of land are revoc-

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\* A donation in consideration of assistance to be rendered to the donor, is, by the Kandyan law, revocable, subject in certain cases to compensation for assistance actually rendered. (*Dodandenia v. Koomare. Gov. Ag. Matelle, Morg. D. p. 7*)

Donations.

Kandyan deeds of gifts, excepting those made to priests, whether conditional or unconditional, are (like wills) always revocable by the donor in his lifetime, and are often made in contemplation of death; but such presents differ essentially from last wills or documents in respect to their transferring an immediate title or interest to the donee in the property thereby granted; whereas a will does not take effect until the death of the testator. Until proof on both sides has been gone into as to the execution of these grants, and it be shown whether they were delivered or not to the donee, and whether the donees were put into immediate possession of the lease granted thereby, this court cannot, in the present stage of the suit, give any *opinion* as to what is the legal effect of the deeds.

(4271. *D. C. Matelle*, 20 Aug. 1844.) The consideration on condition of the deed of gift is "to render all and every necessary assistance till my death, to cause my remains to be buried according to the customs of the country." Now the custom on such gifts is for the donee to send one or more servants to wait upon the donor, and to supply provisions and medicines, and procure the burial according to his ability, the condition of the party, and the value of the land. (See *Marshall, Dig.*

able at pleasure during the lifetime of the person who alienates the same; but a definitive *sale* of land is not revocable by the seller at his pleasure; for though it was not without precedent for bargain of this land to be broken and annulled, even years after the sale, it was neither justified by law or custom. Unconditional donations of moveable property, such as cattle, goods, or money, were not recoverable. For it was exceedingly common for old persons having no children,\* to take up their residence in their old age with relations or strangers, in whose favour they, in the first instance, executed a deed of gift or bequest, transferring the whole of the donor's property to the donee, for the sake of assistance and support; but it frequently happened that the

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p. 321, par. 46); and such services not being required to be rendered personally by the donee himself, his heirs, although not named in the deed, take by law, on his death, an interest in the condition, and may perform it. Whether the services have been continued to be duly rendered to, and accepted by, the donor during his lifetime, or whether he ever expressly revoked the deed of gift and resumed possession of the lands given, are questions for evidence upon such points being raised in defence by the answer. (12121, *D. C. Kornegalle*, 11th June, 1851, *Coll.*)

\* (Note by Sir Charles Marshall.) And in many instances, as the cases show, where they had children, but who were unable and unwilling to give the requisite assistance. It would appear from the text that what is here laid down as the opinion of the assessors on the subject of the revocation of deeds for assistance, had reference to moveable property only; but it can scarcely have been intended to be so limited; and the numerous cases on this subject would sufficiently prove that landed property constantly forms the subject of these additional gifts or bequests.—This and sundry other passages in the Memoranda of Mr. Sawers have suggested a fear that the copies of these memoranda are not always correct.



donor was a person of capricious mind or violent temper, and upon any slight occasion would remove to another house and execute a similar deed; and thus numerous claims to his property after his death would be made upon deeds of the same import and of apparently equal validity; in such case the judge always decided in favour of the person under whose care the deceased had died, however short the period might have been of his residence at that house; but any other person who had rendered the deceased assistance and support for any length of time, and had been put to expense thereby, would have a right to compensation out of the deceased's property; and even before the death of the person assisted, such compensation would be demanded and recovered. The person rendering the last assistance and support to the deceased would have a preferable right to his property to that of a person holding a deed of bequest, whose house he had quitted, or whose service he had rejected from dissatisfaction with treatment he had received. But it must be clearly proved that it was the intention of the deceased that the person rendering him assistance in his last moments was to be his heir; otherwise the person rendering the last duties would only be entitled to be rewarded for his or her services out of the deceased's property, while the bulk of the property would go to the heirs at law. And even in the case of deceased dying out of the immediate care of a person in whose house he had lived, or

able at pleasure during the lifetime of the person who alienates the same; but a definitive *sale* of land is not revocable by the seller at his pleasure; for though it was not without precedent for bargain of this land to be broken and annulled, even years after the sale, it was neither justified by law or custom. Unconditional donations of moveable property, such as cattle, goods, or money, were not recoverable. For it was exceedingly common for old persons having no children,\* to take up their residence in their old age with relations or strangers, in whose favour they, in the first instance, executed a deed of gift or bequest, transferring the whole of the donor's property to the donee, for the sake of assistance and support; but it frequently happened that the

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from whom he had received assistance and support, even to a period near that of his death, provided his so dying not under the care of this person was accidental, and not by his having voluntarily rejected his assistance and support, such benefactor would still come in for the property before the heir at law; liable, however, to the person under whose care the deceased ultimately died for his or her trouble or expense.

Therefore, according to Kandyan law, the owner of land or other property is not prohibited from disposing of it to any person he pleases, away from his heirs; that the consent of the heir to such disposition is not necessary to give validity to it. Whether the owner's reasons for so disposing of his property must necessarily be expressed, seems doubtful; but as it is usual not to state the reason, whether undutiful conduct on the part of the heir, want of support or assistance, or any other ground to such omission, must always excite suspicion, and in doubtful cases must weigh very forcibly against the act of alienation; that in all cases deeds disinheriting the heir at law require to be strictly and jealously watched; and that if they be not satisfactorily established, the court will lean against them in favour of the rights of the heir at law, as is the rule of the law of England and of the civil law. That in all transfers for assistance to be rendered, the condition must be shown to have been faithfully and strictly performed; in failure of which, the transfer ought not to be enforced: that the donor has

the right of revocation by any subsequent transfer; and even without deed, for the act of his removing to another house where the transfer was in consideration of assistance would seem to amount to a revocation; that where his intention is not clearly expressed as to revocation and other disposition, the court must decide according to the evidence whether just ground existed for his dissatisfaction with the first donee; and that where the subsequent transfer is confirmed, or the former one is revocable, the question arises as to the claim of the former donee for remuneration, for assistance actually rendered by him.\*

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\* By the Kandyan law, the consent of the son is not necessary to enable the father to dispose of his property in order to obtain assistance and support. Such a requirement would not only be unreasonable itself, but is at variance with the general rules of the Kandyan law, and opposed to numerous decisions. (4380, *Jud. Com. Kandy; Morg. D. 1.*)

Transfer.  
Consent of  
son.

In a case between Kandyan parties, where a person had transferred certain lands to enable him to procure support: *Held*, that even if the deed of transfer should turn out to be invalid as an absolute transfer, it should at least be considered that the transferee had a virtual mortgage on the lands for any expense which he might have actually been put to for the support of the transferor or the payment of his debts; and, therefore, that he had a right to hold the lands as a security for repayment. (*Ibid.*)

Transfer to  
procure sup-  
port.

On this subject the reader is referred to the following cases:—

Deeds, as well for services previously rendered as for those to be rendered in future, are, by the Kandyan law, revocable. (28626, *D. C. Kandy*, 25 Aug. 1857.) See also

Certain deeds  
revocable.

22404—21344, *D. C. Kandy*, 25 March, 1850.

23886, *D. C. Kandy*, 12 Sept. 1851.

24318, *D. C. Kandy*, 31 July, 1844.

14253, *D. C. Badulla*, 20 Aug. 1844.

4271, *D. C. Matelle*, 20 Aug. 1844.

All deeds of gift, whether conditional or unconditional, are revocable by the donor in his lifetime.

Eldest son.

The eldest son has no right to a better share of the estate of his parents than his other brothers, and his sisters having Beena husbands.

Daughters  
marrying in  
Deega.

Daughters, while they remain in their father's house, have a temporary joint interest with their brothers in the landed property of their parents;\* but this they lose when given out in Deega marriage by their parents, or by their brothers after the death of their parents;† but not, it would seem, by half brothers.‡ No. 6,754. Rat-

divorced wife or  
destitute wi-  
dow to sup-  
port.

destitute of the means of support, she would have a right to return to the house of her parents, and there to have lodging, support, and clothing from her parents' estate; but when she fails to produce evidence to this effect, she will have no such claim. (7901, *D. C. Kandy*, 14 Sept. 1836; *Morg. D.* 96.)

\* *Scoble*. If a woman is married in *Beena*, she is not entitled to a specific land, but only to a share jointly with other heirs in the ancestral property. (1687, *C. R. Avishawelle*.)

So that an only daughter by a previous marriage is entitled to half the father's lands, and does not forfeit her rights by a *Deega* marriage. (2765, *D. C. Colombo*, 15 June; *Morg. D.* 328.)

If a woman is decreed to be entitled to recover one half of her father's lands, as being the only child by the first marriage, although given in *Deega* by him, the other half of the father's lands devolves on the children of the second marriage. See 20898, *D. C. Kandy*: 3574, *D. C. Matelle*: 1333, *D. C. Kandy, North*: 14311, *D. C. Badulla*, 5 July. 1854.

† 6939, *D. C. Ratnapoora*, 5 Feb. 1834; *Morg. D.* 13. A marriage in *Deega* does not divest the wife of her inheritance, where she has always kept up a close connexion with her father's house; and this independently of the state of destitution in which she may be, and which of itself would entitle her to some assistance from the estate of her deceased parents. (690, *D. C. Madewelletenne*, 3 May, 1834; *Morg. D.* 15.)

Marriage in  
Deega.  
Inheritance.

‡ Where a woman, married in *Deega*, subsequently returned to her *Deega* village, and died there: *Held*, that though on her return she was entitled to support and assistance from her half-brother, the defendant (and this whether the father had enjoined it on him or not),

napoora, 26th October, 1833.\* It is, however, reserved for the daughters in the event of their being divorced from their Deega husbands, or becoming widows destitute of the means of support, that they have a right to

yet that, at her death, all claim upon the paternal property was at an end; and that her son (who had settled in his father's village, and inherited his lands) could have no claim against the defendant. (5137, *Jud. Com. Kandy, Oct. 30, 1833; Morg. D. 3.*)

A father having left issue by two marriages, his estate should be divided into two equal portions; and the issue of one marriage is entitled to one moiety of the parent's estate; and, if an only daughter, would not forfeit her right by her *Deega* marriage in favour of her brothers and sisters of the half blood: *i. e.* when a proprietor.

Suffragam and Udderatte customs differ in this last point. By Suffragam custom a *Deega* daughter of the half blood would never forfeit by any *Deega* marriage her right to inherit a share of her father's estate in favour of her brothers and sisters of the half blood; whereas the old Udderatte customs made a distinction, in such cases, as to the rights of the daughter when she had been married in *Deega* by her father, and where she married in *Deega* subsequent to his decease. Yet this distinction never existed to the mother's estate, and even in respect to the father's estate it does not appear to have been adhered to or acknowledged latterly; the more liberal custom having prevailed: *viz.* that the daughters of the half blood do not forfeit, by a *Deega* marriage, their right to inherit their parents' estate in favour of their brothers or sisters of the half blood. (1333, *D. C. Kandy*, and 3574, *D. C. Matelle, 24 June, 1843.*)

The original proprietor of the land in dispute died intestate, and leaving a widow and two daughters, minors; of whom the eldest, Rang Etenna, married in *Beena*, and was the mother of the youngest, Subeca Etenna. Suberat Etenna was married out in *Deega* by her mother, and subsequently sold half of the lauds to the defendant by a deed, under which he claims such moiety. The Supreme Court was of opinion that the mother was entitled to give her daughter away in *Deega* after the death of her father; and that, upon being so married out in *Deega*, this daughter was debarred from inheriting any portion of her father's lands, the whole of which devolved on her sister married in *Beena*. (*Armour*, pp. 24, 114-18: 19931, *D. C. Kandy, 4 Jan. 1851; Coll.*)

\* But, if the daughter is the only issue, her *Deega* marriage does not bar her claim. (40, *C. R. Newera Ellia, 21 Nov. 1863.*)

return to the house of their parents' estate. But the children born to a Deega husband have no right of inheritance in the estate of their mother's parents. This last position is to be taken as opposed to the rights of sons and of daughters married in Beena. As regards collaterals and more distant relations, the children of Deega married daughters have, in many cases, a preferable claim; indeed, the exclusion of Deega married daughters themselves would seem only to have reference to sons, and Beena daughters themselves would seem only to have reference to sons and Beena daughters of the same bed; for Deega married daughters being the only issue of that bed, have joint, if not an equal, right with their half-brothers to their father's estate.

If, however, a daughter, who has been given out in Deega, should afterwards return to the house of her parents, with the consent of her family, and there marry a Beena husband, the issue of this connection will have the same right of inheritance in the estate of their maternal grandfather or grandmother as the issue of her uterine brothers.

On failure of the issue of sons and of daughters married in Beena, a Deega married daughter would succeed; but if she be dead, her father's brothers succeeded before her children; and again, if the brothers be dead, the Deega daughter's children succeeded before the children of her father's brothers. On this point, Mr. Sawers observes, there appears to be a considerable de-



gree of uncertainty; but the chiefs seem pretty unanimously of opinion that where two brothers have possessed the family estate undividedly, the one brother would succeed to the other in preference to the other daughters married in Deega; but where the family estate has been divided, and so possessed by the two brothers, the children of a Deega married daughter would succeed to their maternal grandfather before their grandfather's brothers; and, even in the first instance, that is, where the brothers have possessed the estate undividedly, the children of the Deega married daughter, if they become destitute, but not otherwise, would have a right to claim support from their maternal grandfather's estate, though the parveny right to that estate would be in their grand uncle, maternal grandfather's brothers.

A daughter having a Beena husband in the house of her parents, her children have the same right of inheritance to the estate of their mother's parents as the children of their mother's brothers; but if the children of the daughter having a Beena husband inherit any considerable landed estate from their father, in that case their share of their mother's family estate would be proportionally diminished.\*

A daughter married in Beena, quitting her parent's house with her children to go and live in Deega with

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\* A Beena husband has no right to or interest in his wife's estate after her death. *Query.* Has a Beena husband an interest in the property acquired during coverture? (333, *D. C. Kandy*, 26th January, 1860.)

Daughters  
marrying in  
Beena.

her husband before her parent's death, forfeits thereby, for herself and her children, the right to inherit any share of her parent's estate [she having at the time a brother or a Beena married sister], unless one of the children be left in her parent's house. Four of the chiefs, Mr. Sawers adds, are of opinion that the daughter previously married in Beena\* may reserve for herself and her children her own and their claim on her parent's estate, by visiting him frequently and administering to his comfort, and especially by being present, nursing and rendering him assistance in his last illness; and this would especially be the case where there were two daughters and no sons, either in re-establishing the right of one to the entire estate against the other daughter married in Deega, or for half of the estate if the other daughter be married in Beena. But if there should be a son besides these two daughters under the above circumstances, and he living at home; in that case the son or his heirs would get half the estate, and the other moiety would be divided between the two daughters, or their heirs.† But should the son have

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\* (Note by Sir C. Marshall.) *And afterwards going to live with her husband in Deega.* Sawers must have intended these words to be understood; because, otherwise, the right of the Beena married daughter would have remained unimpaired, and would have stood in no need of this special mode of preservation.

† (Note by Sir C. Marshall.) 'Mr. Sawers, it is presumed, means that the other moiety would be divided between the two daughters, provided both had rendered assistance, or if one only assisted, that the other was married in Beena; for if one be married in Deega, and ren-

been living out in Beena, and the parent have been depending on his daughters and their husbands for assistance and support, in that case he would only be entitled to one-third, and the daughters or their children to one third each.

A daughter, being the only child of a man's first, or second, or third marriage, will have equal rights with her brothers of the half blood in her father's estate, even if given out in *Deega*. But where there is an only daughter, or only daughter of one bed, though such daughters would have absolute or *parveny* rights in their shares, they would be entitled to shares inferior to those of their half-brothers; commonly, only half as much.

Daughters' rights in reference to brothers of the half-blood.

Daughters before marriage, or returning from a *Deega* marriage, have an equal claim for maintenance from the share of all their brothers, although of the whole or half blood; that is to say, from all the shares into which their parent's estate may have been divided.

Daughters un-married or returning from *Deega*.

If a daughter bear children in the house of her parents, without having an acknowledged husband, such children would have a doubtful or weak claim to any share of their maternal grandfather's property, and must depend chiefly on the good will of their uncle or uncles for support and a provision out of the grandfather's estate.

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der no assistance, &c. it seems clear that she could have no claim, and the estate would, in such case, be divided between the son residing in the house of his parents and the assisting daughter.

A daughter by conduct which brings disgrace upon her family would destroy her parveny right of inheritance in the estate of her parents; but still she would have a right to support from the estate of her parents, and could demand the same at law from the brothers.

Daughters must accept the husband chosen for them by their parents, or, in the event of the parents being dead, by their brothers, and must go out with such husbands in *Deega*; but, in the event of such husband turning out badly, disinheriting her children, and compelling the wife to return to her father's house, the brothers are bound to make provision for their unfortunate sister and her children out of her father's estate.\*

Grandchildren.

Grandchildren, whether the children of a son or daughter, have the same right of inheritance to their grandfather's estate that their deceased parents would have had if he or she had survived; that is, they are entitled to his or her shares: and great grandchildren, in like manner, inherit through their deceased parents.

Sister married in *Beena*.

The only daughter of a deceased brother, or of a sister having had a *Beena* husband, is entitled to her parent's share of the family estate; nor does she lose her right to such share by being married in *Deega* marriage by her grandfather or grandmother, in which case she would have a right of inheritance; but her being so

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\* It is questionable whether a woman has not gained a free will in this matter under the Kandyan marriage ordinance.

given away by her uncles would not deprive her of her right of inheritance in her grandfather's or grandmother's estate.

If a daughter have unauthorized intercourse with a paramour in her father's house, the children of such intercourse have no right of inheritance in their maternal grandfather or grandmother's property; but if the father be known, and the children be acknowledged by him, they would have a claim of inheritance on his *parveny* property, provided the paramour were of equal rank and degree with the mother.

Illegitimate children.

The same custom regulates the succession to the mother's as to the father's estate; and daughters having brothers have no superior rights of inheritance in their mother's landed property to what they have in their father's estate; with this exception, however, that when the parents have each an independent estate, the daughters, whether married in *Deega* or otherwise, have *parveny* rights to equal shares with their brothers in their mother's estate.

Succession to the mother's estate.

Where an estate was enjoyed undividedly by two or three brothers, having but one wife in common, on the death of one of the husbands, and the wife, or, in the event of the wife being divorced after the death of one of the husbands, the children, being the issue of the joint connexion, can claim the share of their deceased father, to hold it independently of their surviving father or fathers. If one of the joint husbands should quit the

Succession in the case of associated husbands.

connexion and take a wife for himself alone, and have issue also by her, and he die intestate, his share of the family property would be divided between the issue of his first wife, which he had in joint-connexion with his brother or brothers, and the issue of his sole wife, a moiety to each. Nor has the brother, who capriciously detaches himself from a joint-connexion after the issue born under it, the power of depriving his first family of the whole of his share of the family estate; one moiety at least of his share should remain with his first family, begotten under the common connexion of him and his brothers.

Where an estate is enjoyed undividedly, or otherwise, by three brothers, two of whom are married to one wife, while the third brother has a separate wife, in the event of one of the family or associated brothers dying without issue, the other brother, with whom he had the joint wife shall be his sole heir, and the brother having a separate wife shall have no share of such demised brother's property of any land.

The acquired property of one associated brother, dying without issue, goes to the other associated brother; but the property which the deceased had received from either of his parents would revert to that parents and associated brothers, being cousins or strangers in blood to each other, are reciprocally the heirs of each other; if either die without issue, to the property of all kind which the deceased may have acquired during the asso-

ciation; but not to the property which the deceased may have received from his parents, or brothers, or sisters, or which he may have inherited in any way from his own family.

Should an associated husband die, leaving children by a former single marriage, such children would be his heirs, except to the property acquired during the association, which property would go to his associate.

The issue of an associated connexion inherit their father's parveny estate equally with the half blood by a former or subsequent marriage of their father, unless the father should, in the first instance, have transferred or settled the whole or any part of such property on his first family; in which case, the second family gets the whole which the father had reserved to himself of his hereditary estate. But the property acquired under such marriage goes to the issue of such marriage respectively, unless the father should have made a division of his acquired property also at the time of his separation from his first family; in which case, the last family would get the whole of that share of the acquired property which the father had reserved for himself.

Uterine brothers and sisters, though born to several fathers, have all equal rights of inheritance to their mother's peculiar estate.

A son, detaching himself from his family, and forming a *Beena* marriage in the house of another, does not lose his right of inheritance to the estate of his parents;

Son married  
in *Beena*.

by purchase or by gift from strangers; and should no provision of this kind exist for the children of a low-caste wife, they will, in that case, be entitled to temporary support from their father's hereditary property.

Succession on failure of descendants.

Failing immediate descendants, that is, issue of his own body by a wife of his own or of higher caste, a man's next heir to his landed property (reserving the widows' life interest) is his father, or, if the father be dead, the mother; but for a life interest only [this limitation to a life interest seems, however, to be in contradiction to what will be stated in p. 9, by which the mother is stated to be absolute heiress at law to her children dying without issue, and to have the power of disposal of the father's parveny estate, which she inherits through them], and on the same conditions on which she holds her deceased husband's estate: viz. in trust merely for her children [and this limitation to a trust or life interest seems to apply to the father equally as to the mother, in the case of acquired property]; if the father and mother be both dead, the brother or brothers and their sons, and, failing brothers and their sons, the sister or sister's sons succeeded.

Nephews and nieces.

\*A sister's son has not a preferable right to the brother's daughter, unless he has been adopted by his

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\* By the Kandyan law, nephews and nieces of the whole blood succeed before nephews and nieces, as well as brothers even, of the half blood. (*Sawyer's Digest*, p. 27: 971, *D. C. Seven Corles*, October 26th, 1836: *Morg. D.* 101.)



uncle; and therefore that, failing a brother's son, the property should be divided between the sister's son and the brother's daughter. But should the nephew have been neglected while the uncle was instrumental in procuring a *Beena* husband for his niece, and appearing otherwise to take a paternal solicitude about his niece, in such case she would be her uncle's sole heiress rather than the nephew, being a sister's son.

The husband is not the heir to his wife's landed parveny estate which she inherited from her parents, nor to her acquired landed property; that, on the contrary, the moment the wife dies, the husband loses all interest in her estate, which, if she has left no issue, reverts to her parents or their heirs; and that, though the wife is entitled to the entire possession of her deceased husband's estate, so long as she continues single and remains in his house, yet the husband must quit his wife's estate the moment she dies.

The mother is heir to her children, even in the parveny property of her deceased husband, through them. But if she die intestate, the estate will revert to her husband's family, whose parveny property it was; with this exception, that, if the mother has children, either by a former or subsequent husband, these children, being the ultimate brothers and sisters of the children through whom she inherited the estate, will inherit the same from her. And children of the same mother by different fathers are reciprocally heirs to each other,

Mother heir  
to her chil-  
dren.

after the children of the whole blood have failed. But if the mother has been divorced by any of her husbands, the children born to other husbands cannot inherit the property of the children whom she had borne to the divorcing husband.

Wife dying  
intestate.

If a wife die intestate, leaving a son who inherits her property, and that son die without issue, the father has only a life interest in the property which the son derived from or inherited through his mother. And at the father's death such property goes to the son's uterine brothers or sisters, if he have any, and, failing them, to the son's nearest heirs in his mother's family.

Inheritance by  
the half blood.

With respect to the father's property, the right of inheritance of the half blood is postponed to that of brothers and sisters of the whole blood. For example, A has by his first wife two sons and a daughter, and by his second wife two sons, and dies: on the death of one of the sons of the first bed without issue, no part of his property would go to the children of his second bed, or half blood; but the brother and sister of the whole blood would inherit the whole of the deceased brother's property: on failure, however, of the brothers and sisters of the whole blood and their issue, the brothers and sisters of the half blood are then to inherit.

Half  
brothers.

The property derived from the father goes to the half brothers on the father's side, in preference to the half brothers on the mother's side; for example, A has a son by his first wife, and another son by his second

wife, and dies, and his estate is divided, his widow marries again, bears children to her second husband, and dies; her son by A's children inherits in preference to his mother's children by her second husband.

Two half brothers associated with one wife are heirs reciprocally to each other, in preference to brothers of the whole blood: suppose A leaves two sons by his first wife, and two sons by his second wife; at his death, his property is equally divided among the four sons. If a son of the first bed becomes the associated husband of the same wife with a son of the second bed, these two half brothers would inherit from each other, unless the association be entirely dissolved before the death of either of them.

Nephews and nieces of the whole blood succeeded before the brothers of the half blood. Nephews and nieces.

So sisters of the whole blood, though given out in *Dowry*, succeeded in preference to brothers of the half blood. Sisters of the whole blood.

To an estate coming from the mother, the maternal cousin will succeed before the paternal cousin. If a man die without father or mother, land derived from either reverts to their relations respectively within three generations; and in failure of such, it goes to the Crown. Cousins.

Nephews of the whole blood, being sons of the several brothers, share alike in the landed estate of an uncle dying childless, without respect to the numbers of each Nephews.

brother's family. Thus, if one brother leave one son, and another brother three sons; the lands of the third brother dying without issue would be divided into four shares, one to each of his four nephews. But if one of the first-mentioned brothers were still alive at the death of the childless brother, such surviving brother would take a moiety of the childless brother's estate, and the other moiety would be divided among the children of the other deceased brother. At the death, however, of such last surviving brother, if he should not have disposed of his moiety of his deceased childless brother's portion, by sale, gift, or bequest, a fresh division of the childless brother's estate will take place among his nephews or their respective heirs, as if his brother had not survived him; that is, the nephew's side; all share alike in the estate of their deceased childless uncle. Mr. Sawers adds, "It is held that the children of brothers are the nearest of kin to a man after his own children, and that the children of his sisters are of the same affinity to each other that the children of brothers are to each other; and that they cannot intermarry, being, in fact, called and considered brothers and sisters. But it is held that there is so little affinity of blood between the children of a brother and those of a sister, their custom makes their intermarriages the most approved connexion. The son of the eldest brother has a sort of vested right to have for his wife his cousin, the eldest daughter of his father's eldest sister; and the con-

nexions of the most respectable families often run in this way from generation to generation."

If a son acquire independent property in his father's lifetime and die, leaving issue, before his father, his property goes to his widow and children. But his father, if destitute, would be entitled to maintenance out of the estate of his deceased son, but would have no deeper interest in it, nor could he object to the widow and children of his deceased son selling the estate, though such sale would destroy the means of maintaining him. If the son leave an only daughter, the father would have the right to possess the acquired estate of his deceased son; but he could not dispose of it in any way prejudicial to the parveny right of inheritance of the daughter to her father's property.

Son dying before his father.

If a wife and children are obliged to quit the husband's house from the means of subsistence failing to be sufficient for the whole family, this does not prejudice the right of inheritance of her or her children to the property of the husband.

Wife quitting the husband's house on account of destitution.

Sisters have a right of maintenance from their parent's estate in the event of their becoming destitute by the misfortune or bad conduct of their husbands. Nor is this right destroyed by the sale of the parental estate by the brothers; for any person purchasing such an estate, without the concurrence of sisters who may have such claim upon it, would be liable to the sisters of the seller for the same support out of the estate as their

Sisters becoming destitute.

brother would have been bound to afford them in the event of their becoming destitute; and the same obligation would be upon the holder of the estate in the event of its passing from the brother's son to his uterine brother by a different father.

Deformed sister.

If a deformed sister, for whom a suitable match cannot be got in Deega, get herself a suitable husband to live with her in Beena, the brothers must give up to her a due portion of her parents' estate, according to the number of children; which portion she can dispose of as she thinks fit; but should she die childless and intestate, her share reverts to her brothers, and does not go to her husband.

Succession to a person dying childless and leaving parents.

If a person die childless, but leaving parents, brothers and sisters, the property which the deceased may have received from his or her parents reverts to them respectively [if from the father, to the father; if from the mother, to the mother]; and his acquired property, whether land, cattle, or goods, also goes to his parents; but only the usufruct of it. The parents cannot dispose of such acquired property by sale, gift, or bequest; but it must devolve on the brothers and sisters, who, however, have only the same degree of interest in their deceased brother's acquired property that they have in their deceased parent's estate; ultimately it is equally divided among the brothers of the whole blood of the deceased, or their sons, according to what would have been their father's share; failing brother's sons, it goes to sisters of the

whole blood, or their sons; failing them, to the brothers of the half blood, uterine, and their children; failing them, to the sisters of the half blood, uterine, and their children; failing both brothers and sisters of the half blood, uterine, and their children, to brothers of the half blood by the father's side, and their children; next, to sisters of the half blood by the father's side, and their children; next, to the mother's sister's side, that is to say, the mother's sister's children; failing them, to the mother's brothers and their children, next to the father's brothers, and their children; and, failing them, to the father's sisters, and their children.

The father is not the heir of the property of his children born in Beena marriage which they have acquired through their mother, the maternal uncles or next of kin on the mother's side being the heir to such property; but the father will succeed to such children's property otherwise acquired.

Father no heir to child's property acquired from Beena mother.

When a person dies intestate, leaving no nearer relations than first cousins, called brothers or sisters, his or her acquired property goes in equal shares to such cousins by the father's and mother's side; that is to say, to the children of the father's brothers and to the children of the mother's sister or sisters, share and share alike.

Shares of first cousins.

If a man die leaving relations on his mother's side, but none on his father's side, his father's land will pass

How a father's land passes.

to his mother's family, his widow, if he left one, having a life interest in the property.

Descent of  
Sannasses.

Sannasses and title deeds of all descriptions by the possessors of which lands are held "*Patta condooes*," by which the family designation or title is preserved, as also all articles received as royal gifts, follow the descent of the land, and are considered the common property of the heir.

Persons inca-  
pable of inher-  
iting.

Persons incapable of inheriting are: 1st, such as have assaulted and struck or wounded their parents; 2ndly, such as have been discarded by their parents for shameful conduct; but mental or bodily infirmities do not disqualify from inheritance.

An intestate's  
immediate  
heirs.  
Widow's  
rights.

When a man dies intestate, his widow and children are his immediate heirs; the widow having the custody and administration of the property as long as she lives in her husband's house, conducting herself with prudence and circumspection, and doing nothing to cause shame or disgrace to the family, nor squandering the property. Provided the widow thus conducts herself with propriety, her children cannot call for a division of the property till her death, or till she quits her deceased husband's house; but the children of a former marriage of the husband may claim their shares. The widow is entitled to no more than a like share as one of the children. But she is besides entitled to what was considered her own wearing apparel, jewels and ornaments,



commonly worn by herself and given to her by her husband; also to all the property she may have brought with her on her marriage, and what she may have acquired herself in the shape of presents, gifts or bequests, or what she may have purchased with the produce of her own hands, or gained by trade. Cattle are considered to belong to that description of moveable property of which she is entitled to an equal share with her children, out of her husband's estate. A widow, whose husband has left no issue, is entitled, at her husband's death, to the whole of his moveable property, including money, grain, goods, slaves, and cattle, unless the three last mentioned have been heirlooms in her husband's family; that is, what he had inherited or received with the landed estate of his ancestors. But all goods or cattle acquired by the husband during the coverture, by purchase or by gift from others, the widow is entitled to a share of the produce of the slaves or cattle, being of the original stock of the husband's family. On leaving her husband's house, the widow has a right to carry with her all such property as she is entitled to as above stated. But if her husband's family lands have been burthened with debt, or mortgaged by her husband's ancestors, the widow must give up as much of the moveable property as will amount to half the sum necessary for the disburthening or dismortgaging the landed property of the deceased husband: and if the deceased husband had himself so burthened or mort-

gaged his family estate, then his moveable property is liable, to the last article, to be disposed of for the liquidation of the same; in which case, the widow would get nothing, if the debt of the deceased exceeded the value of his moveable property to which she would otherwise be entitled.

Moveable property, how divided on death of widow.

At the death of the widow, the moveable property is to be divided equally among the children, except the daughters who have already received their shares on being given out in marriage.

In the event of there being no children, the widow inherits the whole of the household goods, grain in store, and the cattle which have been acquired, together with the increase in the husband's stock of estate subsequent to the marriage. The property, however, which the husband had inherited from his parents is generally claimed by his nearest kindred, and the widow has no share of it.

Moveable property of an intestate leaving neither widow nor children.

If a man die intestate, leaving neither widow nor children, his moveable property goes to his parents; failing them, to such of his brothers and sisters as have rendered him assistance and support on his death bed; failing them, to his next of kin, or those who have rendered them assistance, except in cases where the property is more than amounts to a fair recompense to the stranger who has rendered the deceased assistance; in which case, the stranger must be satisfied with a compensation out of the deceased's property, and the

remainder goes to the next of kin as above mentioned; failing parents and sisters and brothers, the nephews and nieces inherit according to the shares to which their parents would have been entitled; and in this respect the children of brothers and sisters have equal rights; and failing sisters and brothers and their children, the moveable property of the deceased will go to the uncle and aunts or their issue, on both father's and mother's side; that is to say, one-half to the kindred on the father's side, and one-half to the kindred on the mother's side. But these rules apply only to the acquired property of the deceased; since whatever he received through his mother will revert to the mother's family, and what came from or through his father will revert to his father's family.

The right of inheritance of children of the half blood is postponed to that of the children of the whole blood. *Vide supra*, as to the relative rights of children of the half-blood, as regards landed property.

Whole blood precedes half blood.

A wife dying, leaving a husband and children, her peculiar property of all descriptions goes to her children, and not to her husband.

Mother's peculiar property goes to children.

A wife dying barren or without surviving children, all the property which she received from her parents reverts to them, or to her brothers and sister, and their issue. The husband inherits all the property acquired during the coverture; but the property acquired under a former marriage, or when single, would go to her nearest

Succession to property of a childless wife.

of kin in her own family; but, failing brothers and sisters and their issue, the husband comes in before the wife's uncles or aunts and their issue.

Rights of the Crown.

The property of a deceased person goes to the crown only when no kindred can be found to inherit (*vide supra* par. 90), as the landed property goes to the crown.

Mother when heiress to her children.

The mother is heiress to the acquired property of her children, dying unmarried and without issue, and that the same is entirely at her disposal. But should she die intestate, the property would go to the brothers and sisters of the whole blood equally, and, failing them, to the brothers and sisters of the half blood uterine.

Unmarried woman dying intestate.

Lands as well as moveable property acquired by an unmarried woman, dying intestate and without issue, follow the above rules of succession; but parveny property goes to the nearest male relations only, of that side of the family from which she inherited.

Property of a concubine.

Property given to a concubine, or acquired by her, if she die intestate and without issue, follow the same rule of inheritance as the property of an unmarried woman; but if a concubine or a prostitute leave issue, such issue will inherit their mother's property.

Debts of deceased payable by heirs.

The debts of the deceased must be paid by them who inherit his or her property, according to the value of their respective shares. Debts of money, paddy, or grain, should be paid by those who inherit the lands. But if the moveable property of the deceased be large,

in proportion to the landed property, the heirs of the moveable property must pay a share of the debts, in proportion to the value of such property.\*

It is a pious duty incumbent on sons to pay their parents' debts, although they may not have inherited any property from them.

If a *Beena* husband contract a debt without the consent or knowledge of his wife, she is not liable to pay it. Wife's liability for husband's debts.

A *Deega* wife is liable to pay the debts of her deceased husband, whether she have inherited property from him or not. The husband is liable to pay such debts of his wife as she has contracted for the purposes of the family; but not such as have been unnecessarily contracted, and without the knowledge of the husband.

When the family of a man or woman has been separated and apportioned off [that is, it is to be presumed, the state divided], and such man or woman has contracted a second marriage, the members of such separated family neither has a right to share in the estate of their parent at his or her death, nor are they liable for the debts of their parent contracted after the separation. The issue of the second marriage shall inherit the whole estate, and be liable for the debts: but the separation must have been complete and indubitable. Portioned children.

A parent is not liable to pay the debt of a child, unless the debt have been contracted for the benefit of Parents' liability for child's debts.

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\* But this must now be subsequent to the modern testamentary jurisdiction.

his parent's family. A father could not be taken in execution for his son's debt.

#### ON GUARDIANSHIP.

Children, being minors and left orphans, provided they have not been placed specially under the guardianship of any one by their parents, fall under the guardianship of their maternal grandfather or grandmother; failing them, to that of their maternal uncles or aunts; failing them, to that of their paternal uncles and aunts; and failing them, to that of an adult brother or sister.

The guardian is entitled to the administration of his ward's own estate. But should the ward have no such estate, the guardians, being of the mother's family, cannot call upon the grandfather or grandmother on the father's side, to whom the father's hereditary property shall have reverted at his death, to afford the means of support to their ward; but they must support their ward in such case themselves, or give up the ward to the guardianship of the grandfather or grandmother on the father's side.

No instance occurs of a guardian having been called to account for the *produce* of his ward's estate. He must account for the original property, whether in land or goods; but the guardian has the usufruct of his ward's estate during the minority.

Guardian,

The guardian is not necessarily the heir of the ward;

but it is very common, when a person leaves minor children, to execute a deed expressed literally thus: "I give my land and my child to such a person." By which deed, so expressed, the guardian becomes the heir of the ward. And this construction, as to the right of inheritance, has even been put upon deeds of a more ambiguous wording, such as, "I give charge of my lands and my child to such a one." In some instances there have even been decisions [declaring, it is to be presumed, the guardian to be the heir of his ward] given by the *Maha Nadooa* [High Court], and confirmed by the King, upon no other grounds than that of guardianship; but, in these cases, the child must have been taken charge of in infancy by the guardian, who must, therefore, have had more the character of a parent than a guardian.

A widow may appoint a guardian for her child or children, with the right to inherit such children's property, in the event of their dying in minority and without issue; but such guardian, appointed by the mother, will not inherit the property which the ward inherits through his or her father, which will revert to the father's family.

#### AS REGARDS THE ADOPTION OF CHILDREN.

A regularly adopted child, if the adopting parent has no issue of his or her own body, inherits the whole

estate of the person adopting him or her.\* But if the adopting parent have issue, male or female, of his or her body, the adopted child will in that case have but an inferior portion of the estate, with the issue of the parents. The chiefs did not say positively what proportion such share should bear to the share of each of the real issue; but they think it should be one-fourth of such share.†

The adopted child must be of the same caste as the adopting parent; otherwise he or she cannot inherit the hereditary property of the adopting parent.

A regular adoption must be publicly declared and acknowledged;‡ and it must have been declared and generally understood that such children are to be an heir of the adopting parent's estate. The declarations of deceased persons are often very material on questions of adoption.§

The fact of a child being reared in a family, even though a near relative, is not to be construed into a regular adoption, without its having been openly avowed and clearly understood that the child was adopted on purpose to inherit the property.

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\* This does not apply to the Maritime Provinces. (240, *D. C. Tangalle*, 6th May, 1837; *Morg. D.* 153.)

† In one case, one-third was decreed. (13071, *D. C. Kandy; Austin*, 51.)

‡ But requires no deed. (13071, *D. C. Kandy; Austin*, 51.)

§ Affirmed in *Austin*, pp. 52, 64, 74. What constitutes adoption is a mixed question of law and fact. (28190, *D. C. Kandy; Austin*, 202.)



On the principle above laid down, that an adoption should be publicly declared; when it was attempted to establish a deed, the proof of which was unsatisfactory, and the only consideration stated for the instrument was the alleged adoption of the person in whose favour it purported to have been executed, of which adoption no evidence was offered, the Supreme Court observed that the adoption, if it had really taken place, would be a fact of sufficient notoriety to make it capable of very easy proof, and, in the absence of such proof, concurred with the court below in considering the deed not proved. No. 1220, Ruanwelle, 21st October, 1833, the adoption of a child, supposing the fact to be proved.

On the other hand, it may be established to form a good and valid consideration for an absolute gift or transfer in favour of such adopted child. Thus, a plaintiff claimed certain land by virtue of an uterine gift from his uncle, P. Ralle, which was proved; but the defendant claimed under a later deed from the same person. Witnesses deposed that P. Ralle had first adopted the plaintiff's younger brother, who died, upon which he asked the mother of the children to be allowed to adopt the plaintiff; that she at first objected to this second adoption, on the ground that she had already parted with one of her children; and then that P. Ralle executed the deed in favour of the plaintiff, who lived with his uncle till his death, and remained in his house till after the funeral. The Court of Kornegalle,

observe that the law is altered as regards deeds of lands passed subsequently to 1st July, 1835, by Ordinance No. 7 of 1834.

Ancient execution of deeds

As regards the execution of deeds, it never was customary for the witnesses to sign the deed: it was the general practice for the party executing it to make a mark by a mere scratch, or by writing one letter on the leaf before it was written upon. This was commonly done before the leaf was delivered to the writer by the person who was to execute the deed. But its being marked or signed by him was not considered essentially necessary to its validity, if it was completed and read over to him before his death; or if it were proved that it contained the last verbal declaration of the person transferring or bequeathing the property, such instrument would be held to be valid. In short, all that was necessary was to prove the will or intention of the disposer of the property. It was common, when a writer could not be procured at the moment, for the person making the bequest or transfer to sign or mark the *talpot* or *olah* upon which the deed was ultimately to be written. When a man's last hour approaches, and, for want of a writer, the time will admit of doing no more, the dying man sometimes writes a single letter, or makes a scratch on a blank *olah*, at the same time verbally declaring his will. In such case the deed may be written in his name immediately after his decease, and, the names of those who were present at the transaction

being subjoined as witnesses, it is held of equal validity.

The customary ceremony on such occasions was for the person making the transfer or bequest to deliver the *talpot*, *olah*, or *ketta* into the hands of the person in whose favour the bequest or transfer was made, who received it with reverence and respect; after which he carried it round to the bystanders, and delivering the deed to each of them, received it back from each in a congratulatory manner.

It was considered sufficient to invalidate a deed, that it was in the handwriting of the person in whose favour it was drawn; and this was certainly a necessary precaution where deeds were executed in so loose a manner.

It was not necessary that all the witnesses mentioned in the deed should be present; it was only necessary that they should have been informed by the person executing the deed, that he had executed, or intended to execute, such a deed, and that its contents expressed his will or intention, declared at the time he marked the leaf. The names of witnesses absent at the time of writing are sometimes inserted in the deed; and it is considered sufficient, *provided* the deed be read to them shortly afterwards, in the presence of the parties, or of him who executes it. It is impossible that the insertion of the names of persons not present at the execution can give any validity to the deed. Nor is this position

inconsistent with the above; for the reading over the deed to the witnesses in the presence of the parties, or of the person executing it, is in fact tantamount to a fresh execution and delivering of the deed, though it would, no doubt, be better and more satisfactory that each witness should sign the instrument, in order to leave less possibility of doubt as to the identity of it.

When no deed or *ketta* was given, on a bequest being made, it was customary for the person making the bequest to lick the right hand of the donor, and to deliver the bequest in his or her favour. The strict observance of all such ceremonies gave the greater validity to the act and deed. In one case the donor of land gave one of his teeth to the donee as a token of his intention.

Contracts formerly.

As trade was unknown to the greater part of the Kandyan nation, their contracts were neither numerous nor varied, and consisted chiefly in the borrowing of money or grain for present necessity; money to pay fees or fines to their chiefs, or by the chiefs to satisfy similar demands from the King; grain for sowing and for subsistence. If the amount borrowed were large, writings were usually executed, with mortgages of lands or moveable property. If small, some article of property was delivered in pawn, with or without writing, except in transactions between individuals who had such confidence in each other as to lend without either.

If money be lent on personal security, or if security

be afterwards given when the debtor is pressed for payment, which is a more frequent practice, such security is usually to be answerable for the debt first, in case the debtor die or abscond within a fixed period; or, secondly, in case the debtor fail to pay within a fixed period. In the first case, the security has only to produce the body of the debtor and deliver him to the creditor at the expiration of the appointed time.

In the second case, the creditor demands his money of the surety [the time being expired], without having recourse to the original debtor, or distraining his property, and the surety must seek his remedy from the debtor.

Money is usually borrowed on one of the following conditions:—1st. On mortgage of land, with a stipulation that it shall become the absolute property of the creditor, if the money be not paid within a specified period, the land being possessed by the creditor, to enjoy the produce in lieu of interest. 2nd. On mortgage, generally without the stipulation above mentioned; but the creditor possessing the land for interest. 3rd. On mortgage, possession being given to the creditor, to enjoy, not only on account of interest, but on condition that one or more *ridies* of the principal sum borrowed shall be discounted [deducted from the debt] every year, till the whole be paid off; the usual rate being one *ridie* for every *pela* of land. 4th. On mortgage without delivering possession of the land, but only of the title deed,

Loans and mortgages.

with the stipulation that it shall become the absolute property of the creditor if the debt be not satisfied within a fixed period. 5th. On mortgage without possession, but with a stipulation to pay a portion of the annual produce in lieu of interest. 6th. Without any mortgage; but with a stipulation to pay a certain quantity of paddy annually in lieu of interest. In the two last cases, it is more frequently a caution that one or more *ridies* of the principal be also liquidated annually.

Parveny lands  
in former days.

In former days, the person in possession of a parveny landed estate inherited from his ancestors, and having children, might not mortgage such estate without the consent of his wife, if the children were minors, or of the children, if they had arrived at years of discretion. But the consent of more remote heirs was not necessary to render the mortgage valid against them. This custom has become obsolete, and never was universally acted on; but prudent persons take the precaution, both in purchasing land and in lending money on mortgage, to have the consent of the heirs, and that consent either publicly expressed or entered in the deed.

A mortgage made by a co-heir of more of the family estate than his own portion only being liable for the debt.

Any person, other than the rightful owners, holding property, cannot sell, mortgage, or pawn such property to the prejudice of the rightful owner; that is to say, the rightful owner shall be entitled to recover his pro-

erty, free from all burthens which the person who wrongfully holds possession of it may have attempted to impose upon it.

A widow, having the administration of her deceased husband's estate, may, during the minority of her children, mortgage the landed property, if necessity require it. But this must be clearly to satisfy the necessary and urgent wants of the family, otherwise the children might not be held liable to pay the debt. But, in all cases where the children are as much as fourteen or fifteen years old, their consent is necessary to render such mortgage valid against them and their lands.

Widow, when she may mortgage her minor children's property.

If no lands were delivered into the creditor's possession, nor any share of produce assigned to him, payment of interest in money was stipulated, according to one of the following modes:—1st. An increase took place [usually one hundred per cent. in Kandy, and fifty per cent. in the country]; and if the principal were not paid within the year, no interest was charged; and though payment were protracted for any indefinite term beyond the year, the interest did not increase; that is, did not exceed the one hundred or fifty per cent. above mentioned. 2nd. A certain rate of interest was stipulated to be paid per mensem, or per annum; and whatever amount might accumulate, it admitted no limitation. The rate of interest long sanctioned in Kandy by the example of the Royal Treasury, from which it was frequently lent to traders, was twenty per cent. per annum;

Interest.

but as no prohibition existed, the moneyed men, who were few, and consisted chiefly of Malabars and Moormen, often exacted three, four, six, and latterly even eight *pice* a month for each P. N. Pagoda. About ten years before the establishment of the British Government, the rate was limited, by the King's order, to two *pice* a month for each P. N. Pagoda, which was then equivalent to ten *ridies*. But this regulation is not considered to have affected the interest stipulated to be paid according to the first mode: money was usually borrowed under immediate pressure, and under the latter condition by traders who were almost exclusively of the two classes just mentioned.

A premium or preliminary present was also sometimes given for the favour of the loan, according to the necessity of the borrower and the rigour of the lender. It usually consisted of cattle, paddy, cloths, or some gold or silver articles, and sometimes stood in the place of interest, if the money were repaid within a short stipulated period, but not otherwise. This present was called *atchicareme*, and a similar word in the Maritime Provinces means earnest money paid by a purchaser of property to the seller to fix his bargain.

It was a very general practice in the country to borrow paddy or other grain, for seed and for consumption, payable at the next ensuing harvest. The established rate of interest was fifty per cent. and the creditor often went, or sent his people, to the fields to secure

Interest on  
borrowed  
grain.



payment. If, after receiving it on the spot, he re-delivered it to the debtor, on his entreaty, and allowed a respite till the next season, the whole was considered as principal, and fifty per cent. charged upon the whole amount next year. This exaction of compound interest was at one time forbidden by the King, as oppressive to the poor; but, of course, could only be partially prevented in practice. If the debts were suffered to remain outstanding, without such receipt and re-delivering, no more interest was charged. In the Seven Korles and Nuwere-Kalaweya, no interest was charged on paddy, because it was an abundant article. In Dumbera no interest is payable on money or grain; but in these districts it is often customary to receive a surplus of one or two *lahas* on every *pela* of grain, not on account of interest, but in order to compensate for the diminution of quantity by drying. The case of this exception in Dumbera is not sufficiently explained; but it is said to have been established by a former King's order. For loans of paddy, also, the borrower was sometimes, but by no means universally, required to give a premium. The common rate was four *pice* per *pela*; but, in times of scarcity, has risen to six, and even eight, *pice* for seed paddy. In countries where it was customary to charge interest on paddy, the premium occasioned no diminution of the interest.

If a debtor died, the principal was recoverable from his heirs, to the extent of the assets of the deceased;

but not the interest, whether the loan were of money or grain.

Services in  
reference to  
mortgaged  
lands.

Where land is delivered into the temporary possession of the creditor, the mortgager still performs King's service, to which the land is liable. Accordingly, in cases where it is matter of dispute whether the land has been sold absolutely, or only mortgaged, we often find each party endeavouring to establish the performance of this duty by himself, as a proof, supposing the service to have been performed by the original owner, that the land had only been mortgaged; or, supposing it to have been performed by the occupier, that there had been an absolute sale.

Debtor and  
creditor.

The creditor possessed considerable power over his debtor; but rarely exercised it in a severe degree till after numerous solicitations, made in vain, for the recovery of his right. For it was customary to make repeated demands to allow further respite, and to fix another term, accepting landed or personal security, on one of the above-mentioned conditions; and a new loan was often procured upon mortgage, to liquidate former and smaller debts.

Sometimes, on complaint to a chief, for recovery of a debt, the debtor would be summoned, and the claim investigated in regular course; and when, after admission or proof of the debt, payment was directed and unreasonably delayed, the chief, on application, would sometimes send officers to seize the debtor's property,

and deliver to the creditor a pledge sufficient to satisfy his demand. Public sales of property under execution for debt were entirely unknown. It is scarcely necessary to say that any proceeding, such as that which is described in this paragraph, would now be altogether illegal and void. But it is useful to know that such a course, for the recovery of debts, was formerly recognized; because cases often present themselves in which the rights of the parties may depend on such ancient awards or decisions, which, at the time they were passed, were received as binding.

Suits among creditors, in cases of insolvency, did not often occur; but it was held that the following simple and equitable rules [as regards the distribution of the property] should be observed:—The mortgaged property must answer in preference for the debt due to the mortgager. Property, the possession of which had been fairly obtained, should answer for the debt due to the possessor. Any other property must be shared by the creditors in proportion to their respective debts, without preference on the ground of priority of origin or of decree.

The relation and heirs of a minor may interfere and prevent his selling his property. But if they do not so interfere at the moment, or as soon as it comes to their knowledge, they have no remedy afterwards. If, however, it was done without their knowledge, they have their remedy, if their relative died under age.

The same rule applies to females, being minors, as to males.

A minor,  
when he may  
make a will.

A minor, at the age of ten years, may dispose of his or her property by will; but to make such will or bequest valid, it must be proved that the minor was fully aware of the import and consequences thereof; and, further, that there were sufficient grounds for cutting off the inheritance from the heir at law.

## ADDENDUM No. 1.

*Referred to in page 246, Vol. i.*

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RULES AND ORDERS TOUCHING AND CONCERNING  
THE FORM AND MANNER OF PROCEEDING IN APPEALS TO  
HER MAJESTY IN COUNCIL.

PROMULGATED IN OPEN COURT ON THE SIXTEENTH DAY  
OF DECEMBER, 1842.

1. It is ordered that, from and after the first day of January next, the 9th clause of the Rules and Orders touching proceedings in appeal before the Supreme Court, dated the first day of October, 1833, be revoked.

2. That every petition, praying leave to appeal under the 52nd clause of the Charter, shall also pray that the judgment, decree, sentence, rule, or order, intended to be appealed against, may be brought before the judges by way of Review.

3. Every such petition shall set forth the time and place at which the said judgment, decree, sentence, rule,

or order was pronounced, made, or given; the number of the suit or action in the District Court; and the names of the parties thereto. And the party lodging any such petition with the registrar shall, within forty-eight hours after lodging the same, cause a notice, setting forth a copy thereof, and the date on which it was so lodged, to be served on the adverse party or parties.

4. If the record has, since the date of the said judgment, decree, sentence, rule, or order, been remitted to the District Court, an order will, on motion to the Supreme Court, or any judge thereof, issue to the District Court to return the record, with the said judgment, decree, sentence, rule, or order, and all proceedings had thereon or subsequent thereto, certified under the hand of the District Judge, to the Supreme Court.

5. In all cases where by law any party shall be required to give security for the performance of any judgment, decree, or sentence, which may be pronounced or made upon an appeal to Her Majesty in Council, such party shall, if such security is to be by bond, enter in a book, to be kept for that purpose in the registrar's office, the names, description, and places of abode of the proposed sureties, and shall give due and sufficient notice thereof to the adverse party or parties, specifying the time appointed by any judge of the Supreme Court at which the said sureties will justify their ability to enter into such bond: and if such security is to be by

way of mortgage, or voluntary condemnation of or upon some immoveable property, such party shall deposit in the said office the title deeds and other documents having reference to such property, and shall give due and sufficient notice that he has so done to the adverse party or parties, specifying the time fixed for his attendance to execute the mortgage or other deed. If, after due notice, the party or parties receiving the same do not appear to oppose the said security, or pray for and obtain further time to examine into the sufficiency of the sureties, or the value and situation of the immoveable property to be mortgaged or secured, or the validity of the deeds relative thereto; and the said sureties shall swear or make affirmation as to their sufficiency, or the party tendering such mortgage or other deed shall swear or make affirmation as to the sufficiency thereof, as the case may be: then the judge shall admit the party and his sureties to enter into the said bond; or shall admit the party to execute such mortgage or other deed, as the case may be.

6. The cause shall be set down for hearing in review on some day to be appointed by the Supreme Court, and of which due notice shall be given by the registrar to all parties.

## ADDENDUM No. 2.

DIGEST OF THE CASES DECIDED BY THE SUPREME COURT  
ON THE QUESTION OF OFFENCES.

It was found impossible, considering the size of this work, to include a complete treatise on criminal jurisprudence; nor does it seem necessary to do so, as the best English treatises are in the hands of every one: the author has, therefore, simply added this digest of the cases decided by the Supreme Court on the question of offences. A complete treatise on *Criminal Practice* will be found in the first volume.

Abuse of  
force.

Resisting any person in the discharge of his duties, while removing a person infected with small pox, by virtue of a warrant directed to him by the Justice of the Peace, is an offence under No. 17 of 1844, § 60. (3047, *Negombo*, 11 Feb. 1848; *P. C. Ca.* 17.)

An unlawful detention of the person, being in the nature of a false imprisonment, which includes an assault, is within the jurisdiction of the Police Court; but does not authorize the Police Court to make an order similar to a writ of *habeas corpus*. (12438, *P. C. Galle*,



31 Dec. 1851; *P. C. Ca.* 37: 20876, *P. C. Galle*,  
30 Jan. 1856; *P. C. Ca.* 85.)

Pulling down a fiscal's notice of sale, not an offence.  
(15169, *P. C. Callara*, 13 Feb. 1856; *P. C. Ca.* 85.)

"Forcibly taking away property of another, is not an offence," as charged, if there is not in the evidence sufficient alleged for a criminal prosecution. (10018, *P. C. Point Pedro*, 19 March, 1856; *P. C. Ca.* 89.)

"Feloniously branding cattle, and concealing them," is not an offence, unless it amounts to receiving, theft, or an offence under some ordinance; and then it should have been so laid. (2659, *P. C. Ratnapoora*, 14 March, 1853; *P. C. Ca.* 65.)

A threat of immediate violence, coupled with an intention and a present ability to inflict it, on an officer, if the officer should proceed to execute his duty, is an obstruction of that officer in the execution of his duty. (22880, *P. C. Ballepitty Modere*, 2 Sept. 1863.)

It is necessary, to sustain a prosecution under the 17th clause of the Ordinance No. 15 of 1843, that the officer assaulted or resisted should be proved to have been acting in execution of a duty imposed upon him by the ordinance. It must, therefore, appear that the officer was acting in execution of a warrant of apprehension issued or endorsed by a Justice of the Peace of the district for which he had been appointed to act, as required by the 5th clause; or that there was reasonable suspicion that the person arrested had committed some

offence of magnitude, as contemplated by the 11th clause. (27457, *P. C. Jaffna*, 13 *March*, 1860.)

Obstructing a  
fiscal's officer.  
Ord. No. 1 of  
1839.

A fiscal's *peon* went to serve summonses on coolies on an estate, and took a *cangany* with him to point them out. The owner of the estate refused to permit the *cangany* to enter the estate. The *cangany* was not a fiscal's officer, and not one of the officers contemplated by the 10th clause of the ordinance. A fiscal's *peon* has *no* right to take any person to an estate, unless that person has been duly authorized to point out the parties on whom process is to be served. (7354, *P. C. Badulla*, 24 *March*, 1863.)

A criminal complaint can be preferred by any one, and not by the party injured only. (9949, *P. C. Gampola*, 14 *Feb.* 1860.)

Arson.

Sentence reserved for consideration of the Supreme Court: Judge's opinion that the sentence must, under the ordinance, include corporal punishment, with transportation or imprisonment; and the prisoners are ordered to be detained in gaol, and brought up to receive their sentence at the next Matura Sessions.

*Second, P. J. Starke*, considers that where an ordinance declares that a party guilty of an offence shall be liable to two or more punishments named, such liability is in the nature of a maximum of punishment; and it is in the discretion of the court, according to the circumstances of the case, to award one of the punishments only; and that an award of both or all the punishments

in all cases is not imperative: and it is conceived to be against the object and purpose of the provisions in the due distribution of punishment, according to the nature of the crime or offence. *Ederibandem Mamgey Abe and Aturuliya Leam Duregey Babova* — for *Arson*: 23 Dec. 1853; Coll. Court.

The motion in arrest of judgment is overruled, the indictment is sufficiently supported by the evidence adduced. It appears that the words "Notarial instrument" occurs before the purport of the instrument is set out, and being matter of inducement, the record would, in England, have been ordered to be amended by striking out the word "Notarial": vide 2, *Reess*; C. P. 798-9, and note (9); and whenever such amendment is allowed, the Supreme Court would reject the words as surplusage; as, although the court has by its rule of the 6th December, 1845, ordered that no objection shall lie to the form of any information in any case where such objection would not be allowed by the law of England upon any indictment, it has never gone on to further declare that all objections which are valid by the law or practice of England shall be equally allowed here. On the contrary, the Supreme Court has always mainly looked on such technical objections to see whether the information stated the offence with sufficient clearness and certainty for the prisoner to know the crime with which he was charged, and to be able to make his defence to it; and in this case the information

Arrest of  
judgment.

can leave no doubt as to the nature of the instrument: viz.—that it purported to be a deed of sale of the garden mentioned therein, but was incomplete for want of the due attestation of a notary, the gist of the offence laid therein being, that the prisoner, in his office of notary, had fraudulently omitted to seal and sign such deed of sale. (*Queen v. H. de Loze Wickresmesinhe*, 4th December, 1847, *Coll.*)

## Assault.

When an assault without legal justification is proved, it is the duty of the Police Magistrate to convict. He has no power to dismiss the case because he thinks it trifling. Such a power is given in English Acts, but not in our ordinances. To discourage trumpery charges, nominal fines should be inflicted. (1569, *P. C. Chilaw*, 6 Nov. 1863.)

## Breach.

A breach of a condition in a lease is not a criminal offence. (3715, *P. C. Batticaloa*, 29 Jan. 1850; *P. C. Ca. 27.*)

## Cattle stealing.

Where the accused have been previously convicted, or when the offence of cattle stealing is common in a district, the Supreme Court will inflict corporal punishment on cattle stealers; but not generally on convictions of receiving cattle. (7404, *D. C. Matura*, 1 Sept. 1855.)

## Corporal punishment.

The Supreme Court never orders flogging on the bare buttocks in *public places*; and only twenty or thirty lashes, when laid on the buttocks, to be *privately* inflicted in the gaol. (*Ibid.*)

Failing to pay the commutation is not *per se* an offence within the 5th section of the Commutation Ordinance. The offence created thereby is failing to pay the commutation, *and* not performing the labour when required. (14598; *P. C. Madawellette*, 22 Feb. 1853; *P. C. Ca.* 65.)

If defendant elects to perform labour, under the Commutation Ordinance, and fails to perform, he has committed an offence; but if the Chairman of the District Committee afterwards allows him to commute, and gives him a receipt, the offence is condoned. (15711, *P. C. Matura*, 12 March, 1856; *P. C. Ca.* 86.)

There must be a *mens rea*, or a *mens conscia* in the performance of an otherwise innocent act, before the court can hold such an act to be criminal, even though made penal under a statute. (16940, *P. C. Kaigalle*, 29 Oct. 1861; *P. C. Ca.* 160.)

A person should not be charged with one offence, and found guilty of another. (345, *P. C. Ratnapoora*, 14 July, 1846; *P. C. Ca.* p. 3.)

A person cannot be found guilty of two offences contained in one indictment or charge, and have a double punishment imposed upon him. (555, *P. C. Jaffna*, 17 June, 1851; *P. C. Ca.* 35.)

The Supreme Court is of opinion that the words "on board or on shore" are explanatory and subordinate of the landing or receiving goods; and that, as the parties were not in either of these situations, the charge

of obstructing the officer does not lie. (*Coll.* 7313, *D. C. Caltura*, 13 *Sept.* 1853.)

Deputy  
Queen's  
Advocate.

It is expressly provided by Ord. No. 15 of 1843, §§ 50 and 52, that the Deputy Queen's Advocate shall have power, at any time before conviction, to abandon or put a stop to any prosecution commenced by him in any court; and that, in the event of the prisoner having pleaded, he shall thereon be entitled to an acquittal. The failure of the Deputy Queen's Advocate to appear and prosecute in a former case, can amount only to his having abandoned it, and, the defendants never having pleaded therein, the dismissal of the case cannot be regarded as an acquittal, in contravention of the above enactment; neither does the court consider it necessary for the Deputy Queen's Advocate, upon reinstating any prosecution so abandoned, to give any reason for his failing to appear on the day appointed for trial on the first complaint. (*9016. D. C. Galle*, 17 *June*, 1854.)

Disturbance.

*Held*, that beating tom-tom and crying *Hoo* in the town of Tangalle is no offence, as no ordinance or proclamation makes such acts offences in that town. (*4856, P. C. Tangalle*, 29th *August*, 1853; *P. C. Ca.* 69.)

"Disturbing the public peace" is not an offence known to the law of England or Holland, unless the acts brought to support it amount to a breach of the peace; but if a person is so charged, and the P. M. reports to the S. C. that the facts show a breach of the peace,

the S. C. will affirm the conviction as if a breach of the peace had been discharged. (39,568, *P. C. Colombo*, 13th September, 1856; *P. C. Ca.* 96.)\*

But riotous conduct tending to a breach of the peace is an offence. (3840, *P. C. Badulla*, 30th January, 1856; *P. C. Ca.* 84.)

Unquestionably the words of the ordinance on which the complainant relies are very strong; but they do not over-ride the great general principle of "*actus non facit reum nisi meus sit rea.*" We followed this principle in deciding the case of *P. C. Kaigalle*, 16,940 (reported in *Beling v. Van der Straaten*, p. 160), notwithstanding the strong words of the ordinance on which that case proceeded; and that principle was acted on by the English Court of Queen's Bench in the case of *Rex v. Sleep*, xxx, L.J.M.C. 170. (70,626, *P. C. Colombo*, 10th November, 1863, *Coll.*)

Disturbing  
public wor-  
ship.

When a Christian congregation is assembled in their regular place of worship to join in public prayer and to listen to the religious exhortation of their minister, they are assembled for the performance of public worship within the meaning of the 36th clause of No. 17 of 1844; and that any one who molests them during such performance is liable to punishment. (64,740, *P. C. Colombo*, 29th September, 1862.) *N.B.* Held that this clause applies to the whole colony.

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\* The marginal note to this case in the *P. C. Ca.* is entirely erroneous.

Evil speaking. Using abusive expressions in the public streets is not an offence at common law; but possibly the evil speaker may be proceeded against under § 2 of ordinance No. 4 of 1841. (*Note*—that is, if he is behaving in a riotous and disorderly manner.) (5558, *P. C. Ratnapoora*, 23rd January, 1856; *P. C. Ca.* 83.)

Calling a person a “Pariah” is not a criminal offence. (14,593, *P. C. Jaffna*, 29th July, 1856; *P. C. Ca.* 95; citing *Van Lwn.* p. 486.)

The use of indecent language towards any one in a private place, unaccompanied, is only ground for a civil action, and no offence. (13,959, *P. C. Cleavagacherry*, 24th February, 1857; *P. C. Ca.* 105.)

Fine. If no sum is specified as to the amount of a fine, the case will be set aside. (7608, *P. C. Point Pedro*, 21st November, 1853.)

#### MURDER.—APPOINTMENT OF CONSTABLE.

Before the judge summed up—objected by the prisoner's counsel that the crime could not amount to murder, inasmuch as the persons endeavouring to apprehend the prisoner were not acting under legal authority.

That the 7th clause of the ordinance 15 of 1843 gave no authority; as it did not appear that Mr. Morris, who verbally appointed Coopey Tamby as constable, was fiscal, nor did it clearly appear that there was any headman or other officer present authorised to act.



That neither did the 10th clause give authority; because by that clause private persons are only empowered to apprehend criminals where the crime has been recently committed, which, in this instance, was not the case. The judge charged the jury, if they believed the evidence as given, to find a verdict of guilty of murder, and that he would reserve the point above mentioned. The Supreme Court, sitting collectively, having read the evidence, heard counsel for the Crown, and weighed the whole case, are of opinion, that the objections taken by the counsel for the prisoner are inapplicable to the case, and must be overruled, and that the verdict of the jury is correct; inasmuch as by the 11th clause of the 1st ordinance, under the circumstances as detailed in evidence, Coopey Tamby and his companions, acting as private persons, had authority to arrest the prisoner. Queen v. Ama Lebbe, 28th May, 1865.

The prisoner, in this case, was examined on affirmation by a justice of the peace concerning a certain theft, at a time when neither he nor any other person was under suspension, but when the justice was merely seeking information. At his trial for the robbery in question, his examination above mentioned was tendered in evidence on the part of the prosecution, and was objected to by his counsel as being taken on his affirmation. The judge admitted the evidence, but reserved the point. The jury found him guilty, and the matter came on before the Collective Court. The prisoner's counsel Evidence.

contended that statements on oath are inadmissible when given under constraint, except where a party is a witness against another charged; but that in this case no person was charged and cited. *Rex v. Lewis; Reess*, p. 856; *Rex v. Davis; Reess*, 856. He further contended that, under the ordinance No. 15 of 1843, § 23, the prisoner was not at liberty to refuse answering questions, even though having a tendency to criminate himself.

On behalf of the Crown, it was argued that the examination even on oath of a person not in custody and not under suspicion is always admissible; and cited *Starkie on Evidence*, vol. i. 198: I. Philips, 404; *Rex v. Tuttle*, 5; *Cur. v. Payne*, and *Rex v. Hayward*, *Highfield's case*, *Moody's Crown Cases*; that, supposing the court should be against him, yet that the prisoner having made another statement which was put in, and which referred to his former statement as being what he had to say, the objection was thereby cured, and such former statement rendered unobjectionable. Mr. Morgan, in reply, after supporting his former arguments, contended that as the statement taken on affirmation was not read a second time to the jury, it became unexceptionable, and must be regarded as not having been read at all.

This court, in considering the admissibility of evidence, are constrained by the ordinance to follow, with certain exceptions, the law of England. On referring to all the cases of which they are aware, the judges have

come to the conclusion, that at this day, in English courts, the examination in question is admissible. The cases down to this year are collected and commented on in Taylor on Evidence, § 649, *et seq.*

With regard to the ordinance No. 15 of 1843, the court construes the words relied on to signify that where an answer is demandable it must be given, and that they were never intended to form any exception to the general rule of evidence; and lastly, that if the examination should have been found inadmissible by reason of the affirmation, yet, having been read to the jury subject to an objection, as soon as that objection was removed it became valid evidence and required not to be read again. The prisoner will therefore be brought up for sentence. (*Queen v. Grime, Lebbe, A. L. Marcar and others*, 20th December, 1848, *Coll.*)

Point reserved is whether a jury having found a person guilty of assault who was tried for robbery on the usual indictment, for robbery which contains a substantial charge of assault—the conviction is good, it having been the custom, so far as is known, to join count of assault in the indictment. Offences—  
Joinder.

The majority of the court are of opinion (dissentiente, the Senior Puisne Justice) that as there is no distinction drawn in this island between felonies and misdemeanors, it is competent to find a prisoner guilty of assault under the form of indictment aforesaid, just as he may be found guilty of house-breaking when indicted

for house-breaking and theft. (*Queen v. Kappu, Kandoo and others*, for assault, *Coll.* 16th December, 1852.)

Offences —  
Stealing property,

The Q. R. here is whether the property in a dwelling-house alleged to be broken into is sufficiently laid in certain persons named respectively Appoohamy, Dingery, Menika, and Kiri. Menika and the property stolen are well laid as of the said Appoohamy, he, as also the others, having a gey name. Appoohamy says he is always spoken to as Appoohamy, and never by his gey name; it is the same by which his neighbours call him. Court follows the English practice on the point—that property may be laid in a person by the name by which he is generally known. (*Queen v. Waiter and Ramalnegan*, 28th July, 1851.)

Offences.

Defendant charged, by information, with the commission of certain acts which are prohibited by § 59, of 5 of 1837; and as that clause contains a substantial prohibition of those acts, without pointing out any remedy for disobedience, the Supreme Court is of opinion that the defendant might be prosecuted, as he has been, for a misdemeanor, and that he is punishable by fine or imprisonment, or both. Though a penalty be attached to, or a proceeding different from that by criminal information were provided for, the breach of the § 59 by another section in the ordinance, the prosecutor may still exercise his right of proceeding on the prohibitory clause as for a misdemeanor, or may choose to proceed according to the other provision in the ordi-

nance. It is therefore unnecessary in the case to determine whether the 8th clause has any application to the acts proved against the defendant; though the S. C. is of opinion that that section relates to certain acts done before due report and entry, and not, as is the case with regard to the accused, to acts done after such report and entry. (8937, *D. C. Galle*, 14th May, 1850.)

A person summoned for an assault, but in reality to be bound over to keep the peace, so behaved in court as, in the opinion of the P. M. "to evince an intention of committing an offence against the person of another," was bound over to keep the peace under § 8 of 4 of 1855. Held good. (1549, *P. C. Trincomalie*, 14th November, 1863.)

Peace—binding to keep.

The police magistrate cannot, on a charge of assault, bind over any party to keep the peace, but must proceed under the 2nd section of ordinance No. 4 of 1855, under which alone he has power to bind over to keep the peace. (41,054, *P. C. Galle*, 12th November, 1861.)

The 17th clause of 15 of 1843 does not apply to false evidence given to a justice of the peace, but only to officers of a subordinate character. (30,063, *P. C. Negombo*, 15th August, 1861.)

When a magistrate inflicts a fine of prevarication, he should put down in the record, in detail, his reasons for inflicting the same. (124, *P. C. Plopalli*, 27th November, 1857.)

Prevarication.

## Penalty.

When the offence is in its nature single and cannot be severed, then the penalty shall be only single; because, although several persons may join in committing it, it still constitutes but one offence. (*Rex v. Clerk*, 2 *Cowper*, 612, per *Lord Mansfield*; 2312, *P. C. Ballepitty Modere*, 2nd December, 1862.)

Thus, when two defendants were charged with removing arrack contrary to the provisions of ordinance 10 of 1848, §§ 33, 37, the S. C. held it a single offence committed by two, and ordered only one penalty. (4405, *P. C. Pantura*, 25th August, 1863.)

## Punishments.

The Supreme Court has not power to alter the amount of punishment awarded by a Police Court, provided it be sanctioned by ordinance 8291. (*P. C. Chavagacherry*, 20th June, 1853.)

## Police Officer.

A police officer is only entitled to protection when he acts within the legitimate scope of his authority. (16720, *P. C. Tangalle*, 24th September, 1860.)

## Receiving.

All cases of receiving ought to be sent to the Queen's Advocate. (59815, *P. C. Colombo*, 24th September, 1861.)

## Stolen property.

A charge of "having stolen property in possession" does not charge an offence. (3410, *P. C. Badulla*, 12th March, 1856; *P. C. Ca.* 87.)

## Stabbing and wounding.

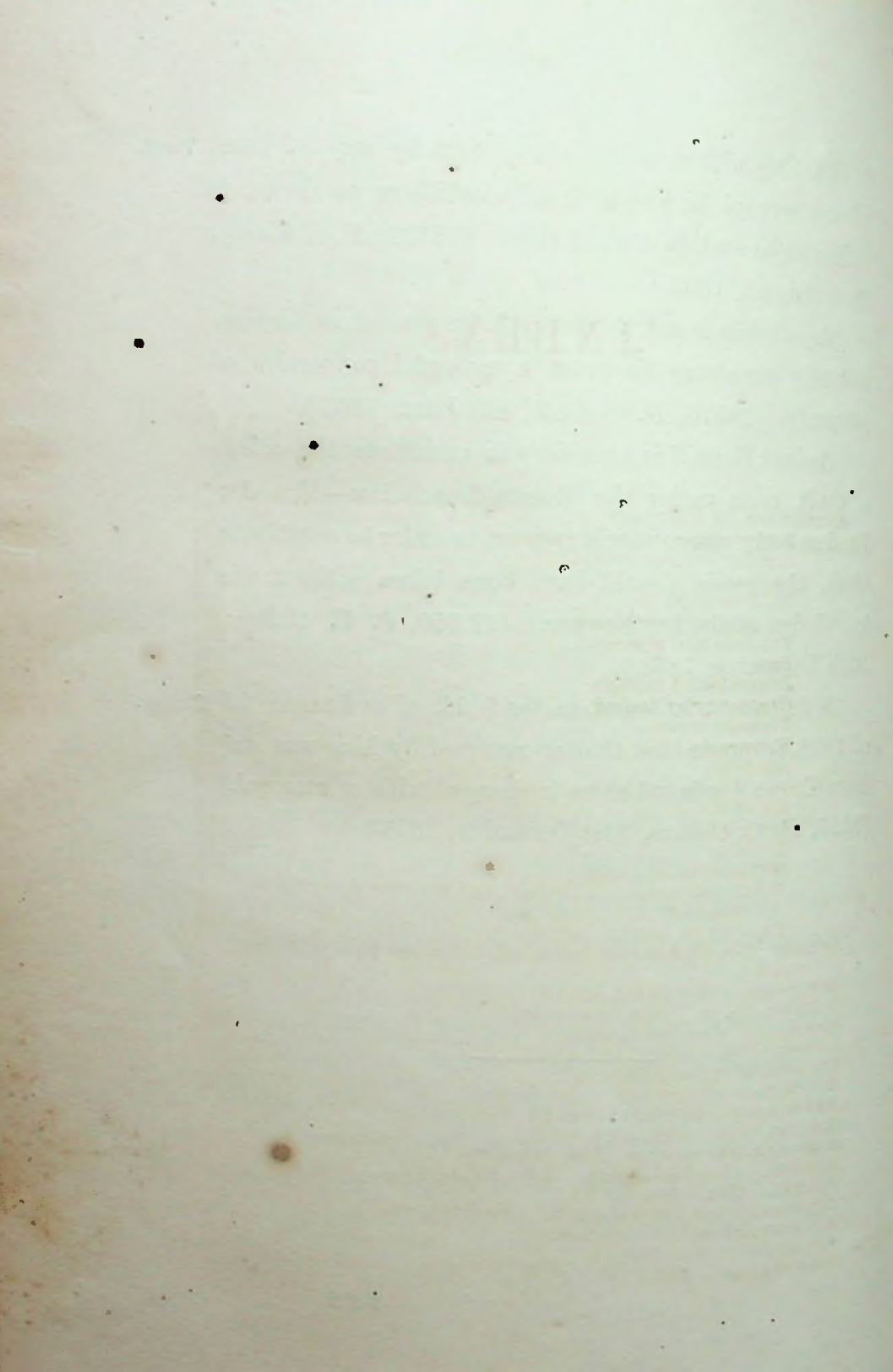
If serious, must be tried in the Supreme Court, being felony in England and highly punishable in Ceylon. (1277, *D. C. Batticaloa*, 4th June, 1850. *Carr.*)

Parting with a master's rice, even by way of loan, Theft. after a servant had been strictly forbidden to do so, is sufficient to sustain a conviction. (53723, *P. C. Kandy*, 19th August, 1862.)

*Asportation* is not necessary to be proved in Ceylon, but only necessary to prove a wrongful conversion of property. (9515, *D. C. Galle*, 5th June, 1863.)

*Animus furandi* is necessary to constitute the crime of theft, even under the Roman-Dutch law—Van der Linden 342; where it will appear, in order to constitute theft, the goods should have been taken without the knowledge of the legal owner. (21,350, *P. C. Caltura*, 10th December, 1858.)

A defendant is bound, under § 12 of ordinance 24 Timber. of 1848, to prove that timber removed by him was *not* from Crown lands, when he is charged with a removal. (9457, *P. C. Caltura*, 21st December, 1853.)





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APPENDICES.

## APPENDIX A.

RULES AND ORDERS FOR REGULATING PROCEEDINGS UNDER THE  
ORDINANCE NO. 12 OF 1840, ENTITLED "AN ORDINANCE TO  
PREVENT ENCROACHMENTS UPON CROWN LANDS."

Referred to in p. 29, vol. i.

*Promulgated in open court on the 16th day of December, 1842.*

1. It is ordered that, from and after the 15th day of January next, all informations exhibited by the Queen's Advocate, or any Deputy Queen's Advocate, in virtue of his office, charging any person or persons with having committed a breach of the Ordinance No. 12 of 1840, entitled "An Ordinance to prevent encroachments upon Crown lands," shall be, as near as may be, in the form following:—

In the District Court of

Filed the                    day of

A. B. Esq. Deputy Queen's Advocate for the District of  
who prosecutes for and on behalf of Her Majesty,  
presents and gives the court to be informed:

That C. D. late of                    in the district of  
on the                    day of                    last, at                    in this District of  
*(here set forth distinctly the nature and description*  
*of the offence, as the case may be),* contrary to the provisions of  
the Ordinance No. 12 of 1840, entitled "An Ordinance to pre-  
vent encroachments upon Crown lands," in that behalf made  
and provided.

Wherefore, upon due proof and conviction thereof, the said  
A. B. prays the judgment of the court against, the said C. D.  
according to law.

(Signed) A. B.

*Deputy Queen's Advocate for the District of*

2. The Secretary of the District Court shall, upon order of court, as soon as may be after the filing of any such information, and of the affidavit in support thereof required by the said ordinance, issue and deliver to the Fiscal the process of the said court for compelling the appearance before the said court, upon such day as the District Judge shall appoint, of the defendant to answer the charge, of the witnesses in support thereof, and of such persons as the said defendant may desire to have summoned in his behalf; and the said Fiscal shall serve a copy thereof on the defendant, and on each of the witnesses therein named, and shall, at the time of serving such copy on the said defendant, ascertain from him the names and places of abode of the persons whom he requires to be summoned on his behalf, and shall thereupon forthwith serve on each of such persons a copy of the said process; and the said process shall be by summons under the hand of the said Secretary, and as near as may be in the form following:—

In the District Court of

To the Fiscal of the said District

Summon C. D. of            to appear personally before this court  
at    on the    day of    next, at    o'clock in the forenoon,  
then to answer, and abide the judgment of this court, upon the  
information of A. B. Esq. who prosecutes for and on behalf of  
Her Majesty, that the said C. D. (*here shortly insert the particu-  
lars of the offence charged*); and summon also E. F. of  
G. H. of            &c. and such persons (if any) as you shall be  
required by the said C. D. to summon on his behalf, that they  
and each of them be and appear personally at the day and place  
aforesaid, to testify all they and each of them know concerning  
the said charge. Serve on each of them the said C. D.—E. F.—  
G. H. &c. a copy of this summons, and return to this court on  
that day what you have done hereon.

Dated at

the

day of

(Signed) J. M.

Secretary.

3. If either party, having neglected or omitted to cause any person or persons to be summoned to give evidence on his behalf in manner aforesaid, shall desire to compel the appearance of any such person or persons to give evidence at the trial, he may sue out the process of the court for that purpose; which



shall be by summons under the hand of the Secretary, in the form in use in other prosecutions before the said court.

4. On the day on which the summons is returnable, the District Court shall, unless the said court shall see fit to order the hearing to be postponed to some future day, inquire into the matters charged in the information, by causing the Secretary to read the same, by hearing the witnesses produced in support thereof and for the defence, and by the examination of the party or parties relative thereto, if such examination shall appear to the court necessary or expedient. Provided that if the prosecutor do not appear on such day the information shall be dismissed.

5. The service of all summonses and orders issued or made by any District Court, under or by virtue of the Ordinance No. 12 of 1840, or under or by virtue of the foregoing Rules and Orders, shall be made by the Fiscal in the same manner as is provided to be done in other prosecutions before the said court.

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## APPENDIX B.

Referred to in note, p. 101, vol i.

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### SCHEDULE TO THE STAMP ORDINANCE.

#### PART I.

Containing the duties on instruments of conveyance, contract, obligation, and security for money; on deeds in general, and on other instruments, matters, and things, not falling under either of the following heads.

#### PART II.

Containing the duties on law proceedings, and in the Supreme Court, District Courts, and Courts of Requests respectively.

#### PART III:

Containing the duties, in testamentary proceedings, on probates of wills and letters of administration.

## PART I.

£ s. d.

AFFIDAVIT, or affirmation, not made for the immediate purpose of being filed, read, or used in any court of justice in this island..... 0 2 0

*Exemptions from the preceding and all other stamp duties.*

' Affidavits, or affirmations, required or authorized by law to be made in criminal matters; affidavits, or affirmations, on the assumption of any office under government, or for the verification of any public accounts, or to be made pursuant to this ordinance.

AGREEMENT, or contract, or any minute or memorandum of an agreement made in this island (and not otherwise charged, nor expressly exempted from all stamp duty), whether the same shall be only evidence of a contract or obligatory upon the parties, from its being a written instrument, where the matter thereof shall be

Of the value of £1, and not exceeding £ 5.....	0	0	3
Exceeding 5                    "                    10.....	0	0	6
"                    10                    "                    25.....	0	1	6
"                    25                    "                    50.....	0	2	6
"                    50                    "                    100.....	0	4	0

And for every additional £25 or part thereof, a further progressive duty of ..... 0 1 0

Where the value of the agreement, or of such minute or memorandum, does not appear on the face thereof, such instrument shall bear a stamp of 0 5 0

Provided always, that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of..... 0 5 0

*Exemptions from the preceding and all other stamp duties.*

Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant.

Memorandum, letters, or agreement for or relating to the sale of any goods, wares, or merchandise.

Memorandum, letter, or agreement made with

any common carrier, or other person, for the carriage of goods, wares, or merchandise in this island.

Conditions of sale of any property sold by auction.

Letters containing any agreement (not before exempted) in respect of any merchandise or evidence of such an agreement which shall pass by the post between merchants, or other persons carrying on trade or commerce in this island, and residing and actually being at the time of sending such letters at the distance of twenty miles from each other.

Memorandum or agreement made between the master and mariners of any vessel or boat for wages.

Agreement made in compliance with or under the provisions of the Mercantile Shipping Acts.

Agreement to marry, not containing any settlement or transfer of property.

Memorandum, or agreement, made by or with Her Majesty, or any government officer in the execution of his office.

APPRAISEMENT or valuation of any estate or effects, moveable or immoveable; or of any interest therein; or of the annual value thereof; or of any dilapidations; or of any repairs wanted; or of the materials and labour used, or to be used, in any buildings; or of any artificer's work whatsoever.

Where the amount of such appraisement or valuation shall not exceed £25 .....	0	1	3
And where it shall exceed £25, and not exceed £50,	0	2	6
"                    50                    "	100,	0	5 0
"                    100                   "	200,	0	10 0
"                    200                   "	500,	0	15 0
"                    500.....	1	0	0

*Exemptions.*

Appraisements, or valuations of any property, for the purpose of ascertaining the duty payable on probates or letters of administration; or made by or at the instance of any executor or administrator with a view to the distribution of any estate under his charge; or made by or at the instance of any government officer in the execution of his office, or by or for the Savings' Bank or Loan Board.

ARTICLES OF CLERKSHIP, or contract, whereby any person shall first become bound to serve as a clerk, in order to his admission as an advocate, proctor, notary, or apothecary ..... 10 0 0

ARTICLES OF CLERKSHIP, or contract, whereby any person shall become bound to serve as a clerk, in order to such admission as aforesaid, for the residue of the term for which he was originally bound, in consequence of the death of his former master, or of the contract between them being vacated by consent, or by rule of court, or in any other event ..... 1 0 0

ASSIGNMENT.—See Transfer or Assignment.

AWARD ..... 1 0 0

BILL OF EXCHANGE, Promissory Note, Draft or Order, viz.

Draft, cheque, or order for the payment of any sum of money *to the bearer*, or *to order*, *on demand*, 0 0 1

Inland bill of exchange, promissory note, draft, or order for the payment to the bearer, or to order, at any time otherwise than on demand, of any sum of money

Not exceeding.....£ 5.....	0 0 1
Exceeding £ 5, and not exceeding 10.....	0 0 2
"    10,                    "    25.....	0 0 3
"    25,                    "    50.....	0 0 6
"    50,                    "    75.....	0 0 9
"    75,                    "    100.....	0 1 0
"    100,                   "    200.....	0 2 0
"    200,                   "    300.....	0 3 0
"    300,                   "    400.....	0 4 0
"    400,                   "    500.....	0 5 0
"    500,                   "    750.....	0 7 6
"    750,                   "    1000.....	0 10 0
"    1000,                  "    1500.....	0 15 0
"    1500,                  "    2000.....	1 0 0
"    2000,                  "    3000.....	1 10 0
"    3000,                  "    4000.....	2 0 0
For every additional £1,000, or part of £1,000 of the money thereby made payable.....	0 10 0

*Inland Bill, draft, or order* for the payment of any sum of money, though not made payable to bearer or to order, if the same shall be delivered to the payee or some person on his behalf.....

*The same duty as on a bill of exchange for the like sum, payable to bearer or order.*

*Inland Bill, draft, or order* for the payment of any sum of money weekly, monthly, or at any other stated periods, if made payable to the bearer or to order, or if delivered to the payee, or some person on his behalf, where the total amount thereby made payable shall be specified therein, or can be ascertained therefrom.....

*The same duty as on a bill payable to bearer, or order otherwise than on demand, for a sum equal to such total amount.*

And where the total amount of the money thereby made payable shall be indefinite.....

*The same duty as on a bill otherwise than on demand for the sum therein expressed only.*

And the following instruments shall be deemed and taken to be inland bills, drafts, or orders for the payment of money, within the intent and meaning of this Schedule; viz.

All drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee or some person on his behalf.

All receipts given for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, or if the same

shall be delivered to the payee or to some person on his behalf.

And all documents or writings usually termed letters of credit, or whereby any person to whom any such document or writing is, or is intended to be, delivered or sent, shall be entitled or be intended to be entitled to have credit with, or in account with, or to draw upon any other person for or to receive from such other person any sum of money therein-mentioned.

*Exemptions from the Duties on Drafts or Orders.*

All drafts or orders drawn by the treasurer of the colony or any other government officer in the execution of his office.

All letters of credit, whether in sets or not, sent by persons in this colony to persons out of the same, authorising drafts on the British Territories in India, or in Ceylon, or any other of Her Majesty's colonies or foreign possessions.

And the following instruments are to be deemed and taken to be promissory notes, within the intent and meaning of this Schedule:—

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain, and not amount in the whole to £20.

*Exemptions from the Duties on Promissory Notes.*

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, where the same shall not be made payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to £20 or be indefinite.

And all other instruments bearing in any degree the form or style of promissory notes, but which in

law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.

But such of the notes and instruments here exempted from the duty on promissory notes shall nevertheless be liable to the duty which may attach thereon as agreements or otherwise.

FOREIGN BILLS OF EXCHANGE drawn in, but payable out of this colony.

If drawn singly, or otherwise than in a set of three or more, the same duty as on an inland bill of the same amount and tenor.

If drawn in sets of three or more, for every bill of each set, where the sum payable thereby shall not exceed .....£25.....

	£25.....	0	0	1
And where it shall exceed £25 and not exceed	50...	0	0	2
"                    50          "	75...	0	0	3
"                    75          "	100...	0	0	4
"                   100         "	200...	0	0	8
"                   200         "	300...	0	1	0
"                   300         "	400...	0	1	4
"                   400         "	500...	0	1	8
"                   500         "	750...	0	2	6
"                   750         "	1000...	0	3	4
"                  1000         "	1500...	0	5	0
"                  1500         "	2000...	0	6	8
"                  2000         "	3000...	0	10	0
"                  3000         "	4000...	0	13	4
"                  4000         "				

Every bill of the set, for every additional £1000, or part of £1000, of the money thereby made payable. . 0 3 4

FOREIGN BILL OF EXCHANGE drawn out of this colony and payable within this colony, the same duty as on an inland bill of the same amount and tenor.

FOREIGN BILL OF EXCHANGE drawn out of this colony and payable out of this colony, but negotiated within this colony, the same duty as on a foreign bill drawn within this colony and payable out of this colony.

*Exemptions from the preceding and all other stamp duties.*

All bills of exchange, drafts, or orders, drawn by the treasurer of this island, or any other government officer in the execution of his office.

BILL OF LADING of or for any goods, merchandizē, or effects exported or carried coastwise, for each part of every set .....	0	0	6
BOND given as a security for the payment of any definite and certain sum of money; mortgage for any definite and certain sum of money, and of or affecting any property, moveable or immoveable, where the sum shall not exceed £5 .....	0	0	3
Exceeding £5, and not exceeding £10 .....	0	0	6
"    10,                    "    20 .....	0	1	0
"    20,                    "    30 .....	0	1	6
"    30,                    "    40 .....	0	2	0
"    40,                    "    50 .....	0	2	6
"    50,                    "    75 .....	0	3	9
"    75,                    "    100 .....	0	5	0
And for every additional £100, or part thereof, a further progressive duty of.....	0	5	0
Bond of any kind whatever not otherwise charged in this Schedule, nor expressly exempted from all stamp duty.....	1	0	0

*Exemptions from the preceding and all other stamp duties.*

Bonds given by any government officer, or his sureties for the due execution of his office.

Bonds given by any person to Her Majesty, or to any public officer for the use of Her Majesty, for any debt or sum of money due or to become due to the Crown, or to the government of this island.

Bonds of indemnity given to fiscals or their deputies, or officers in the execution of their duty.

Bonds given to any officer of customs in his official capacity.

CHARTER PARTY, or any agreement or contract for the charter of any vessel .....	1	0	0
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*Exemptions.*

Charter party made by or with any government officer in the execution of his office.

COMPOSITION, deed, or other instrument of composition between a debtor or debtors and his or their creditors.....	1	0	0
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CONVEYANCE or transfer of immoveable property.

Where the purchase or consideration money therein



or thereupon expressed shall not exceed £5 .....	0	0	6
Where the same shall exceed £5, and not exceed £10,	0	1	0
"                    10,                    "                    20,	0	2	0
"                    20,                    "                    30,	0	3	0
"                    30,                    "                    40,	0	4	0
"                    40,                    "                    50,	0	5	0
"                    50,                    "                    75,	0	7	6
"                    75,                    "                    100,	0	10	0
And for every additional £25, or part thereof, a further progressive duty of .....	0	2	6
CONVEYANCE or transfer of immoveable property, of any kind whatsoever, not charged in this Schedule, nor expressly exempted from stamp duty .....	1	0	0

*Exemptions from the preceding stamp duties.*

All conveyances and transfers to Her Majesty,  
or to any person for or on behalf of Her Majesty.

All leases and mortgages, and all transfers or  
assignments thereof.

CONVEYANCE or transfer of moveable property, where  
the purchase or consideration money therein or  
thereupon is expressed, or the value of such pro-  
perty where the purchase or consideration money  
is not expressed, the same duty as on a bond for the  
like amount.

CONVEYANCE or transfer of moveable property, of any  
kind whatsoever, not charged in this Schedule, nor  
expressly exempted from stamp duty, where the  
value of the same does not appear on the face  
thereof .....

5 0 0

*Exemptions from the preceding and all other  
stamp duties.*

Transfers of bills of exchange and promissory  
notes by indorsement.

DECLARATION of any use or trust .....	1	0	0
DEEDS, or instruments of confirmation, revocation, substitution, surrogation, disclaimer and renuncia- tion .....	1	0	0
DEED, or instrument not otherwise charged in this Schedule, nor expressly exempted from stamp duty,	1	0	0
GIFT—deed of gift of immoveable property, where the value of the property given shall not exceed £5.....	0	0	6

Exceeding £5, and not exceeding £10 .....	0	1	0
"    10,                    "    20 .....	0	2	0
"    20,                    "    30 .....	0	3	0
"    30,                    "    40 .....	0	4	0
"    40,                    "    50 .....	0	5	0
"    50,                    "    75 .....	0	7	6
"    75,                    "    100 .....	0	10	0
And for every additional £25, or part thereof, a further progressive duty of .....	0	2	6

## LEASE of any lands.

Where the rent payable for the whole term com-  
prised in the lease shall not exceed £5.. .... 0 0 6

Where the same shall exceed £5, and not exceed £10, 0 1 0

    "                    10,                    "                    15, 0 1 6

    "                    15,                    "                    20, 0 2 0

    "                    20,                    "                    25, 0 2 6

    "                    25,                    "                    50, 0 5 0

    "                    50,                    "                    75, 0 7 6

    "                    75,                    "                    100, 0 10 0

And where the same shall exceed £100, then for  
every £50, or part thereof ..... 0 5 0

Where the term of years is not defined, the duty  
shall be reckoned as if the lease were for 10 years.

LETTER, or power of attorney of any kind ..... 0 10 0

Substitution or surrogation under any letter of  
attorney ..... 0 5 0

*Exemptions from the preceding stamp duties.*

Power of attorney made by any petty officer, sea-  
man or soldier, or by the executors or adminis-  
trators of any such person, for pay or prize money.

LETTERS of *Venia Etatis*..... 5 0 0

LICENCE for marriage without publication of banns ... 1 0 0

MORTGAGE. See Bond.

NOTARIAL DEED, not otherwise charged in this Sche-  
dule, nor expressly exempted from all stamp duty... 0 10 0

Notarial copy of, or extract from, any instru-  
ment, and copy of, or extract from, any deed regis-  
tered in any District Court, certified by the secretary  
of such court..... 0 1 0

PARTITION, any deed of..... 0 5 0

PROMISSORY NOTE. See Bill of Exchange, Inland.

PROTEST of any bill of exchange or promissory note for any sum of money not exceeding £20 .....	0	2	0
Exceeding £20, and not exceeding 100 .....	0	3	0
"    100,                    "    500 .....	0	5	0
"    500 .....	0	10	0
Protest of any other kind .....	0	5	0
RECEIPT or discharge given for or upon the payment of money amounting to £2 or upwards .....	0	0	1

*Exemptions.*

Receipts given for money deposited in any bank, or in the hands of any banker, to be accounted for, whether with interest or not.

Receipts or discharges written upon promissory notes, bills of exchange, drafts, cheques, or orders for the payment of money duly stamped according to the laws in force at the date thereof; or upon bills of exchange drawn out of, but payable in this island.

Receipts or discharges, endorsed or otherwise written upon or contained in any bond, mortgage, or other security, or any conveyance deed or instrument whatever, duly stamped according to the laws in force at the date thereof, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby received.

Releases or discharges for money by deed duly stamped according to the laws in force at the date thereof.

Receipts or discharges given by or to any government agent, fiscal, or his deputy or officer, or other public officer in the execution of his office.

TRANSFER, or assignment of bond, mortgage and lease, where the money secured, or consideration paid, or security assigned shall not exceed £5 .....	0	0	3
Exceeding £5, and not exceeding 10 .....	0	0	6
"    10                    "    20 .....	0	1	0
"    20                    "    30 .....	0	1	6
"    30                    "    40 .....	0	2	0
"    40                    "    50 .....	0	2	6
"    50                    "    75 .....	0	3	9
"    75                    "    100 .....	0	5	0

And for every additional £100, or part thereof, a further progressive duty of.....	0	5	0
WARRANT to act as a Notary Public .....	5	0	0

### *Exemptions.*

Where any person duly admitted a notary in any district of this island shall be afterwards admitted a notary in any other district, the subsequent warrant shall be free of duty.

### *Exceptions from the preceding and all other stamp duties.*

All instruments exempted from the payment of stamp duties by virtue of the Ordinance No. 7 of 1833; No. 7 of 1853; and No. 12 of 1859.

All instruments to or on behalf of Her Majesty, or any Government officer in his official capacity.

All wills, testaments, and codicils, whether notarial or otherwise.

All instruments for the sale, transfer, or other disposition, either absolutely or by way of mortgage or otherwise of any ship or vessel, or any part, share or property of, or in, any ship or vessel.

Provided that where any grant of land shall be made by Her Majesty or her successors, and where any instrument hereinbefore specified (not being a draft, order, or promissory note for the payment of money, or a receipt or discharge for or upon the payment of money), shall be executed or acknowledged before a notary public, or shall be executed before some public officer, under the authority of the Ordinance No. 17 of 1852, entitled "*To make further provision touching the execution of certain deeds and instruments,*" or by any Fiscal or Deputy Fiscal in the execution of his office, the stamp duty hereby chargeable on such instrument shall be chargeable on the duplicate or counterpart thereof, instead of on the original instrument: and in such case, if the duty exceed the sum of five shillings, the original instrument shall bear a stamp of.....

PART II.

CONTAINING THE DUTIES ON LAW PROCEEDINGS.

	1st Class.	2nd Cls.	3rd Cls.	4th Class.	5th Class.	6th Class.	7th Class.	8th Class.
<p><b>IN THE SUPREME COURT.</b></p> <p style="text-align: center;">—</p> <p><i>In Civil Proceedings.</i></p> <p>Every affidavit or affirmation—Bill of costs—Bond of security in appeal to the Queen in Council, or other bond or recognizance—Certificate in appeal to the Queen in Council—Copy (office copy) of any decree, deposition, document, or other matter of record—Decree or judgment, or order having the effect of a decree or judgment, interlocutory or final—Exemplification under the seal of court of any record or proceedings therein—Exhibit of each unstamped document—Injunction—Mandate, or writ of mandamus procedendo and prohibition—Order of transference—Petition to the Queen in Council—Proxy—Rule nisi or absolute—Summons—Translation of any exhibit.</p>	Under £10.	Under £30.	Under £75.	Under £150.	Under £500.	Under £1000.	Under £5000.	£5000 & upwards.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
	0 1 6	0 3 0	0 4 0	0 6 0	0 9 0	0 12 0	0 15 0	1 0 0

*Exemptions.*

All affidavits or affirmations for verifying service of process.

All mandates in the nature of writs of habeas corpus, and all rules relating thereto.

Provided also, that no Queen's Advocate or Deputy Queen's Advocate suing or being sued, or intervening in any suit, *virtute officii*; and no person duly admitted to sue, or intervene or defend, as a pauper, shall be required to use any stamps, in civil proceedings, in the Supreme Court. But if judgment for costs shall be given in favour of such advocate or pauper, the value of such stamps as would have been used by him if he had not been allowed to proceed without using stamps, or the value of such part thereof as shall be mentioned in the said judgment, shall be paid by the party against whom such judgment shall have been given to the Commissioner of Stamps, or to the Secretary or Clerk of the Court in which the case shall have been instituted, for and on behalf of such commissioner; and in failure thereof the said secretary or clerk shall insert the said value in the writ of execution issued by the party in whose favour such judgment shall have been given, and shall pay the said value, when recovered, to the said commissioner from the first amount levied under the said writ; or if no such writ be issued, the said secretary or clerk shall issue a writ of execution, free of stamp duty, for the recovery of the said value, to be appropriated in like manner; provided, that if the said value be inserted by the secretary or clerk as aforesaid in the writ issued by the party in whose favour judgment has been given, the first proceeds of such writ shall be applied to the payment of the fees due to the said advocate, and to the advocate or proctor, if any, who has conducted the case of such pauper; and after such appropriation the proceeds shall next be applied to the payment of the said value of stamps.

All matrimonial proceedings shall be charged as in the fourth class.

Testamentary proceedings shall be charged in the class corresponding with the value of the estate, which must be set out by affidavit when the application for probate or letters of administration is made.

# IN THE DISTRICT COURTS.

## *In Civil Proceedings.*

Every affidavit or affirmation—Bill of costs—  
 Certificate in appeal—Commission to survey—  
 Of reference and all other commissions—Com-  
 mitment in mesne process or execution—Copy  
 (office copy) of the decree or judgment—Libel  
 —Answer—Replication or other pleading—  
 List of witnesses—Notice of trial or argument  
 —To hear judgment of the District Court or  
 Supreme Court—Petition of appeal—Proxy—  
 Rule nisi or absolute—Summons to defendant  
 or defendants, without reference to number—  
 Summons to intervenient or intervenients,  
 without reference to number—Warrant of at-  
 tachment—Writ of execution against person  
 or property.

Every award—Bail bond or other bond or re-  
 cognizance—Certificate of quiet possession—  
 Commission to examine witnesses—Edictile  
 citation for certificate of quiet possession—In-  
 junction—Set of interrogatories—Sequestra-  
 tion—Warrant of arrest in mesne process.

Every exhibit of each unstamped document—  
 Office copy, duly certified, of all matter of re-  
 cord, per sheet of 120 words—Subpoena to  
 each witness—Translation of each document.

1st Class.	2nd Class	3rd Class	4th Class.	5th Class.	6th Class.	7th Class.
Under £30.	Under £75.	Under £150.	Under £500.	Under £1000.	Under £5000.	£5000 & upwards.
£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
0 2 0	0 3 0	0 5 0	0 8 0	0 10 0	0 12 0	0 15 0
0 5 0	0 8 0	0 12 0	0 18 0	1 5 0	1 10 0	2 0 0
0 0 9	0 1 0	0 1 6	0 2 6	0 3 6	0 4 0	0 7 6

*Exemptions.*

All affidavits or affirmations for verifying service of process.

All mandates in the nature of writs of habeas corpus, and all rules relating thereto.

Provided also, that no Queen's Advocate or Deputy Queen's Advocate suing or being sued, or intervening in any suit, *virtute officii*; and no person duly admitted to sue, or intervene or defend, as a pauper, shall be required to use any stamps, in civil proceedings, in the Supreme Court. But if judgment for costs shall be given in favour of such advocate or pauper, the value of such stamps as would have been used by him if he had not been allowed to proceed without using stamps, or the value of such part thereof as shall be mentioned in the said judgment, shall be paid by the party against whom such judgment shall have been given to the Commissioner of Stamps, or to the Secretary or Clerk of the Court in which the case shall have been instituted, for and on behalf of such commissioner; and in failure thereof the said secretary or clerk shall insert the said value in the writ of execution issued by the party in whose favour such judgment shall have been given, and shall pay the said value, when recovered, to the said commissioner from the first amount levied under the said writ; or if no such writ be issued, the said secretary or clerk shall issue a writ of execution, free of stamp duty, for the recovery of the said value, to be appropriated in like manner; provided, that if the said value be inserted by the secretary or clerk as aforesaid in the writ issued by the party in whose favour judgment has been given, the first proceeds of such writ shall be applied to the payment of the fees due to the said advocate, and to the advocate or proctor, if any, who has conducted the case of such pauper; and after such appropriation the proceeds shall next be applied to the payment of the said value of stamps.

All matrimonial proceedings shall be charged as in the fourth class.

Testamentary proceedings shall be charged in the class corresponding with the value of the estate, which must be set out by affidavit when the application for probate or letters of administration is made.



# IN THE DISTRICT COURTS.

## *In Civil Proceedings.*

Every affidavit or affirmation—Bill of costs—  
 Certificate in appeal—Commission to survey—  
 Of reference and all other commissions—Com-  
 mitment in mesne process or execution—Copy  
 (office copy) of the decree or judgment—Libel  
 —Answer—Replication or other pleading—  
 List of witnesses—Notice of trial or argument  
 —To hear judgment of the District Court or  
 Supreme Court—Petition of appeal—Proxy—  
 Rule nisi or absolute—Summons to defendant  
 or defendants, without reference to number—  
 Summons to intervenient or intervenients,  
 without reference to number—Warrant of at-  
 tachment—Writ of execution against person  
 or property.

Every award—Bail bond or other bond or re-  
 cognizance—Certificate of quiet possession—  
 Commission to examine witnesses—Edictible  
 citation for certificate of quiet possession—In-  
 junction—Set of interrogatories—Sequestra-  
 tion—Warrant of arrest in mesne process.

Every exhibit of each unstamped document—  
 Office copy, duly certified, of all matter of re-  
 cord, per sheet of 120 words—Subpoena to  
 each witness—Translation of each document.

1st Class. Under £30.	2nd Class Under £75.	3rd Class Under £150.	4th Class. Under £500.	5th Class. Under £1000.	6th Class. Under £5000.	7th Class. £5000 & upwards.
£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
0 2 0	0 3 0	0 5 0	0 8 0	0 10 0	0 12 0	0 15 0
0 5 0	0 8 0	0 12 0	0 18 0	1 5 0	1 10 0	2 0 0
0 0 9	0 1 0	0 1 6	0 2 6	0 3 6	0 4 0	0 7 6

No oral pleading shall be received, except the party wishing to plead orally shall furnish a blank sheet of paper on which to write the pleading; and which paper shall bear a stamp of the same value as if it were a written pleading in a case of the like class. And any party failing to furnish such paper shall be taken to be in default.

Poundage at the rate of one per centum on all moneys levied in execution, either by sale or by payment of the debtor to the Fiscal or his deputy, although the creditor becomes purchaser of the property sold in execution, and obtains credit for the purchase money in reduction of the writ. The order for credit or for payment should be written on a stamp or stamps answering in value to such one per centum.

No party shall be allowed to take any proceedings on or by virtue of any decree or judgment without first taking a copy thereof.

Provided, also, that no Queen's Advocate or Deputy Queen's Advocate suing or being sued, or intervening in any suit *virtute officii*, and no person duly admitted to sue, defend, or intervene as a pauper, shall be required to use any stamps in civil proceedings in the District Court. But if judgments for costs shall be given in favour of such advocate or pauper, the value of such stamps as would have been used by him if he had not been allowed to proceed without using stamps, or the value of such part thereof as shall be decreed by the said judgment, shall be paid by the party against whom such judgment shall have been given, to the Commissioner of Stamps, or to the Secretary, for and on behalf of such Commissioner; and in failure of payment, the said Secretary shall insert the said value in the writ of execution issued by the party in whose favour such judgment shall have been given, and shall pay the said value, when recovered, to the said Commissioner, from the first amount levied under the said writ; or if no such writ be issued, the said Secretary shall issue a writ of execution free of stamp duty, for the recovery of the said value, to be appropriated in like manner. Provided that, if the said value be inserted by the said Secretary as aforesaid in the writ issued by the party in whose favour judgment has been given, the first proceeds of such writ shall be applied to the payment of the fees due to the said advocate, and to the advocate or proctor, if any, who has conducted the case of such pauper; and after such appropriation, the proceeds shall next be applied to the payment of the said value of stamps.

And no summons, subpoena, warrant of arrest, or in execution, nor any other citation or writ whatsoever, which has once been issued out of the court, and returned by the officer to whom it was directed, shall, on any pretext whatever, be re-issued, unless any such process has been returned not served or executed, by reason that the party could not be found, or had left the jurisdiction of the court, or by reason that no property of the debtor, or none sufficient to satisfy the exigency of any writ of execution, could be found. Provided always, that, in respect of any subpoena or subpoenas, the same may be re-issued, although served, in case the judge shall, on good cause shown, so order.

Provided also, that, in appeals to the Supreme Court, the appellant shall deliver to the Secretary of the District Court, together with his petition of appeal, the proper stamp for the decree or order of the Supreme Court, and certificate in appeal, which may be required for such appeal.

Matrimonial suits shall be charged as in the third class.

Testamentary proceedings shall be charged in the class corresponding with the value of the estate, which must be set out by affidavit when the application for probate or letters of administration is made.

*Exemptions.*

All affidavits or affirmations for verifying service of process. All orders for the release or discharge of civil prisoners. All warrants of attachment for non-attendance or contempt issued by the court at its own instance.

IN THE COURTS OF REQUESTS.

	1st Class.	2nd Class.	3rd Class.
	Under £2.	£2 and under £5.	£5 and upwards.
	£ s. d.	£ s. d.	£ s. d.
Every affidavit or affirmation— Bail bond or other bond or recognizance—Commission to survey, or for any other purpose—Commitment—Copy of decree or judgment—Notice or rule—Proxy—Plaint or answer—Petition of appeal—Summons to defendants or intervenients, without number—Warrant of attachment or execution.	0 0 6	0 1 0	0 2 0
Every office copy of any matter of record—Subpoena to each witness—Exhibit of each unstamped document—Translation of each document.	0 0 3	0 0 6	0 1 0

Poundage at the rate of one per centum on all moneys levied in execution, either by sale, or by payment of the debtor to the Fiscal or his deputy; although the creditor becomes purchaser of the property sold in execution, and obtains credit for the purchase money in reduction of the amount of the writ. The order for credit, or for payment, should be written on a stamp or stamps answering in value to such one per centum.

Provided also, that no Government officer, suing or being sued, or intervening in his official capacity, shall be required to use any stamps in any Court of Requests. But if judgment for costs shall be given in favour of such Government Officer, the value of such stamps as would have been used by him if he had not been allowed to proceed without using stamps, or the value of such part thereof as shall be decreed by the said judgment, shall be paid by the party against whom such judgment shall have been given, to the Commissioner of Stamps, or to the Clerk of the Court in which the case shall have been instituted, for and on behalf of such Commissioner; and in failure of such payment, the said Clerk shall insert the said value in the writ of execution issued by the party in whose favour such judgment shall have been given, and shall pay the said value, when recovered, to the said Commissioner from the first amount levied under the said writ; or, if no such writ be issued, a writ of execution, free of stamp duty, for the recovery of the said value to be appropriated in like manner. Provided that, if the said value be inserted by the said Clerk as aforesaid in the writ issued by the party in whose favour judgment has been given, the first proceeds of such writ shall be applied to the payment of the fees due to the said Government Officer; and after such appropriation, the proceeds shall next be applied to the payment of the said value of stamps.

Provided always, that, in respect of any subpoena, the same may be re-issued, although served, in case the commissioner shall, on good cause shown, so order. Provided also that, in appeals to the Supreme Court, the appellant shall furnish to the clerk of the court the proper stamp for the decree or order of the Supreme Court, and the certificate in appeal, which may be required for such appeal.

No party shall be allowed to take *any proceedings on or by virtue of any judgment or decree without first taking a copy thereof.*

*Exemptions.*

All affidavits or affirmations for verifying service of process; all warrants of attachment issued by the court at its own instance.

## PART III.

## CONTAINING THE DUTIES IN TESTAMENTARY PROCEEDINGS ON PROBATES OF WILLS AND LETTERS OF ADMINISTRATION.

	£	s.	d.
Every account, provisional or final.....	0	5	0
„ bond .....	0	5	0
„ copy (office copy) of any will or codicil, or extract therefrom, or of any document mentioned in this part of the Schedule.....	0	1	6

Probate of a will, or letters of administration, where the property and estate for, or in respect of, which such probate or letters of administration shall be granted, exclusive of what the deceased shall have been possessed of or entitled to as trustee for any other person or persons, and not beneficially, and exclusive, also, of the debts due by the deceased on mortgage or other notarial bonds, shall be:—

Under the value of £5.....	0	1	0
Of the value of £5, and under the value of £10.....	0	2	0
„ 10, „ 20.....	0	4	0
„ 20, „ 30.....	0	6	0
„ 30, „ 40.....	0	8	0
„ 40, „ 50.....	0	10	0
„ 50, „ 75.....	0	15	0
„ 75, „ 100.....	1	0	0

And for every additional £25, or part thereof, a further progressive duty of .....

	0	5	0
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## APPENDIX C.

Referred to in note, p. 128, vol. i.

## TABLE OF CUSTOMS' DUTIES.

## IMPORT DUTIES.

	£	s.	d.
Arms and Ammunition :—			
Guns and rifles .....	0	5	0
Pistols .....	0	5	0
Gunpowder .....	0	0	4
Shot .....	0	1	6
Bacon, butter, cheese, and hams .....	0	6	0
Beef and pork .....	0	2	6
Beer, ale, porter, and all other malt liquors, in wood, per gallon,	0	0	3
Ditto, ditto, in bottles, per gallon,	0	0	4
Fish, dried or salted, and fins and skins, the produce of creatures living in the sea .....	0	1	0
Flour (wheat) .....	0	2	0
Hops .....	0	6	0
Malt .....	0	0	4
Metals :—			
Brass sheets .....	0	6	0
Copper sheathing and nails .....	0	6	0
Iron, bar .....	0	7	0
Corrugated .....	0	14	0
Galvanized .....	1	10	0
Hoop .....	0	10	0
Pig .....	0	5	0
Rod .....	0	8	0
Sheet .....	0	10	0
Lead, sheet .....	1	0	0
Spelter and Zinc .....	0	18	0
Steel .....	0	18	0
Opium .....	0	1	0
Paddy .....	0	0	3
Pitch, rosin, or tar .....	0	1	0
Rice, wheat, grain, peas, beans, and other grain, (except paddy) .....	0	0	7

	£	s.	d.
Saltpetre .....	0	1	0
Spirits and cordials .....	0	5	0
Sugar, refined, and candy .....	0	5	0
Ditto, unrefined .....	0	2	6
Tea .....	0	0	6
Tobacco, manufactured.....	1	0	0
Unmanufactured .....	0	10	0
Cigars and snuff .....	0	0	8
Wine, in wood .....	0	1	6
Ditto, in bottles .....	0	2	6
Goods, wares, and merchandize, not otherwise charged with duty or prohibited, and not comprised in this table of exemptions hereinafter set forth, for every £100 of the value thereof in this market ...	5	0	0

*Table of Exemptions.*

Books and maps, printed.  
 Bullion, coin, pearls, and precious stones.  
 Coal, coke, and patent fuel.  
 Coconut oil. .  
 Copperah.  
 Cotton wool.  
 Couries, and other shells.  
 Ground nuts, gingeley seed, and linseed.  
 Horses, mules, asses, and all other live stock.  
 Ice.  
 Manures.  
 Regimental clothing, necessaries, and accoutrements imported  
 for the use of Her Majesty's land and sea forces.  
 Seeds intended for agricultural and horticultural purposes, in-  
 cluding plants.  
 Specimens illustrative of natural history.  
 Tanks (iron).  
 Whale oil.

## TABLE OF CUSTOMS' DUTIES

PAYABLE ON GOODS, WARES, AND MERCHANDIZE, BEING THE GROWTH,  
 PRODUCE, OR MANUFACTURE OF THE ISLAND OF CEYLON,  
 EXPORTED TO PARTS BEYOND SEAS.

	£	s.	d.
Arrecanuts .....	0	0	4
Cinnamon.....	0	2	0





No. 2.

Plaintiff }  
 against } In the District Court of  
 Defendant. }

To

The Fiscal of the District of

*Summons.*

Summon

defendant

to appear before this court on the

day of

at

o'clock, to answer

of

plaintiff in a suit to

whereof the said plaintiff has filed his libel in this court, and  
 have you there this summons.

By order of court,

*Secretary.*

*Fiscal's return.* By virtue of this summons I have caused  
 the said to be summoned  
 as herein directed, and as appears by the oath of the officer who  
 served the same, hereunto annexed.

*Affidavit of service.*

makes oath that he did

serve the within summons on the person of the  
 defendant

on the

day of

last.

*Return of non est inventus.*

I hereby certify that the within-named de-  
 fendant is not to be found in this district.

*Fiscal.*

No. 3.

Plaintiff }  
 against } In the District Court of  
 Defendant. }

To

The Fiscal of the District of

*Warrant of arrest.*

Arrest and seize

the above-named defendant, and keep him safely,  
 so that you have his body before this court

forthwith, to answer

plaintiff in a suit for

whereof the said plaintiff has filed his libel in this court, unless  
 and until the said defendant shall give you good and sufficient  
 security to appear and answer the plaintiff's said libel, and to  
 abide by and perform the judgment of this court, or to surrender

himself or be surrendered to be charged in execution for the same; and on his giving such security you are hereby authorized to discharge the said defendant, and have here this mandate on the return day thereof.

By order of court,  
Secretary.

*Fiscal's return.* By virtue of this mandate I have arrested and seized the body of the defendant and [have him ready to be produced in court] or [have released him on security, the bond of which I herewith return to this court].

*Fiscal.*

---

No. 4.\*

Plaintiff }  
against } In the District Court of  
Defendant. }

*Bond to the* Know all men by these presents, that we  
*fiscal for ap-* and are held and firmly  
*pearance.* bound in the sum of £ for the payment  
of which we bind ourselves jointly and severally,  
our heirs, executors, and administrators, firmly by these presents.

The condition of this obligation is such, that if the above  
bounden do appear before this District Court on the  
day of to answer to a suit for  
then this obligation to be void, otherwise to remain in full force.

Signed, sealed, and 0  
delivered in court, this 0  
day of 0

---

No. 5.

Plaintiff }  
against } In the District Court of  
Defendant. }

*Bail above.* Know all men by these presents, that we  
and are held and firmly  
bound in the sum of £ for the payment of which  
we bind ourselves jointly and severally, our heirs, executors,  
and administrators, firmly by these presents.

The condition of this obligation is such, that if the above  
bounden do appear before this District Court on the

---

\* See Rule 11 of Section I. Revoked.

day of \_\_\_\_\_ to answer to \_\_\_\_\_ in a suit for  
 and shall pay any sum or sums of money which shall  
 be awarded by the court, and shall abide by and perform the  
 judgment of the court, or shall surrender himself or be surren-  
 dered by his bail above named, to be charged in execution, then  
 this obligation to be void, otherwise to remain in full force.

Signed, sealed, and \_\_\_\_\_ 0  
 delivered in court, this \_\_\_\_\_ 0  
 day of \_\_\_\_\_ 0

---

No. 6

Plaintiff }  
*against* } In the District Court of  
 Defendant. }  
 To

The Fiscal of the District of

*Commitment* Receive into your custody the body of  
*on mesne* taken under a warrant of arrest (in mesne pro-  
*process.* cess) dated \_\_\_\_\_ at the suit of  
 and keep him safely until he give good and suf-  
 ficient security in the sum of £ \_\_\_\_\_ to stand and abide the  
 judgment of the court in the premises, and pay all such sum or  
 sums of money as shall be decreed, or surrender himself to be  
 charged in execution.

---

No. 7.

Plaintiff }  
*against* } In the District Court of  
 Defendant. }  
 To

The Fiscal of the District of

*Release.* Release from your custody the body of  
 taken at the suit of \_\_\_\_\_ under a warrant  
 of arrest (in mesne process) dated the \_\_\_\_\_ or (taken under  
 a warrant of arrest in execution dated the \_\_\_\_\_) if for no  
 other cause detained.

Dated \_\_\_\_\_

By order of court,  
 Secretary.

---

No. 8.\*

Plaintiff }  
*against* } In the District Court of  
 Defendant. }

---

\* See Rule 5 of Section I. Revoked.

*Answer.*

The answer of the defendant to the libel of the plaintiff [by his proctor (a)] sheweth that

Whereupon the said defendant doth pray and for such other relief as the court shall deem meet.

[Signature of the defendant or his proctor.]

(a) To be omitted if the defendant appears in person.

No. 9.\*

Plaintiff  
against  
Defendant. } In the District Court of

*Replication.*

The replication of the plaintiff to the answer of the defendant sheweth

That

Whereupon the said plaintiff prays the judgment of the court, as by his libel he has already prayed.

[Signature of the plaintiff or his proctor.]

No. 10.†

Plaintiff  
against  
Defendant. } In the District Court of

*Conditional  
order for ar-  
rest for non-  
appearance.*

On the motion of \_\_\_\_\_ proctor  
for the plaintiff, and on reading the return of  
the fiscal to the summons issued in this case, on  
the \_\_\_\_\_ day of \_\_\_\_\_ last, it is  
ordered that the defendant do, on  
day of \_\_\_\_\_ next, show cause why he should not be  
arrested for default of appearance.

By order of court,  
Secretary.

No. 11.†

Plaintiff  
against  
Defendant. } In the District Court of

To

*Mandate of  
arrest for not  
appearing.*

Whereas \_\_\_\_\_ cited to appear in  
this court, on the \_\_\_\_\_ day of \_\_\_\_\_  
to answer to \_\_\_\_\_ in a suit for £

\* See Rule 7 of Section I. Revoked.

† See Rule 11 of Section I. Revoked.

Whereof the said \_\_\_\_\_ has filed a libel in this court, has not appeared in obedience to the said citation; you are therefore to arrest the body of the said

and safely keep him, so that you may have him before this court forthwith, to answer the said libel; unless and until the said defendant shall give good and sufficient security so to appear and answer. And have you here this mandate.

By order of court,  
Secretary.

*Fiscal's return.* By virtue of this mandate I have arrested and seized the body of \_\_\_\_\_ the defendant [and have him ready to be produced in court] or [have released him on security, the bond of which I herewith return to the court.]

\_\_\_\_\_  
No. 12.\*

Plaintiff }  
against } In the District Court of  
Defendant. }

*Notice to defendant of proceeding in default of answer.* On the motion of \_\_\_\_\_ proctor for the plaintiff, it is hereby notified to the above-named defendant that, if he do not file his answer to the libel of the said plaintiff on or before the \_\_\_\_\_ day of \_\_\_\_\_ next, the secretary of this court will be directed to enter a general denial for the defendant, and the plaintiff will be entitled to proceed ex parte.

By order of court,  
Secretary.

\_\_\_\_\_  
No. 13.

Plaintiff }  
against } In the District Court of  
Defendant. }

To

The Fiscal of the District of

*Process of sequestration.* Whereas you have returned to a citation issued against the above-named defendant, on the \_\_\_\_\_ day of \_\_\_\_\_

---

\* See Rule 12 of Section I. Revoked.

last, in this suit, that he was not to be found within this district. And whereas the plaintiff above named has verified his demand to the satisfaction of this court; you are, therefore, commanded to seize and sequester the houses, lands, goods, moneys, securities for money, and debts of the said defendant, to the value of £ \_\_\_\_\_ wheresoever, or in whose custody soever, the same may be within this district, and to retain and secure the same till the defendant shall appear and abide the order of this court, or until you receive further directions from this court herein, and to give due notice in writing to all persons in whose possession or power such property of the defendant, whether moveable or immoveable, shall be of this sequestration, and requiring them to reserve and retain the same and all issues, rents, profits, and interests accruing therefrom to abide the order of this court. And that you do, on the \_\_\_\_\_ day of \_\_\_\_\_ next, inform this court what property you shall have seized and sequestered, with the true value of the same, and in whose possession the same respectively were at the time of seizure, and have you there this mandate.

By order of court,  
*Secretary.*

*Fiscal's return.* By virtue of this mandate I have seized and sequestered the property of the defendant specified in the annexed schedule.

*Fiscal.*

---

No. 14.

*Endorsement for further sequestration.* Seize and sequester property of the within-named defendant to the further amount of £ \_\_\_\_\_ in manner and form as you were hereby before directed.

To

*Fiscal.*

*Judge.*

---

No. 15.\*

Plaintiff }  
against } In the District Court of  
Defendant. }

*Conditional order to dis-*

On the motion of \_\_\_\_\_ proctor  
for the defendant, it is ordered that the above-

---

\* See Rule 21 and 22 of Section I. Revoked.

*miss the suit* , named plaintiff do, on the \_\_\_\_\_ day  
*on plaintiff's* of \_\_\_\_\_ next, show cause why this action  
*default.* should not be dismissed with costs for default  
 by the said plaintiff [of filing his list of wit-  
 nesses]. (a)

By order of court,  
 Secretary.

(a) Or [of setting the case down for hearing within one month  
 after issue joined.]

\_\_\_\_\_  
 No. 16.\*

Plaintiff }  
*against* } In the District Court of  
 Defendant. }

*Notice of pro-* On the motion of \_\_\_\_\_ proctor  
*ceeding ex* for the plaintiff, it is ordered that the said  
*parte on de-* plaintiff be at liberty to proceed ex parte to the  
*fault by de-* hearing of this case (the defendant having made  
*endant to* default in filing his list of witnesses), unless the  
*file list of* said defendant shall show good and sufficient  
*witnesses.* cause to the contrary on or before the  
 day of \_\_\_\_\_ next.

By order of court,  
 Secretary.

\_\_\_\_\_  
 No. 17.

Plaintiff }  
*against* } In the District Court of  
 Defendant. }

*Subpoena.* To  
 The Fiscal of the District of  
 \_\_\_\_\_ of  
 Summon \_\_\_\_\_  
 to appear before the District Court of  
 \_\_\_\_\_ day of \_\_\_\_\_ at  
 on \_\_\_\_\_  
 9 o'clock of the morning, to testify all such matters as  
 may know touching a certain suit pending in the said court  
 between the above-named parties, at the instance of the said  
 \_\_\_\_\_  
 under penalty, for non-attendance, of forfeiting  
 to our Lord the King the sum of £5, and of all other pains and  
 forfeitures which will ensue from such disobedience.  
*Duce tecum.* And further that the said

\* See Rule 21 of Section I. Revoked.

do bring with

the following  
By order of court,  
*Secretary.*

*Fiscal's return.* I hereby certify that a copy of the above  
subpœna has been served upon the said  
as appears by the oath of the officer hereunto annexed.  
*Fiscal.*

*Affidavit of  
service.*

serve a copy of the  
day of

makes oath that he did  
on the  
last.

---

No. 18.

Plaintiff  
against  
Defendant. } In the District Court of

To

The Fiscal of the District of

*Warrant of  
arrest against  
a witness for  
non-appear-  
ance.*

Whereas it appears by your return to a  
certain subpœna, issued in this case at the in-  
stance of the above-named  
that  
said subpœna was duly served with a copy  
thereof, but failed to appear in obedience

named in the

thereto.

You are therefore to seize and arrest the said  
and bring him before this court forthwith, in order that he may  
undergo the penalties legally awarded against him for such con-  
tempt and disobedience.

By order of court,  
*Secretary.*

---

No. 19.

Plaintiff  
against  
Defendant. } In the District Court of

To

The Fiscal of the District of

*Writ of execu-  
tion against  
property.*

Levy and make of the houses, lands, goods,  
debts and credits of the above-named  
by seizure, and if necessary by sale



thereof, the sum of £ which  
 has recovered against the said  
 by a judgment of this court, bearing date the  
 day of and have that money before this court  
 on the day of to render to the  
 said and inform this court for what  
 sum or sums, and to what person or persons, you have sold the  
 said property respectively, and have you there this mandate.

By order of court,  
 Secretary.

*Fiscal's return.* By virtue of the within writ of execution I  
 have recovered by the  
 sum of which amount I have

*Fiscal.*

---

No. 20.

Plaintiff }  
*against* } In the District Court of  
 Defendant. }

To

The Fiscal of the District of

*Writ of execu-* Seize and take of  
*tion against* and keep him safely, so that  
*person.* you have his body before this court forthwith  
 to satisfy the sum of £  
 which the said recovered against  
 by a judgment dated the  
 day of last.

By order of court,  
 Secretary.

*Fiscal's return.* By virtue of the within writ of execution, I  
 have taken the within-named  
 and I have him ready to be produced before the court.

*Fiscal.*

---

No. 21.

Plaintiff }  
*against* } In the District Court of  
 Defendant. }

To

The Fiscal of the District of

*Commitment*  
*under war-*

Receive into your custody the body of  
 taken under a warrant of arrest

*warrant of arrest* in execution, dated \_\_\_\_\_ at the  
*in execution.* suit of \_\_\_\_\_ to satisfy a  
 decree of the court, dated \_\_\_\_\_ for  
 the sum of £ \_\_\_\_\_ and interest from \_\_\_\_\_ to  
 the day of payment, and costs of suit.

Dated \_\_\_\_\_ 18

By order of court,  
*Secretary.*

---

No. 22.

*Statement by  
 a person ap-  
 plying to sue  
 or defend as  
 a pauper.*

In the District Court of \_\_\_\_\_  
 affirms and avers that he is not possessed of  
 any lands, money, goods, or other property  
 which would enable him to prosecute (a) his  
 action against \_\_\_\_\_ save and except the follow-  
 ing, which do not exceed in value the sum of £5.

Signed

The \_\_\_\_\_ day of \_\_\_\_\_ 18

List of the applicant's property above referred to

(a) Or "to defend," as the case may be.

---

No. 23.

*Affidavit in  
 support of  
 application  
 to sue or de-  
 fend as a  
 pauper.*

In the District Court of \_\_\_\_\_  
 and \_\_\_\_\_ severally make  
 oath and say that they are well acquainted with  
 \_\_\_\_\_ and his circumstances, and to  
 the best of their knowledge and belief the state-  
 ment which he has made touching his property  
 is true.

Sworn in court  
 this \_\_\_\_\_ day of \_\_\_\_\_ 18

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FORMS, SECTION II.

CRIMINAL JURISDICTION.

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The Forms requisite for this branch of jurisdiction are not  
 referred to in the Rules of Procedure for that branch; those

Rules being merely of a general nature, and not pursuing the course of proceeding through its different stages. The following Forms, however, which are adapted from those now in use in the Sitting Magistrate's Court of Colombo, may probably be found of service in some of the District Courts; and the introduction of them here will, at all events, tend to produce uniformity of practice.

---

 No. 1.

Criminal Jurisdiction. } In the District Court of  
*Summons.* You are hereby directed to appear before  
 the District Court of at  
 o'clock in the morning of the day of to answer to a  
 complaint of  
 Colombo 18  
 By order,  
 Secretary.

---

 No. 2.

Criminal Jurisdiction. } In the District Court of  
*Subpœna.* You are hereby directed to appear before  
 the District Court of at  
 o'clock on the morning of the day of to give  
 evidence in the case of against  
 under a penalty of £5 in case of disobedience.  
 Colombo 18  
 By order,  
 Secretary.

---

 No. 3.

Criminal Jurisdiction. } In the District Court of  
 To  
 The Fiscal of  
*Warrant of arrest for contempt.* Take into custody the body of  
 charged with contempt of court for not appearing  
 on the to an order of the  
 and send before me on or before  
 the  
 Given under my hand 18  
 C 2

## No. 4.

By

District Judge of  
To the Fiscal of

*Warrant of commitment for further examination.* Whereas \_\_\_\_\_ stands charged before me with \_\_\_\_\_ This is, therefore, in His Majesty's name to require you to keep \_\_\_\_\_ him the said \_\_\_\_\_ in your custody, and \_\_\_\_\_ to send before me \_\_\_\_\_ for further examination.

Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_

## No. 5.

*Recognizance to keep the peace.* Be it remembered that on the \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord One Thousand Eight Hundred and \_\_\_\_\_ came before me,

District Judge of \_\_\_\_\_ and \_\_\_\_\_ acknowledged to be indebted to our Lord the King in the sum of £ \_\_\_\_\_ that is to say, the said \_\_\_\_\_ in the sum of £ \_\_\_\_\_ and the \_\_\_\_\_ securities in £ \_\_\_\_\_ each to be made and levied of their goods, chattels, lands, and tenements respectively, to the use of our Lord the King, his heirs and successors.

The condition of the foregoing recognizance is such, that if the above bounden \_\_\_\_\_ shall peaceably demean himself and be of good behaviour towards all His Majesty's liege subjects, and especially towards \_\_\_\_\_ for the space of \_\_\_\_\_ from the date of the said recognizance, then this recognizance to be void or else remain in its full force.

In presence of \_\_\_\_\_

## No. 6.

*Recognizance to appear and give evidence.* Be it remembered, that on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_ came before me \_\_\_\_\_ and \_\_\_\_\_ District Judge of \_\_\_\_\_

acknowledged to be indebted to our Lord the King in the sum of £ \_\_\_\_\_ to be made and levied of his goods, chattels, lands, and tenements, to the use of our Lord the King, his heirs and successors.

The condition of this recognizance is such, that if the above bounden \_\_\_\_\_ shall appear before the District Court of \_\_\_\_\_ on \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ and \_\_\_\_\_ give evidence on the prosecution, then this recognizance shall \_\_\_\_\_

be void, or else remain in its full force.

Signed in presence of

---

No. 7.

By

District Judge of

To

*Warrant of  
arrest.*

Take into custody the body of  
of charged on the oath of  
with stealing property belonging to the said  
and bring him before me forthwith.

Given under my hand and seal this 18

---

No. 8.

By

District Judge of

To

*Warrant to  
arrest and  
search.*

Constable of

Whereas information upon oath has been  
given before me, that of has been  
robbed of and whereas there has been offered to me  
strong grounds for believing that one of  
has been concerned in the said robbery, I do hereby authorize  
you to apprehend the said to search his dwelling  
house and out offices for and, if you find any such,  
to bring it and the said before me to be dealt with  
according to law.

Given under my hand and seal this 18

---

No. 9.

By

District Judge of

To

*Search  
warrant.*

Search the house and premises of  
of or for stolen property  
belonging to to be pointed out by  
him as appears in the annexed affidavit, and bring the same, if  
any be found, before me forthwith, together with the said  
to be dealt with according to law.

Given under my hand and seal this 18

No. 10.

Criminal Jurisdiction. } In the District Court of

To

The Fiscal of  
The King  
Vs.

*Sequestration in case of flight.* Whereas \_\_\_\_\_ stands charged before me with \_\_\_\_\_ and has fled from justice. You are hereby directed to seize and sequester the property, moveable and immoveable, of the said \_\_\_\_\_ and keep them under sequestration till the said \_\_\_\_\_ shall come, or render himself amenable to justice by being apprehended, or by a voluntary surrender or submitting himself to be tried for the crime he stands charged with, and return must be made forthwith, what you have done in the premises.

Given under my hand and seal this

18

No. 11.

By

District Judge of

To

The Fiscal of Colombo.

*Commitment under the Vagrant Act.* Be it remembered that \_\_\_\_\_ was brought before me on the \_\_\_\_\_ 18 \_\_\_\_\_ charged with being a suspected person or vagrant lurking in my jurisdiction, without any ostensible means of livelihood, and unable to give a satisfactory account of himself.

And whereas, upon information given to me on the oath of \_\_\_\_\_ constable, and on the oath of \_\_\_\_\_ the said \_\_\_\_\_ there appears to me reason to suppose that the said \_\_\_\_\_ is an idle and disorderly person—I do hereby sentence the said \_\_\_\_\_ to be employed in repairing the public roads, or any other public works, until the said \_\_\_\_\_ shall perform one of the following conditions:—

1st. Shall procure two securities in the sum of £7 10s. each, to keep the peace for twelve calendar months.

2nd. Or some credible person shall agree to entertain him in his service.

3rd. Or until I shall be satisfied, from his deportment in custody, or other circumstances, that he will of himself take to some service or employment, so as to obtain an honest livelihood; in any of which cases, he shall be brought before me and discharged.

This is, therefore, in His Majesty's name to require and command you to carry the said sentence into effect.

Given under my hand 18

---

No. 12.

By \_\_\_\_\_ Esq.

*Conviction by* District Judge of

*District Judge.* To

The Fiscal of

Be it remembered that \_\_\_\_\_ stands convicted before me on the oath of \_\_\_\_\_ and others, with having in his possession stolen property, knowing the same to be stolen.

Now I, the said \_\_\_\_\_ have sentenced the said \_\_\_\_\_ to receive \_\_\_\_\_ and to be imprisoned at hard labour for \_\_\_\_\_

This is, therefore, in His Majesty's name, to require you to cause the sentence to be carried into execution.

Given under my hand, this

---

No. 13.

By \_\_\_\_\_ Esq.

District Judge of

To

The Fiscal of

*Warrant of  
commitment  
for trial be-  
fore Supreme  
Court.*

Whereas \_\_\_\_\_ stands charged before me, on the oaths of \_\_\_\_\_ and others, with \_\_\_\_\_

This is, therefore, in His Majesty's name, to command you safely to keep the said \_\_\_\_\_ in custody for trial before the Honourable the Supreme Court, till discharged by due course of law.

Given under my hand and seal this 18

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Witnesses for the Crown.

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Prisoner's witnesses.

## FORMS, SECTION III.

## JURISDICTION OVER IDIOTS, ETC.

There does not appear to be any necessity for providing any forms for this branch of jurisdiction of the District Courts.

## FORMS, SECTION IV.

## TESTAMENTARY JURISDICTION.

## No. 1.

*Affidavit of death.* Testamentary Jurisdiction. } In the District Court of  
 maketh oath and  
 sayeth that he knew and was well acquainted  
 with the above-mentioned  
 when alive. That, prior to his death, the said  
 resided at and died-at  
 on or about the day of leaving  
 property, as this deponent verily believeth, within the jurisdic-  
 tion of this court.  
 Sworn in court this  
 Before me

## No. 2.

*Affidavit of the execution of the will.* Testamentary Jurisdiction. } In the District Court of  
 and make  
 oath and say that they were personally present  
 at on or about the  
 day of and saw the said  
 subscribe name to the writing  
 now produced and shown to these deponents, and publish and  
 declare the same as and for last will and testament, and  
 that in testimony thereof, at the request and in the presence of  
 the said testator, and in the presence of each other, they also



subscribed their names thereto as witnesses, and that the same subscribed to the said writing is of the handwriting of the said deceased, and that the names also subscribed, are respectively of the handwriting of these deponents. And these deponents, lastly, make oath and say that the said at the time of so subscribing his name to the said writing was, to all appearance, and as these deponents verily believe, of sound mind, memory, and understanding.

Sworn in court this  
Before me

---

No. 3.

Testamentary }  
Jurisdiction. } In the District Court of

*Oath by executors before probate.* You swear that you believe the writing now produced to you bearing date the day of and marked to be the last will and testament of deceased. That you are the executors therein named; that you will faithfully execute the said will by paying the debts and legacies of the deceased, as far as the property will extend and the law binds you; that you will exhibit into this court a true, full, and perfect inventory of all the property, moveable and immoveable, and all the rights and credits of the deceased on or before the day of and that you will file a true account of your executorship on or before the day of

Sworn in court this  
Before me

---

No. 4.

Testamentary }  
Jurisdiction. } In the District Court of

*Probate.* Be it known to all men that, on the day of in the year the last will and testament of deceased, a copy of which is hereunto annexed, was exhibited, read, and proved before the court, and administration of all the property and estate, rights, and credits of the deceased was and is hereby committed to the executor in this said last will and testament named;

being first sworn faithfully to execute the said will by paying the debts and legacies of the deceased, as far as the property will extend and the law will bind; and, also, to exhibit into this court a true, full, and perfect inventory of the said property on or before the \_\_\_\_\_ day of \_\_\_\_\_ and to file a true and just account of \_\_\_\_\_ executorship on or before the \_\_\_\_\_ day of \_\_\_\_\_

Given under the seal of the District Court of  
this \_\_\_\_\_ day of \_\_\_\_\_

Witness

Judge.

---

No. 5.

*Reservatory clause to be inserted before the date of the probate in case of any executor being absent.*

Reserving, nevertheless, to this court full power and authority to grant like probate and administration to \_\_\_\_\_ the other executor named in the will, whenever \_\_\_\_\_ shall duly appear before

this court and sue for the same.

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No. 6.

Testamentary } In the District Court of  
Jurisdiction. }

*Citation to the next of kin.* To the Fiscal of \_\_\_\_\_ greeting. Cite or cause to be cited, the lawful next of kin of \_\_\_\_\_ late of \_\_\_\_\_

deceased, and all other persons who may have in their possession any wills or codicils of the deceased, to appear before this court on the \_\_\_\_\_ day of \_\_\_\_\_ at nine o'clock in the morning, and to bring such wills or codicils, if any, or if none, that the said next of kin do accept or refuse letters of administration of the estate of the deceased, or otherwise do show cause why administration should not be granted to the secretary of this court, or to such other person as the court shall consider fit. In default of which appearance and cause shown, this court will proceed to grant letters of administration to the said secretary or other person, as aforesaid.

By order of court,  
Secretary.

*Return of the fiscal to the citation.* By virtue of this mandate, I have cited the lawful next of kin of the within-named late of deceased, and all other persons, as within directed.

*Fiscal.*

---

No. 7.

Testamentary } In the District Court of  
Jurisdiction. }

To and

*Commission of appraisalment.* Know ye that you and each of you are hereby fully empowered and authorized by the oaths of lawful men, and by such other ways and means whereby the same may best be known, to ascertain the value of the property and estate, rights and credits of the said deceased, and the same so ascertained to certify to this court under your heads on or before the day of

Given under the seal of the District Court of  
this day of  
Witness

*Judge.*

*Return and oath of appraisalment.* The return to this commission appears by the schedule hereunto annexed, marked which schedule we severally swear is a true and just list of appraisalment of all the property and estate, rights, and credits of deceased.

Sworn in court this  
Before me

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No. 8.

Testamentary } In the District Court of  
Jurisdiction. }

To (a) of deceased

*Letters of administration, with the will annexed.* Whereas lately departed this life, leaving a will, which has been duly proved in this court, and whereas no executor is named in that will, you are therefore fully empowered and authorized by these presents to administer and faithfully dispose of the property and estate, rights and credits of the said deceased, and to demand and recover whatever debts may belong to state, and to pay whatever debts the said deceased did owe,

(a) Widow, widower, or next of kin, or secretary of the court.

and also the legacies contained in the said will, so far as such property and estate, rights and credits shall extend; you having been already sworn well and faithfully to administer the same, and to render a true and perfect inventory of all the said property and estate, rights and credits, to this court on or before the \_\_\_\_\_ day of \_\_\_\_\_ next; and also a true and just account of your administration thereof on or before the \_\_\_\_\_ day of \_\_\_\_\_ next. And you are, therefore, by these presents deputed and constituted administrator, with the will annexed, of all the property and estates, rights and credits of the said deceased.

Given under the seal of the District Court of  
this \_\_\_\_\_ day of \_\_\_\_\_

No. 9.

Testamentary }  
Jurisdiction. } In the District Court of

*Security bond  
by adminis-  
trator.*

Know all men, by these presents, that we and \_\_\_\_\_ are held and firmly bound unto \_\_\_\_\_ Secretary of the District Court of \_\_\_\_\_ [or to the secretary of that court for the time being] the said \_\_\_\_\_ in the sum of £ \_\_\_\_\_ and the said \_\_\_\_\_ and \_\_\_\_\_ in the sum of £ \_\_\_\_\_ each, for which payment well and truly to be made to the said \_\_\_\_\_ or to the said secretary for the time being, we and each of us do hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents hereby renouncing.

Whereas by order of this court of the \_\_\_\_\_ day of \_\_\_\_\_ it is ordered that letters of administration of the property and estate, rights and credits of the said \_\_\_\_\_ deceased be granted to the said \_\_\_\_\_ on his giving security for the due administration thereof, and whereas the estate of the said deceased has been appraised and valued at the sum of £ \_\_\_\_\_

Now the condition of this obligation is, that if the above bounden \_\_\_\_\_ do render into this court a true and perfect inventory of all the property and estate, rights and credits of the said deceased, which have or shall come to the possession or knowledge of the said \_\_\_\_\_ or of any other person for him, on or before the \_\_\_\_\_ day of \_\_\_\_\_ and shall well and truly administer the same according to law, and further, shall render to this court a true and just account of his said administration on or before the \_\_\_\_\_ day of \_\_\_\_\_ next, and shall deliver

and pay over the rest and residue of the said property and estate, rights and credits which shall be found remaining upon the said administration, to the person or persons lawfully entitled to the same, then this obligation to be void and of none effect, otherwise to remain in full force. 0

Signed, sealed, and delivered 0  
in court, this day of 0

NOTE.—If the administrator, instead of sureties, should mortgage property by way of security, the form can easily be altered by omitting what relates to the sureties and inserting the usual clause of hypothecation.

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No. 10.

Testamentary }  
Jurisdiction. } In the District Court of

*Oath by administrator, with the will annexed.* You swear that you believe the writing now produced to you bearing date the day of and marked to be the last will and testament of deceased. That you will faithfully execute the said will, by paying the debts and legacies of the deceased, as far as the property will extend and the law bind. That you will exhibit into this court a true, full, and perfect inventory of all the property, moveable and immovable, and all the rights and credits of the deceased, on or before the day of and that you will file a true account of your executorship on or before the day of

Sworn in court this  
Before me

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No. 11.

Testamentary }  
Jurisdiction. } In the District Court of

*Affidavit of nuncupative will.* and severally make oath and say that they, these deponents, were, on or about the day of at about o'clock of personally present at where since deceased, then lay dangerously ill, of which sickness the said on or about the day of since died, and that they the said deponents did then and there hear the said deceased make nuncupative will by word of mouth, in the words following, or to the like effect [insert here the declarations of the deceased].

And these deponents further make oath and say that the said \_\_\_\_\_ spoke those words with an intent as they these deponents verily believe that the same should stand and be taken for \_\_\_\_\_ last will and testament. And that the said \_\_\_\_\_ at the time of making \_\_\_\_\_ said nuncupative will was to all outward appearance, and as they these deponents verily believe, of sound mind, memory, and understanding.

Sworn in court \_\_\_\_\_ this  
 Before me \_\_\_\_\_

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No. 12.

Testamentary } In the District Court of  
 Jurisdiction. }

*Probate of  
 nuncupative  
 will.*

The form of probate of nuncupative wills may easily be adapted from that of ordinary wills (Form No. 4), by inserting the word "nuncupative" after the words "last will and testament:" and if no executor be named in the nuncupative will, substituting the words "administrator appointed by the court," for the words "executor in the said last will and testament named."

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No. 13.

*Authority to  
 appraisers to  
 take possession.*

And you are further hereby empowered, authorized, and required to take charge and possession of the said property and estate, rights and credits of the said deceased, and to keep the same under your charge and possession till

further orders.

[This clause is to be inserted in the commission of appraisement, Form No. 7, in cases in which no executor or next of kin, &c. appears.]

---

No. 14.

Testamentary } In the District Court of  
 Jurisdiction. }

*Bond by creditors on receiving administration.*

[The obligatory part of this bond may be the same as Form No. 9.]

Whereas, by order of this court of the \_\_\_\_\_ day of \_\_\_\_\_ it is ordered that letters of administration of the property and estate, rights and credits of the said \_\_\_\_\_ deceased be granted to the said \_\_\_\_\_ of the creditors of the said deceased on \_\_\_\_\_ giving security as is hereinafter provided.

Now the condition of this obligation is, that if the above bounden do render into this court a true and perfect inventory of all the property and estate, rights and credits of the said deceased, which have or shall come to the possession or knowledge of the said or of any other person for on or before the day of and shall well and truly administer the same according to law, and pay the debts fairly and justly according to their respective degrees, without favour or partiality, or in equal proportions, if the estate should prove insufficient to satisfy all the debts in full, and further, shall render to this court a true and just account of said administration on or before the day of next, and shall deliver and pay over the rest and residue, if any, of the said property and estate, rights and credits, which shall be found remaining upon the said administration to the person or persons lawfully entitled to the same. Then this obligation to be void and of none effect, otherwise to remain in full force.

Signed, sealed, and delivered  
in court this day of \_\_\_\_\_

## No. 15.

Testamentary } In the District Court of  
Jurisdiction. }

To and

*Letters ad col-* Whereas it has been verified to this court  
*ligenda.* that late of died leaving  
property within this District, you and each of  
you are hereby empowered and authorized to take, collect, demand, and receive all and every the said property, and the rents, issues, and profits thereof, and safely to keep the same until the administration thereof be granted in due form of law to such person or persons as shall appear entitled to the same, or until you receive further orders from this court in that behalf.

By order of court,  
Secretary.

## No. 16.

Testamentary } In the District Court of  
Jurisdiction. }

[The obligatory part the same as that of No. 9.]

*Security bond* Whereas, by order of this court of the  
*by guardian.* day of last the said was  
nominated guardian of the person and estate of .

minor, the value of which estate amounts to £  
 Now, therefore, the condition of this obligation is, that if the  
 shall duly and faithfully execute his said office of  
 guardian, and shall well and truly apply the interests, rents, and  
 profits of the said estate, or so much as may be necessary for  
 the maintenance and education of the said minor, and shall have  
 the principal thereof to be paid to \_\_\_\_\_ on  
 attaining full age, and shall duly account for all sums received  
 and disbursed, and shall render true accounts to this court of  
 all such receipts and disbursements twice in every year, or  
 oftener if called upon so to do. Then this obligation to be void  
 and of none effect, otherwise to remain in full force.

Signed, sealed, and delivered  
 in court this \_\_\_\_\_ day of \_\_\_\_\_

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### FORMS, SECTION V.

#### MATRIMONIAL JURISDICTION.

No Forms seem necessary for this branch of jurisdiction.

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### SECTION VI.

#### REVENUE JURISDICTION.

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### SECTION VII.

#### ASSESSORS.

Any Forms which may be necessary for the purpose of  
 summoning and enforcing the attendance of assessors may be  
 adapted from those now in use in the Supreme Court with  
 respect to jurors.

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### SECTION VIII.

#### APPEAL.

No. 1.\*

Plaintiff }  
*against* } In the District of  
 Defendant. }

*Petition of*  
*appeal.* To the Supreme Court of the Island of Ceylon.  
 The petition of appeal of \_\_\_\_\_ the  
 and \_\_\_\_\_ appellant sheweth that the above  
 suit was instituted [here state the grounds of

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\* See Rule 1 of Section VIII. Revoked.



appeal, which may be done in general terms, except in cases of a pauper appellant, who must state his reasons at length].

Wherefore the said appellant prays that the said judgment may be reversed, with costs.

No. 2.

Appellant }  
*against* } In the District Court of  
 Respondent. }

*Bond to prosecute appeal,*  
*&c.* Know all men by these presents, that we and are held and firmly bound jointly and severally to in the sum of £ for the payment of which we bind ourselves jointly and severally, our respective heirs, executors, and administrators, firmly by these presents.

Now the condition of this obligation is such, that if the above bounden shall duly prosecute the appeal which he has instituted against the decree of the District Court of passed on the day of now last, in the suit above-mentioned, and shall well and truly perform, and abide by, the judgment which shall ultimately be pronounced by the Supreme Court of the Island of Ceylon, and shall pay any sum or sums of money which the said Supreme Court shall decree to be paid by the said appellant, and shall pay all costs, as well those incurred and taxed in the said District Court, as those which shall be incurred and taxed in prosecution of the said appeal, if the said appellant shall be decreed to pay the same, then this obligation to be void and of none effect.

NOTE.—The terms of the bond may be altered according to the stipulations into which the appellant may be required to enter, as pointed out by the 4th and 6th Rules, and also according to the nature of the security offered and accepted.

No. 3.

Certificate in appeal.

In the District Court of  
 No. { *against* } Plaintiffs (a)  
 and  
 } Defendants (a)  
 and

(a) If the appellant sue or defend in *forma pauperis*, that circumstance should be here stated.

I, the undersigned Secretary, do certify that this suit was instituted before this court on the            day of            and that on the            day of            a            (b) decree was passed therein in favour of the above-named            and respondents; that on the            day of            the            lodged a petition of appeal, which petition is herewith transmitted, together with the said decree, and (c) [the proceedings. And that on the            day of            the said appellant gave security] as required by the Rules and Orders in that behalf.

Dated at            the            day of           

Secretary.

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## APPENDIX E.

### FORM OF CERTIFICATE.

Referred to in p. 455, vol i.

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In the District Court of

Whereas A. B. of            did, on the            day of            18           , make application in writing to this Court for a Citation to be issued pursuant to the provisions of the Ordinance No. 7 of 1835: in which application the said A. B. did affirm that he was in the exclusive and bonâ fide possession of (*describe the property as in the application*), and which application was supported by the affidavit of C. D. and E. F. And whereas a Citation was thereupon issued by this Court, bearing date the            day of            18           , requiring all persons having, or pretending to have, any right or title to the said property, to appear before this Court and establish their claims to the same by due course of law, or be for ever barred therefrom; which Citation and the translation thereof have been duly affixed, published, and certified by

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(b) Final or interlocutory as the case may be.

(c) If the appeal be in *forma pauperis*, omit the words between [ ] and insert the following words (the summary of the grounds thereof).

the fiscal, as required by the said ordinance. And whereas the said A. B. hath apparently complied with all the requisites of the said Ordinance directed to be observed, and no person hath preferred any adverse claim to the said property. Be it therefore known to all, that the said A. B. hath a good and valid title to the property aforesaid, saving, nevertheless, the claim, right, and title of such persons as in and by the said ordinance are excepted, but not further or otherwise; in testimony whereof this Certificate is granted to the said A. B.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ one thousand eight hundred and \_\_\_\_\_

G. H.  
District Judge.

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## APPENDIX F.

Referred to in p. 558, vol. i.

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### B.

#### FORMS OF PLAINTS.

- In the Court of Requests of
- A. B. of \_\_\_\_\_  
*(if he sues in any capacity, then state such capacity; e. g. "as executor of E. F." or "as administrator of the estate of E. F." or as the case may be), Plaintiff.*
- vs.*
- C. D. of \_\_\_\_\_  
*(if sued in any capacity, then state as above), Defendant.*

#### § 1. COMMENCEMENTS AND CONCLUSIONS.

(Date.)

The Plaintiff, by G. H. his Proctor [or, "in person," as the case may be] sues the Defendant for [here state the cause of action, as near as is material, in the forms following, §§ 2, 3, and

4, including, wherever practicable, a Bill of Particulars; and conclude as follows].

And the plaintiff prays judgment for £ [and, if interest is payable, "and interest thereon, at per cent. per annum, from the "].

[Or, if the action is brought to recover specific goods:—"And the plaintiff prays for a return of the said goods, or their value, and £ damages for their detention "].

[Or, if the action is brought to recover lands, or houses, or the like:—"And the plaintiff prays judgment for the said premises, and for possession thereof, and £ as damages" [or, "£ per month as mesne profits," as the case may be].

## § 2. STATEMENT OF CAUSES OF ACTION EX CONTRACTU.

*For Goods Sold.*—For goods bargained and sold [or, "sold and delivered"] by the plaintiff [or, "by the said E. F. in his lifetime;" or as the case may be] to the defendant [or "to the said E. F. in his lifetime," or as the case may be], to wit (here enumerate the goods in the form of a Bill of Particulars).

*For the Use of a House and Land.*—For the defendant's use, by the plaintiff's permission, of a house and land of the plaintiff, to wit (here describe the premises briefly).

*For Hire of Goods.*—For the hire of goods by the plaintiff, lent on hire to the defendant, to wit (here enumerate the goods, in the form of a Bill of Particulars).

*For Freight.*—For freight for the conveyance of goods in a ship, by the plaintiff for the defendant, at his request; to wit: &c.

*For Carriage of Goods by Land.*—For the conveyance of goods by the plaintiff for the defendant, at his request; to wit: &c.

*For Passage Money.*—For the passage of the defendant on board the plaintiff's ship, at the defendant's request.

*For Demurrage.*—For the demurrage of the plaintiff's ship, kept on demurrage by the defendant, for days, at £ a day.

*On an Award.*—For money payable by the defendant on an award made by E. F. by virtue of a submission made by the plaintiff and defendant, bearing date the 18 .

*For Work and Materials.*—For work done (in building a house, or the like), and for materials provided by the plaintiff for the defendant, at his request, to wit, &c.

*For Money Lent.*—For money lent by the plaintiff to the defendant.

*For Money Paid.*—For money paid by the plaintiff for the defendant, at his request.

*For Money Received.*—For money received by the defendant for the use of the plaintiff.

*On an Account Stated.*—For money found to be due from the defendant to the plaintiff, on an account stated between them.

*On a Bond.*—For money due on a bond, dated \_\_\_\_\_, whereby the defendants bound themselves (the first as principal, and the second as surety, *or as the case may be*) to pay to the plaintiff, on demand [*or* “within six months from the date thereof,” *or as the case may be*], the sum of £ \_\_\_\_\_ and interest, &c.; but which the defendants have failed to pay. [*Or*, that the defendants (the first as principal, and the second and third as sureties) are jointly and severally indebted to the plaintiff in £ \_\_\_\_\_ upon the annexed bond.

*Upon a Lease for Rent.*—For that the plaintiff by a lease, dated the \_\_\_\_\_, let to the defendant a house, No. \_\_\_\_\_ in Marandahn, for three years, from the \_\_\_\_\_ at £ \_\_\_\_\_ a month, payable monthly, whereof six months’ rent became due on the \_\_\_\_\_, and is still unpaid.

*Upon a Promissory Note or Bill of Exchange.*—That the defendant (as maker, *or indorser, or acceptor, as the case may be*) is indebted to the plaintiff in £ \_\_\_\_\_ upon the annexed Promissory Note (*or*, Bill of Exchange, *as the case may be*).

*On a Guarantee.*—That the defendant, in consideration that the plaintiff would supply one E. F. with goods on credit, promised to be answerable to the plaintiff for the same; and although the plaintiff supplied the said E. F. with goods to the price of £ \_\_\_\_\_, yet neither the said E. F. nor the defendant has paid for the same.

### § 3. STATEMENT OF CAUSES OF ACTION EX DELICTO.

*Trespass to Land.*—That the defendant broke and entered into certain land of the plaintiff, called (*Koongahawatte*), situated at (*Marandahn*), and bounded as follows:—

North by, &c.

East by, &c.

South by, &c.

West by, &c.

containing (*three acres*) in extent, and carried away the produce thereof, to wit (100 *cocoanuts*)—(*or, broke and destroyed the fences thereof, or as the case may be*).

*Trespass to Goods*.—That the defendant seized a hackery of the plaintiff, of the value of £7 10s. and detained the same for 5 days (*or, shot at a cow of the plaintiff, and maimed her; or as the case may be*).

*Assault*.—That the defendant assaulted and beat the plaintiff.

*Wrongful Conversion of Goods*.—That the defendant wrongfully converted to his own use [*or “wrongfully deprived the plaintiff of the use and possession of”*] certain goods of the plaintiff, to wit, &c.

*Wrongful Detention of Property*.—That the defendant detains from the plaintiff his title-deeds of certain lands called (*Jamboegahawatte*), situate in (*Marandahn*); to wit, one deed, dated, &c.

*Against Carriers*.—That the defendant undertook, for certain reward, to carry certain goods of the plaintiff; to wit (5 *bales of cloth*), of the value of £6, from (*Colombo*) to (*Kandy*); but the defendant has not delivered the same [*or, “but, by the carelessness of the defendant, the said goods were damaged and lost to the plaintiff”*].

#### § 4. STATEMENTS OF CAUSES OF ACTION RELATING TO LAND.

*In Possessory Cases*.—For that the plaintiff was in possession for more than a year and a day, of a certain field, called (*here state the name, situation, boundaries, extent, and value, as above, § 3*). Yet the defendant ousted the plaintiff therefrom. Wherefore the plaintiff prays to be restored to possession.

#### IN PROPRIETARY CASES.

(a.) *On a Claim by Inheritance*.—For that: 1, A. was the owner of the garden, called (*here state the name, situation, boundaries, extent, and value, as above*). 2, That he died in 1830, leaving issue B. C. and D.; of whom D. died unmarried and without issue; and C. died leaving three children, of whom the plaintiff is one; and he, as such, became entitled to and was possessed of an undivided one-third of one-half of the premises; 3, Yet the defendant claims title thereto, and, in March last, ousted the plaintiff therefrom, to the plaintiff's damage of £           ; 4, Wherefore the plaintiff prays judgment for the said premises, and for possession there-

APPENDIX.

of, and £                    as damages (or, £                    per month as mesne profits).

(b) *On a Claim by Purchase.*—(Commence as in par. 1, form (a), and proceed as follows). 2, That the said A. by deed, dated 8th July, 1829, sold the same to the plaintiff. 3, Yet, &c.

(c) *On a Claim by Gift.*—(Commence as in par. 1, form (a), and proceed as follows). 2, That the said A. by deed, dated 12th June, 1825, gifted the same to the plaintiff, who accepted it. 3, Yet, &c.

(d) *On a Claim by partition.*—(State the premises and the plaintiff's right, as in par. 1 and 2, form (a), and proceed as follows:) 3, That by partition made amongst the heirs, by deed dated the 19th December, 1850 (or, by partition made and acted upon for more than 10 years), the plaintiff, in lieu of his said share, obtained the following (here describe the property claimed). 4, Yet, &c.

(e) *On a Fiscal's Seizure.*—(State the premises and the plaintiff's right, as in the above forms, and conclude as follows). 3, Yet the defendant, being the holder of a Writ, No. 24,825, of the District Court of Colombo, directed against one *Ahamadoc Lebbe Comisteeer*, caused the fiscal to seize and advertise the said premises for sale, and disputed the plaintiff's title thereto. 4, Wherefore, &c.

(f) *On Disputed Boundaries.*—1, That the plaintiff and defendant are owners of two adjoining gardens; to wit, *Galbodde-watte* of the plaintiff, and *Polwatte* of the defendant. 2, Yet the defendant has encroached upon the plaintiff's garden, towards the south, to the extent of about 2 roods, of the value of £3, and disputes his title thereto. Wherefore, &c.

(g) *On a Claim by Prescription.*—1, That the plaintiff was for 10 years and upwards in the undisturbed and uninterrupted possession of (here state the premises, as above.) Yet, &c.

C.

FORM OF SUMMONS.

SUMMONS.

In the Court of Requests of

No.

A. B. of                    (as Executor, &c. or as the case may be), Plaintiff.

vs.

C. D. of                    (as Executor, &c. or as the case may be), Defendant.

To the Defendant above named.

You are required to appear before this Court on the day of \_\_\_\_\_ next, at ten o'clock in the forenoon, to answer the suit of the plaintiff above named, wherein\* he claims £ \_\_\_\_\_ for [here state the cause of action, briefly, from the plaint; and, if interest is claimed, say, "together with interest at \_\_\_\_\_ per cent. per annum from the \_\_\_\_\_"].

And take notice that in default of your so doing, the Court will enter judgment for the plaintiff.

[Here insert the date.]

J. M. Chief Clerk.

### D.

#### FORM OF RETURN TO SUMMONS OR OTHER PROCESS.

(To be endorsed thereon, or annexed thereto.)

I do hereby swear (or affirm, as the case may be) that I did, on the \_\_\_\_\_ day of \_\_\_\_\_, serve the within summons (or subpoena, or as the case may be) on the within-named defendant (or witness, or as the case may be) by [here state the mode of service, as in the following forms:]

(a.) By delivering a copy (or translation) thereof to him.

(b.) By delivering a (copy) thereof to (Juanis Appoo), being a person of his household apparently more than sixteen years old, whom I found at the (dwelling-house) of the (defendant).

(c.) By affixing a (copy) thereof on the (door post) of his (dwelling-house), at (No. 36, Chatham Street, Colombo).

(d.) By affixing a (copy) thereof at (Davetagahawatte, in Demettegodde), being his last known place of residence.

### E.

#### FORM OF ADMISSION,

(Date)

The defendand admits the claim, and consents to judgment being entered for the plaintiff, as prayed for in the plaint.

C. D. (defendant.)

---

\* Note.—If the action is brought to recover lands, or houses, or the like: Wherein he claims a certain garden, Jamboogahawatte, situated at, &c. and complains that you have ousted him therefrom (or, "that you have caused the same to be seized, on a Writ, as the property of E. F."); and also £ \_\_\_\_\_ damages.



Signed in my presence,

J. M. Chief Clerk [or, Interpreter, or as the case may be].

---

F.

FORMS OF PLEAS OR ANSWERS.

§ 1. COMMENCEMENTS AND CONCLUSIONS.

The defendant, by G. H. his proctor [or "in person," as the case may be] says—(here insert the plea or answer, as near as is material, in the forms following : § 2, 3, 4).

And for a second plea the defendant says—(here state the second plea; and so as to further pleas; and if the defendant prays for a declaration of title to land, conclude as follows—"and the defendant prays for judgment for the said premises." In other cases no conclusion will be necessary.)

§ 2. PLEAS IN ACTIONS EX CONTRACTU.

*Plea to the Jurisdiction.*—That the defendant is resident of \_\_\_\_\_, beyond the jurisdiction of this Court: and the alleged cause of action did not accrue to the plaintiff within such jurisdiction.

*Denial of plaintiff's capacity.*—That the plaintiff is not executor [or "administrator," or "assignee," or as the case may be] as alleged.

*Denial of defendant's capacity.*—That he is not [executor, &c.] as alleged.

*Minority of defendant.*—That at the time of the said contract [or "of the accruing of the said cause of action"] he was a minor.

*Coverture of defendant.*—That at the time of the said contract [or "of the accruing of the said cause of action"] she was the wife of D. D.

*Plene administravit.*—That he has fully administered the estate of the said E. F. and had not, at the commencement of this suit, or at any time since, any goods of the said E. F. to be administered.

*Denial of the Debt.*—That he was never indebted as alleged.

*Denial of the Contract.*—That he never promised [or

"agreed" or "warranted," or such other appropriate word] as alleged.

*Denial of the defendant's making the Note or accepting the Bill.*—That he did not make the said Note [or "accept the said Bill"].

*Denial of Bond or Agreement.*—That he did not execute the said Bond [or "Agreement"],

*Prescription.*—That the alleged cause of action did not accrue within [three] years before this suit.

*Payment.*—That he satisfied the plaintiff's claim by payment [or "That as to £ , parcel of the plaintiff's claim, the defendant satisfied the same by payment"].

*Satisfaction.*—That he satisfied the plaintiff's claim by delivering to him certain goods, to wit; (*here enumerates the goods in the form of a Bill of Particulars*).

*Set-off.*—That the plaintiff, at the commencement of this suit, was, and still is, indebted to the defendant in £ , for (*here state the cause of set-off, as in a Pleint*) which amount the defendant is willing to set-off against an equal amount of the plaintiff's claim.

*Tender.*—That as to £ , parcel of the plaintiff's claim, the defendant, before action brought, tendered the same to the plaintiff, but he refused to accept it.

*Release.*—That before action brought the plaintiff, by a deed dated , released the defendant from the said claim.

### § 3. PLEAS IN ACTIONS EX DELICTO.

*Plea to the Jurisdiction.*—(As above, § 2.)

*Not guilty.*—That he is not guilty.

*Non delinet.*—That he did not and doth not detain as alleged.

*Denial in trespass, of the plaintiff's possession.*—That the plaintiff was not possessed of the said premises; but the same were in the possession of the defendant (*or of E. F. by whose license the defendant committed the alleged trespass*).

*Denial, in trespass, of the goods being plaintiff's.*—That the said (*hackery, or cow, or as the case may be*) was not the plaintiff's as alleged.

*Leave and License.*—That he did what is complained of by the plaintiff's leave and license.

*Self-defence.*—That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence.

*Lien in detinue.*—That the defendant had and still has a lien over the said goods for the sum of £            due by the plaintiff to the defendant for the conveyance of the same by the defendant for the plaintiff, and at his request, from (Liverpool) to (Colombo); or “for work done by the plaintiff upon the said goods for the defendant and at his request.”

#### § 4. PLEAS IN ACTIONS RELATING TO LAND.

*Plea to the Jurisdiction.*—That the said lands are of greater value than £10 (or, that the said premises are situated and the defendant is a resident at Negombo, beyond the jurisdiction of this Court).

*Denial of Entry and Ouster.*—That he is not guilty.

*Denial of Seizure.*—That he did not cause the said seizure, nor dispute the plaintiff's title.

*Denial of Plaintiff's Title, &c.*—(Admit or deny each of the paragraphs in the Plaintiff; and state the matter in defence, following, as nearly as possible, the forms provided for Plaintiffs: *ex. gr.*)

1, That A. was the owner of the premises, which are correctly described: 2, That he left four children, to wit, B, C, D, and E, of whom E. died unmarried and without issue; C. also died, leaving three children, of whom the plaintiff is one, who is accordingly entitled only to a third of a third: 3, That the defendant, as the only son of F, was and is entitled to his one-third; and beyond this, he does not dispute the plaintiff's title.

---

### G.

#### FORM OF NOTICE TO BE EXAMINED.

NOTICE.	In the Court of Requests of	
No.	A. B. of	Plaintiff.
	vs.	
	C. D. of	Defendant.

To the plaintiff (or defendant) above-named.

You are required to appear before this Court on the day of            next, at 10 o'clock in the forenoon, to be examined *vivâ voce*.

(Here insert the date.)

J. M. Chief Clerk.

---



Witness our hands at this day of one  
thousand eight hundred and sixty

Signed in my presence, C. D.  
E. F.

K.

FORM OF WRIT OF EXECUTION AGAINST  
PROPERTY.

WRIT AGAINST PROPERTY. In the Court of Requests of  
No. A. B. of Plaintiff.  
vs.  
C. D. of Defendant.

To the Fiscal for the Province.

Levy and make of the houses, lands, goods, debts, and credits  
of the above-named, by seizure, and if necessary  
by sale thereof, the sum of £

*Judgment £.* with interest as per margin, which  
*Costs* the above-named has re-  
covered against the said

£ by a judgment of this Court, bearing  
date the day of ; and

*With interest on £* pay the same to the said ; and  
*at per cent. from the* inform this Court, for what sum or  
sums, and to what person or persons,  
you have sold the said property re-  
spectively. And have you there this  
Mandate.

(Here insert the Date.)

J. M. Chief Clerk.

L.

FORM OF WRIT OF EXECUTION AGAINST PERSON.

WRIT AGAINST PERSON. In the Court of Requests of  
No. A. B. of Plaintiff.  
vs.  
C. D. of Defendant.

To the Fiscal for the Province.

Seize and take the above-named and keep him

safely, so that you have his body before this Court forthwith, to satisfy the sum of £

*Judgment £*

*Costs*

£

with interest as per margin, which the above-named has recovered against the said by a judgment of this Court bearing date the day of ; And have you there this Mandate.

*With Interest on £*

*at per cent. from the*

*(Here insert the Date.)*

*J. M. Chief Clerk.*

### M.

#### FORM OF WRIT OF POSSESSION.

WRIT OF POSSESSION.

In the Court of Requests of

No.

A. B. of

Plaintiff.

vs.

C. D. of

Defendant.

To the Fiscal for the Province.

Forthwith eject the above-named from, and place the above-named in possession of the (field called *Halagahacoomboore*, situated at *Dehiwelle, &c.*) which, by a judgment of this Court, bearing date the day of has been decreed to the said ; and inform this Court, on or before the day of what you have done by virtue hereof. And have you there this Mandate.

*(Here insert the Date.)*

*J. M. Chief Clerk.*

\* NOTE.—*If the Writ relate to moveables:* Forthwith take and recover from the above-named the (*Title Deeds of the garden Delgahavatte*) and deliver the same unto the above-named ; he the said having recovered the same by a judgment, &c. (*as above*).

### N.

#### FORM OF ATTACHMENT.

ATTACHMENT.

In the Court of Requests of

No.

A. B.

Plaintiff.

vs.

C. D.

Defendant.

To the Fiscal for the \_\_\_\_\_ Province.  
 Attach \_\_\_\_\_ so that you may have his body forthwith  
 before this Court, to answer for (*his non-appearance on a notice  
 served upon him by order of this Court, or, for his contempt of this  
 Court, in having taken possession of a certain garden, from which he  
 had been ejected by an Order of this Court; or, as the case may be*).  
 And have you there this Mandate.

(Here insert the date.)

J. M. Chief Clerk.

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O.

FORM OF COMMITMENT.

COMMITMENT. In the Court of Requests of \_\_\_\_\_  
 No. A. B. Plaintiff.  
 vs.  
 C. D. Defendant.

To the Fiscal for the \_\_\_\_\_ Province.  
 Receive into your custody the body of \_\_\_\_\_, com-  
 mitted under an order of this Court, dated the \_\_\_\_\_ day  
 of \_\_\_\_\_ 186 \_\_\_\_\_, and keep him safely until you be lawfully  
 directed to the contrary.

(Here insert the date.)

J. M. Chief Clerk.

---

P.

FORM OF RELEASE FROM COMMITMENT.

RELEASE. In the Court of Requests of \_\_\_\_\_  
 No. A. B. Plaintiff.  
 vs.  
 C. D. Defendant.

To the Fiscal for the \_\_\_\_\_ Province.  
 Release from your custody the body of \_\_\_\_\_, com-  
 mitted under an order of this Court, dated the \_\_\_\_\_ day  
 of \_\_\_\_\_ 186 \_\_\_\_\_, if for no other cause detained.

(Here insert the date.)

J. M. Chief Clerk.

---

## Q.

## TABLE OF COSTS AND EXPENSES.

## I. Costs as between party and party, where a Proctor or Advocate has appeared.

1. *In the Court of Requests.*In MONEY CASES, which have *not been contested.*

In all cases above £2 and not exceeding £5	0	7	6
Ditto 5 ditto 10	0	15	0

In MONEY CASES, which have been *contested;*

In all cases above £2 and not exceeding £5	0	15	0
Ditto 5 ditto 10	1	10	0

In all LAND CASES.

In all cases not exceeding £5.....	0	15	0
Ditto above £5 and not exceeding £10	1	10	0

2. *In Appeal.*

Brief fee on Argument £1 1s. to £2 2s. according to the length and difficulty of the case.

Provided that where an Advocate and Proctor shall have appeared for the same party in any case, no additional costs shall be recoverable by reason of such appearance.

## II. Costs and expenses, whether a Proctor or Advocate has appeared or not.

1. *Court-fees*, as regulated by the Schedule annexed to the Ordinance No. 19 of 1852, "*To amend the law relating to Stamp-duties,*" or by any Ordinance relating to Stamp-duties which may be in force for the time being.

2. *Batta of Witnesses*, at the discretion of the Commissioner, and according to the circumstances of each witness.

## III. Translator's Fees.

For every folio of 120 words	-	-	-	8d.
For every fractional part of a folio	-	-	-	8d.



## APPENDIX G.

Referred to in p. 589, vol. i.

## B.

## FORMS OF PLAINTS.

In the Police Court of

A. B. of

Complainant.

No.

vs.

C. D. of

Defendant.

(Date.)

*Plaint*:—That the Defendant (*did*) on the (*sixteenth*) day of (*February*) last, at (*Hill Street, Colombo*) [*here state the matter complained of, as in the following forms:*]

1. *Assault*.—Assault and beat the Complainant.
2. *Assault on a Public Officer*.—Assault and resist the Complainant, being an Officer of Police, while in the execution of his duty.
3. *Obstructing a Road Officer*.—Obstruct and molest the Complainant, when acting under the authority of the District Road Committee of (*Negombo*), in the seizure of a bullock found straying on the road; in breach of § 74 of the Ordinance No. 15 of 1843.
4. *Theft*.—Steal a (*comb*), the property of the Complainant.
5. *Receiving Stolen Property*.—Receive, knowing it to be stolen, a (*comb*), the property of the Complainant.
6. *Neglect of Duty by Servant*.—Grossly neglect his duty whilst in the service of the Complainant, as a (*domestic servant*) in breach of § 7 of the Ordinance No. 5 of 1841.
7. *Desertion of Child*.—Leave his Child without mainte-

nance, so that it requires to be supported by others; in breach of § 3 of the Ordinance No. 4 of 1841.

8. *Exposure of Person.*—Indecently expose his person, in breach of § 4 of the Ordinance No. 4 of 1841.

9. *Forcible Entry.*—Without the authority of a Magistrate, take forcible possession of the field (*Illook-cumboore*), whilst in the possession of the Complainant; in breach of the Proclamation of the 5th August, 1819.

10. *Failure to perform Labour.*—Fail to attend and perform labour on the (*Madampittiye*) road, though duly required so to do; in breach of § 5 of the Ordinance No. 14 of 1848.

11. *Cock-Fighting.*—(*Was*) engaged in cock-fighting at a tavern; in breach of § 4 of the Ordinance No. 4 of 1841.

12. *Gaming.*—(*Was*) engaged at a game of chance with cards, in a shed kept for the purpose of promiscuous gaming; in breach of § 4 of the Ordinance No. 4 of 1841.

13. *Illegal Possession of Arrack.*—(*Was*) found in possession of           gallons of Arrack, contrary to the provision of § 32 of the Ordinance No. 10 of 1844.

14. *Collecting Toll without a Badge.*—Being the Toll-keeper at the (*Dehiwelle*) Bridge, collect toll without wearing his metal badge; in breach of § 9 of the Ordinance No. 9 of 1845.

15. *Forcibly Passing a Toll Station.*—Forcibly pass across the place appointed for the collection of tolls at the (*Mutwall*) Ferry; in breach of § 13 of the Ordinance No. 13 of 1845.

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### C.

#### FORM OF SUMMONS.

In the Police Court of

A. B. of

Complainant.

No.

vs.

C. D. of

Defendant.

To the Defendant above named.

You are required to appear before this Court, on the day of           , at ten o'clock in the forenoon, to answer a complaint preferred against you by the Complainant above named, in that you did, on the            [here copy the plaint].

(Date.)

J. M. Chief Clerk.

---

## D.

## FORM OF WARRANT

Under § 14 of Ordinance No. 13 of 1861.

In the Police Court of

A. B. of

Complainant.

No.

vs.

C. D. of

Defendant.

To

Inspector of Police (*or as the case may be*).

Whereas it has been shown to the satisfaction of this Court that the attendance of the above-named defendant cannot be secured by means of an ordinary summons; you are therefore required forthwith to apprehend, and bring him before this Court, to answer a complaint preferred against him by the Complainant above named, in that the said defendant did, on the

[*here copy the plaint*].

(Date.)

G. H. Police Magistrate.

## E.

## FORM OF COMMITMENT.

In the Police Court of

A. B. of

Complainant.

No.

vs.

C. D. of

Defendant.

To the Fiscal for the Province.

Receive into your custody the body of the above-named Defendant, herewith sent to you, charged with [*here state the offence in terms of the plaint*], and safely keep him until the day of \_\_\_\_\_, when you are hereby required to bring him before me at ten o'clock in the forenoon, to be dealt with according to law.

(Date.)

G. H. Police Magistrate.

(Endorsement, in case of a Remand:—Remanded till the day of \_\_\_\_\_, 1861.

(Date.)

G. H. Police Magistrate.)

## F.

## FORM OF RECOGNIZANCE.

In the Police Court of

A. B.

Complainant.

No.

vs.

C. D.

Defendant.

Be it remembered that we, C. D. and E. F. both of  
are jointly and severally held and firmly bound to our Sovereign  
Lady the Queen in the sum of £                   ; that is to say, the  
said C. D. in £                   , and the said E. F. in £                   ,  
to be paid unto our said Lady the Queen, her heirs and suc-  
cessors; for which payment to be well and truly made, we bind  
ourselves, our heirs, executors, and administrators, and all our  
property, firmly by these presents.

The condition of this Recognizance is such, that if the above  
bounden C. D. shall appear before the said Court on the  
day of                   , at ten o'clock in the forenoon, and take his  
trial in the above-styled case, then this Recognizance shall be  
void, or otherwise shall be in full force and virtue.

Witness our hands, at                   , this                    day  
of                   , One thousand eight hundred and  
sixty

Signed in my presence,  
G. H. Police Magistrate.

C. D.  
E. F.

## G.

## FORM OF RETURNS.

(To be indorsed or annexed.)

I do hereby swear (or affirm, as the case may be) that I did,  
on the                    day of                   , serve the within sum-  
mons (or subpoena, or as the case may be) on the within-named  
Defendant (or Witness, or as the case may be), by—[here state  
the mode of service, as in the following forms:]

(a.) By delivering a copy (or translation) thereof to him.

(b.) By deliveriug a copy (or translation) thereof to (*Juanis  
Appoc*), being a person of his household, apparently more than  
sixteen years old, whom I found at the (*dwelling-house*) of the  
said defendant (or witness).

Sworn, this                    day of }  
186                   , Before me }

## H.

## FORM OF NOTICE.

In the Police Court of

A. B. of

Complainant.

No.

vs.

C. D. of

Defendant.

To the above-named Plaintiff.

You are required to attend this Court, on the \_\_\_\_\_ day  
of \_\_\_\_\_, at ten o'clock in the forenoon, to be examined  
touching the above case.

(Date.)

J. K. Chief Clerk.

## I.

FORM OF WARRANT UNDER SECTION FIFTEEN OF  
THE RULES AND ORDERS.

In the Police Court of

A. B. of

Complainant.

No.

vs.

C. D. of

Defendant.

To

Inspector of Police (*or as the case may be*).

Whereas the above-named C. D. having been summoned to  
appear before this Court, has failed to do so, or to excuse his  
absence; you are therefore required forthwith to apprehend and  
bring him before this Court, to answer the complaint there  
pending against him.

(Date.)

G. H. Police Magistrate.

## K.

## FORM OF SUBPOENA.

In the Police Court of

A. B. of

Complainant.

No.

vs.

C. D. of

Defendant.

To

You are required to appear before this Court, on the \_\_\_\_\_  
day of \_\_\_\_\_, at ten o'clock in the forenoon, to give evidence  
touching the above case.

(Date.)

J. K. Chief Clerk.



M.

FORM OF COMMITMENT OR ORDER UNDER SECTIONS THIRTY-THREE AND THIRTY-FOUR.

In the Police Court of

A. B. of

Complainant.

No.

vs.

C. D. of

Defendant.

To the Fiscal for the

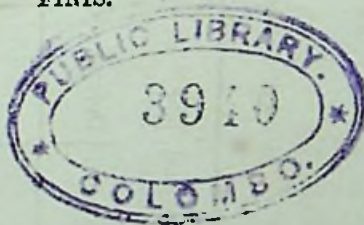
Province.

Whereas the above-named defendant stands convicted before me of [here state the offence], and has been sentenced to . You are therefore hereby required to cause the said sentence to be carried into execution.

(Date.)

G. K. Police Magistrate.

FINIS.



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LONDON :

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