REPORTS

OF

IMPORTANT CASES

Heard and Decided

BY THE

SUPREME COURT OF CEYLON

DURING THE YEARS

1872, '75 and '76.

Edited by

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PREFACE.

Many a Chief Justice has regretted that, for want of an unbroken series of law reports, the courts of the island had often brought their proceedings into disrepute by pronouncing contradictory decisions, and wasted public time by elaborately adjudging questions of law which had been as elaborately adjudged years before. In order to remove this reproach from the administration of justice in Ceylon, I entered upon a scheme of law reporting in 1874, by which I hoped to bridge all the gaps existing between 1820 and 1868. In May 1884 I had the pleasure of completing my scheme.

Upon the Hon. Mr. Grenier, the present Attorney General, abandoning his intention to edit the reports for 1872, 1875 and 1876, I begged Messrs. Wendt, Sampayo and LaBrooy of the Colombo Bar to prepare for the press the cases I had collected for those years. They have cheerfully performed this task, and I offer them my best thanks.

The head notes for 1872 are the work of Mr. Wendt, those for 1875 of Mr. LaBrooy, and those for 1876 of Mr. Sampayo. Mr. Wendt has also kindly made up the general index for the three years and has helped me in the revision of the proof sheets.

The time has come for digesting the judiciary law of the island. I earnestly hope that some enterprising member of the bar will, without delay, enter upon this duty, which now may be fulfilled in view of the following series of reports being available to the profession :—

Ramanathan	1820-'33
Sir Charles Marshall	1833-'36
Morgan	1833-'42
Ramanathan	1843-'55
Lorens	1856-'59
Ramanathan	1860-'62
Ramanathan	1863-'68
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Grenier	1873-'74
Ramanathan*	1875-'76
Ramanathan	1877
Supreme Court Circular†	1878-'83
Wendt	1882-'83
Supreme Court Circular†	1884-'90

P. RAMANATHAN.

COLOMBO,
February, 1890.

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* The reports for 1872, '75 and '76, now issued, in one volume.

† The Supreme Court Circular, including that for 1890, consists of nine volumes.

DIGEST.

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The courts in Ceylon would not necessarily grant to the husband administration to his wife's estate, but have the right to exercise a discretionary power.

Where the husband had previously propounded a will the genuineness of which he was unable to prove, the next of kin were preferred to the husband.

Observations on the law of administration in Ceylon.

D. C. Galle, No. 2,530. In re *Dadallege Rolintina* ... 311

4.—*Administration—application for, by attorney of executors in England—security, amount of—security of a limited company—R. & O. section* 4, *rules* 4 *and* 6.

Where the attorney of the executors of a will, proved in England, applied for administration to the estate in Ceylon, the Supreme Court did not insist on the same rigorous scrutiny, as in ordinary cases, of the sufficiency of the security, and saw no objection to accepting the security of a limited company whose business included "the transaction of mercantile and other business as agents, on commission or otherwise, in Ceylon."

D. C. Colombo, Testy. No. 3,938. In re *Sir John Cheape* ... 294

See KANDYAN LAW 5.

Administrator.

Administrator—His purchase of property belonging to the estate—Impeachment of sale by heirs—Fraud—Lapse of time—Acquiescence on the part of the heirs.

Defendant was appointed official administrator of the estate of one Mr. Marshall, in February 1841.

On the 13th of May 1846, final account of the estate was closed by defendant, after notice to the attorney of the heirs of Mr. Marshall.

In 1873 an action was brought by the heirs of Mr. Marshall impeaching the correctness of defendant's accounts and charging him with fraud, especially with regard to the sale of a house and garden called Cinnamon Lodge, which the defendant had bought from the purchaser at Mr. Marshall's auction nine months after. It was alleged on the part of the plaintiffs that the first sale was a collusive one and that the real purchaser was the defendant himself and the property was sold for very much less than its real value. It was proved by the defendant that the sale had been previously advertised in four issues of the leading newspaper in the island and that several persons, including the defendant himself, had bid for the property.

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Held, that although an executor or administrator buying his intestate's property is liable to have his act very narrowly scrutinised by the court, yet in the present instance the circumstances were such as to negative any fraud on the part of the defendant. The court relied on the fact that the sale sought to be impeached was an open transaction (the heirs of the deceased having been represented by an attorney, who was aware of the purchase by the defendant, and did not question the *bona fide* character of the transaction) and that (nearly thirty-two years having elapsed between the purchase and the institution of the present action) it was impossible for the defendant to adduce evidence as to the value of the property at the time, as all the witnesses who could have spoken to its value then were dead.

D. C. Colombo, No. 62,414. *Marshall* v. *Stork*... ... 136

Adoption.

See KANDYAN LAW 5.

Animals.

See REI VINDICATIO.
CAUSE OF ACTION 5.

Appeal.

1.—*Appeals on questions of fact—Principles on which the Supreme Court interferes—Burden of proof.*

The Supreme Court does not set aside judgments of the Court below on questions of fact unless it is made perfectly clear to the Supreme Court that the Court below has come to an erroneous conclusion. So, when the burden of proof was on the defendant, and the evidence was so conflicting that the Court was left in considerable doubt as to which side was correct, the Supreme Court affirmed the judgment given below for plaintiff.

C. R. Colombo, No. 79,700. *Maitland* v. *Ford*... ... 8

2.—*Practice—Appeal out of time*—Laches—*Jurisdiction of single judge—Ordinance* 11 *of* 1868, *sec.* 27.

A defendant in July 1872, sought leave to appeal out of time against a judgment passed in 1859, and filed an affidavit deposing that she had not prosecuted the appeal because the Judge who had pronounced the judgment had thereafter sent for the parties and promised to settle amicably any disputes that might arise among them in consequence of it.

The Supreme Court refused the application.

Observations on the principles which should govern such applications.

Appropriation of payments.

Appropriation of payment, rules of—Roman Dutch Law.

Where a person, indebted on two accounts to another person, made a payment—

Held, that to constitute a legal appropriation under the Roman Dutch Law, either by creditor or by debtor, the appropriation must be made at the time of payment and not after.

Where defendant was doubtful as to such appropriation, and where defendant was indebted on two promissory notes, on one as maker and on the other as endorser—

Held, that the payment should be appropriated to the former, which was the debt most burdensome to the debtor.

Arbitration.

Arbitration—irregularity—ex parte *proceedings.*

Where a reference was made to two arbitrators and an umpire, and where one of the arbitrators disagreed with his colleagues and refused to take part in the inquiry which continued in his absence, and the award as sent in was signed only by the other arbitrator and the umpire,

Held, that the award was invalid.

See COURT OF REQUESTS 1.

Arrack Ordinance.

Arrack, possession of—Ordinance No. 10 *of* 1844, *clause* 32.

Possession of arrack in less quantity than two quarts is not an offence within the meaning of clause 32 of the Ordinance 10 of 1844.

See TAVERN.

Arrest.

Arrest of offender—Duty of headmen—frivolous prosecution.

A headman is not bound to take into his custody a person

charged with an offence, but may use his discretion as to doing so.

Where a criminal charge is laid, the complainant if he acted under a *bona fide* though mistaken belief in doing so should not be condemned to pay the defendant's expenses.

See FISCAL 2.
PRACTICE 8.
RESISTANCE.

Assessment tax.

See POLICE.

Assessors.

See DISTRICT COURT 1.

Assignment.

See MORTGAGE 2.
PREFERENCE AND CONCURRENCE 2.

Attachment.

See TRUSTEE.

Attestation.

See PROMISSORY NOTE 2.
WILL 4.

Bailment.

See DEPOSITUM.
COMMODUM.

Basnaike Nilame.

See KANDYAN LAW 4.

Bottomry bond.

Hypothecation of cargo—Duty of the master—Bottomry bond—Communication with the owner.

A master cannot bottomry a ship without communication with his owner, if communication be practicable, and *a fortiori* cannot hypothecate the cargo without communicating with the owner of it if communication with such owner be practicable. Such communi-

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cation must state not merely the necessity for expenditure, but also the necessity for hypothecation.

Buddhistic law.

1.—*Buddhist law—Power of incumbent to lease or transfer temple and its appurtenances to another priest.*

A Buddhist priest, the incumbent of a Temple, cannot lease or transfer his rights as such incumbent to another priest.

See PRACTICE 2.

Burial ground.

Custodian of a burial ground—Notice of death to person claiming to be custodian—validity of such notice—Bye-law of the Colombo Municipal Council, chap. 28.

Where a Municipal bye-law required certain parties, in cases of deaths, to give information to the custodian of the burial ground respecting certain particulars required to be registered by such custodian,

Held, that the bye-law was satisfied when the information was given to a person who claimed to be and acted as custodian, though his title to the office was disputed by another person.

Cattle Trespass.

Cattle trespass—feeding charges—liability of owner—Ordinance No. 2 *of* 1835.

Defendant's cattle, which had been seized trespassing, were given in charge by the owner of the land to plaintiff, a headman, who now sued for the cost of the keep.

Held, that in the absence of a promise to pay such cost, the plaintiff could not maintain this action for want of privity.

Cause of action.

1.—*Cause of action—payment of debt—action to obtain a receipt for such payment or refund of the amount paid.*

The plaintiffs being indebted to defendant in a judgment gave a mortgage of certain property to defendant. Afterwards defendant agreed to receive in liquidation of the debt a certain sum in cash and some jewellery in pledge for the balance and to release the

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mortgaged property and grant a receipt for the debtor. Accordingly defendant received the sum of money agreed upon and the pledge, but failed and refused to give a receipt for the orginal debt or to release the mortgaged property.

Held, that plaintiff had a good cause of action against defendant for compelling him to grant a receipt and release the mortgaged property, or to refund the money paid and return the pledge.

D. C. Jaffna, No. 8,225. *Meera Saibo* v. *Mahammado Ussen* 240

2.—*Cause of action—action on bills of exchange covered by hypothecation of bills of lading—concurrent remedy—construction of agreement.*

Defendant negotiated certain bills with plaintiff and covered them by hypothecation of bills of lading for certain goods shipped by defendant to England. It was agreed that the delivery of the goods should not prejudice the rights on the bills in case of dishonour, nor recourse taken thereon affect plaintiff's title to the security to the extent of defendant's liability. The bills were dishonoured and were put in suit in this case. The plaintiff, however, after the institution of the case, began to realize the goods in London, which fact the defendant pleaded. The district court held that plaintiff could not pursue both remedies concurrently, and stayed proceedings until the goods should be fully realized.

Held, that plaintiff was entitled to maintain the action for the amount which for the time represented "the extent of defendant's liability."

And the Supreme Court directed an account to be rendered of the receipts, and judgment to be given for the balance, future sums realized before levy to go in satisfaction of judgment.

D. C. Colombo, No. 68,363. *The Chartered Mercantile Bank* v. *O'Halloran* 305

3.—*Cause of action—action to recover value of stolen property against purchaser*—mala fides—*Roman Dutch Law.*

For the maintenance of an action for the value of stolen property against a purchaser who has already dispossessed himself of it, there must be *mala fides* on his part.

D. C. Kandy, No. 63,034. *George Wall & Co*, v. *Fernando* 301

4.—*Cause of action—excessive levy under writ in previous case—ex parte motion—practice.* 39

In a previous case instituted in September 1871, the 1st defendant sued plaintiff in ejectment, claiming Rs. 200 per annum as damages, and an injunction was obtained restraining plaintiff from plucking fruits, &c. In July 1873, 1st defendant obtained final judgment for damage and costs as prayed. In April 1874, on an *ex parte* motion, writ was issued to recover judgment and costs

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Rs. 520·50, and Rs. 200 yearly damage from September 1871 to February 1874. In June 1874 the fiscal by the 2nd defendant, fiscal's arachchi, carried out the writ and recovered the whole amount. In July 1874 plaintiff raised the present action against 1st defendant for the amount of excess, averring that he had not been in possession since the injunction and that damages had been recovered for the time he had been out of possession.

Held, that there was no cause of action against the 2nd defendant.

Held, that in the absence of laches, plaintiff could maintain this action against 1st defendant, the fact of his not proceeding in the original suit, as he should have done, going only to the question of costs.

Held also, that neither the judgment in the previous case, which did not specify the period for which damages were awarded, nor the order issuing writ, which did specify that period but was made *ex parte*, was a bar to the present action.

D. C. Matara, No. 27,781. *Abegunewardana* v. *Louis* ... 299

5.—*Cause of action—injury caused by one animal to another—action for compensation.*

Defendant's buffalo chased the plaintiff's buffalo and drove it on to the Railway line, where it was killed by a passing train.

Held, that plaintiff was entitled to compensation.

C. R. Kandy, No. 2,652. *Malhami* v. *Mudalihami* ... 288

6.—*Cause of action—estoppel—costs.*

On conveying land to plaintiff, defendant omitted to except a planter's interest which then attached to the land. Plaintiff in a previous action obtained a decree of rescission of the contract and refund of the money, subject to his reconveying the land to defendant. But this he could not do, as he had created an incumbrance on the land in favour of a third party. The present action was brought to recover compensation for the wrongful act of the defendant. The district judge held the judgment in the previous case to be a bar to the present action. On an appeal by plaintiff,

Held, (CLARENCE J. *dissentiente*) that the judgment of rescission in the previous case was no bar to the present action for compensation, but only affected costs.

D. C. Matara, No. 28,393. *Andris* v. *Gajadira* ... 272

See JURISDICTION 1, 2.
PRESCRIPTION 6.

Certificate, R.

See INSOLVENCY 6.

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Church.

Coffee-stealing Ordinance.

Plaint defective—possession of green coffee—Ordinance No. 8 of 1874, sec. 5.

Section 5 of Ordinance No. 8 of 1874 enacts—"Where green gathered coffee shall be found in the possession of any person, such person may be presumed to have stolen such coffee, or unlawfully received it, knowing it to have been stolen, unless such person shall satisfactorily account for his possession thereof."

The defendants were charged under the above section with having green coffee in their possession without being able to give a satisfactory account of the same. They were convicted and appealed.

Held, that the plaint disclosed no offence.

Collision.

Collision of ships—Contributory negligence—Damages—6th Port Rule of 6th January 1866—Employment of pilot at the port of Galle.

The owner of a ship, which sustains an injury from collision with another ship, cannot make the master of the latter liable in damages even if he were proved to have acted negligently, if plaintiff himself were guilty of negligence which substantially contributed to the injury, and were wanting in ordinary care which might have avoided the consequences of the defendant's negligence.

In determining the question of negligence, it is material to consider whether the customary rules of navigation have or have not been observed.

Authority of Port Rules made under the Master Attendant's Ordinance considered; also the employment of pilots.

Commodum.

Commodum – Damage to—Irresistible violence or unavoidable misfortune—Burden of proof.

The person to whom anything is lent gratuitously is bound to return it in the same state in which he borrowed it, unless prevented by irresistible violence or unavoidable misfortune; and it is for the borrower to show that the damage to the thing lent was not due to any fault of his own.

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Composition.

See PARTNERSHIP.

Compound interest.

Compound interest—Dutch Usury Laws—their force in Ceylon —Rate of interest recoverable.

Compound interest is illegal and cannot be recovered even though expressly stipulated for.

Held also by MORGAN, A. C. J. and STEWART, J. (CAYLEY, J. *dissentiente*) that the Usury Laws of Holland, being in their nature merely local enactments and unsuited to the condition of affairs in Ceylon, were not introduced by the Dutch, and were not in force during their occupation of the Island, and that, therefore, any rate of interest stipulated for could be recovered.

D. C. Colombo, No. 63,436. *Ramasamy Pulle* v. *Tamby Candoe* 189

Concurrent remedies.

See CAUSE OF ACTION, 2.

Confession of judgment.

See PRACTICE, 5.

Consideration.

See DONATION, 2.
CONTRACT, ILLEGAL.

Construction.

See GAME.
FRAUDULENT ALIENATION, 3.
CAUSE OF ACTION, 2.
TOLLS, 3.
PRINCIPAL AND SURETY, 2.

Contempt of Court.

1.—*Contempt of court – Removal of court records by proctors, contrary to orders of court—Costs of rule* nisi.

The District Court has power to make regulations forbidding the removal by proctors of records of court from the record-room, and may punish breach of such regulations as a contempt of the court.

Where a rule *nisi* is discharged unconditionally, the respondent cannot be ordered to pay the costs.

D. C. Colombo, No. 60,355 &c. In the matter, &c., of *Charles E. Ball*, and others 52

Contract.

Contract, illegal.

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Contribution.

See INDEMNITY.

Costs.

See EVIDENCE.
CAUSE OF ACTION, 6.
CONTEMPT OF COURT, 1.

Court of Requests.

1.—*Court of Requests—Arbitrator appointed by—Power to award larger sum than the Court of Requests.*

An Arbitrator appointed by a Court of Requests cannot award a larger sum than the court itself has power to award.

C. R. Panadura, No. 16,140. *Perera* v. *Hendrick* ... 89

2.—*Court of Requests—Power of, to punish parties bringing false cases.*

Courts of Requests have no power to punish parties for bringing false cases, as for a contempt of court.

C. R. Negombo, No. 24,821. *Jusey Perera* v. *Andivale Appu* and others 108

See JURISDICTION, 8.

Criminal law.

Theft—Evidence—Charge for stealing a live animal—Proof of theft of a carcase.

Upon an indictment for stealing a live animal, evidence cannot be given of stealing a dead animal. An indictment for stealing a dead animal should state that it was dead.

D. C. Colombo, No. 2,149 189

See LABOUR ORDINANCE, 5.
TAVERN, 2.

Crops.

See LABOUR ORDINANCE, 4.

Crown.

1.—*Conveyance of land by Crown—Warranty of title.*

In conveyances of land from the Crown, the purchaser is not entitled to any covenant for title, and in the absence of express warranty he must be taken to have purchased at his own risk.

C. R. Kalutara, No. 29,608. *Fernando* v. *Morgan* ... 57

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2.—*Crown grant of Land—Condition—Forfeiture Summary Resumption of possession by Crown.*

A grant of land by the Crown to the plaintiff in 1835 was subject to the conditions, *first*, that if within three years the land was not brought into full and fair cultivation (according to the opinion of a majority of nine competent persons, to be assembled by the Government Agent for the purpose of inspecting the land at the expiration of the said period) the grantee should make good the value (on the appraisement of a majority of the nine persons) of the one-tenth share of the produce that the Government would have received had the land been duly cultivated, and the grant should be utterly void and of none effect; and *second*, that if at any time it should be made apparent to the majority of nine persons summoned as before, that the land had been for one year neglected and uncultivated, the grant should be utterly void and of none effect.

In an action by the plaintiff in 1871 for a trespass on the land committed by the orders of Government,

Held, that the first condition could only be enforced at the expiration of the three years or within a reasonable time after.

Held also, that the right of the Crown to avail itself of a forfeiture on breach of the second condition had not been waived by lapse of time, but was enforceable at any time by the procedure provided by the grant, continuing non-cultivation being a continuing cause of forfeiture.

No nine competent persons having been assembled for the purpose of enforcing the forfeiture,

Held, that the Crown could not summarily resume possession of the land, although it had never been brought into cultivation, and that the plaintiff was therefore entitled to judgment.

C. R. Panadura, No. 13,969. *Perera* v. *Samerenayeke* ... 58

3.—*Action against the Crown—Ceylon Government Railway—Carriers by Railway—Loss of Goods—Ordinance No.* 10 *of* 1865 *sec.* 13—*Responsibility of the Crown for negligence of its servants—Burden of proof—Nature of evidence as to negligence.*

The proper person to be sued in an action arising ex contractu by a subject against the Crown is the Queen's Advocate.

The Government of Ceylon, as owners of the Ceylon Government Railway, are responsible as carriers by land for loss of goods entrusted to them to be carried, where such loss is occasioned by the negligence of its servants, there being nothing in section 13 of Ordinance 10 of 1865 which relieves them from any such responsibility, although the burden of proving negligence is on the party asserting it.

In proving negligence, it is not necessary to prove that any particular person is to blame.

D. C. Colombo, No. 64,401. *Ceylon Co. Ld.* v. *The Queen's Advocate* 157

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4.—*Ord.* 12 *of* 1840, *sect.* 6—*non-payment of customary taxes or dues—forbearance of crown to collect taxes—tax upon kurakkan—requirements of the Ordinance—ejectment.*

D. C. Kandy, No. 63,047. 313

See PADDY TAX, 2.

Custodia legis.

See FISCAL'S SALE, 2.

Damages.

1.—*Obligation* quasi ex contractu—*Adjoining lands—Damage caused by neglected condition of neighbour's land*—Damnum absque injuria—Culpa.

Plaintiff and defendants owned adjoining lands planted with coffee. Defendants' land was overgrown with weeds, and the seeds of such weeds, being blown and carried into plaintiff's land, entailed upon him double the expense for weeding that was incurred when defendants' land was kept free from weeds.

Held, that defendants' omission to keep their land clean was mere *culpa*, and therefore not actionable unless a legal right had been injured by it; and that there was nothing to show sufficiently any right on the part of plaintiff which had been injured by that omission.

C. R. Panwila, No. 3,721. *Mackelvie* v. *Edoris* 61

2.—*Damages—Plumbago mines wrongfully worked*—Bona fide *mistake of ownership—Mode of assessing damages.*

In a suit for an account of plumbago wrongfully quarried by the defendant, it being found that the working of the mine was carried on in the *bonâ fide* belief that it belonged to the defendant, the court held that the defendant was bound to pay the fair market value of the plumbago after deducting his working expenses.

Hilton v. *Woods*, 36 L. J Chancery Division, 941, followed.

D. C. Kalutara, No. 27,397. *VanCuylenburg* v. *Harmanis Vederale* 127

3.—*Misrepresentation—fraud—damages—evidence.*

Plaintiff, as vidana reported to the defendant, as Mudaliyar, an alleged encroachment on crown land by certain parties by cultivating it with coconuts. The defendant then sued the trespassers in the Court of Requests, the plaint alleging that they cultivated

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the land with paddy. At the trial of the case the plaintiff gave evidence and deposed to the coconut cultivation. On account of the variation between the plaint and plaintiff's evidence, the commissioner dismissed the case and reported the plaintiff to the Government Agent who thereupon dismissed plaintiff from his post as vidana. Plaintiff now sued defendant for damages, for maliciously "charging" the trespassers with paddy cultivation with intent to injure plaintiff and cause him to be dismissed from office. The answer admitted the dismissal but denied that it was due to any wrongful act of defendant.

Held, that plaintiff's dismissal was not the natural consequence of the error in the plaint, so as to entitle plaintiff to damages as against defendant.

D. C. Kalutara, No. 29,061. *Ranesinghe* v. *Goonewardana* 259

4.—*Action for damages—Negligence—Setting fire to jungle—Pleading—Evidence.*

In an action for causing damage to a coffee estate into which fire had spread from a neighbouring land where jungle had been set fire to,

Held, that it was not necessary to prove negligence, even though averred in the libel, on the part of the defendant or his agents.

D. C. Kandy, No. 64,643. *Elphinstone* v. *Boustead* ... 268

See COLLISION.

CAUSE OF ACTION, 5.

Damnum absque injuria.

See DAMAGES, 1.

Decisory oath.

Decisory oath out of court.

A judge should not be a party to an agreement that a case should be decided, not on the merits but, by decisory oaths. He may however postpone the case to enable parties to carry out their own arrangements and to move for judgment accordingly.

C. R. Balapitymodera, No. 23,628. *De Soyza* v. *De Abrew* 110

Defamation.

1.—*Master and servant—Register book—Character—Damages—Justification.*

A master who does not justify the bad character given by him to his servant in the register book is liable in damages.

Divorce.

1.—*Divorce—Marriage not followed by cohabitation—Adultery—Laches.*

The plaintiff and his wife the defendant were married in the year 1860. They separated immediately after the marriage ceremony, and never cohabited, and the plaintiff never made the defendant any allowance for maintenance. For three years immediately before action the defendant was living in adultery. Plaintiff in 1871 brought the present action for a divorce *a vinculo* on the ground of the wife's adultery.

Held, that the plaintiff was, on account of his *laches*, not entitled to a divorce.

D. C. Colombo, No. 59,124. *Swaris* v. *Alwis* ... 50

2.—*Divorce—Malicious desertion.*

In an action by the wife against the husband for a divorce on the ground of malicious desertion, the husband denying the desertion and pleading that he was always willing to receive the plaintiff as his wife, it appeared that the parties were living separate for six years, having only cohabited for two months after marriage, that the wife had never requested the husband to receive her into his house, nor sent him any letter or message with the same object, nor had the husband ever declared his unwillingness to receive her or to accede to such request if made. At the trial the wife expressed her unwillingness to be reconciled to her husband.

Held, that malicious desertion of the wife by the husband had not been established.

D. C. Jaffna, No. 20,905. *Parpathy* v. *Suppramaniar* ... 72

See MOHAMMEDAN LAW, 3.

Donation.

1.—*Donation—Revocation and cancellation—Breach of condition—Ingratitude—Atrocious and contumelious slander and reproaches.*

Plaintiff by deed gifted a house and premises to the defendant, her nephew, (whom she had brought up and educated, and who had always lived with her in her house) subject to right of enjoyment thereof during her life. The defendant thereafter systematically used foul and contumelious abuse and reproaches to the plaintiff, which made it impossible for her, as a decent and respectable woman, to remain in the house with him. The plaintiff, having under these circumstances left the house, brought an action to recover possession, which the defendant delayed by a frivolous and vexatious defence.

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Held, that plaintiff was entitled to revoke the gift, both for breach of the condition to which it was subject, and for the use of atrocious and contumelious slanders and reproaches by the donee to the donor.

D. C. Colombo, No. 54,687. *Sansoni* v. *Foenander* ... 32

2.—*Donation—Concubine—Immoral consideration.*

A donation is not void because made to a concubine, provided it was not made in order to induce the donee to come and live in illicit intercourse with the donor, or to continue to live in such intercourse, the donee being otherwise desirous to break it off.

D. C. Jaffna, No. 20,463. *Parasattyummah* v. *Sathopulle* ... 67

3.—*Donation—Acceptance—Presumption of.*

Acceptance is as a rule necessary to render a donation complete ; but acceptance may be fairly and reasonably presumed when there are circumstances to justify such a presumption.

D. C. Matara, No. 27,805. *Lokuhamy* v. *Juan*... ... 215

See FRAUDULENT ALIENATION, 2.
KANDYAN LAW, 3.

Endorsement of warrant.

See RESISTANCE.

Ejectment.

See TITLE.

Estoppel.

See TITLE.
CAUSE OF ACTION, 6.

Eviction.

See FISCAL'S SALE, 5.

Evidence.

Evidence—Refusal to produce documents on grounds of public policy—Privilege—Waiver of—Admissibility of certified copies in evidence – Ordinance 12 *of* 1864*—Costs.*

The Colonial Secretary is entitled as a matter of right to withhold, on grounds of public policy, the production in evidence of letters written to him.

But having given certified copies of the documents in question

to the plaintiff for the purposes of an action, the Colonial Secretary must be taken to have waived his privilege, and cannot therefore refuse to produce the original documents.

Certified copies, given in pursuance of Ordinance 12 of 1864, dispense with the necessity of producing the original documents.

A successful appellant is bound to pay the costs in appeal, if the reversal of the order is due to reception in appeal of affidavit of facts not laid before the court below.

See MOHAMMEDAN LAW, 1.
POSSESSION, 1.
CRIMINAL LAW.
STAMP, 3.
COFFEE-STEALING ORDINANCE.

Excessive levy.

See CAUSE OF ACTION, 4.

Execution.

See PRACTICE, 3, 4.
INSOLVENCY, 3.
MORTGAGE, 2.
FISCAL, 2.

Finding of property.

Finder of property—Proclamation of 26th October 1823—repeal—the revised edition of the Ordinances.

The proclamation of 26th October 1823 requires the finder of property to bring the same to the headman of the village on pain of punishment.

This Proclamation though not expressly repealed, is not contained in the revised edition of the Ordinances, and the Ordinance No. 6 of 1867 declares the revised edition to be *prima facie* evidence that it contains the only lawful proclamations, regulations, &c.

Held, that the Proclamation of 26th October 1823 is still in force.

Fine.

See GAME, 1.

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Fiscal.

1.—*Fiscal's Ordinance, No. 4 of 1867, sec. 74—Refusal to quit land sold under writ—Encumbrance prior to judgment and issue of writ.*

A mere refusal to quit land sold under a writ is not an offence under section 74 of Ordinance 4 of 1867, which authorises the fiscal to remove from it only the party condemned or some person claiming on his behalf, or some person claiming under a title created by the defendant subsequent to the seizure of such property. Consequently, such section does not apply to the case of a person in possession of the land in lieu of interest under a bond prior in date to that upon which judgment was obtained and writ issued.

P. C. Panadura, No. 23,638. *Gunatilake* v. *Pieris* ... 103

2.—*Arrest under sec. 32 of the Fiscal's Ordinance, 4 of 1867—"Shall."*

Before arresting a person under a writ of execution, it is not essential that the fiscal should repair to his dwelling house for the purpose of demanding payment of the amount of the writ.

The word "shall" in sec. 32 of Ordinance 4 of 1867 is merely directory.

D. C. Colombo, No. 65,684. *Freudenberg & Co*, v. *Cowell*.. 104

Fiscal's Sale.

1.—*Fiscal's sale—Misdescription—Rule* nisi for *setting aside sale.*

The fiscal having sold certain immovable property, described in his advertisement as "all that house and ground bearing assessment No. 34," the defendant moved for a rule to have the sale set aside, on the ground that the property sold consisted not only of the tenement No. 34 but of two other tenements numbered respectively 34*a* and 35*b*.

Held, that although the boundaries given included all three tenements, the misdescription was a substantial one and a sufficient *prima facie* case for a rule had been made out.

D. C. Colombo, No. 65,685. *Mantell* v. *Gunesekere* ... 90

2.—*Fiscal's sale does not wipe off prior incumbrances—Land under sequestration—Mortgage thereof.*

A fiscal's sale has not the effect of wiping off encumbrances prior to that on which the land was sold.

A mortgage of land under sequestration is invalid, it being for that time in the custody of the law.

D. C. Colombo, No. 61,113. *Fernando* v. *Pieris* ... 151

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3.—*Fiscal's sale in execution—Prior encumbrances—Proper procedure to revise irregularity or error in a suit.*

A fiscal's sale does not wipe off incumbrances prior to that on which the sale took place. It is not the province of a fresh suit to show irregularity or error of fact or of law in another suit, which must be shown in the suit itself on application to the original court to amend such irregularity or error or by way of appeal from, or review of, the judgment.

Gavin v. *Hadden*, 8 Moore's P. C. Reports N. S. Part I. p. 90 followed.

D. C. Colombo, No. 65,558. *Alla Pitcha* v. *Karpen Chitty*... 154

4.—*Fiscal's sale—Irregularity—Prevention from bidding, by fiscal's officer.*

A fiscal's sale is not irregular simply because a judgment creditor was deterred from bidding at it by the fiscal's officer conducting it telling him that he could not, if he bought the property, get credit for the amount of his debt.

D. C. Kandy, No. 55,042. *Madar Saibu* v. *Robertson* ... 223

5.—*Fiscal's sale—Eviction of purchaser—Action by purchaser against execution creditor for recovery of purchase money—Liability of execution creditor for pointing out for sale land not belonging to judgment debtor.*

Per STEWART and CAYLEY, J. J. (MORGAN, A.C.J. *dissentiente*) : a purchaser at a fiscal's sale, upon been evicted by the rightful owner, is not entitled to recover the purchase money drawn by the execution creditor, there being no warranty on the part of the execution creditor or privity between him and the fiscal. The judgment creditor not being guilty of fraud, the maxim *caveat emptor* must prevail.

D. C. Kandy, No. 58,857 224

6.—*Fiscal's sale—Payment of purchase money by purchaser to plaintiff—claim for credit—Ordinance No. 4 of 1867, clause 50.*

A purchaser at a fiscal's sale, who was a stranger to the writ, paid part of the purchase money to the fiscal and the balance to the plaintiff.

Held, that the purchaser was not entitled to credit for the amount paid to the plaintiff.

D. C. Colombo, No. 65,907. *Silva* v. *Sewetha Unanse* ... 250

7.—*Fiscal's sale—sale of moveables—misdescription of property—power of court to set aside sales of moveables for irregularity—Fiscal's Ordinance—common law.*

The courts in Ceylon have the power inherent in them at com-

Fishing, right of.

Right to fish in the sea – Use of different kinds of net.

The right to fish on the coasts of Ceylon is common to everybody. The fact that one particular kind of net has been used for a large number of years does not prevent the use of any other kind of net.

Forfeiture of crown grant.

See CROWN, 2.
WILL, 2.
LESSOR AND LESSEE.
JURISDICTION, 3.

Forma pauperis.

See PRACTICE, 2.

Fraudulent alienation.

1.—*Fraudulent alienation—Insolvency—Claim in execution.*

K., being indebted to the plaintiff in the sum of £9 2*s* 6*d*, and possessing other lands exceeding that sum in value, gifted the land in question to the defendants, his concubine and nephew. Plaintiff, having obtained judgment against K.'s representatives, seized this land in execution, when the defendants claimed it and stayed the sale. Plaintiff now sought to set aside the claim and have the land declared executable on the ground that the gift was fraudulent; but did not aver or prove that K. owed other debts than that to plaintiff, or that his estate was insolvent, at the date of the gift or of the present action. The District Judge having given plaintiff judgment on the ground that the gift was in any event "liable to plaintiff's claim,"

Held (reversing his judgment) that no cause had been shown for avoiding the gift and that defendants were entitled to judgment.

D. C. Kandy 20,929, (Austin 123), and the general principles affecting fraudulent alienation of property, considered.

2.—*Donation in fraud of creditors—Debt incurred after donation—Action by creditor to set aside donation.*

On 8th December 1866, G., being then not indebted to any

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person, gifted to the defendants, his children, one of his lands, subject to a *fidei commissum*, his wife joining in the gift. The gift was accepted by one of the donees on behalf of all, and the deed was registered on 31st January 1867. G. continued to live on the land with his children and sometimes had some of the fruits of the land. G. became indebted to plaintiff on a promissory note on 14th November 1867. Plaintiff, having obtained judgment on the note in April 1871, seized the land in execution, whereupon the defendants claimed it and stayed the sale. Plaintiff now sought to have the gift set aside as made in fraud of creditors, and the land declared liable to be sold in execution of his judgment.

Held, that no reason had been shown for holding the gift to be fraudulent.

D. C. Matara, No. 26,193. *Supermanian Chetty* v. *Goonewardane* 74

3.—*Conveyance of lands in fraud of creditor—Action by creditor against fraudulent alienor and alienee—Cancellation of deed and treatment of parties thereto as mortgagor and mortgagee—Accounting between them—Legal fraud.*

N, being in insolvent circumstances, conveyed two cocoanut estates to T, his brother-in-law, subject to a private understanding that T was to re-convey them to him on being refunded the amount advanced. Plaintiffs, who were judgment creditors of N, seized the said estates at his request, but T claimed them as his and prevented the sale thereof. Plaintiffs now sued N and T, praying that the estates in question may be declared the property of N and be held executable under their writ.

The Supreme Court, reversing the judgment of the court below, decreed that the deed in question should not operate as conveyances but only as subsisting mortgages; that T should be treated as mortgagee in possession, and should render an account of the profits received and expenditure incurred by him in respect of the two estates; and that the estates should be liable to be sold under plaintiffs' writ, subject to the mortgages created for the respective amounts to be ascertained on the footing of the accounts ordered.

Legal fraud is an act unwarrantable in law to the prejudice of a third person, and not that crafty villainy or grossness of deceit to which the term 'fraud' is applied in common language.

D. C. Kalutara, No. 62,519. *Alston Scott & Co.* v. *Nannytamby* 180

Game.

1.—*Close season—Killing deer—Amount of fine—Ordinance No. 6 of 1872 cl. 11 sub-sec. 1 and 2,—Construction of Statutes.*

A Police Magistrate has power to exercise a discretion in deter-

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mining the amount of fine under subsection 1 of clause 11 of Ordinance No. 6 of 1872.

In a case of doubtful construction the legislature should be presumed to have given, rather than withheld, the power to exercise a discretion in determining the amount of fine.

P. C. Chilaw 10,071 approved and followed ; P. C. Kalmunai 2240, (Grenier's Reports, 14), disapproved.

P. C. Jaffna, No. 6,955. *Valayutha Udayar* v. *Vetty Valen* 91

2.—*Game—killing game without a license—Ord. No.* 6 *of* 1872 *sect.* 5—"*reside*"—*burden of proof.*

Ordinance No. 6 of 1872 sect. 5 enacts : "No person shall kill game out of the division of the Korale, Vidana Arachchi or Mudaliyar in which he resides without taking out a license empowering him to do so."

The first defendant in this case was a "season visitor" at Nuwara Eliya, *i. e.* a person who occupies a bungalow there for three or four months during the fashionable season for purposes of health or recreation. The 2nd defendant was the 1st defendant's butler, and the 3rd defendant was the keeper of the bungalow which 1st defendant occupied and had been such for several years. All three killed game without any license.

Held, that the 1st and 2nd defendants did not "reside" at Nuwara Eliya within the meaning of the Ordinance, and therefore required a license to kill game there.

Held also, that in a charge under the above section of the Ordinance, the burden of proving the existence of a license was on the defendants.

P. C. Nuwara Eliya, No. 9,478. *Downall* v. *d'Esterre* ... 254

Gaming.

See VAGRANTS ORDINANCE, 2.

Harbouring deserter.

See LABOUR ORDINANCE, 7, 10.

Headman.

Headman—Duties of—Section 163 *of Ordinance* 11 *of* 1868.

A headman is bound, under the provisions of section 163 of Ordinance 11 of 1868, to arrest persons charged with offences of a serious nature, even though the person charged does not reside within his district.

P. C. Galle, No. 92, 210. *Sinno appu* v. *Silva*.... ... 163

See ARREST.

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Husband and wife.

1.—*Husband and wife—Mutual last will—Widow and children in possession of joint estate—application of widow for division of joint estate—Delay in such application—right of children under the will.*

Where, under a mutual will which provided that the surviving spouse should be guardian of the children and enjoy, until his or her demise, the entire estate owned in common, the widow continued in possession for 15 years and thereafter applied to the court for a division of the joint estate, *held* that, notwithstanding the delay, she was entitled to succeed in her application, at least as regards the immoveable property.

Held also that under the circumstances she could not be called upon to file a separate account of her intromissions with the minors' estate, and that the cost of the maintenance and education of the children and other charges in excess of receipts would have to be duly audited before the widow, as guardian, is allowed to diminish the capital due to them.

D. C. Colombo, No. 2,402. *Re Asserappa* 229

2.—*Husband and wife—action by husband—plea of non-joinder Thesavalamei—practice.*

Two persons, husband and wife, who were natives of Jaffna, granted a bond to defendant mortgaging certain inherited property of both. The husband now sued defendant to recover the bond alleging that the mortgage debt had been satisfied. The plea of non-joinder having been taken,—

Held, that the wife should have been joined as plaintiff.

D. C. Jaffna, No. 1,246. *Visuwalingam* v. *Sabapathy* ... 249

3.—*Husband and wife—Muhammadan parties—Action by husband—plea of non-joinder—practice.*

In an action by a Muhammadan husband for specific performance of an ante-nuptial contract, by which certain property was promised as dowry to the wife by her parents,—

Held that the husband could not maintain the action without joining the wife as plaintiff, or obtaining special authority from her, even though the wife was no party to the ante-nuptial contract.

D. C. Colombo, No. 67,906. *Saibo Dorey* v. *Akamado Lebbe* 309

See WILL, 1.
ADMINISTRATION, 3.
VAGRANTS ORDINANCE, 3.

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Indemnity.

Indemnity—contribution between wrong-doers—Wrongful sequestration of goods—Ex turpi causa non oritur actio.

Plaintiff, the assignee of an insolvent estate, at the instance of the defendant, a creditor, procured the sequestration of certain shop goods as the property of the insolvent, defendant undertaking to indemnify the plaintiff against the consequences of the sequestration. A third party claimed the goods, and recovered damages against the plaintiff for a wrongful sequestration.

In an action by plaintiff on the indemnity, the court below held on the evidence that the plaintiff, before suing out the sequestration had taken no reasonable care to inquire whether the insolvent had any reasonable colour of title and had blindly lent himself to the defendant in a case where he had the strongest reason for suspecting (if not knowing) the injustice of the claim; but that such conduct was not so "manifestly flagitious" as to fall within the rule *Turpes stipulationes nullius esse momenti*, and deprive him of the benefit of his indemnity. Judgment having been given for the plaintiff,—

The Supreme Court, in appeal, affirmed the judgment, and

Held, that the rule against contribution between wrong-doers did not apply to this case, which fell within the exception to that rule established by *Betts* v. *Gibbins* (2 A. and E. 57).

Injunction.

See PRESCRIPTION, 6.

Insolvency.

1.—*Insolvency—Allowance to insolvent—Failure to pass last examination—Ordinance 7 of 1853, sects. 89, 122.*

The Court, on 15th June, 1871, ordered payment to the insolvent of an allowance. The second sitting, fixed for the 13th July, was on that day adjourned to the 27th July, without any reference to an adjournment of the last examination. On 27th July 1871, the insolvent was examined, and the sitting adjourned for two months with a view to his further examination, if necessary. On 13th September, 1871, the insolvent left the Island with the unconditional leave of the court, and the assignees discontinued payment of the allowance. On 19th April, 1872, the insolvent moved that the allowance be continued from the date when it ceased. The court ordered the discontinuance of the allowance from the date of this motion, but held it had not the power to refuse payment of the arrears, believing that the order of 15th June 1871 had been for payment "until further orders."

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Held (following *Ex parte Osborne, Re Jewett*, 10 Jur. N. S., 1137) that the allowance ceased upon the insolvent failing to pass his last examination on 13th July 1871, and, there having been no subsequent order for its payment, the motion of 19th April, 1872, should have been refused.

D. C. Colombo, Insolvency, No. 848. Re *Thomson*, Ex parte *Smith* 29

2.—*Insolvency—Cause for refusing certificate—Breach of promise of marriage—Ordinance 7 of 1853, sect. 151.*

The circumstance that an insolvent has been condemned in damages for a breach of promise of marriage does not fall within the category of "offences" specified in sect. 151 of the *Insolvency Ordinance* as disentitling the insolvent to a certificate.

D. C. Colombo, Insolvency, No. 880. Re *Don Louis* ... 54

3.—*Insolvency—Protection, duration of—Execution against person—Ordinance 7 of 1853 sects. 34, 89.*

The defendant was adjudicated insolvent on 13th July 1865, when an order protecting his person from arrest was made. The second sitting, fixed for 5th October 1865, was simply adjourned to 12th October, on which day an assignee was appointed and the sitting again simply adjourned. No further order as to protection was made, and no further steps taken in the matter. In August 1872, the defendant was arrested on a writ of execution against his person, and committed.

Held, that the arrest and committal were valid.

D. C. Colombo, No. 39,186. *Mammie* v. *Cootty Allie* ... 60

4.—*Insolvency—Sequestration of estate of partners—Grant of certificate—Fraud—Application for re-hearing—Ordinance No. 7 of 1853, clause 133.*

J. P. and D. D. (partners) were adjudicated insolvents and obtained certificates. Afterwards a creditor moved for sequestration of the estate of P. P., S. P., and D. H. (partners of J. P. and D. D.) and that the same might be duly dealt with in the insolvency case, and further that the court might order a rehearing of the matter of the certificate already granted to J. P. and D. D.

Held that under the circumstances, the allowance of the certificate might be re-considered, but that as regards the application of the creditor to have the estate of P. P., S. P., and D. H. sequestered, the proper course was for him to come forward as petitioning creditor and apply that they might be adjudged insolvents *qua* partners of the insolvent firm.

Held also that it is only under very special circumstances that the matter of a certificate should be re-opened when there has been

Interest.

Interest in land.

Intervention.

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Irregularities of procedure.

Joint debtors.

Judgment, alteration of.

Judgment, prescription.

Judgment, opening up.

Jurisdiction.

1.—*District Court—Jurisdiction—Cause of action—Ordinance No.* 11 *of* 1868, *sec.* 65.

A promissory note made at Colombo and payable at Kandy, the makers of the note being resident at Kandy at the time of action, may be sued upon in the District of Court of Colombo, under section 65 of Ordinance 11 of 1868, as part of the cause of action (the making of the note) was at Colombo.

D. C. Colombo, No. 68,764. *Sinne Lebbe* v. *Pieris* ... 156

2.—*Jurisdiction—cause of action—"wholly or as to any part" —Ordinance No.* 11 *of* 1868, *sect.* 65.

Plaintiff and defendant entered into a partnership deed, which was signed at Galle by plaintiff and at Batticaloa by defendent, by which plaintiff was to buy arrack at Galle and Colombo and send it to Batticaloa where defendant was to sell it. Accordingly plaintiff bought a large quantity of arrack at Galle and forwarded it to defendant at Batticaloa. Plaintiff brought the present action in the District Court of Galle for the recovery of a certain balance of the partnership account. Defendant pleaded to the jurisdiction. The district court held that it had jurisdiction and gave judgment for plaintiff and the defendant appealed.

Held, that the deed having been signed by plaintiff at Galle and plaintiff having according to agreement bought the arrack at

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Galle, a part of the cause of action, within the meaning of section 65 of Ordinance No. 11 of 1868, sufficient to confer jurisdiction on the District Court of Galle, did there arise.

D. C. Galle, No. 36,121. *Fernando* v. *Fernando* ... 260

3.—*Court of Requests—Jurisdiction—forfeiture of lease.*

A Court of Requests has no jurisdiction to declare the forfeiture of a lease, of which the value of the unexpired term exceeds Rs. 100.

C. R. Panwilla, No. 5,621. *Punchiappuhami* v. *Punchiappuhami*... 293

See CAUSE OF ACTION, 1.
VAGRANTS ORDINANCE, 2.
PARTNERSHIP.

Kandyan law.

1.—*Kandyan Law—Paternal inheritance—Beena marriage—Deega marriage.*

Plaintiff was married out in deega to H., and being called back to the Mulgedera by her parents, lived with them, having her child with her. The plaintiff afterwards married in beena, and on the death of her associated fathers was given out in deega by her brothers, but she left her child by her beena husband behind her at the Mulgedera.

Held, that plaintiff having been recalled by her parents and having thereafter married in beena, her right to her fathers' estate revived, and that such revival was not affected by her subsequent deega marriage, as she had left her child behind her at the Mulgedera.

D. C. Kandy, No. 59,273. *Tikiri Kumarihami* v. *Loku Menika* and others 106

2.—*Kandyan Law—Grandchildren dying without issue—Right of grand-mother to a life interest in their property.*

A grandmother is, according to the law obtaining in all the Kandyan districts, except the Sabaragamuwe district, entitled to a life interest in the property of those of her grandchildren who die without issue.

D. C. Kurunegala, No. 19,887. *Punchy Menika* v. *Dingiri Menika*... 130

3.—*Kandyan deed of gift—Revocation of—Death of donee during the life time of donor.*

A Kandyan deed of gift purporting to be made in consideration

Labour Ordinance.

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4.—*Labour Ordinance—'estate or property'—preference of coolies over—18th clause of Ord.* 11 *of* 1865—*Crops severed from the land.*

Crops severed from the land are not "estate property," within the meaning of the 18th clause of Ordinance 11 of 1865, so that servants or artificers employed on a coffee estate have no preferent right over crops severed from the estate as against a special mortgagee.

D. C. Kandy, No. 65,664. *MacGregor* v. *The Oriental Bank Corporation* 235

5.—*Master and servant—plea of guilty—evidence—"surprise"—practice.*

On a charge against a cooly for neglect of duty, whereby some coffee was stolen from a store, the defendant pleaded guilty, only admitting thereby the deficiency in the coffee, and the plea recorded was afterwards altered to one of not guilty.

Held that it was competent for the magistrate, as a matter of judicial discretion, to allow the defendant to withdraw his plea of guilty and enter a plea of not guilty and try the defendant on the merits.

A witness having been called as an expert, at the instance of the court on the day of trial,

Held, that if the party was taken by surprise, application should have been made for a postponement of the trial, and that the alleged surprise was not a ground of appeal.

P. C. Matale, No. 11,202. *Strachan* v. *Savile*... ... 242

6.—*Master and servant—seducing a servant—evidence—Ordinance No.* 11 *of* 1865, *sec.* 19.

Where defendant, a kangani, took a cooly away from his work for part of a day and made him do certain work in a garden of his own, but had no intention of permanently withdrawing the cooly from the employer's service—

Held that this did not amount to seducing or attempting to seduce the cooly from the employer's service within the meaning of the Ordinance.

P. C. Matale, No. 12,946. *Boss* v. *Allagan* 303

7.—*Master and servant—harbouring a deserting cooly—Ordinance No.* 11 *of* 1865—*evidence.*

Where a kangani on an estate, in obedience to orders of his employer, received into his gang and superintended the labour of a cooly, who had deserted from another estate to the knowledge of the kangani,—

Held, that this did not amount to "harbouring," within the meaning of the Ordinance.

P. C. Badulla, No. 18,939. *Gray* v. *Adaikan*... ... 289

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8.—*Master and servant—refusal to attend at the place of work after the expiration of a term of imprisonment awarded for desertion —termination of contract—Ordinance No.* 11 *of* 1865, *secs.* 11 *and* 24.

The defendant had been convicted in a previous case on a charge of desertion and sentenced to a term of imprisonment, at the expiration of which he refused to return to service, and he was thereupon charged under sec. 11 of the Ordinance.

The magistrate acquitted the defendant on the ground that there was no order made in the previous case in terms of sec. 24 of the Ordinance, that no part of the imprisonment should be considered a part of the period of service.

On an appeal by the complainant,—

Held, that the charge was sustainable, so long as there was no evidence of any determination of the contract of service since the previous conviction.

P. C. Ratnapura, No. 688. *Sandicon* v. *Solla Muttu* ... 287

9.—*Master and servant—Disobedience of orders—evidence— Ordinance No.* 11 *of* 1865.

A cooly employed on an estate in one district is not liable under the Ordinance for disobeying an order to work in another estatea in remote district, without evidence of a general engagement.

P. C. Matale, No. 12,443. *Gordon* v. *Allegan* 288

10.—*Master and servant—harbouring a deserting cooly—notice in writing—Ordinance No.* 11 *of* 1865, *sec.* 19.

The Ordinance No. 11 of 1865 sec. 19 enacts : "any person who shall wilfully and knowingly seduce or attempt to seduce from his service or employment any servant or journeyman artificer, bound by any contract to serve any other person or persons....., or who shall wilfully and knowingly harbour or conceal any servant or journeyman artificer who shall have absented himself without leave from the service of such other person to whom he is so bound, or who shall wilfully and knowingly retain in his service any servant or journeyman artificer bound under any contract to serve any other person after receiving notice in writing that such servant or journeyman artificer is so bound as aforesaid, shall be guilty of an offence, &c."

Held, that in a charge under the above section for harbouring a deserting cooly, it is not necessary to prove that defendant received notice in writing of the contract of service, that requirement attaching only to a case of retaining in a person's service a servant bound under contract to another.

P. C. Haldummulla, No. 3,615. *Campbell* v. *Perumal* ... 286

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Laches.

Landlord and Tenant.

1.—*Landlord and tenant—Insolvency—Preferent claim for house rent—Landlord's lien—Acceptance of Promissory Notes for amount of rent due.*

A landlord does not, by accepting from his tenant promissory notes for the amount of rent due, lose his preferent legal hypothec over the *invecta et illata.*

2.—*Landlord and tenant—notice to quit—validity of.*

A notice to quit given to the occupier of a house by a person who subsequently acquired the property but had no interest in it at the time at which he gave notice, is invalid.

Legal hypothec.

Lessor and lessee.

Lease—Cancellation of, by decree of Court—Sections 13 *and* 17 *of Ordinance* 13 *of* 1866—*Judicial sale.*

A lease may not be cancelled by the lessor on non-payment of rent by the lessee without a decree of court. Although section 13 of Ordinance 13 of 1866 makes the amount due a first charge on the estate, yet it must be read along with section 17, which vests in the purchaser only the right, title and interest of the proprietor.

Lien.

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3.—*Muhammadan law—Divorce, requisites for—Muhammadan Code of* 1806, *cls.* 87, 88 *and* 89.

For a valid divorce between Muhammadan parties at the instance of the husband, it is necessary that three written notices, or tallock, should have been given, as required by the 89th clause of the Ceylon Muhammadan Code of 1806, unless this requisite can be proved to have been dispensed with by a custom having the force of law.

See CONTRACT, ILLEGAL.
HUSBAND AND WIFE, 3.

Mortgage.

1.—*Mortgage of moveables—Sale in execution under unsecured creditor's judgment—Right to proceeds—Preference and concurrence.*

A special mortgagee of moveable property cannot prevent the sale of such property, in execution of a third party's judgment on an unsecured debt, but has a right to preferential payment of the mortgage debt out of the proceeds of such sale.

2.—*Execution—Sale of mortgage bond in debtor's favour—Assignment to purchaser—Ordinance No.* 7 *of* 1840, *sects.* 2, 20.

The Fiscal's Clerk, who sold in execution the debtor's interest in a mortgage bond executed in his favour by the defendant, granted to the purchaser the following document :

"*Levena Markar* has purchased the debt bond No. 6,958, dated 8th April 1868, for a sum of Rs. 30 sold under the writ No. 11,553 of the C. R. Panadura."

Held, that this was a sufficient assignment to *Levena Markar* of the execution-debtor's interest in the bond, and entitled the plaintiff, to whom *Levena Markar* had assigned his interest, to recover from the defendant the amount due upon the bond.

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Obligation quasi ex contractu.

See DAMAGES, 1.

Obstructing thoroughfare.

See THOROUGHFARES' ORDINANCE, 1.

Ordinances.

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Ordinance *continued.*]

Out-door proctor.

Paddy tax.

2.—*Paddy-tax renter—Crown—Prescription.*

To an action by the paddy-tax renter to recover the value of the Government share, the defendant pleaded a prescriptive right of exemption from the tax.

Palinode.

See DEFAMATION, 2.

Paraveni tenant.

Paraveni land—Proprietor – Tenant—Right of tenants of paraveni lands to dig for plumbago—Right of proprietor to lease plumbago mines.

A tenant of a paraveni land has not the right to dig, for his own use, for plumbago to be found in his pangu, or do anything to permanently diminish its value ; nor has the proprietor a right to lease the mine to third parties.

D. C. Kegalle, No. 2,336. *Unambuwa* v. *Puncha Weda* ... 226

Partition.

1.—*Partition—Ordinance* 10 *of* 1863, *sect.* 4—*Notice to warrant and defend title—Refund of purchase money.*

In a partition suit, a party is not entitled to a decree against his vendor for refund of the purchase-money, in default of the vendor warranting and defending his sale to such party of any interest in the land under partition.

D. C. Galle, No. 26,416. *Silva* v. *Daniel* 62

2.—*Partition—decree for sale—Ordinance No.* 10 *of* 1863.

In a suit for partition of land, a decree of sale should be made only when partition is impracticable, the mere fact of the land being small not being a sufficient ground.

D. C. Galle, No. 58,906. *Chitterenaike* v. *Siman* ... 285

Partnership.

Partnership—liquidation—effect of bankruptcy in one country on property in another—jurisdiction—deed of composition, requisites of—Ordinance No. 7 *of* 1858, *secs.* 134 *and* 136.

Two firms, consisting of the same three persons, carried on business in London and Colombo respectively under two different names and styles. The property of the Colombo firm consisted entirely of moveables. On the 29th July 1875 one of the partners, for himself and as attorney for the others by virtue of a power dated 22nd June 1875, filed a petition for liquidation of both firms in the London Court of Bankruptcy, and on 19th August 1875 a liquidator was appointed.

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On 21st September 1875 the trustee under a deed of arrangement dated 18th August 1875, purporting to be between the members of the partnership under the Colombo style and 6-7th of the creditors, certified the same to the district court of Colombo under sec. 136 of Ordinance No. 7 of 1853, and the district court declared it to be in accordance with sec. 134. But it appeared that one of the partners did not in fact sign the deed of arrangement. Upon subsequent motion in the district court on behalf of the London liquidator and several English creditors, the certificate of the Ceylon trustee and proceedings founded thereon were discharged as irregular.

Held, (it being proved that the London and Colombo firms were one and the same partnership) that the proceedings in the London Court of bankruptcy being prior in date, the London and not the Ceylon trustee was entitled to preference, such priority vesting in the former the property, being moveables, of the Colombo firm as well, and that the jurisdiction thus first exercised by the London Court should, in the interests of all concerned, be exclusive.

Held also, that even if the Ceylon deed of arrangement had been duly signed by all the partners, the two firms being one partnership, signature by 6-7th of the creditors of the Ceylon firm did not satisfy the requirements of sec. 134 of the Ordinance No. 7 of 1853, and that therefore, independently of the steps taken in London, the deed of 18th August 1875 was ineffectual for the purpose of liquidation by arrangement of the Colombo firm.

In the matter of a deed of arrangement with creditors made by Duncan Anderson & Co. 277

Petition of appeal, Statements in.

See MORTGAGE, 3.

Pleading.

See CONTRACT, 2.
DAMAGES, 4.

Police.

Police—Ordinance 16 *of* 1865, *sects.* 10, 34, 49—*Ordinance* 5 *of* 1867, *sect.* 1—*Police force quartered on village, for misconduct of inhabitants—Cost of maintenance—Assessment.*

Where a Police Force is, under Ordinance 16 of 1865, sec. 10 quartered in any place, by Proclamation of the Governor, the cost of maintaining such force must be met by a tax upon the inhabitants of such place, according to their respective means and not by a rate upon the lands situated in such place.

C. R. Colombo, No. 84,355. *Perera* v. *Layard*... ... 55

See RESISTANCE.

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Possession.

1.—*Original possession—Presumption as to continuance of such possession—Prescription—Planter's share.*

2.—*Possession—Presumption of—Legal owner—Prescription.*

The presumption of law is that the possession of a land is in the legal owner, and the burden of proving a prescriptive possession adverse to that of the legal owner lies on the person who sets up such a claim.

See PRESCRIPTION, 3.

Practice.

1.—*Intervention, at what stage of a case allowed—Rules and Orders of* 1833, *sec.* 1, *r.* 32—*Intervention after execution—Fraudulent judgment.*

A person has a right to intervene in a cause at any stage of the cause,—even after judgment, if an appeal lies.

2.—Forma pauperis, *action in—Rules and Orders (of* 1833), *sec.* 1, *rr.* 42-45—*Buddhist priest suing as incumbent of temple.*

A Buddhist priest, suing as incumbent of a temple to recover temple lands, and possessing as such incumbent other lands appurtenant to the temple and over £5 in value, cannot be allowed to proceed *in forma pauperis*, although he may have no property in his own private right.

D. C. Matala 19,453 (3 Lor. 67), distinguished.

3.—*Execution—Order of Court limiting execution of writ—Notice of motion—Ordinance* 4 *of* 1867, *sects.* 60, 61.

A Court has power to limit the execution of a writ against property issued by it by directing that certain property shall not be levied upon. The writ-holder is entitled to notice of a motion for such a limiting order.

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4.—Execution against the person for judgment under 10*l*— *Ordinance* 7 *of* 1853, *sect.* 165.

Where a plaintiff wishes to enforce a judgment for a sum under £10 by execution against the person of a defendant, he must obtain from the Court, at the time it passes the judgment, an order allowing him so to enforce it, in terms of section 165 of Ordinance 7 of 1853.

When a plaintiff obtains such a judgment by consent or in default, he may apply to the Court to be allowed to prove such circumstances (specified in the Ordinance) as would authorize the court to order execution against the person to issue.

C. R. Nuwara Eliya, No. 2,439. *Rowland* v. *Perera* ... 15

5.—Confession of Judgment—Power of Attorney to Proctor —making of confession in Proctor's own name—sufficiency of such confession.

A confession of judgment under a valid power of attorney to a proctor, who had signed the confession in his own name and not in the formal manner "O. L. M. by his attorney F. C. L." is not bad, if upon the whole instrument it can be collected that F. C. L.'s confession was made and signed on behalf of O. L. M.

D. C. Colombo, No. 66,046. *Morgappa Chetty* v. *Omer Lebbe Markar* and another 100

6.—Practice—Motion for postponement—Weights and Measures—Defective measure—Proof of.

An application for a postponement by a defendant, if he finds that his witnesses are not in attendance, must be made before the case for the prosecution is closed.

A measure is not defective simply because the bottom of it is not in conformity with the established standard measure.

P. C. Kandy, No. 101,574. *VanLangenberg* v. *Meedin* ... 108

7.—Sequestration—Dissolution of—Power of District Judge to dispense with security—Rules and Orders of Supreme Court, § 17 *of sec.* 1.

The district court is bound to require security in dissolving sequestration and has not the power to dispense with such security.

The descretion allowed the district court under clause 17 of section 1 of the Rules and Orders is only with regard to the nature and amount of security to be required.

D. C. Colombo, No. 67,918. *Abdul Cader* v. *Aya Samy* ... 129

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8.—*Arrest in mesne process—affidavit of plaintiff—Ordinances No.* 15 *of* 1856 *and No.* 18 *of* 1864—*practice.*

Where a warrant of arrest in mesne process was issued, upon the affidavit of the plaintiff's attorney and not of plaintiff himself who was in the island, and that of a third party,—

Held that the issue of the warrant was irregular; and the plaintiff himself having subsequently sworn an supplementary affidavit in the same terms as the previous affidavit of his attorney,—

Held, that the plaintiff's subsequent affidavit did not validate the original issue of the warrant.

D. C. Kandy, No. 68,121. *Leechman & Co.* v. *Southern Quilty & Co.* 274

See PROMISSORY NOTE, 1.
FISCAL, 1.
PRINCIPAL AND SURETY, 5.
PRESCRIPTION, 5.

Preference and Concurrence.

1.—*Preference and concurrence—fiscal's sale—assignment of an incumbrance—interest in land—Ord. No.* 7 *of* 1840.

Plaintiff appellant, having at defendant's request paid money due on a mortgagee's writ against defendant in another suit, sued defendant and obtained judgment for the amount and sold the very land which had been originally mortgaged. Respondent, a judgment creditor in another suit against the same defendant, having put in a claim to the proceeds, the plaintiff appellant claimed preference, which was disallowed.

Held, that to entitle himself to stand in the shoes of the original mortgagee, the plaintiff must shew either that he had an assignment of the incumbrance, or that defendant agreed by deed to the substitution of plaintiff in place of the original creditor and the acquittance mentioned payment as made with plaintiff's money.

D. C. Batticaloa, No. 17,875. *Abayavere* v. *Fernando* ... 256

2.—*Right of preference—assignment of mortgage—interest in land—Ord. No.* 7 *of* 1840.

In a contest between a person who paid off a primary and secondary mortgage and obtained no deed of assignment from the mortgagee, and an assignee of a tertiary mortgagee,

Held that in the absence of an assignment of the prior mortgage, and cession of action in favour of the person who paid off the debt, the assignee of the tertiary mortgage was entitled to preference.

D. C. Badulla, No. 20,149. *Muhammado* v. *Alliyar* ... 302

See MORTGAGE, 1.

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Prescription.

1—*Carriage hire—Prescription—Ordinance No.* 22 *of* 1871, *secs.* 9 *and* 11.

A claim for carriage hire falls within the 11th and not the 9th sec. of Ordinance No. 22 of 1871.

C. R. Colombo, No. 101,817. *Walles* v. *Philippu Appu* ... 103

2—*Prescription—Ordinance No.* 22 *of* 1871—*Retrospective—Ordinance No.* 8 *of* 1834.

The Ordinance No. 22 of 1871 is not retrospective in its effect.

D. C. Matara, No. 27,430. *Illangagaon* v. *Perera* ... 219

3.—*Prescription—possession* precario—*Roman Dutch Law—Ord. No.* 8 *of* 1834 *and Ord. No.* 22 *of* 1871—*acknowledgment of title.*

Where possession had begun *precario*, and the evidence that defendants on being ordered on one occasion to be out had asked for time,—

Held, that although by Roman Dutch Law possession *precario*, however long, gave no prescriptive right, yet, on the local ordinance which wholly governs the matter, such possession would be sufficient for purposes of prescription, if there was no acknowledgment of the original owner's title.

Held also, that the circumstance of the defendants asking for time to quit, did not amount to an acknowledgment of title within the meaning of the ordinance.

D. C. Galle, No. 36,754. *Sinno Appu* v. *Silla Umma* ... 318

4.—*Prescription—payment by one of several joint debtors—debt incurred by husband in wife's life time—effect of payment of interest by husband after wife's death on prescription in favour of children—Regulation No.* 13 *of* 1822 *and Ordinance No.* 8 *of* 1834—*Roman Dutch Law.*

In 1859 defendant's father mortgaged to plaintiff's certain land belonging to the marriage community. The mother died in 1860. The father made a payment of interest in 1868. The plaintiff sued the defendants, who as their mother's heirs are in possession of a share of the mortgaged land, to recover a balance due on the mortgage. The defendants pleaded prescription.

Held, (following C. R. 21,698, Vand. Rep. p. 188), that the local legislative enactments, while abolishing the old terms or periods prescription, left untouched the collateral incidents of the Roman Dutch Law.

Held, that by Roman Dutch Law, payment by one joint debtor did not interrupt prescription in favour of the others, except in the

case of the joint debtor *in solido*, and that the Ordinance of 1834 did not have the effect of rendering payment by one of several joint debtors, not being joint debtors *in solido*, an interruption to prescription in favour of the rest.

Held, further, that on the death of the mother, the surviving father on the one hand and the children on the other, became joint debtors *in solido*, and that the debt was now prescribed as against the defendants.

D. C. Colombo, No. 63,533. *Fernando* v. *Silva* 320

5.—*Judgment, revival, of—prescription of judgments—Ordinance No. 8 of 1834 and Ordinance No. 22 of 1871—Roman Dutch Law—practice.*

Where a judgment was pronounced on 22nd January 1862 and nothing was done till 13th October 1875, when a motion for a *rule* to revive judgment was made and resisted by defendant on the ground of prescription,

Held that the Ordinance of 1834, and not that of 1871, applied to this matter, and that under the former a judgment could not be prescribed.

But *held*, that plaintiff must explain any long delay, and that otherwise the court would presume the judgment to have been satisfied.

Observations on the Roman Dutch practice.

C. R. Colombo, No. 32,047. *Mederamy* v. *Kanan* ... 290

6.—*Injunction—prescription—Ordinance No. 22 of 1871, sec. 10—malice and want of reasonable and probable cause, evidence of,*

The plaintiff and defendant were co-owners of a land. In a previous suit present defendant obtained an *interim* injunction in February 1869, upon an affidavit alleging that plaintiff who was entitled to "a small share" was building a house on the "best portion" of the land. At the trial in 1873, however, he made no attempt to prove that the plaintiff was building on the best portion or in any way beyond his rights, and the district court dissolved the injunction. The judgment was affirmed by the Supreme Court in appeal in February 1874. The present action was raised in August 1874 against the defendant for maliciously and without any reasonable or probable cause applying for and obtaining the injunction. The district court gave judgment for plaintiff, and defendant appealed.

Held, that the cause of action accrued to plaintiff not upon the issue of the injunction but upon its dissolution, and that therefore the action was not prescribed.

Held also that the defendant not having attempted to prove at the previous trial the allegations upon which he had obtained the

Previous Conviction.

Principal and Agent.

Principal and Surety.

Surety—Practice of making a surety for the performance of a judgment party to the original suit—New contract

In certain cases, a person who becomes surety for the performance of the judgment, may be made a party defendant in the original suit in which the judgment is obtained; but a surety for the payment of a certain sum and the performance of a certain agreement, which contains terms and provisions which cannot be enforced under the judgment, cannot be made a party defendant to the suit.

2.—*Security bond—liability of sureties—construction.*

Where the condition of a security bond was that the defendants, two in number, should satisfy the judgment of the court or that they should surrender, or be surrendered by their bail, to be charged in execution,—

Held, that the sureties were not liable, unless both the alternatives were unfulfilled.

And where judgment was obtained against one of the two defendants, the other being expressly waived, and *nulla bona* was returned to the writ against the former,—

Held, that there was not within the fair meaning of the instrument a judgment against the defendants unsatisfied, and that the liability of the sureties did not arise.

Proclamations.

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Proctor and client.

Proctor and client—Authority of Proctor to consent to open up final judgment.

A proctor cannot consent to open up judgment pronounced in his client's favor, unless specially authorised to do so by his client.

D. C. Colombo, No. 63,463. *Valan Chetty* v. *Fernando* ... 112

Proctors, contempt of Court by.

See CONTEMPT OF COURT, 1.

Prodigal.

Prodigal—Appointment of Curator—Jurisdiction—Proclamation, 23rd September 1799—Ordinance 5 of 1835—Ordinance 11 of 1868, sects, 64, 73—Nobile Officium Judicis—Order by Court, ex proprio motu.

District Courts have power to appoint curators over the property of "prodigals."

Where an application was made to the District Court to appoint a curator over a person as an idiot or lunatic, and the Court after investigation held that such person was not an idiot or lunatic, and, acting in the exercise of its *nobile officium*, and *ex proprio motu*, appointed a curator over the property of such person :

The Supreme Court, upon appeal, affirmed the order of the Court below.

D. C. Colombo, Lunacy, No. 399. In the matter &c. of *Rodrigo* 40

Promissory Note.

1.—*Promissory note—Maker and Indorser sued together or successively.*

The holder of a promissory note may sue the maker and indorser together, or successively, but cannot recover from either more than the amount due on the note.

C. R. Ratnapura, No. 7,799. *Abeyeratne* v. *Jayasundara* ... 67

2—*Pro. note—signature by a mark—validity of without attestation.*

The signing of a pro. note by means of a mark does not require attestation, but may be proved by external evidence.

C. R. Kandy, No. 1,318. *Ana Pitchey* v. *Kaloo* ... 244

See STAMP, 2.

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Resistance.

Resisting police officer in the execution of his duty—Ordinance No. 16 of 1865, secs. 52 and 75—endorsement of warrant—Ordinance No. 11 of 1868, secs. 150, 153 and 158.

Defendants were charged under sec. 75 of the Police Ordinance with resisting two constables while endeavouring to execute within the district of Galle a warrant issued by the justice of the peace of Balapitiya and addressed to the "police sergeant of Galle." The warrant did not purport to be endorsed by a justice of the peace of Galle, but bore the signature of the superintendent of police of the Southern Province. The defendants were convicted and they appealed.

Held, that the execution of the warrant was illegal, as it was not endorsed by a justice of the peace of Galle, and the prosecution therefore failed.

The constables having acted solely on the warrant and not on any information they had of the commission of a crime, and the proceedings having turned on the validity of the warrant, the Supreme Court refused to consider whether the constables were justified under sec. 52 of Ordinance No. 16 of 1865 in arresting the persons mentioned in the warrant as being suspected of a crime.

P. C. Galle, No. 95,118. *Marshall* v. *Edoris* ... 270

Revised edition of ordinances.

See FINDING OF PROPERTY.

Roman Catholic Bishop.

Roman Catholic Bishop—Right of, as Vicar Apostolic of Jaffna to all the churches and lands attached thereto within his vicariate—Intention of founder of church—Proof of Usage.

The Roman Catholic Bishop at Jaffna has not, as Vicar Apostolic, the right of proprietorship over all the churches and lands attached thereto within his Vicariate, there being no law or usage having the form of law giving him such right, nor do the customs and discipline of the Church of Rome recognise such a right.

When the Supreme Court has to direct what shall be the management of a religious institution, in the absence of express proof of the founder's intention, it will look to what has been the usage followed by its congregation and ministers and others officially interested in it, having regard to the customs and discipline of such religious institution, and will in the absence of evidence to the contrary presume that such usage has been in conformity with the original intentions of the founder.

D. C. Manaar, No. 6,817. *Fernando* v. *Bonjean* ... 168

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Roman Dutch law.

Rules and orders of 1833.

Sale.

Order for goods—Price—Return of goods.

Defendant sent an order to plaintiff for certain goods in these terms : "please deliver to bearer and state price [here followed a description of the goods.]" The goods were delivered to bearer with a memo. of the price. Defendant being dissatisfied with the price returned the goods, which the plaintiff declined to receive and then brought his action for goods sold and delivered.

Held, that the contract of sale was void, in as much as no price had been agreed to.

Held, also that the delivery to the bearer of the order was not such an acceptance by the defendant as render him liable, he having so soon as he was apprised of the price returned the goods.

C. R. Kandy, No. 56,925. *d'Esterre & Co.* v. *Gibson* 92

Salt.

Salt, removal of—Ordinance No. 3 of 1836, secs. 3 and 12—plaint defective.

The provisions of sec. 12 of Ordinance No. 3 of 1836 extend to other districts than those specified in sec. 3.

But *held* that the plaint was defective, in that it stated the quantity of salt by weight, instead of by measure.

P. C. Badulla, No. 19,423. *Punchirala* v. *Ramasami* ... 308

Secretary of District Court.

1.—*Secretary of the District Court—liability of, for monies realized by sale of property in a testamentary matter—negligence—practice.*

In this testamentary case, the district judge ordered that an article lodged in court should be sold by public auction and the

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proceeds deposited in the Loan Board for the benefit of a minor. The article was sold and the proceeds appropriated by the chief clerk of the court. Upon a motion made, the district judge held the secretary of the court to be responsible for the money and ordered him to pay it into court.

Held that the secretary was not liable for the money, except upon proof that his departmental duty included the realizing of the money.

D. C. Testy., No. 47 A. *Ex parte* meerwald 248

2.—*Cause of action—Secretary of District Court, liability of,—stamp money recovered in crown suit—Ordinance No.* 11 *of* 1861.

The crown in this case sued the defendant, secretary of the district court of Batticaloa, for Rs. 5, being stamp money recovered in a crown suit in that court, but which had not been forwarded to the commissioner of stamps as provided by Ordinance No. 11 of 1861. Defendant pleaded that, by a certain distribution of the work of the court, all monetary transactions were entrusted to the head clerk of the court to whom the money had accordingly been paid, but adduced no evidence in support of this defence. The commissioner gave judgment for the crown. On appeal by defendant,—

Held, that defendant was liable to account for the money.

D. C. Batticaloa 47 A, reported p. 248 *supra*, distinguished.

C. R. Batticaloa, No. 7,408 283

Security.

See PRACTICE, 7.
PRINCIPAL AND SURETY, 2.
ADMINISTRATION, 4.

Seduction.

See LABOUR ORDINANCE, 6.

Sequestration.

See INDEMNITY.
PRACTICE, 7.
FISCAL'S SALE, 2.

Service Tenures Ordinance.

Service Tenures Ordinance, No. 4 *of* 1870, *sec.* 23—*Decision of Service Tenures' Commissioners—Appeal to Governor in Council—Time for such appeal—Validity of Governor's decision—Irregularity.*

It is competent for the Governor in Council to entertain an appeal from a decision of the Service Tenures' Commissioners, notwithstanding that such appeal was preferred later than a month

Signature.

Stamp.

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be allowed the opportunity of getting it stamped after payment of the prescribed penalty if necessary.

D. C. Colombo, No. 65,822. *Durham Grindrod and Co.* v. *Meira Lebbe* 216

See SECRETARY OF DISTRICT COURT, 2.

Stolen property, action for

See CAUSE OF ACTION, 3.

Supreme Court.

See APPEAL, 1, 2.

Surprise.

See LABOUR ORDINANCE, 5.

Tavern.

1.—*Tavern—Hours for closing taverns—Section 4 of Ordinance 22 of 1873 and section 37 of Ordinance 7 of 1873.*

The object of the legislature in fixing the time within which taverns are, under section 4 of Ordinance 22 of 1873 and section 37 of Ordinance 7 of 1873, to be closed is to prevent the sale of arrack during those hours.

Where it appeared that the tavern keeper kept his tavern open, not for the purpose of selling arrack, but for verification of the quantity of arrack then in the tavern in the presence of government officers, preparatory to the opening of the new tavern on the following morning, it was held that he could not be prosecuted for failure to close the tavern, under the sections of the Ordinances mentioned.

P. C. Jaffna, No. 1,740. *Murphy* v. *Mayilvaganam* ... 228

2.—*Ord. No. 7 of 1873 section 37—keeping arrack shop open after lawful hours—previous conviction of partner of defendant.*

The section 37 of Ordinance No. 7 of 1873, prohibiting liquor shops to be open after certain hours, provides a higher penalty for a second or subsequent offence. The defendant was convicted of a breach of this section, and on proof that his partner in the liquor shop had been previously convicted of a similar offence, the magistrate inflicted the higher penalty on the defendant. On appeal,—

Held, there was no previous conviction of the defendant within the meaning of the ordinance and that the higher penalty should not have been inflicted.

P. C. Colombo, No. 27,528. *Keegal* v. *Wellonappu* ... 247

Tender.

See CONTRACT, 1, 2.

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Theft.

See CRIMINAL LAW, 1.

Thesavalamai.

Thesavalamai—District of Trincomalie and Batticaloa—Roman Dutch Law.

The law which governs the rights of parties in Trincomalie and Batticaloa is the Roman Dutch Law and not the Thesavalamai. Regulation 18 of 1806 restricted the operation of the Thesavalamai to the extent of governing the rights of the Tamils of the province of Jaffna, which never included Trincomalie and Batticaloa.

D. C. Trincomalie, No. 20,748. *Wellapulla* v. *Sitambelam*... 114

See HUSBAND AND WIFE, 2.

Thoroughfares ordinance.

The Thoroughfares Ordinance, No. 10 *of* 1861 *sections* 81 *and* 83 *—Exercise of powers thereunder—authority in writing—obstruction.*

Section 81 of Ordinance 10 of 1861 authorizes every chairman of a provincial or district Committee, the Commissioner of Roads, "and every person authorized in writing by any such chairman or commissioner" to exercise the powers conferred on officers in charge of works.

Section 83 provides a penalty for resisting, obstructing, &c. any person acting under the authority of the Ordinance in the discharge of his duty.

In this case the complainant, a kangani, employed under an "inspector of roads" in the service of certain contractors, charged the defendants with obstructing him in the execution of his duty in breach of section 83. But there was no proof that he had any authority in writing in terms of section 81. Upon an appeal by defendants from a conviction,

Held, that section 83 must be read with section 81, and that the prosecution failed in the absence of proof that the complainant was authorized in writing in terms of section 81.

P. C. Gampola, No. 27,753. *Sangalingom* v. *Ernst* ... 241

Title.

Title to land—ejectment—Nindagama—proceedings of Service Tenures Commissioners—part transfer—Ordinance No. 7 *of* 1840—*estoppel—evidence.*

Plaintiff was tenant of a certain *pangu* of a *nindagama*. At an inquiry of the Service Tenures Commissioners, an entry was made in the proceedings that plaintiff assigned his interest to his three sons. Subsequently, defendant purchased one-third of the pangu on a writ against one of the sons. Plaintiff now sued defendant in ejectment and obtained judgment, and defendant appealed.

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Held that the entry in the proceedings of the Commissioners conveyed no valid title to the sons.

Held further, that the mere entry, in the absence of other evidence, did not amount to proof that plaintiff held himself out as having assigned his interest to his sons, and therefore did not operate as an estoppel so as to prevent him from claiming the one-third share as against defendant.

D. C. Ratnapura, No. 10,678. *Francina* v. *Madduma Banda* 307

See CROWN, 1, 2.

Title deeds.

See MORTGAGE, 3.

Tolls.

1—*Ordinance* 14 *of* 1867, *sect.* 4—*Vehicle for passengers.*

A cart is not a vehicle for passengers under section 4 of Ordinance 14 of 1867 merely because the owner of the cart gives his servant a ride in it.

P. C. Colombo, 70,275 (Beling and Vanderstraaten, Part II. p. 25.) distinguished.

P. C. Kurunegala, No. 26,697. *Fredrick appu* v. *Paules Rodrigo* 127

2.—*Toll, evasion of*—"*goods*"—*luggage*—*Ordinance No.* 14 *of* 1867, *section* 19.

In a charge for evading payment of toll by removing goods, viz., a bundle of baskets and two other bundles each containing 100 walking sticks, from a vehicle on one side of a bridge to another on the other side, in breach of sec. 19 of the Ordinance No. 14 of 1867,

Held that for a conviction under the above clause, it made no difference whether the first vehicle was a hired one or not, and whether it was one for passengers or not.

Held also, that even if luggage were not "goods" within the meaning of the above clause, the bundles of sticks were not luggage, and the removing of them over the bridge from one vehicle into the other constituted a breach of that clause.

D. C. Kalutara, No. 53,904. *Pieris* v. *Cadersah* ... 288

3.—*Evasion of toll—Irrigation Superintending Officer—tank —Ordinance No.* 14 *of* 1867 *sec.* 7—*interpretation of statute.*

Section 7 of Ordinance No. 14 of 1867 exempts from toll "all persons, vehicles, animals, or boats employed in the construction or repair of any road, bridge, canal or ferry, within 10 miles of the toll station."

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The defendant in this case, a Government officer superintending the construction of a *tank*, was charged with passing, without paying toll, over a bridge which was over 10 miles from the tank itself but less than 10 miles from the nearest point of the high road.

Held, that the defendant, by reason of his superintending the construction of the tank, was not exempt from toll under the section 7 of the Ordinance.

Held also, that the ten miles should be reckoned from the tank itself and not from the nearest point of the high road.

P. C. Puttalam, No. 7,870. *Babappu* v. *Parker*... ... 263

4.—*Toll—Government officer—exemption from toll—Ordinance No.* 14 *of* 1867, *sec.* 7.

An officer is exempt from the toll leviable under sec. 7 of the Toll Ordinance, only when passing the toll station on business actually connected with a work contemplated by that section.

P. C. Tangalla, No. 39,776. *Tepo* v. *Christopher* ... 266

Trustee.

Trustee—Insolvency, after order to pay in trust money—Attachment for contempt—Ordinance 7 *of* 1853, *sect.* 36.

The defendant, a fraudulent trustee, was ordered by the District Court to pay the trust money into Court. He was thereafter adjudicated insolvent on his own petition.

Held, that he was not protected by section 36 of the Insolvents Ordinance from the attachment for contempt of Court in not obeying the order.

D. C. Kandy, No. 41,250. *Botticelli* v. *Ribeira* 12

Vaccination Ordinance.

Vaccination—liability of parent for non-vaccination of child—Ordinance No. 9 *of* 1863, *sect.* 6 *and* 12.

Section 4 of the Ordinance No. 9 of 1863 provides for the appointment of a place for purposes of vaccination and for giving notice to the residents of the days and hours at which an officer will attend at such places to vaccinate.

Section 6 requires parents and guardians to take children under their care to the officer at the appointed place for vaccination, and section 12 provides a penalty for parents and guardians not causing the children under their care to be vaccinated.

The defendant was charged under sections 6 and 12 of the Ordinance for refusing to let his child be vaccinated, but the evidence showed that no place was appointed and no notice was given as required by section 4.

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Held, that the defendant was not liable under the Ordinance, the preliminary requirements of the Ordinance not having been fulfilled.

P. C. Tangalla, No. 40,246. *Spittel* v. *Dingi appu* ... 253

Vagrants Ordinance.

1.—*Vagrants Ordinance—Sub-section* 4 *of clause* 3 *of Ordinance* 4 *of* 1841—"*Not having any visible means of subsistence and not giving a good account of oneself.*"—"*Out-door proctors.*"

Those who earn a livelihood by introducing suitors to proctors and receiving a reward or commission from such proctors, do not come within the purview of Ordinance 4 of 1841, clause 3, sub-sec. 4.

Such an occupation, though conducive to many evils, is not in itself unlawful.

P. C. Colombo, No. 20,848. *Rudd* v. *Abdul Cassim* ... 117

2.—*Gaming—Section* 19 *of Ordinance* 4 *of* 1841—*Police Court jurisdiction—Queen's Advocate's certificate.*

A Police Court has no jurisdiction to try a charge under the 19th section of Ordinance 4 of 1841 without certificate from the Queen's Advocate.

P. C. Colombo, No. 20,177. *Cornelis* v. *Perera* ... 227

3.—*Maintenance—wife's adultery—liability of the husband under sec.* 3 *of Ordinance No.* 4 *of* 1841.

A husband is not liable to punishment for not maintaining his wife who has been guilty of adultery.

P. C. Galle, No. 94,541. *Lokuhami* v. *de Silva* ... 257

Warrant.

See RESISTANCE.

Warranty of title.

See CROWN, 1.
PARTITION, 1.
FISCAL'S SALE, 5.

Weights and measures.

See PRACTICE, 6.

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Will.

1.—*Will—Husband disposing of the whole of the common estate, the wife consenting—Revocation by wife after husband's death.*

A husband executed a last will disposing of the whole of the common estate of himself and his wife and making certain bequests to the wife. The wife joined in the execution of the will, expressly consenting to the dispositions therein contained. The husband having died,—

Held that the wife was not entitled to renounce all benefit under the will, and claim an undivided half of the matrimonial estate.

2.—*Last Will—Provision for forfeiture of share of heir impeaching the will—Validity of such clause.*

A clause in a will that any heir under it disputing the directions of the will shall forfeit his share is valid, and not contrary to public policy. Such forfeiture however is not to take effect if it appears that there was reasonable and probable cause for disputing the will.

3.—*Last Will—Claim under impeached will.*

Remarks by the Supreme Court on irregularities in proceedings had in a testamentary case.

4.—*Execution of will—subscribing witnesses—Ordinance No. 7 of* 1840.

It is not sufficient for the valid execution of a notarial will that the testator signed in the presence of the witnesses, but it is also necessary that the witnesses should subscribe the document in the presence of the testator.

REPORTS

OF CASES DECIDED IN APPEAL IN THE YEAR 1872.

D. C., Colombo, Criminal, No. 596. } THE QUEEN *v.* TELENIS.

Assessors, power of District Court to empanel—Ordinance 11 *of* 1868, *sections* 59, 75, 120 et seqq.

A district Court has power to empanel assessors to be associated with the Judge in the trial and decision of any case in which the Court in its discretion considers such assessors necessary.

This was an appeal by the accused against an order of the District Judge (*T. Berwick*) holding that he had not the power to grant their motion that assessors be associated with the Judge in the trial of the case.

Dias for the appellants.
Ferdinands, D. Q. A., for the Crown, respondent.

Cur. adv. vult.

13*th February*, 1872. CREASY, C. J.—In this case, when it came on for trial in November last, the counsel for the prisoners moved that assessors should be associated with the Judge in the trial. The Deputy Queen's Advocate opposed the motion, arguing that the Ordinance (No. 11 of 1868) made no provision for empanelling assessors, and that the District Judge was bound to try the case alone. The learned District Judge adopted this opinion, and in a long and careful judgment he stated that he had no power, in the present state of the law, to order assessors, and he accordingly refused the motion. The present appeal is against that refusal.

As the question is one of considerable importance, I should not have dealt singly with the case, but I should have reserved it for a Full Court, had it not been for the circumstance that the very same question in this very case has already been brought before the three Judges officially. At the time of trial, an Ordinance was pending in Council, intended to give effect to certain Rules lately promulgated by the Judges, for the District Courts. The learned District Judge of Colombo thought it desirable that new Rules as to assessors should be prepared by the Judges, and sanctioned by the same Ordinance. He brought the subject before the notice

of His Excellency the late Governor, who desired the opinion of the Judges of the Supreme Court. The subject was, therefore, carefully considered by my colleagues, Mr. Justice Temple, Mr. Justice Lawson, and myself. We had before us the reasons of the learned District Judge for holding that the law, as it then stood, and now stands, did not empower him to try cases with the aid of assessors. We came unanimously to the conclusion that District Judges had and have already full power to do so, and that no rules on the subject were necessary. I have a copy of our joint official letter to His Excellency on the subject, which I read out when this case came on for discussion in the Supreme Court. I then stated, if any argument was brought forward which at all shook my belief in the soundness of the opinions expressed in that letter, I should be willing to adjourn this case until the return of Mr Justice Stewart from England, when it might be brought on before a Full Court. But the Deputy Queen's Advocate, who appeared for the Respondent, stated that he had nothing to say.

I consider that the learned District Judge had power to order assessors, and I therefore set aside his order rejecting the application for assessors, which was made by him, as he states, under the belief that he had no such power.

In giving reasons for this judgment, I shall use the substance of the letter already referred to, and this may be considered as the opinion of three Judges, and not of the one alone who now pronounces it.

It is desirable to look carefully, in the first place, to the clause of the *Administration of Justice Ordinance*, 1868, which purports to provide for assessors being associated with the District Judge.

That clause is the 59th. It is as follows:—"It shall be lawful "for the District Judge...in his discretion, at his own instance, or upon "the application of any party in any cause or proceeding in the District "Court, to have three assessors associated with him at the hearing and "decision of such cause or other proceeding; and such assessors shall be "selected, summoned, and be otherwise subject to such Rules as are here-"inafter prescribed."

The learned District Judge of Colombo appears to hold, (and I think correctly), that the first part of the clause, if it stood alone, would give the District Judge power in general terms to associate assessors with himself in cases where he deemed it desirable; and that the first part of the clause would also, if standing alone, give the District Judge an implied authority to do all that might be necessary to give the clause its proper effect. But he thinks that the power is limited by the last words of the clause; and that, inasmuch as no Rules such as those which in the last part of the clause are indicated have been prescribed in the subsequent part of the Ordinance, and as no such rules have been made by the Judges, there is a fatal defect in the Ordinance, and that the District Judge has no practical means of giving effect to the contemplated power of associating assessors. He considers that the Legislature did not intend the District Judge to be entrusted with any discretion in these practical particulars.

It appeared, however, to the three Judges of the Supreme Court, and it still appears to me on careful examination of the Ordinance, that the framers of it did not make any such omission ; and that the portions of the Ordinance which follow the 59th clause do contain rules enough about assessors to satisfy the meaning of the last part of the 59th clause ; so that a District Judge now possesses the power of associating assessors, (which power is given by the first part of the 59th clause), subject to the rules imposed by the subsequent parts of the Ordinance, to which more particular reference will now be made. It is to be remembered that the 59th clause had already fixed the number of assessors.

On turning to the 120th and following sections, it will be found that careful provision is made for ascertaining the qualifications of assessors as well as of jurors. The Fiscals are to make three lists of persons qualified as jurors and as assessors: an English list, a Sinhalese list, and a Tamil list. The lists are to be published. A person summoned as an assessor before a District Judge may object to his liability, and the District Judge may relieve him from service. Another clause (134) gives the District Judge power to fine any person who makes default after being duly summoned as an assessor.

Surely we have here a good many rules about assessors, all contained in the parts of the Ordinance which follow the 59th clause. Careful provision is made by the qualification clauses as to what persons are to be selected from the community as fit to serve as assessors. There are practical regulations as to their being arranged in lists, and other matters. The District Judge may enquire into and determine the liability of persons summoned as assessors. He may fine those who do not obey the summons.

Moreover, there is a very important clause, which will be commented on presently, the 75th clause, which defines the respective functions of the Judge and the assessors at the trial. It seems hard, with all these clauses subsequent to the 59th clause in view, to hold that the framers of this Ordinance were so oblivious as to prescribing practical rules about assessors, as indicated in the last part of the 59th clause, that they have suffered the highly important first part of the 59th clause to become inoperative, and the powers which it purports to give, to be made nullities.

The Ordinance unquestionably contains a body of rules as to the empanelling and challenging of jurors, in which assessors are not mentioned. See clauses from 126 to 133 inclusive. The main object of these clauses is to ensure that the jury in each case shall be formed without the influence of any official person being exercised as to its composition. There are no analogous clauses as to assessors. There seems to be good reason why the framers of the Ordinance did not insert any, if we bear in mind the very great difference between the nature of the functions of jurors, and the nature of the functions of assessors. When this is attended to, it will be seen that an amount of discretionary power may be safely and beneficially given to a Judge in the choice of assessors, which would create natural alarm and objection if given to a Judge as to the choice of jurors. Assessors do not, as jurors do, decide authoritatively and conclusively the question of

fact as to guilty or not guilty. They do not decide authoritatively and conclusively any questions at all. On the other hand, while jurors have nothing to do with questions of law, assessors deal with questions of law just as much as they deal with questions of fact. Assessors give their opinion in open Court on all questions, whether of law or of fact, which the Judge declares to have arisen for adjudication. See section 75 of Ordinance No. 11 of 1868, which expressly applies to prosecutions in District Courts, as well as to civil proceedings. But, (as is enacted by the same clause), if the District Judge is dissatisfied with the assessors' opinions, and if he pronounces an opinion different from theirs, "the opinion of such Judge shall prevail, and shall be taken as the sentence, judgment, or order of the whole Court."

It is in the District Judge's discretion to determine whether he will have the aid of assessors at all ; and it is also in his discretion to determine whether, when that aid has been given, he will or will not be guided by it. It seems reasonable and desirable to leave him also full general powers to obtain the assistance of such assessors as he thinks will be most useful to him. For instance, in a case involving questions of Kandyan Law, a District Judge might naturally wish to have three Kandyan Chiefs as his assessors. In a case involving questions of mercantile usage, a District Judge would probably, if he wished for assessors, prefer three eminent merchants. In cases of damage to shipping by collision, a District Judge would gain most benefit by having three men of nautical experience associated with him. Many other cases might be suggested, in which it would obviously be for the interests of truth and justice that the District Judge should have very free authority in choosing his assessors.

In the judgment of the Supreme Court, the Ordinance No. 11 of 1868, as it now stands, gives the District Judge that power. The only limit is that the assessors must be selected from one of the three lists of jurors and assessors prepared by the Fiscal, as required by the Ordinance in clauses 120 to 125 inclusive. With those published lists before him ; with the power to determine whether any one summoned before him as assessor is qualified and liable to serve ; with the power to fine any one summoned as assessor who does not attend ;—a District Judge cannot have any practical difficulty in securing the attendance of a sufficient number of proper assessors. He may direct them to be summoned from what list he pleases, from the English, from the Sinhalese, or from the Tamil. He may, if he pleases, leave it generally to the Fiscal to summon three assessors from a specified list, in which case the most convenient course would be for the Fiscal to take three of those persons qualified as assessors, living in the neighbourhood of the Court, whose names stand next, or nearly next in rotation for jury-service. Or, the District Judge, if he thinks that other persons on the list would give him more assistance as assessors, may direct such persons to be summoned.

The Ordinance, in the judgment of the Supreme Court, gives all necessary powers without wanting additional clauses in itself, or requiring the supplementary aid of Judge-made rules. As it stands it is sufficient, and superfluous legislation is always a mistake, and a mischief.

In conclusion I would remark that the learned District Judge was quite right in holding that the old rules of 1833 have been abrogated as appendages of an abolished system.

Set aside, the District Judge to exercise his discretion as to having assessors associated with him.

C. R., Mullaitivu, No. 9,409. } KANTAN MIGAEL *v.* ARUMOKOTTAR.

Rei vindicatio—*Cattle and their offspring—Animals* feræ naturæ, mansueta, *and* mansuefacta—Partus ventrem sequitur.

Plaintiff owned two domestic cows, which, five or six years before action, strayed from his premises and ever since roamed uncontrolled in some plains several miles from plaintiff's premises. The cows produced two heifers, which heifers, with their calves, herded and roamed at large with the uncontrolled cattle, until such heifers and calves were caught by the defendant. Plaintiff brought the present action to recover them or their value, and defendant claimed them by right of occupancy and appropriation.

Held, that the plaintiff, not having sold the two cows, nor done any act to disclaim his ownership of them, remained the owner of the two cows and of all their offspring, and was entitled to recover.

Title by occupancy can only be acquired in animals *ferae naturae*, and *mansuefacta*, but not in those that are *mansueta*, such as domestic animals.

The plaintiff appealed against a dismissal of his action by the Court of Requests. The facts fully appear in the judgment.

There was no appearance of either party upon the appeal.

Cur. adv. vult.

13*th February*, 1872. CREASY, C. J.—In this case it appears that the plaintiff some years ago possessed two domestic cows, which he had purchased, and which were branded by him. He never sold them, or did any act to disclaim his ownership of them, but he appears to have taken little care as to their safe custody, and it appears that these animals some five or six years ago strayed away from his premises and roamed with other cattle, uncontrolled, in some plains, several miles from plaintiff's premises.

These cows, while thus roaming without control, produced two heifers. The present action is brought respecting these heifers, and their calves. These heifers herded from their birth with the roaming uncontrolled cattle, until they were caught and secured by the first defendant as next mentioned.

In process of time these heifers themselves had young ; and then the first defendant, by catching the young calves, decoyed the heifers into an enclosure, where he secured them.

The plaintiff sues for the heifers, and the young calves, as being his property.

The Court of Requests has given judgment against him. The Commissioner holds that, in as much as these heifers, as soon as they were weaned, (he might have said "as soon as they were born") were with the herds of uncontrolled roaming cattle, and never had the least *animus revertendi* to the plaintiff's cattle-fold, they are to be regarded as *ferae naturae*; that the plaintiff had no property in them, but that the first defendant acquired property in them by occupancy and appropriation.

It appears to me that the Commissioner of the Court of Requests, in coming to this conclusion, did not sufficiently consider whether the plaintiff always retained his property in the cows, which were the dams of these heifers. If these cows were always the plaintiff's property, it would follow that the heifers, which were the offspring of these cows, were the plaintiff's property also ; and the same rule would apply to the calves of the heifers. It is a very clear rule of law that "all that is born of animals of which you "are the owner becomes by the same rule of right your property." See the *Institutes*, Book 2, tit. 1, sect. 19. "*Item ea quæ ex animalibus dominio "tuo subjectis nata sunt, eodem jure tibi adquiruntur.*" The same law is laid down in the *Digest*, Book 41, tit. 1, sect. 6.

I think indeed that it is questionable whether a proprietary title by acquisition and occupancy, such as the Court of Requests considers the first defendant to have gained in the heifers and calves, can be so acquired in animals of this nature and character. Warnkœnig (a very high authority) limits this mode of acquiring property in animals to the case of those wild animals which are found living in their natural state of liberty. This is very different from extending the right to the case of all animals that are found living wild and at liberty. His words are,—"*animalia fera tantum in libertate naturali degentia occupatione nostra fieri possunt.*" And this limitation seems to be fully borne out by the primary authorities in the *Digest*, Book 41, tit. 1, and *Institutes*, Book 2, tit. 1. Much authority might be cited for denying that cattle, in the circumstances in which these heifers and calves were found, can be properly termed "wild animals living in their natural state of wildness." There are many grounds for arguing that they are creatures tame by nature, that is "*animalia mansueta*," in contradistinction both to "*animalia mansuefacta*," and to "*animalia ferœ naturæ*." The distinction between "*mansueta*" and "*mansuefacta*" is important in the present case. "*Mansueta*" means animals naturally tame, such as cows and sheep. "*Mansuefacta*" means animals naturally wild, such as deer, but made tame by custom. "*Fera*" means animals entirely wild by nature. See Van Leeuwen (page 107), who also limits the right of acquiring by occupancy to the case of animals of the two last descriptions.

Authorities are to be found on the other side, as will be seen on perusing the very interesting case of the *Falkland Islands Company* v. *The Queen* (2 Moore's P. C., N. S., p. 266) in which the general question of proprietary rights in (so-called) wild cattle was learnedly discussed, but the case adjudicated on another point.

But, as I mentioned at the beginning of this judgment, the present case

must be decided in favour of the plaintiff, not on the very broad and difficult question to which I have since adverted, but on account of the proof that two cows, which were the plaintiff's property, were the dams of the heifers in question. In order to make the chain of argument in this respect complete, it is only necessary to establish the point that the plaintiff did not lose his property in his cows by their straying away from him and roaming about uncontrolled, as has already been described.

It is unquestionable that before the cows so strayed away they were the plaintiff's property, and they were naturally and in fact tame and domestic animals—"*mansueta*", to all intents and purposes. This being the case the plaintiff did not lose his property in them, however far they strayed, and however thoroughly they may have lost all *animus revertendi* to his fold.

The doctrine of the "*animus revertendi*" applies exclusively to animals that are "*mansuefacta*", i. e. animals which are naturally and originally wild, but which have been partially reclaimed, and made tame by custom. When such creatures as these stray away, and lose all *habit* of returning (whence it is inferred that they have lost all *intention* of returning), their temporary owner's property in them ceases, and they become the property of the first person who takes them. But with regard to creatures naturally tame (*mansueta*) the case is different, and their owner's property in them continues, however far they may stray. The Roman Law is explicit and minute on this. See the *Institutes*, Book 2, tit. 1, sects. 15 and 16. The *Digest*, Book 41, tit. 1, sect. 5, pars. 5, 6. The Roman Dutch Law has not deviated in this respect from the old Roman Law. See Voet on *Dig.* 41, tit. 1, n. 3. Voet says "*Ad occupationem specierum imprimis per-*
"*tinet venatio, piscatio, aucupium, locum habens in animalibus quae nullius*
"*sunt*; *adeoque non in mansuetis, veluti gallinis, anseribus, ovibus, caeteris-*
"*que pecoribus gregatim pascentibus, etiamsi longissime avolaverint aut aber-*
"*raverint.*"

It is instructive also to read what Savigny in his Treatise on Possession (p. 256) writes on the different manners in which the laws of possession and property affect first tame animals which stray, and wild beasts tamed artificially, which are likened to domestic animals so long as they retain the habit of returning to the spot where their possessor keeps them. When the last mentioned, the "*mansuefacta animalia*," stray and lose the habit of returning, both the right of possession and the right of property are lost. And Savigny remarks that this is the only case where the loss of possession is necessarily accompanied by the loss of property. In all other cases the right of property cannot be lost without the proprietor doing some act to divest himself of it. See *Digest*, Book 50, tit. 17, sec. 11. The plaintiff in this case has certainly done nothing by which he intended to divest himself of the property of the cows.

It is hardly necessary to remark that a man's omission to get cattle branded, as required by Ordinance No. 2 of 1835, cannot take away his right of property.

I adjudge that the animals, which are the produce of the animals thus

proved to be the plaintiff's property, follow the rule of property which applies to their dams, "*Partus ventrem sequitur*," and consequently that the plaintiff is entitled to a verdict in this case.

I do not expect that this case will encourage carelessness among cattle owners in this District. It must be very seldom that a careless owner can prove, (as has been proved in this instance), the identity of the produce of his strayed cows. Where such proof cannot be given, he will of course be unable to recover in respect of such produce. And though the person who takes possession of cattle found under such circumstances may not in strict law acquire a right of property by occupancy, he will acquire a possessory right, which will avail him against all who cannot themselves establish a proprietary title against him ; and which will soon by the law of prescription become a bar even as against the original owner.

No regular evidence has been taken as to the value of the animals, but as the pleadings on one side allege Four pounds (£4) and those on the other side allege Two pounds and ten shillings (£2 10*s*) as the value, the intermediate sum may be fairly taken as the true one, instead of putting the parties to the cost and delay of another trial merely to assess damages.

Set aside. Judgment for plaintiff for the cattle, or their value, Rs. 35.

C. R., Colombo, No. 79,700. } MAITLAND *v.* FORD.

Appeals on questions of fact—Principles on which the Supreme Court interferes—Burden of proof.

The Supreme Court does not set aside judgments of the Court below on questions of fact unless it is made perfectly clear to the Supreme Court that the Court below has come to an erroneous conclusion. So, when the burden of proof was on the defendant, and the evidence was so conflicting that the Court was left in considerable doubt as to which side was correct, the Supreme Court affirmed the judgment given below for plaintiff.

This was an action for the value of goods sold and delivered, to which the defendant pleaded payment. The Commissioner gave judgment for the plaintiff, and the defendant appealed.

Ferdinands, D. Q. A., (*R. H. Morgan* with him) for the appellant.
Dias for the plaintiff, respondent.

Cur. adv vult.

13*th February*, 1872. CREASY, C. J.—The Supreme Court does not set aside judgments of the Court below on questions of fact unless it is made perfectly clear to the Supreme Court that the Court below has come to an erroneous conclusion. This has not been done in the present case,

nor could it have been done. This is one of the class of cases, which sometimes though not often occur, in which the evidence is so conflicting and the witnesses on both sides are so respectable, that it is impossible not to remain in considerable doubt as to which side is correct, however careful may have been our perusal, and our comparative anatomy, of the proofs. When this occurs in a criminal case, the proper termination is an acquittal, because the burden of proof is always on the prosecution to establish the accused party's guilt beyond reasonable doubt and if the prosecutor fails to do so the verdict is against him. But in a civil suit it is necessary, in doubtful cases, to ascertain on which party the burden of proof lies, and to decide against that party if the affirmative of the issue has not been established by him beyond all reasonable doubt. Here the defence is payment. The burden of proof lies on the defendant, and if at the end of the case the Court is not reasonably satisfied that the defendant is in the right, the verdict must go against him. It seems to the Supreme Court, for the reasons (among others) given in the judgment of the Court below, impossible to feel confident at the end of the case that the plaintiff's story about the receipt is erroneous, and that the defendant's is accurate.

This Court therefore is bound to affirm the judgment of the Court of Requests. In so doing it is right to add that the Supreme Court concurs with the Court of Requests in believing that the defendant and his witnesses have not in the least degree been actuated by any dishonourable intent or any spirit of wilful inaccuracy. There has been a mistake on one side or the other ; and the defendant has failed to prove that the mistake was on the side of his adversary.

Affirmed.

C. R., Panadura, No. 14,264. } RODRIGO *v.* DE MELL.

Depositum—Locatio operis faciendi—*Bailment—Loss by robbery.*

Where goods are deposited with another for safe-keeping—whether the bailment is gratuitous (*depositum*), or for reward (*locatio operis faciendi*)—the bailee is discharged from liability if the goods be lost by house-breaking and robbery and not through any want of reasonable care on his part.

This was an action to recover goods deposited by the plaintiff with the defendant for safe-keeping. The defendant pleaded that he had been robbed of the goods, without any want of reasonable care on his part, but failed to establish this, and the Commissioner gave plaintiff judgment. The defendant appealed.

Grenier for the appellant.
The respondent did not appear.

Cur. adv. vult.

28*th February*, 1872. CREASY, C. J.—The pleadings state and admit the delivery of the articles by plaintiff to defendant for safe custody.

The defendant asserts that they were taken away by robbers who broke into his house.

It is not very clear on the evidence whether the defendant was to be paid for his trouble in taking care of the things or not. But whether it was a case of things placed with another to be taken care of without pay for the trouble (i. e. a *Depositum*, or a Gratuitous Bailment), or whether it was a case of a man undertaking for pay to take care of things left with him (in which case it was a *locatio operis faciendi*), the bailee would be discharged from liability for loss, if he could prove that they were lost through house-breaking and robbery, and not through his having omitted to take reasonable care of them. (See the notes to *Coggs* v. *Bernard* in Smith's Leading Cases, Vol. 1, pp 166 to 171).

It lay on the defendant, who set up this defence, to prove it by satisfactory evidence. This he has not done. There is nothing but his own unsupported statement, which is very meagre and suspiciously vague.

The proceedings before the Justice of the Peace appear to have been a mere show.

The verdict for the plaintiff must stand, but the defendant is entitled to have some compensation under his pleas of set off. The plaintiff ought to have taken back the portion of the property that was brought to him. He could not thereby have prejudiced himself in respect of the portion which was not forthcoming. An allowance of Ten rupees will be reasonable and the amount for which judgment is entered for plaintiff will be reduced accordingly.

Modified.

D. C., Colombo, Testamentary, No. 3,656. } IN THE MATTER OF THE GOODS, &C., OF MENDIS.

Administration, necessity for—Estate under £150 in value.

Where an estate was worth under Rs. 1,500, and comprised shares in two lands, worth Rs. 1,040, and two bond-credits amounting to Rs. 250, there being several heirs; and the District Court refused an application for Letters of Administration on the ground that it would entail unnecessary expense—

The Supreme Court, reversing the order, allowed administration to the applicant, following the principles laid down in *D. C. Galle* 28,256 (Vanderstraaten's Reports, 273).

On 15th August, 1871, *Francisco Mendis* applied for Letters of Administration to the estate of the deceased, his brother-in-law, the estate being sworn under £150. The Court having asked for particulars of the property and the "reason why administration is wanted to so trifling an estate", a statement was filed showing immoveable property (undivided shares in two lands) worth Rs. 1,040, moveables worth Rs. 210, and

two bonds in favour of deceased for Rs. 150 and Rs. 100 respectively, making Rs. 1,500 in all. It was stated that the immoveable property could not be divided among the heirs without a sale, and that the debts due to the estate could not be recovered.

The District Judge (*T. Berwick*) on 14th September, 1871, disallowed the application in the following terms :—" Only two small debts are stated as " debts to be recovered, and it is not shown that there is any difficulty about " them. There is therefore no ground for putting the estate to the expense " of administration. As regards the proposed sale and division of the lands " among the co-heirs, the Court does not sanction administration for such " an object ; and when administration is given it does not sanction a sale " of land except when necessary to pay debts. The common land tenure " here is undivided possession. If the joint-owners desire a partition or " sale, the law provides a legitimate process for the purpose without the ex- " pense of administration in addition."

The applicant appealed.

There was no appearance of parties.

Cur. adv. vult.

28*th February*, 1872. CREASY, C. J.—The Supreme Court thinks that the refusal of the application made in this case with the purpose of obtaining a regular administration of the estate was erroneous, though it was doubtless prompted by a desire to benefit the estate.

In a case decided here, (D. C. Galle, 28,256*) during the month of November and reported in the Colonial Gazette dated 2nd December, 1871, we discussed very fully the duties and powers of Executors and Administrators in this Island, and gave reasons for our opinion (previously expressed in the case of *Staples* v. *de Saram*†) as to the extent to which the English law of Executors and Administrators has been established here.

The present is not one of the exceptional cases where the amount of property is so trifling as to justify the Court in not allowing the estate to be administered according to the regular course of law.

Set aside.

Admission of Practitioners.

On reading the Report of the Board of Examiners, it was ordered that *John Perera Samarasinghe* be admitted a Proctor of the Supreme Court of the Island of Ceylon, and *Leopold Ludovici* a Proctor of the District Court of Colombo.

The said *John Perera Samarasinghe* took the usual oaths of office and allegiance.

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* Vanderstraaten's Reports, 273.

† Creasy's Reports, 34.

D. C., Kandy, No. 41,250. } BOTTICELLI *v.* RIBEIRA.

Trustee—Insolvency after order to pay in trust money—Attachment for contempt—Ordinance 7 of 1853, *sect.* 36.

The defendant, a fraudulent trustee, was ordered by the District Court to pay the trust money into Court. He was thereafter adjudicated insolvent on his own petition.

Held, that he was not protected by section 36 of the *Insolvents Ordinance* from attachment for contempt of Court in not obeying the order.

The defendant, a trustee who had fraudulently appropriated the trust money, was ordered to pay it into Court, and was subsequently adjudicated insolvent on his own petition. The money not having been paid in, the plaintiffs moved that the defendant be attached and committed for contempt of Court. The District Judge refused the motion, holding that the insolvency freed the trustee from liability. The plaintiffs appealed.

Dias for the appellants.

Morgan, Q. A., for the defendant, respondent.

Cur. adv. vult.

4th June, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—In this case a fraudulent trustee was ordered by an Award and a Rule of Court to pay the trust money which he had appropriated, or to give security. Instead of obeying the order, he gets himself made an insolvent on his own petition ; and then sets up his insolvency as a reason why the order of the Court should not be enforced by attachment for contempt. We do not think that he has any right to do so. The 36th section of the *Insolvency Ordinance*, No. 7 of 1853, has been relied on in his favour, but the first part of that clause, (which only could be applicable), applies to arrests or imprisonments by creditors, and not to process for contempt of Court. The word " attachment" appears to be designedly omitted in that part of the clause, although it is inserted in a subsequent part which provides for persons in custody being brought up for examination.

The defendant is to have leave to apply to be released from this attachment at the end of twelve months' imprisonment under it.

Set aside. Attachment to issue.

D. C., Kurunegala, No. 1,669. } KOLENDEWEL *v.* ALLAGAPPEN.

Intervention—At what stage of a case allowed—Rules and Orders of 1833, *sec.* 1, *r.* 32—*Intervention after execution—Fraudulent judgment.*

A person hasv right toi ar nteene in a cause at any stage of the cause even after judgment, if an appeal lies.

The plaintiff appealed against an order of the District Judge (*D. E. de Saram*) disallowing the plaintiff's motion to set aside the petition of intervention filed by one *Wellyan Chetty*. The plaintiff on 24th August, 1871, obtained judgment for £60 and costs against the two defendants (who filed an admission) upon a notarial intrument dated 10th February, 1871. A certain coffee estate, half of which belonged to the defendants, was seized in execution. *Welleyan Chetty* on 24th September obtain leave *ex parte* to intervene, and on 25th September filed his petition of intervention. He set out that he was a mortgagee of the defendants' interest in the coffee estate, and mortgagee of the other half-share with possession in lieu of interest, and alleged that the plaintiff's action was premature, the debt not being yet payable under the instrument upon which it was founded, and that plaintiff and defendants were acting in collusion to defraud him of his rights. He prayed that the seizure of the estate might he released, and that he be allowed to continue in possession, giving security to answer the plaintiff in damages. On 23rd November, 1871, the plaintiff moved tbat the Intervention be set aside on the ground that under the Rules and Orders, rule 32, no intervention lay after execution. The District Judge disallowed the motion, sustaining the intervention on the allegations of fraud. The plaintiff appealed.

Ferdinands, D. Q. A., for the appellant.
Dias for the intervenient, respondent.

Cur. adv. vult.

4th June, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

TEMPLE, J.—A person has a right to intervene at any stage of the cause and even after judgment, if an appeal can be allowed against such judgment. The 32nd clause of the Rules allows an intervention "before execution" but does not appear to preclude the petition from being filed in accordance with the Law before the execution has been realized. See 1 Knapp's Reports, pages 91, 92; and Sir Charles Marshall's Reports, page 167.

Affirmed.

D. C., Tangalla, No. 3,077. } REWATE TERUNNANSE *v.* JAYEWICKREME.

Formâ pauperis, *action in—Rules and Orders (of* 1833*), sec.* 1, *rr.* 42-45*—Buddhist priest suing as incumbent of temple.*

A Buddhist priest, suing as incumbent of a temple to recover temple lands, and possessing as such incumbent other lands appurtenant to the temple and over £5 in value, cannot be allowed to proceed *in forma pauperis*, although he may have no property in his own private right.

D. C. Matara 19,453 (3 Lor. 67) distinguished.

The plaintiff, as Incumbent of the Galgoda Pansala in Tangalla, sued *in formâ pauperis* to set aside an execution sale of certain lands at the instance of the first defendant, at which the other defendants had purchased, on the ground that the lands were *sanghike* property and not liable for the debts of the execution debtor. Upon motion by the defendants, and it appearing that the plaintiff as incumbent held lands belonging to the temple and over £5 in value, the District Judge (*F. H. Campbell*) dispaupered him and ordered him to pay the costs of past proceedings within fourteen days, in default the action to be dismissed.

The plaintiff appealed.

Dias for the appellant.
Morgan, Q. A., for the defendants, respondents.

Cur. adv. vult.

5th June, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

STEWART, J.—Though the plaintiff personally may have no property, he sues as the incumbent of a temple on behalf of which, according to his own statement, he, as incumbent, is in possession of several lands.

There was no suggestion either on his examination, or throughout the proceedings on the day of hearing, that the plaintiff held these lands as incumbent of another Temple. The allegation in regard thereto in the petition of Appeal being entirely new, and not even supported by affidavit, cannot be attended to.

The case which has been quoted from Lorenz, part iii, 67, is distinguishable from the present. In that case "the plaintiff and defendant were "disputing as to which of them was the trustee of certain property left to a "Wihare."

Affirmed.

D. C., Kalutara, No. 26,378. } SILVA *v.* SILVA.

Execution—Order of Court limiting execution of writ—Notice of motion —Ordinance 4 of 1867, sects. 60, 61.

A Court has power to limit the execution of a writ against property issued by it by directing that certain property shall not be levied upon. The writ-holder is entitled to notice of a motion for such a limiting order.

The plaintiff sued seven defendants on a mortgage bond. The 2nd, 3rd and 4th defendants, who were sued as the heirs of a deceased obligor, pleaded that, the 4th defendant being entitled in her own right to 1-3rd of the land mortgaged, the mortgagors had no right to encumber the whole land. The plaintiff having obtained provisional judgment, the 2nd, 3rd and 4th defendants on 15th March, 1872, moved *ex parte*, on affidavit of the facts,

that " the Fiscal be instructed to exclude the several shares belonging to the 2nd, 3rd and 4th defendants." The District Judge (*A. Young Adams*) allowed this motion. The plaintiff obtained a rule *nisi* to set aside the order of 15th March for irregularity, in that (1) no notice of the defendants' motion had been given ; (2) defendants' proper course was to apply to the Fiscal ; (3) defendants should have obtained an injunction against the Fiscal. The District Judge remarked that, though the Rules and Orders, rule 33, required notice, the practice of his Court was not to require it when the Proctor for the other side was in Court when the motion was made. As to the 2nd ground : The Court knew of its own knowledge, and might take judicial cognizance of, the fact that sec. 60 of Ordinance 4 of 1867 was generally held to apply to third parties and not to execution-debtors themselves. As to the third ground : the property claimed by the defendants was in their own possession, and any action ought to come from the other side. The order of 15th March was therefore upheld, with the modification that it was made conditional on the defendants' giving security to the extent of the value of the shares claimed. The plaintiff appealed.

The appellant did not appear.
Coomaraswamy for the defendants, respondents.

Cur. adv. vult.

5*th June*, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

STEWART, J.—There is nothing in either the 60th or 61st section of the Ordinance No. 4 of 1867 to prevent the Court issuing an order to the Fiscal as to the extent to which a writ of execution issued by it shall be carried out.

A notice of the motion of the 15th March would have been necessary had the plaintiff insisted on such notice. From the note of the Judge it would appear that the plaintiff's Proctor was in Court when the motion was made, and he must be taken to have waived formal notice.

Affirmed.

C, R., Nuwara Eliya, No. 2,439. } ROWLANDS *v.* PERERA.

Execution against the person for judgment under £10—Ordinance 7 of 1853, sect. 165.

Where a plaintiff wishes to enforce a judgment for a sum under £10 by execution against the person of a defendant, he must obtain from the Court, at the time it passes the judgment, an order allowing him so to enforce it, in terms of section 165 of Ordinance 7 of 1853.

When a plaintiff obtains such a judgment by consent or in default, he may

apply to the Court to be allowed to prove such circumstances (specified in the Ordinance) as would authorize the Court to order execution against the person to issue.

This was an action on a promissory note, and judgment was on 20th November, 1869, entered for the plaintiff by consent, for £5 17*s.* 0*d.*, and interest, and 9*s.* 2*d.* costs. A contest took place between plaintiff and other creditors of defendant upon claims of preference and concurrence on a sum of £15 16*s.* 8*d.* levied by the Fiscal, of which, after two appeals by him, the plaintiff was by the judgment of the Supreme Court dated 25th May, 1870, declared entitled to no part. Nothing was done thereafter till the 11th January, 1872, when the plaintiff obtained an order requiring the defendant to appear and "shew cause why he should not be taken and detained "in execution in terms of the 165th clause of the Ordinance No. 7 of "1853." On the returnable day, the plaintiff swore that the defendant had represented himself as perfectly solvent and not in debt, when the plaintiff lent the money and sold the goods for which the note in question was given, whereas the defendant owed sums amounting to £44, and plaintiff held two other unsatisfied judgments amounting to £15 against him.

The Commissioner *(F. C. Fisher)* "considering that the defendant "obtained credit from the plaintiff under false pretences, and wilfully con-"tracted the debt without at the time having a reasonable assurance of "being able to pay it," ordered that the defendant be taken and detained in execution for a period of three months.

The defendant appealed.

There was no appearance upon the appeal.

Cur. adv. vult.

19*th June*, 1872. STEWART, J.—By the 165th section of the Ordinance No. 7 of 1853, to allow of a defendant being arrested in execution upon any judgment not exceeding Ten pounds, it is requisite that the judge, in giving judgment, should order that the defendant be taken and detained in execution.

The words of the Ordinance are, "it shall be lawful for such Court, "if the judge thereof shall think fit, in giving judgment to order that such "defendant may be taken and detained, &c."

The order for the arrest of the defendant in this case was made on the 26th January, 1872, long after the judgment which was given in November, 1869.

We may point out that, though a judgment be obtained by consent or in default, there is nothing to prevent a plaintiff in applying for judgment to move the Court to be allowed to prove, where they exist, such facts, specified in the Ordinance as would authorize the Court to order execution against person to issue.

Set aside.

D. C., Batticaloa, Testamentary, No. 29. } IN THE MATTER OF THE GOODS, &c., OF AGAMADOLEBBE.

Mohammedan Law—Marriage—Evidence—Registration—Regulation 9 of 1822, sect. 21—Ordinance 6 of 1847—Proclamation of 18th December, 1849.

By the combined operation of Ordinance 6 of 1847 and the Proclamation of 18th December, 1849, the authority of Regulation No. 9 of 1822, requiring proof of Mohammedan marriages to be by register, ceased, and it thenceforth became allowable to prove such marriages by any legal evidence.

A joint application for Letters of Administration to the intestate estate of *Meeralebbepody Agamadolebbepody* was made to the District Court by *Mariancandu* his cousin, claiming to be his widow, and her brother *Oolendolebbepody*. This application was opposed by two brothers of the deceased, who denied that the first applicant had been married to the deceased, and claimed administration themselves. The parties were Mohammedans. Evidence was given of a marriage according to the Mohammedan rites between the deceased and the applicant in 1858, and also of their having lived together ever since and been reputed man and wife. Rebutting evidence was led for the opponents. The District Judge (*G. E. Worthington*) held that Regulation 9 of 1822 governed the marriage, which required registration of all marriages but those of Europeans; and that this marriage, being admittedly unregistered, was invalid. The learned judge also held, on a review of the evidence, that no marriage had been intended or ceremony performed, relying on the circumstances (1) that the deceased had not registered this marriage as he had his first; (2) that he did not, though himself a Registrar, register the birth of the two children borne by the applicant; (3) the absence at the second marriage (when the deceased was a *Vanniah*) of the pomp and show that attended his first marriage, when he was a private individual; (4) that there was a motive for the deceased's seeming to marry the applicant to be found in his desire, as administrator of his father's estate, to get an admission from her relatives of their having received their share of the estate.

Letters of Administration were accordingly granted to the opponents, and the applicants appealed.

Morgan, Q. A., (*R. H. Morgan* with him) for the applicants, appellants.

Dias, (*Ferdinands, D. Q. A.*, with him) for the opponents, respondents.

Cur. adv. vult.

19*th June*, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—We think that *Marian Candu* was proved to have been the lawful wife of the deceased.

With regard to the law, we think that, in the case of Mohammedans, the Regulation of 1822 did not render their marriages null and void unless registered ; but merely enacted that the only legal mode of proving such marriages should be by production of the Register (See end of section 21).

By the combined operation of Ordinance No. 6 of 1847, and the Proclamation of December 18th, 1849, the authority of Regulation 9 of 1822, requiring proof of a Mohammedan marriage to be by register, ceased to exist. Thenceforth it became allowable to prove Mohammedan marriages by any legal evidence.

The common proof of a marriage is to call a person who was present at the ceremony. But mere proof of cohabitation as man and wife is good *primâ facie* evidence of marriage. Here, both kinds of proof were given ; and the very Priest who officiated was called as a witness, and produced the marriage *Sarane* signed by the husband himself. His positive testimony as to this cannot be overweighed by the opinion of one witness who does not think the handwriting to be genuine. Many ingenious doubts are suggested on other points, but they leave the case thus—the parties were really married under somewhat unusual circumstances.

Set aside. Administration to be granted to Applicants.

D. C., Colombo, Insolvency, No. 804. } RE LEDWARD. EX PARTE AUSTIN.

Landlord and tenant—Insolvency—Preferent claim for house-rent—Landlord's lien—Acceptance of Promissory Notes for amount of rent due.

A landlord does not, by accepting from his tenant promissory notes for the amount of rent due, lose his preferent legal hypothec over the *invecta et illata.*

This was an appeal by *F. Schultze*, the Assignee of the Insolvent's estate, against the order of the District Court upon a Special Case submitted for its decision by *Benjamin Austin* and *William Matthew Austin* (as administrators of the estate of *William Austin*) and the Assignee. The following was the

SPECIAL CASE.

Charles Hargrave Ledward was at the date of the adjudication of Insolvency against him and still is indebted to the plaintiffs in the sum of one hundred and twenty-six pounds six shillings and ten pence (£126 6*s.* 10*d.*)

being rent of the house and premises situated in York Street and Baillie Street in the Fort of Colombo from the 1st day of October, 1869, to the 18th May, 1870, being the date of adjudication of insolvency.

That for the rent due for the months of October, November, and December, 1869, and January, February and March, 1870, amounting in all to the sum of one hundred pounds (£100) the plaintiffs accepted from the said insolvent two promissory notes for fifty pounds (£50) each, one of which said promissory notes was dated the tenth day of February, 1870, and was payable on the 13th day of June, 1870, and the other of which said promissory notes was dated the 12th day of April, 1870, and was payable on the 15th day of August, 1870.

That the said insolvent was at the date of the said adjudication of insolvency in the occupation of the said house and premises, and the goods which belonged to him remained in the said premises till about the 19th of June, 1870, when they were sold by George Nicholls, the provisional assignee appointed by this Court, who gave the plaintiffs an undertaking that the removal of the said goods from the said premises shall not prejudice the claim of the plaintiffs to preference in respect of the said arrears of rent, if this Court should on a special case being submitted to it, hold in favor of the claim of the plaintiffs, and these plaintiffs further say that the said promissory notes were accepted by them only for the accommodation of the said insolvent, and though the same were negotiated by them they made themselves personally liable thereon as endorsers. That the said notes were subsequently dishonored by the makers and the plaintiffs as endorsers had to pay the amount due thereon. On the foregoing facts the plaintiffs contend that as landlords they have a preferential claim over the proceeds of the sale of the goods in the said house. The assignee admits that the insolvent at the date of the adjudication of insolvency against him was indebted to Messrs. Austin in the sum of one hundred and twenty-six pounds six shillings and ten pence (£126 6*s.* 10*d.*) and that for the rent due for the months of October, November and December, 1869, and January, February and March, 1870, amounting to one hundred pounds (£100) two promissory notes were given, each for fifty pounds (£50). That one of the promissory notes was due on the 13th June, 1870, and the other on the 13th August, 1870. The assignee disputes the right of Messrs. Austin to lien over the goods in the insolvent's stores in June, 1870, for amount of the rent for the said months, as they had discounted them and had got the value of them that is to say the amount of the rent ; and the goods which were in the insolvent's stores at the time the rent became due, and over which Messrs. Austin may have had a lien, were sold and other goods brought in. Also one of the promissory notes was not due at the time of the sale of insolvent's goods.

Upon the above facts, it is submitted on behalf of the assignee that Messrs. Austin by accepting negotiable promissory notes for this rent lost their lien on the goods and must rank with the other creditors.

At the date of insolvency the insolvent was liable to third parties on

these notes, and when the property was sold one of the notes was not yet due.

20*th December*, 1871. The Court heard Counsel for the parties to the special case.

Ferdinands, D. Q. A., for the Assignee, cited *Hewison* v. *Guthrie* (2 Bing. N. C. 755); *Cowell* v. *Simpson* (16 Ves. jr. 275); Van der Linden, *Instit.*, Henry's Trans. 181, *Novation.*

Dias, for the representatives of *Austin*, cited Evans' *Pothier*, p 385; *Davis* v. *Gyde* (2 A. and E. 625); *Miles* v. *Gorton* (2 C. and M. 504); *James* v. *David* (5 T. R. 141); Smith's Mercantile Law, Ed. 1865, p 539.

Ferdinands, in reply, referred to *Horncastle* v. *Farran* (3 B. and A. 497); *Bunny* v. *Poyntz* (4 B. and Ad. 568); Byles on Bills, 9th Ed. 373.

8*th January*, 1872. BERWICK, D. J.—In this case a person who was adjudicated Insolvent on 18th May, 1870, had previously, being indebted to his landlord for arrears of rent, given him two promissory notes payable respectively on the 13th June and 15th August following. The notes were not backed by any other name, and therefore gave the landlord no new, or better, or other security than he previously had. They have both been dishonoured by the Insolvent, and the landlord, who had discounted them, has had to retire them himself. The landlord now claims the benefit of the legal tacit hypothec over the *invecta et illata*. The assignee, for creditors, disputes the claim, contending that the landlord lost his right of legal hypothec by taking the notes: and this question has been submitted on a special case to the decision of the Court.

It is a rule of the Civil Law that a landlord's legal hypothec is not effectual until he has sequestrated or laid an arrest on the goods by judicial authority, *praeclusione publica auctoritate* (3 Burge 600, Voet 20. 2. 3) after which process, *qualis praeclusio nostris moribus non modo jus hypothecæ locatori firmat, sed et praelationem ei tribuit.*" The goods, however, were sold by the assignee in Insolvency under agreement that the rights of parties should not be thereby prejudiced. This sale was six days after the first note fell due, and before the other had matured. The landlord had not, in fact, at that time issued any process of law against the goods; but the case must be treated as if he had sequestrated them, for the agreement to a sale without prejudice, of course meant that an intended and imminent sequestration was stopped on the faith of that agreement, and the goods must be considered as if they were still on the premises. They must also be considered and dealt with as if they were still the property of the Insolvent, subject or not to a hypothec as may now be decided.

The question then is, Would a sequestration, if obtained by the landlord while the goods were still on the premises, have been valid? or would it be liable to be set aside at the instance of the owner or those standing in his place on the ground that these notes had been taken?

There can be no doubt, I think,—and indeed this was admitted—that taking the promissory notes did not extinguish the original debt, and that as regards it and the liability to be sued for it, taking the notes had no other effect than to give the debtor time till they should be due and either paid or dishonoured. As regards the legal hypothec, which forms an intrinsic accessory by force of law to the original debt, I expressed my opinion at the hearing that the continued subsistence of the original debt would naturally carry with it the continuance of all its *legal* incidents and accessories so far as these had not been surrendered either by express agreement or by necessary implication from some agreement essentially inconsistent with them, of which there is nothing whatever shewn in this case ; and that according to the principles of the Civil Law (1) the mere acceptance of additional securities to those already held without express surrender of the hypothec given by law would not extinguish the latter, although (2) the extension of the original contract time for the payment of the debt might operate to prevent earlier recourse by sale against property pledged or hypothecated for it.

The correctness of this second point so stated I find borne out almost verbatim by a passage in Voet's Commentaries on the Pandects, 20. 5. 1, which is abbreviated in the summary as follows: *Pro rogato termino solutionis debiti principalis etiam differenda venditio pignoris pro illo debito obligati.*" This point is, however, of comparatively less importance now because the question of whether the goods could be sequestered during the currency of the notes which gave the debtor indulgence of time seems to me to be closed as to the note which had not matured at the date of the sale by the circumstances that it is now overdue and dishonoured ; and the case comes before me as if the goods were still on the premises and in the possession of the tenant, and therefore still liable to sequestration if the legal hypothec has not been wholly extinguished.

On the other vital point, however, I find that the view I expressed is equally borne out by the Civil Law authorities which I will presently quote, merely pausing to advert to the English cases cited by Counsel. The case chiefly relied on by Counsel for the landlord, viz. *Davis* v. *Gyde* (2 Ad. and E. 625) seems as completely in point as any English case can be, and my judgment, though following the Civil Law, will be in accordance with it. Much of the argument of the learned Judges who decided that case is, I conceive, inapplicable to the law of this country, but not so the arguments of Justices Williams and Coleridge, and the decision there was that a landlord's right to distrain for rent was neither lost nor suspended by his taking a promissory note for the rent due, where it did not appear that the note had been taken in *satisfaction* of the rent, nor that there was any *express agreement* that the taking of the note should suspend the right of distress till it was due or dishonoured.

But on the other hand, to quote the words of TINDAL, C. J., in *Hewison* v. *Guthrie* (2 Bing. N. C. 759) "it is well established by the authorities "that if a security is taken for the debt for which the party has a lien upon "the property of the debtor, such security being payable at a distant date,

" the lien is gone. The case of *Cowell* v. *Simpson* (16 Ves. jr. 275) and " the authority of Lord Eldon in applying the doctrine there laid down in " the case of factors and other trades is decisive on the point."

Cowell v. *Simpson*, which was mainly relied on by the learned Counsel for the Assignee, and the class of cases to which it belongs, show then that the English law differs widely in the case of trade liens (corresponding to the *jus retentionis* of the Civil Law) from what it is in the case of landlord's distress for rent, which there is very high authority for saying is "not materially different" from the landlord's hypothec in this country, but not less widely does the Civil Law differ in the respective incidents of the *jus retentionis* and the *pignus legati*. In the first, which is the English right of lien, the lien may be put an end to at the option of the debtor against the will of the creditor by due security being given for the debt, an incident which does not belong to the other. See Voet 14. 2. 21, and *Censura Forensis* 4. 36. 13. And though there may be nothing in the Civil Law to support the extent to which *Cowell* v. *Simpson* and the English authorities have gone (where the new contract amounts to nothing more than an indulgence of time) nor perhaps even to justify the grounds on which these rest, viz., a substituted contract—a new implied agreement to rely on the debtor's personal credit alone—or a supposed inconsistency and contradiction between the new security and the original contract—yet there can be no doubt that Lord Eldon was right in referring to the Civil Law as the fountain of the English rule that a security for the money puts an end to the lien.

But what we have to deal with here is not a case of lien, but of legal hypothec, and where we have in the taking of the promissory notes nothing in the way of security incompatible or inconsistent with its continuance, the law of this country seems to me quite clear that that transaction in no way impedes the landlord's original rights. I find that Voet says (20. 6. 12), "*Similiter nec pignus legale perimitur, ubi conventionale constituitur* ; *aut fidejussores dantur* ; *cum provisio hominis non tollat provisionem legis, quoties jam ante hominis provisionem nata est legis provisio, ac ad eundem utraque finem tendit, sed magis tunc applicandum sit illud, abundantem cautelam non nocere.*" He afterwards refers to and explains away a passage in the Digest (21. 1. 14) to the effect that when a landlord has contracted with his cultivator thus : "*ut invecta importata pignori essent donec merces tibi soluta, aut satisfactum esset,*" and has afterwards accepted from him a cautioner or surety for the debt, the hypothec previously contracted for ceases—a passage which would be very misleading if it were forgotten that in the Roman Law the landlord of a rural subject had a tacit hypothec for his rent over the fruits of the tenement only, to which fruits he looked as the fund for payment of his rent, and had no hypothec over the *invecta* or anything not strictly the produce of the farm. The Civil Law, therefore, on the point immediately in question, as stated by Voet in the passage just quoted, seems to be entirely identical with the English Law.

It will be adjudged that the landlord's hypothec existed over the goods in question at the time of the sale, and that he is entitled to a preference

over the proceeds thereof to the extent of the rent due to him by the Insolvent at the time of the adjudication of Insolvency : and that the Insolvent Estate do pay the costs of this Special Case.

The Assignee appealed.

Ferdinands, D. Q. A., for the appellant.
Dias for the respondents.

Cur. adv. vult.

19*th June*, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—This was a case as to the endurance of a landlord's hypothec for rent, notwithstanding the taking of notes of hand for the amount, which were not backed by any other name, and which were not paid.

The District Judge has gone fully into the facts and the law of the case in a learned and able judgment ; and it is sufficient for us to say that we affirm it for the reasons therein given.

Affirmed.

D. C., Kandy, No. 53,770. } MILLER *v.* YOUNG.

Mortgage of moveables—Sale in execution under unsecured creditor's judgment—Right to proceeds—Preference and concurrence.

A special mortgagee of moveable property cannot prevent the sale of such property in execution of a third party's judgment on an unsecured debt, but has a right to preferential payment of the mortgage debt out of the proceeds of such sale.

The plaintiffs, as execution creditors in *D. C. Kandy* 53,363, seized certain shop-goods in the possession of their execution debtors, *Nathaniel & Co.*, which the defendants claimed and stayed the sale. Plaintiffs brought the present action to have the claim set aside and the property declared executable under their judgment. The defendants justified their claim on the ground that they were mortgagees of *Nathaniel & Co's.* stock in trade by bond dated 22nd April, 1870, containing a covenant on the part of *Nathaniel & Co.* to surrender the stock to the defendants when required so to do ; and that the stock had been so surrendered, and was in defendants' possession when seized, *Nathaniel* being then the paid servant of the defendants.

The District Judge (*C. H. de Saram*) found that the stock was of the value of £970, and held that defendants were aware at the date of their

mortgage, of the debt to plaintiffs ; that defendants were simply mortgagees to the extent of £600 ; that the covenant to surrender the mortgaged property in satisfaction of the debt when called upon "must be treated "as a nullity as illegally affecting the interests of the other creditors of "*Nathaniel & Co.* The proper course for the defendants to have adopted "was to allow the sale under the plaintiffs' writ and claim the proceeds. "But this not having been done, and the defendants having taken over "property valued at £970, it can he no hardship to them that the decree "in this case should not only be, that the goods be sold under the plaintiffs' "writ, but that the proceeds should go in the first instance in satisfaction of "that writ. It is quite possible that, after all, the sale of the stock in "trade and book debts mortgaged to the defendants, *minus* the paoperty in "question, may not realize enough to satisfy the mortgage on which the "defendants rely. If it should so turn out ultimately, the defendants are "themselves to blame. *Prima facie* the defendants have taken over more "than sufficient of the goods and debts to pay themselves, and they can do "very well without the goods in question." The goods were accordingly decreed to be sold under the plaintiff's writ, and the proceeds to be applied in the first instance to the satisfaction of that writ.

The defendants appealed.

Morgan, Q. A., for the appellants.
Dias for the plaintiffs, respondents.

Cur. adv. vult.

19*th June*, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—The judgment in *Ledward's case*, reported in Lorenz, part 3, page 49, and affirmed by the Privy Council on appeal,* decided that a mortgage of moveables effected by notarial bond, though not acccompanied by delivery of possession, conferred on the mortgagee a prior right to payment out of the proceeds of the moveables. But this mortgage did not absolutely transfer the goods to the mortgagee : consequently he had no right to demand the stoppage of the sale by the execution creditor, as was done here. His proper course was to claim that the money realized by the goods, when in the Fiscal's hands, should be applied in satisfaction of his, the mortgagee's, debt in priority to the debt of the unsecured execution creditor.

Varied. Defendants to have preference over plaintiffs on proceeds sale.

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* 1 Moo. P. C., N. S., 386 ; 12 W. R. 22 ; 2 N. R. 554.

D. C., Colombo, Testamentary, No. 3,666. } IN THE MATTER OF THE LAST WILL OF WYTIANADEN.

Will—Husband disposing of the whole of the common estate, the wife consenting—Revocation by wife after husband's death.

A husband executed a Last Will disposing of the whole of the common estate of himself and his wife and making certain bequests to the wife. The wife joined in the execution of the Will, expressly consenting to the dispositions therein contained. The husband having died,

Held that the wife was not entitled to renounce all benefit under the Will and claim an undivided half of the matrimonial estate.

Candappa Chettiar Wytianaden Chettiar died on 10th August, 1871, leaving the following Last Will, executed by him jointly with his wife *Cadiriatchy* :—

On the 9th day of August, 1871, Candappa Chettiar's Son Wytianaden Chettiar residing in house No. 32 in Brass-founder Street in Colombo declares, that whereas he is sick and weak and that his life is uncertain and whereas that he is possessed of moveable and immoveable property in this world, and that he is resolved of settling them in some way, he being in sound memory and mind doth so of his own accord without the persuasion of any person and therefore doth hereby revoke and cancel all Last Wills, codicils or any other writing relating to Last Wills, if any had been executed by him hithertofore.

1st.—The Testator desires and appoints his brother Candappa Chettiar Mut-Ambelewane Chettiar, his Son-in-law Welaydepulle Arumagattapulle, and Ayasamipulle Weloepulle, these three, to be Executors to his Estate after his death, and he further desires that the said Executors should have all powers, after his death, to take charge of his property and to dispose them of in the manner herein-after described.

2nd.—The Testator desires that the said Executors should have all powers towards recovering the debts due to him and to pay the debts due by him.

3rd.—The Testator desires that all his moveable and immoveable property shall be divided into four and one share thereof shall go to his wife Cadiriatchy—one share to his eldest daughter Walliatchy wife of Weloepulle—one share to his second daughter Nallatchy wife of Welaydepulle Arumagattapulle, and one share to his third daughter Sinatchy wife of Tigagerajepulle Ohondamuthapulle. He also desires that these persons shall not be at liberty for any purpose whatever to sell, mortgage or to give away the said property in gift to strangers, but they should receive the income derivable from them during their life time, and after their death the same shall descend to their children; and that they too be not at liberty to sell, mortgage or gift away the same for any purpose but should receive the income thereof.

5th.—The Testator declares that the said Executors shall not be entitled to take any commission or other charges.

6th.—The Testator further declares that the foregoing dispositions have been made of his own accord and free will.

7th.—Cadiriatchy his wife, on this occasion declares that she consents to the foregoing Last Will and Testament and signs and grants the same.

In proof of the declarations of the said appearer Candappa Chettiar Wytianaden Chettiar and Cadiriatchy they the said Candappa Chettiar Wytianaden Chettiar and Cadiriatchy have set their hands and seals unto three of the same tenor and date in the presence of the Notary and the hereunto subscribing two witnesses.

(Signed) WYTI.
„ Mark of CADIRIATCHY.

[Attestation.] I, S. L. Ahamado Lebbe, Notary Public,.....certify that the said Candappa Chettiar Wytianaden Chettiar and Cadiriatchy having lawfully expressed their intentions and wishes in the foregoing Last Will, the same was read over and explained unto them.....and was duly signed and sealed by them and granted, &c.

The Executors moving the Court for probate, *Cadiriatchy* filed a renunciation of all benefits under the Will, and claimed an undivided half of the common estate of herself and *Candappa*. The District Court held as follows :—

19*th April*, 1872. BERWICK, D. J.—In order to decide whether the widow can now revoke the Will in any part, it is necessary first to ascertain what the *intention* of the Document was :—*i. e.*, whether it intended to dispose of the whole goods in community, or only of the deceased's share : for the widow having joined in the Will and expressly consented to it, is bound by its actual intention. And the decision will turn on the question whether the pronoun *his* (the Testator's) property was meant to comprehend the whole Matrimonial Estate, or only the husband's moiety.

It is true that the Supreme Court have laid down that the presumption in law is that, in joint Wills, each Testator only disposes of his or her own share of the Estate. But this presumption is not only liable to be overturned by the plain intention of the Document, but it only takes place *in dubio* ; and the kind of doubt of which an illustration is given in the *Censura* deserves to be particularly remarked; it is the case where spouses simultaneously disposing of their property in one mass, "leave the survivor of them a life-rent of the whole mass," but where after the death of both, the ordinary separation of the goods in community is to take place ; and the share of each Testator is to lapse to the respective next of kin of each precisely as if there had been no Will. In *such* a case the surviving Testator is held entitled to dispose by separate Will of that share which *at his or her death* will devolve on his or her common law heirs In fact, such a Will is no more than a provision that the survivor shall have the life rent of the *deceased's share* in the community : and each joint Testator in such a case has done no more in effect than dispose of his *own share* to the extent only of keeping his heirs temporarily out of it pending the survivor's life-rent. Clearly the survivor in such a case could not reasonably be compelled to take a life-rent of the other's moiety if he or she does not want it, and the pre-

sumption is most obvious, that it was never intended to tie up the survivor's power of disposition over what the will itself only left to the ordinary law of Intestacy. It is very important when a rule of law is explained by an illustration, to observe what light the illustration throws on the meaning of the rule.

The Will now before us in no way approaches the kind of wills or doubts which the text in the *Censura* contemplated.

The joint Will before us is a very simple one. It provides that the property bequeathed shall be divided into four equal parts, *whereof* one share shall go to the Testator's wife, and the others to his three daughters respectively; and then there is the usual clause against alienation or mortgage.

It is in Tamil, inartistically drawn by an ordinary native, an uneducated notary—that is to say not, by a Lawyer.

All the clauses except one begin with the words, "the Testator desires," "the Testator declares," etc: and the excepted one, the 7th, is in the following terms,—"Cadiriatchy, his wife, on this occasion declares that she consents to the foregoing Last Will and Testament and signs and grants the same."

The parties were common Tamils. The Court has learned on investigation that the wife had not contributed anything to the matrimonial Estate, nor had any separate property of her own:—and that the daughters, whose claims would be prejudicially affected by her present attempt if it were to succeed, are the daughters of her husband by a former marriage. I have learned this from her proctor.

I have said that the Will was drawn by a common uneducated native notary, but it was more than this:—The notary is a *Moorman*, who whatever he might know of Mohammedan Law, was not in the least likely to know anything whatever almost of the Roman Dutch Law.

The Testator and Testatrix were not Moors, and their only community of association with the notary was one of common language, and it may be added perhaps, of the community of their native customs in almost ignoring any rights of property in a wife, in this respect being wholly different from the ordinary Singhalese population of the country. Indeed the Testator's people exceed the Moors in ignoring such rights, for the Mohammedan Law does in theory at least yield this in certain respects.

We therefore have both notary and Testator extremely unlikely to have had anything but a vague idea of a wife's right under Roman Dutch Law to a moiety of a matrimonial Estate,—nay more, this law is so entirely opposed to English ideas and anticipations that it is not unfrequently overlooked by Englishmen here.

What therefore more natural than that both Testator and Testatrix should,—even if they or their notary knew the law,—use the familar expression "all *his* moveable and immoveable property"; and what more unnatural, if he had dreamt that half *his* property belonged to his wife, than that he should have bequeathed her a fourth of it, and

one-fourth to each of his three daughters, and yet made no provision whatever for disposition among his wife and children of the other half, although his wife was a party to the Will.

Again, if he only intended to dispose of what the Dutch Law gave him a right to dispose of *independently* of the wife, where was the use of his wife joining in the Will ?

It seems to me that she was made a party to it in consequence of some half inkling of her having some sort of interest under Dutch Law, but an inkling not sufficiently full to vary the popular Tamil idea of the property being truly " his" property ; and which expression is therefore naturally used. In this view the wife's joining in the Will plainly demonstrates that the expression " his " property included that which in the Dutch Jurisprudence is called the common or matrimonial Estate. I have not the slightest doubt that the present claim founded on Dutch Law is a mere astute after-thought of the Lawyer engaged in the case (himself a Tamil) and that the parties to the Will never dreamt at the time of such a construction being placed on their act.

But there is a clause in the Will, which enables me to ascertain the true intention to be different from that attempted to be attributed, and to do so under pure Dutch Law Canons. The Testator desires that " the said Executors should have all powers towards recovering the debts *due to him.*" Now these debts are part of the property bequeathed. But from the Dutch view, the debts are as much a part of the matrimonial Estate as any other property. If technicality of expression is to be insisted on as the rule for construction of this Will, in one clause, let us take a technical view of the expression " debts due to *him*" in the other clause : and it will then follow that under the Dutch Law there can be no such thing. But the clause is one not to be held meaningless, and the meaning given to this pronoun there must be applied throughout. And as it is evident that as to part of the property the Testator and Testatrix had no idea of a *communio bonorum*, it follows that no other intention can be attributed to the use of the masculine pronoun in the next clause, wherein he (with the consent of his wife) makes disposition of "all *his* moveable and immoveable property." I do not in the least doubt, nor see the least ground for doubt, that whether the parties did or did not have the Dutch Matrimonial Law in their minds, the intention of both spouses in this Will was to dispose of the *whole* of what would be comprehended by Dutch Law in the matrimonial estate.

The Law in such a case is settled. See *D. C. Colombo* 56,179.* The widow, if she pleases, may renounce personal benefit under the Will, —there is no objection to that,—but she cannot defeat the Will, nor the rights of third parties under it. The death of the Testator causes the Will, in the language of the Civil Law, " *transire in contractum et fieri irrevocabilis.*"

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* Vanderstraaten's Rep. 112.

The Final Account is to be amended, and the property distributed as desired by the Will. Fresh deeds of distribution must be executed, and they must be examined to see that the prohibitory clauses are inserted which the Will requires.

Cadiriatchy appealed.

Dias, for the appellant—The widow is entitled to exercise her election whether she will take under the Will or stand by her legal rights. The Will is the Will of the husband alone and disposes of his half of the community. Throughout the first six clauses he alone speaks; the executors are appointed to "his" estate, to distribute "his" estate after "his" death; the fourth clause disposes of all "his" moveable and immoveable property, a share going to "his" wife. This Will falls under Rule 4 as laid down in *D. C. Colombo* 56,179. Rule 5 shows that the presumption is in favour of the view that each Testator only disposed of his own share of the estate.

Cur. adv. vult.

20th June, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

STEWART, J.—We think this judgment right, and agree with the learned District Judge in the conclusion he has come to.

Though there is no express disposition by the wife in the body of the Will, the attestation clause clearly shows that she (together with her husband) signed the document as their joint Last Will.

The 7th clause, by which the wife consents to the disposition contained in the preceding clauses, would have no meaning unless the whole joint estate be included.

It appears to us, taking the whole joint Will together, that the Testator intended to deal with all the property in community, and under his control, and that his wife agreed and assented to such disposition.

Affirmed.

D. C., Colombo, Insolvency, No. 848. } RE THOMSON. EX PARTE SMITH.

Insolvency—Allowance to insolvent—Failure to pass last examination—Ordinance 7 of 1853, sects. 89, 122.

The Court, on 15th June, 1871, ordered the payment to the insolvent of an allowance. The second sitting, fixed for the 13th July, was on that day adjourned to the 27th July without any reference to an adjournment of the last examination. On 27th July 1871, the insolvent was examined, and the sitting adjourned for two months with a view to his further examination

if necessary. On 13th September, 1871, the insolvent left the Island with the unconditional leave of the Court, and the assignees discontinued payment of the allowance. On 19th April, 1872, the insolvent moved that the allowance be continued from the date when it ceased. The Court ordered the discontinuance of the allowance from the date of this motion, but held it had not the power to refuse payment of the arrears, believing that the order of 15th June 1871 had been for payment "until further orders."

Held, (following *Ex parte Osborne, Re Jewett*, 10 Jur. N. S., 1137) that the allowance ceased upon the insolvent failing to pass his last examination on 13th July 1871, and, there having been no subsequent order for its payment, the motion of 19th April, 1872, should have been refused.

This was an appeal by *Messrs. J. K. Smith & Co.* and other proved creditors against an order of the District Court directing the payment to the insolvent of certain arrears of allowance. The facts sufficiently appear in the judgment.

Morgan, Q. A., (*Grenier* with him) for the creditors, appellants.
Dias for the insolvent, respondent.
Ferdinands, D. Q. A., for the assignees.

Cur. adv. vult.

20*th June*, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

STEWART, J.—The circumstances connected with this appeal are as follows:—

The insolvent was examined at considerable length on the 27th July last (the first adjournment of the second sitting) when his further examination was postponed in order that he might if necessary be again examined, and for that purpose the second sitting was adjourned for two months.

On the 13th September, upon medical certificate the insolvent was permitted to leave the Island unconditionally, the Court having been informed that the assignees would not require his attendance,—that he left a Book-keeper able to give every information,—and that (in the state of the insolvent's health) no information could be got from him personally.

The original second sitting had been fixed for the 13th July. It does not appear that on that day any express order was made for the adjournment of the last examination, which, by the 89th section of the Ordinance No. 7 of 1853, is required to take place at the second public sitting, "or the adjournment day thereof for that purpose."

The assignees having discontinued the payment to the insolvent from his departure from the Island, of his allowance which had been ordered by the Court on the 15th June, it was moved on his behalf on the 19th April that the allowance "already granted to him be continued from the date when the payment thereof ceased."

The motion was objected to by certain creditors. The Court decided that the allowance should be discontinued only from that date, (19th April), the learned District Judge being of opinion that he had not the power of refusing payment of the arrears undrawn to date. The order of 15th June was that the allowance be made "till further orders."

The appeal now before the Supreme Court is against the latter part of this decision.

In the first place we have to remark that the order of June 15th, on which the judgment is apparently mainly based does not state, as supposed by the District Judge, that the allowance was to continue "till further orders." The motion applying for the allowance certainly contains these words, and further, that the amount should be fifty pounds (£50). The order, however, is simply, "the insolvent is allowed £40 per month."

But, whatever may have been the precise wording of the order, it is clear that it must be taken in connection with, and subject to, the 122nd section of the Ordinance, which enacts that "it shall be lawful for the "District Court, if it think fit, from time to time to make such allowance "to the insolvent out of his estate, until he shall have passed his last "examination, as shall be necessary for the support of himself and family: "Provided always, that no such allowance shall be made by the Court "for any period after the adjournment of the last examination *sine die*."

Looking to the fact of the insolvent having been fully examined, and subsequently allowed to leave unconditionally, that his presence was not further required, and to the report of the assignees in this respect, it appears to us that the last examination of the insolvent was practically, and to all intents and purposes, closed at the time, and his attendance was dispensed with.

We have further to observe that the words in the 109th section of 24 and 25 Vict. c. 134, "up to the time of passing his last examination" which are to the same effect as the corresponding passage in clause 122 of our Ordinance, have been held to mean up to the time appointed under section 140 (clause 89 of Ordinance) for the bankrupt to pass his last examination; and therefore, where a bankrupt had failed to pass his last examination at the first meeting, (there had been several adjournments) it was held that the allowance ceased. See *Ex parte Osborne, Re Jewett*, 10 Jurist, **N.** S. 1137; where the Lord Chancellor points out, "the time of "passing the last examination must mean the day of public sitting directed "by the Statute. If the bankrupt did not on the day of that sitting pass "his last examination, the allowance must cease."

The time appointed for the last examination of the insolvent, by the 89th clause of the Ordinance, is at the second public sitting, which was fixed by the Court for the 13th July. The 122nd clause empowers the Court, if it thinks fit, from time to time to make such allowance, &c., but no such order (as contemplated by this clause) was made subsequent to the 13th July, the day appointed for the last examination. The only order relating to allowance is that of 15th June, which, upon the authority of the case referred to, ceased to be of efficacy after the 13th July.

For the above reasons we think that the application of the insolvent should have been refused.

Set aside.

D. C., Galle, No. 30,694. } ANAGIA *v.* SADA.

Marriage according to Singhalese custom—Validity without Registration—Regulation 9 *of* 1822—*Ordinances* 6 *of* 1847, 13 *of* 1863.

Marriages according to Singhalese custom are not invalidated for want of registration under Regulation 9 of 1822.

This was an action in ejectment, the plaintiffs claiming the land in question as the children of the sisters of one *Jano*, whose original title was admitted. The first defendant claimed the land as son and sole heir of *Jano*, the plaintiffs alleging that the first defendant was illegitimate. At the trial evidence was given to show that the first defendant's mother had been conducted in marriage, according to Singhalese custom, by *Jano*, and that they had lived together as man and wife till her death 15 or 16 years before the trial in November 1871. The marriage was not shown to have been registered. The District Judge (*L. F. Liesching*) held that the marriage was not proved and gave judgment for the plaintiffs. The defendants appealed.

Morgan, Q. A., for the appellants.
Dias for the plaintiffs, respondents.

Cur. adv. vult.

26*th June*, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

STEWART, J.—The evidence shows that *Jano* conducted the first defendant's mother in marriage from her parents' house (according to Singhalese custom) and lived with her as man and wife for thirty years.

Such a marriage as the above is not invalidated for want of registration under the Regulation 9 of 1822. See Ordinances 6 of 1847 and 13 of 1863.

Set aside. Action dismissed.

D. C., Colombo, No. 54,687. } SANSONI *v.* FOENANDER.

Donation—Revocation and cancellation—Breach of condition—Ingratitude—Atrocious and contumelious slander and reproaches.

Plaintiff by deed gifted a house and premises to the defendant, her nephew, (whom she had brought up and educated, and who had always lived with her in her house) subject to right of enjoyment thereof during her life. The defendant thereafter systematically used foul and contumelious abuse and reproaches to the plaintiff, which made it impossible for her, as a decent and

respectable woman, to remain in the house with him. The plaintiff, having under these circumstances left the house, brought an action to recover possession, which the defendant delayed by a frivolous and vexatious defence.

Held, that plaintiff was entitled to revoke the gift, both for breach of the condition to which it was subject, and for the use of atrocious and contumelious slanders and reproaches by the donee to the donor.

The facts of this case fully appear in the report of the proceedings upon the first appeal (Vanderstraaten's Reports, 144) and in the judgment.

Morgan, Q. A., (*Ferdinands*, D. Q. A., with him) for the plaintiff' appellant.

Dias for the defendant, respondent.

Cur. adv. vult.

2*nd July*, 1872. The judgment of the Court CREASY, C. J., (TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—This was a suit for the cancellation of a Deed of Gift of the 19th November 1868 made by the plaintiff (Miss Sansoni) to her nephew (Mr. Samuel Peter Foenander) in respect of a certain house and premises.

At the first trial on September 5th 1870, the learned District Judge of Colombo,* after hearing the plaintiff's evidence, gave judgment of nonsuit, but directed the parties to pay their own costs, as he considered both parties to have been in some way to blame. That judgment was appealed against; and the appeal was argued in the Supreme Court, and our first judgment was given on March 31st 1871.† The Supreme Court (then consisting of the late Mr. Justice Lawson, and of the present Chief Justice and the present Senior Puisne Justice) set that nonsuit aside. A carefully prepared judgment was delivered by this Court, stating the law of the case (according to the opinion of all the Judges), and stating with regard to the facts that the plaintiff had made out a sufficient case to entitle her to judgment. But, in as much as the defendant's Counsel informed us that he was about to call witnesses on his side at the trial, but was checked from doing so by an intimation that the District Judge was about to nonsuit, we sent the case back for further hearing. This was a deviation from our usual practice, for we generally require that both parties should go fully into their cases at the first opportunity, but, as we stated, we looked at the case as a serious one both as to character and pecuniary amount, and we gave the defendant another opportunity of stating and proving his side of the story.

The case came on for further hearing in the Colombo District Court on August 22nd, 1871. Witnesses on defendant's side were heard ; and the learned District Judge gave judgment dismissing the plaintiff's claim ; the parties were ordered by him as before as to pay their own costs, up to the date of the former judgment ; and the plaintiff was ordered by him to pay defendant's costs incurred subsequently. That is to say, the District Judge ordered

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* T. Berwick, Esq.

† Vanderstraaten's Rep. 144.

the plaintiff to pay defendant's costs of the first appeal, which the Supreme Court considered plaintiff right in bringing, and to pay also defendant's costs of the further hearing, which had been granted by the Supreme Court as an indulgence to the defendant.

With regard to the tone and temper of the learned District Judge's second judgment, we shall merely remark that we have acted in this case as we were requested to do by the learned and able Counsel for the defendant, who had to support the District Court's judgment, and who, in doing so, expressly requested us to "lay aside the District Judge's language and to examine the facts as sensible men." We have done so to the best of our ability; and the result is, that we remain satisfied, one and all, that the new evidence adduced at the second hearing has not altered the effect of the evidence given at the first hearing, and that the plaintiff is entitled to the relief which she prays.

There are certain matters on which the cases made out by both parties are substantially the same, and these matters of agreement give valuable aid towards ascertaining on which side the truth lies when we come to the matter of disagreement.

That the plaintiff brought up the defendant, her nephew, from infancy; that she provided for his maintenance and education; that after he had attained the age of manhood they lived in the same house peaceably and amicably on the whole (though probably with occasional disturbances); that soon after the execution of the deed of gift the state of things became wholly altered; and that thenceforth their household was a scene of invectives, upbraidings and complaints;—these are matters on which the evidence on the defendant's side is fully as explicit as is the evidence on the side of the plaintiff.

The learned District Judge ascribes the unhappiness in this household "to the habitual contumely of the plaintiff towards the defendant's wife, and to the squabbles of the women." It would be easy to understand that an aunt and nephew may have lived happily together until the nephew's marriage, and that the introduction of the nephew's wife into the household then proved an element of discord, causing first of all squabbles between the women, and leading to dissensions between the nephew and the aunt. But it is impossible to explain the admitted facts of this case on that suggestion only, inasmuch as the nephew's marriage took place as long ago as 1858, and the aunt, the nephew and the nephew's wife continued to get on very well together till the time of the deed of gift in 1868. The defendant himself says that the plaintiff never reproached his wife until a week after the deed of gift was executed, and he states elsewhere that at the time of the gift he and his wife were living with the plaintiff almost entirely at her expense except as regards their dressing and amusements. He adds, "I lived on very affectionate terms with her up to the date of the deed of gift." We must seek for some cause for the sudden and vehement change in their conduct towards each other beyond the mere feminine proclivity of an old aunt and a young wife to quarrel with each other, when brought under the same roof.

The plaintiff's case is that so long as she kept her property at her own

disposal, her nephew (the defendant) treated her on the whole with proper respect and civility; but as soon as he had persuaded her to execute a deed of gift in his favour of the house and premises, which formed the best portion of her property, he changed his manner to her, became insolent offensive and brutal, and treated her with such systematic contumely and abuse, that she was no longer able to remain in the house with him.

The defendant says that his aunt, the plaintiff, began to quarrel with his wife and him soon after the execution of the deed of gift, because she was angry at finding that Henry Foenander, defendant's brother, had heard of the deed of gift, and made complaints about it.

This last is not a very probable story; but those who are conversant with Courts of Justice and indeed with human affairs generally, know very well that improbable things often take place, and we pause from calling a story decidedly untrue, merely because it is unlikely to be true. Nevertheless the improbability of a story is good reason for requiring very full evidence in support of it, and for watching the details of that evidence with special care.

There is also a suspicious circumstance in the manner in which the defendant brings forward this story, about Henry Foenander's discovery of the deed having been the origin of the aunt's ill-will towards the defendant. Not a word was heard of this story at the first trial. It is true that at that trial the defendant called no witnesses, but the plaintiff and her witnesses were cross-examined. The plaintiff was questioned by the defendant's counsel about her not getting on well with the defendant's wife, and other topics; but she was not asked a syllable about Henry Foenander's discovery of the deed of gift, or about what she, the plaintiff, did or said in consequence of such discovery. The same remark applies to the cross-examination of plaintiff's principal witness, Henrietta Bailey. She also was cross-examined about the feeling between plaintiff and defendant's wife, and other matters, but she was not asked whether she knew anything about plaintiff's anger or annoyance at Henry Foenander's knowledge of the deed of gift. There was an interval of nearly eleven months between the first and second hearings. There was an interval of nearly five months between the first judgment of this court and the second hearing. It looks much as if the story of the plaintiff's being angry with defendant because Henry Foenander knew of the deed, was an after thought; and that this story was got up when defendant found that the mere fact of the women occasionally bickering would not sustain his case, and that it was necessary to find some cause, other than his own ingratitude and misconduct for the changed state of circumstances, which undoubtedly began soon after the execution of the deed, and not soon after the defendant's marriage.

We are not going to enter here into arguments in support of those parts of the former judgment of this Court, which declared that the plaintiff at the first hearing had made out such a case as, if uncontradicted, entitled her to the relief prayed. What we have now to examine is whether the defendant at the second hearing contradicted the plaintiff's case sufficiently to overthrow it, or to materially impair its credibility.

The most important witness called by the defendant was Amelia de Silva. Her general evidence in favour of the defendant's general conduct would be very important, if her value as a witness was not nullified by the palpable zeal and bias in favour of the defendant shewn by her in her account of the scene at the removal of the furniture. She represents the defendant as not angry on this occasion, but sitting quietly on a couch, reading a book, and merely remarking, with respect to one of the boxes, "that is my box ; don't remove it." Now the defendant himself in his description of this occurrence states that he shook his fist at the man who was going to remove the box, and abused him, and threatened to break his head. He (the defendant) also tells us that he on that occasion pointed towards Henry's house, and said, "Cursed wretches, even Hell would find no place for you, for this injury done me." He says also that when Mrs. Bailey remonstrated with him for scolding, he reiterated similar expressions against Henry and his wife.

The evidence on the plaintiffs' side as to this matter discloses greater violence in defendant's language and conduct, and asserts it to have been directed towards plaintiff personally. But if we take defendant's own admission only, we find a display of anger and vituperation such as Miss de Silva, if present, must have noticed and remembered. The wholly inaccurate account of this scene which she has given, shews that she has been actuated by most undue zeal to represent the defendant as quite meek and mild, and we cannot give her testimony any weight whatever.

The defendant is naturally the principal witness on his own behalf. His evidence cannot be rejected on that account, any more than could that of the plaintiff. Nor is the evidence of either to be on that ground treated with compendious disbelief, which is equivalent to rejection.

Having carefully considered defendant's own evidence, and compared it with the other proofs and facts in this case, we think it unsatisfactory for the combined effect of several reasons.

First, there is the inherent improbability (already referred to) of the story that the plaintiff should have totally changed her manner towards him, not on account of his marriage, but on account of the deed of gift having become known to Henry Foenander.

Secondly, there is the strong presumption (already adverted to) that this story is a mere after-thought, there having been no cross-examination on the subject at the first hearing.

Thirdly, there is the strong and specific contradiction which, not only the plaintiff but Mrs. Bailey and Samuel Appu also give to the defendant's evidence as to the scene at the removal of the furniture. Defendant says that his abusive language was levelled at Henry Foenander and Henry's wife, neither of whom, it is to be observed, was present, or so far as we can find even within hearing. Samuel Appu states the defendant to have called the plaintiff on this occasion "a demon," saying "May "the devil take you. Hell would be hot for you, you damned drunken "whore, you have commenced your career from this day. You damned "bitch, you are going to the house of Mary." It is impossible to suppose that language of this kind could have been levelled by the defendant at

Henry Foenander and his wife, and not at plaintiff. Indeed Samuel Appu adds that on the language being used, "Plaintiff began crying and said, For all that I have done you this is my reward." Mrs. Bailey also states that the foul language was addressed by defendant to plaintiff personally; and on cross-examination she adds that "the abusive epithets used by defendant were in Portuguese, and he used the second person singular, which is not respectful to an equal in Portuguese."

Fourthly, there is a part of defendants' evidence which seems to us to shew a spirit of mean crafty malignity towards the plaintiff though the learned District Judge looks at it in a very different light.

The following is the part of the defendant's evidence to which we refer, and it is material to notice that it was not elicited in cross-examination but given on examination in-chief.

"I always used respectful language to her, except on a few occasions "when the circumstances provoked me to speak with some warmth; but "even then I never used such improper expressions, as that which has "been read. The circumstances were, when she rendered herself obnoxious, "I said to her, "You are jeopardising your soul by acting so." What these "circumstances were, I wish not to state. It is my affection to the "plaintiff that induces me not to state what these circumstances were."

The learned District Judge himself questioned the defendant on this matter, and his answers were as follows :—

"My affection to Aunt is so strong, and the circumstances which I "have referred to as having provoked me are so peculiar, that I believe "my objections to answer them would withstand the ordeal of cross-exami- "nation. The circumstances affect her character. Of course, if required "by the Court I am prepared to state them."

(Note by District Judge—"No cross-examination is put on this point, "although the condition in which the evidence is left was specially pointed out to both Counsel; and then the above question was put by the Court. Still the matter was not pressed on either side.")

The learned District Judge in his judgment comments on this as follows :—

"I refer more particularly to some secret conduct of the plaintiff "which his, *i. e.* the defendant's, good feeling prevented him from divulg- "ing, something which was stated to be known to the Counsel on both "sides but generally repressed, and which the plaintiff's Counsel would not "cross-examine on, as would have been right if the circumstance (whatever "it may refer to) had been unfounded. The Court openly remarked on "this omission at the time, but of course, as the Counsel for the plaintiff "preferred to leave the matter as it was, it was no duty of the Court to "take it further."

We cannot discover on what authority the learned District Judge states that the supposed secret misconduct was stated to be known to the Counsel on both sides. The learned Queen's Advocate, who acted for the plaintiff at the hearing in the District Court and on the hearing of both appeals here, emphatically disclaimed such knowledge. There had been no cross-examination of the plaintiff as to this hinted abomination in her

conduct. The plaintiff's case was closed when the defendant, as it appears to us, obtruded maliciously an insinuation against his relative, the plaintiff, of some misconduct too foul to be described. We see here no trace of generosity, but the very essence of dastardly malignity.

We think also that the defendant has given false evidence as to having spent considerable money on improvement and repairs of the house in question, nearly £200. Proof of this by other evidence than his own, by the persons whom he employed and paid, by the bills and receipts, and by other obvious modes of proof, could easily have been produced, if this statement had been true; and the defendant and his advisers must have known well how valuable such proof would have been. He adduces no evidence whatever of the kind. He produces a mortgage on the property of £25 which he paid off; but then it is also a fact in the case that he received the sum of £25 from the plaintiff. He says that he spent the £25 in repairs, but he has no evidence beyond his own assertion as to these repairs.

It is most important to observe that in the action brought by the plaintiff against the defendant in 1869 to recover possession of the house, the defendant in his answer (though he sets out a variety of circumstances to shew that he ought to be allowed to live in the house jointly with the plaintiff) says not a word about these outlays of his on the house. Nothing was allowed to him on the settlement of that case for such alleged outlays: nor, so far as we can see, was anything then claimed by him. We cannot but regard this story about the defendant's expenditure on the house as a fiction, and such mendacity discredits the whole of his evidence.

We must now say a few words about that action of 1869, on which the learned District Judge has dwelt at very great length in his apparent desire to fix upon the Supreme Court an error of law about the operation of the deed of gift.

In giving our first judgment we considered, and we consider still, that the plaintiff had the beneficial interest in the house during her lifetime. We did not in that judgment discriminate between usufruct of rents and profits, and possession, because it is clear to us that the defendant, after the manner in which he had obtained the deed, could not avail himself of the ambiguous manner in which this deed was penned, to dispute the plaintiff's legal possessory rights, and also because all parties, including the learned District Judge of Colombo in his first judgment, had up to that time treated the plaintiff's possessory right during her lifetime as perfectly clear, and no question had been raised about it. In his recent judgment the learned District Judge dwells much on the precise words of the condition in the deed.

He sets them out, and they are as follows. "That the said Samuel "Peter Foenander shall allow and permit me the said Angelina Sophia "Sansoni peaceably to enjoy and possess and to take to my own use and "benefit all the rents, issues and profits of the said premises during my "natural life, for my maintenance, and that after my death the said "premises shall devolve absolutely upon the said Samuel Peter Foenander "his heirs, executors, administrators and assigns."

The learned District Judge gives his opinion that the plaintiff had

no right to occupation or possession of the premises as against the defendant, his tenants and assigns, and had no more than a life usufruct of the rents. The learned District Judge has forgotten the important letter filed in the case, marked Lr. A., by which the defendant induced the plaintiff to make the deed. In that letter he asks her to have the property transferred to him, "on the distinct understanding, however, by a special clause of transfer, that I am to have no control whatever on or over the property or its produce during your lifetime." In another part of the letter he says that her acceptance of the proposal will be to her benefit without any risk of his claiming "that which by right both legal and moral is and should be yours and yours alone as long as God spares you."

Now it is certain that in no Court, being (as our Courts are) a Court of equity, as well as a Court of law, would a man who had obtained by such a letter as this from an aged female relative a gift of a house, subject to her life interest, be allowed to set up the ambiguous and imperfect wording of the deed as to her life interest, as a justification for keeping her turned out of possession. It is but doing justice to the defendant to say that neither he nor any of his legal representatives has ever done any thing of the kind. When the plaintiff brought her action pf ejectment in 1869, the defendant's answer was prepared by Mr. Lorenz, whose high merits we fully recognise, and who certainly always did his best for a client. In that answer the deed of gift is cited, and it was filed by the defendant, but no attempt was made to set it up as barring the plaintiff's possessory right. On the contrary, the answer, after setting out part of the words of the condition, alleges "that the plaintiff in pursuance of "that condition continued to live in the said premises for some time after."

The learned District Judge in his present judgment praises the defendant and his advisers for having pleaded so as to force the plaintiff to set out the Deed ofRevocation of May 1869, and he says that the just and laudable object of the protracted defence was to obtain a judicial decree as to the validity or nullity of that Deed of Revocation. If so, it is very remarkable that when the trial came on, no such judgment was obtained, nor so far as we can ascertain, was it ever asked for or discussed. On the contrary, the defendant consented to a judgment by which he gave up possession, paid some mesne profits, and paid the plaintiff's costs of suit. The question of the validity of the Deed of Revocation was expressly reserved as an open question.

We must judge men by their acts, and when we find a defendant acting in this way, we must continue to believe that he did so from a desire to open out proceedings in a case in which he the defendant knew that he had no valid defence.

On the whole, we consider that the evidence adduced by the defendant at the second hearing has not materially altered the case; and we adhere to the judgment already given by this Court that the plaintiff has made out a case which entitles her substantially to the relief prayed in her libel.

Set aside. Deed of gift declared null and void.

D. C., Colombo, Lunacy, No. 399. } IN THE MATTER OF RODRIGO, AN ALLEGED LUNATIC.

Prodigal—Appointment of Curator—Jurisdiction—Proclamation of 23rd September 1799—Ordinance 5 of 1835—Ordinance 11 of 1868, sects. 64, 73—Nobile Officium Judicis—Order by Court ex proprio motu.

District Courts have power to appoint curators over the property of "prodigals."

Where an application was made to the District Court to appoint a curator over a person as an idiot or lunatic, and the Court after investigation held that such person was not an idiot or lunatic, and, acting in the exercise of its *nobile officium*, and *ex proprio motu*, appointed a curator over the property of such person:

The Supreme Court, upon appeal, affirmed the order of the Court below.

On 8th February 1872, *Mary Anna*, the step-mother of *Ambrose Rodrigo Senady*, filed an application, supported by affidavit, alleging that she had reason to believe the said *Senady* to be an idiot or a lunatic, and praying that he might be pronounced of unsound mind, and a guardian appointed over his person and property. The Court fixed a day for the production of the alleged Lunatic, and for proof of the requirements of sect. 2 of Regulation 2 of 1829, a copy of this order being directed to be served on the alleged Lunatic, with an intimation to furnish the Court forthwith with the names of any witnesses he might wish examined on his behalf. On the motion of the petitioner, Drs. *Vandort* and *Koch* were authorized to assist the alleged Lunatic, who was committed to the care of one *David*, under whose care and influence he was stated to be. At the hearing on 22nd March 1872, after the evidence of Dr. *Vandort* had been taken, the alleged Lunatic was examined by the petitioner's counsel and his own. The Court reserved its judgment.

19th April 1872. BERWICK, D. J.—This is an application to have a party declared of unsound mind, and that a Guardian be placed over his person and property.

I am of opinion that Ambrose Rodrigo is *not* proved to be of unsound mind in the sense of the Regulation No. 2 of 1829.

But it has been urged that he is one of those persons who, in the words of Vanderlinden's Translator (p. 110) "by the scandalous wasting of their property, are emphatically termed in our law *prodigals*"—and to such persons Guardians may be appointed by the Court. Grotius (*Introd.* p. 47) speaks of them as those who are incapable of self-government or of administering their property through "defect of disposition, as prodigals who are termed spend-thrifts and extravagant," and he (I can hardly say contrasts but) differentiates them from such persons as are idiots, mad, or insane, whose defect is that of "understanding." The case before me appears to be of a mixed nature, for there is at least that deficiency of understanding which is due to the want of developement and

education of the mind in reasonable proportion to the man's years and pecuniary position,—if there be not indeed a greater and constitutional weakness. It is a case of which, I believe, the English Law could take no cognizance, but the Dutch Law unquestionably vests a more distinct and extensive jurisdiction in our Courts to appoint Guardians than the law allows in England,—and it is fitting to observe that there is not only the authority of Burge (III. 976) for saying that the jurisdiction exists under the Civil Law, and the jurisprudence of Holland, Spain, and Scotland, and formerly of France, and still to a modified extent by the "*Code Civile*"; but also the authority of Grœnewegen (p.198), in these words "*ita plerisque civitatum statutis cautum, et omnium fere gentium moribus receptum est.*"—The subject forms a considerable chapter in Scotch jurisprudence under the title of Interdiction (see Erskine's *Principles*, p. 182, and Bell's *Principles*, p. 587). The law of England is therefore almost if not entirely unique in its defect of cognizance of, and provision for such cases. With respect to this country, which derives its system of jurisprudence from the Roman Dutch Law, it is perfectly plain that the jurisdiction must exist, unless it has been obviously taken away from our Courts by legislative enactment, which it does not appear to me to have been, either by the Charter, or by the recent *Administration of Justice Ordinance*, and there are precedents of its having been actually exercised from time to time by the District Courts.

The power of this Court to interfere in proper cases being assumed, the next question is whether this is a proper case for Interdiction ; to decide which it will be proper first to ascertain as precisely as possible to what description of persons the law contemplates its application. This enquiry is the more essential in a case like the present, where there is no ground for alleging the defendant to be a "prodigal and spend-thrift" in the popular sense of these expressions, by which they are associated with the idea of vicious indulgence : but where the alleged inability to manage his property arises from that species of "imbecility which is the result of a *natural facility of temper*" (Bell *ut sup.*) ; and yet is so little associated by the law with "defect of judgment" (in Erskine's words) or "defect of understanding" (in the words of Grotius' Translator) that all his deeds executed before judicial interdiction remain valid in spite of it. It is the more necessary to examine the law in this respect before proceeding to apply it to the case before us, because there seems little reason to doubt that the Roman Law (notwithstanding that it was as old as the Laws of the XII Tables) was really intended principally to meet that extravagance of luxury and vice which we do popularly associate now a days with the idea of a "spendthrift and prodigal," and I had doubts whether, when these vices are absent, as in this case, our Law could interfere :—in a word the question is what is the true meaning of the substantive word "prodigal" in a technical and legal as distinquished from a mere Dictionary or popular sense ?

The definitions of *prodigal* in Voet and the *Censura* are taken over in the words of the Roman Law, where such persons are described as "qui furiosum faciunt rerum suarum exitum," and "qui neque finem neque modum

servant inutilium expensarum." They are spoken of after that amendment, which justifies the removal of the interdiction, as having returned "ad sanos mores," which may be translated sober conduct. In their treatment by the law after Interdiction they are distinguished by Voet from sufferers from defect of understanding thus :—"Alias insuper inter furiosos ac prodigos differentias esse : quin imo in quam plurimis pupillo potius quam furioso prodigos comparari." Voet 27. 10. 9. Voet also observes that the kind of prodigality which would subject a party to interdiction is not to be inferred *merely* from the fact of money being spent in gambling, intoxication or prostitution, sensibly remarking that a person who betakes himself to these vices may at the same time be industrious in other respects, thrifty in ordinary affairs, or even avaricious and parsimonious for the very purpose of enabling him to scrape money together for such indulgences. Lastly, the same author states in discussing a certain point that "non tamen propter meretricios mores, sed *tantum* propter *luxuriam* iis conjunctam, curator constituendus foret" (27. 10. 12.)

If interdiction be limited to those persons who squander their estate *propter luxuriam*, in the original and offensive sense of the word as distinguished from the sense of such extravagant prodigality of waste as may, by many other means, accomplish a *furiosum exitum* of one's whole wealth,—then I do not think the present case would be within the law : for certainly the evidence shews nothing of the kind ; and some at least of these quotations give reasonable ground for contending that where such "luxury" is wanting the law does not interfere : but I do not think that all of them have so limited an application ; and if such was indeed the original idea, it is clear that in modern systems of law the jurisdiction has been amplified, in fair harmony with the maxim "est boni judicis ampliare jurisdictionem," used in the sense of amplifying remedies to the advancement of justice. In case of doubt of the true interpretation or scope of the old Dutch Law, it is reasonable to enquire what the law is to-day in corresponding and related systems of jurisprudence.

In the French Civil Law, Pothier in his Treaties on Persons says, that the interdict is removed by the Judge when the person interdicted "a donne des preuves de sa bonne conduite"; from which expression, better moral conduct might perhaps be inferred,—but on the other hand, he does not expressly associate the prodigality in question with moral mis-conduct, but on the contrary describes it only as such "excès de prodigalite qui donnent lieu de craindre qu'elle ne dissipe bientot tout son bien"; and elsewhere he incidentally says, "L'interdit pour cause de prodigalite, n'etant interdit qu' a cause de la *mauvaise administration qu' il faisait de ses biens*," &c. (*Traite des Personnes*, part 1, tit. 6, sect. 5.)

The Scotch law defines interdiction as "a legal restraint laid upon those who, either through their profuseness, *or the extreme facility of their tempers*, are too easily induced to make hurtful conveyances,..... "profuse or liable *to be imposed upon*" (Erskine 181, 184.) To read the rest of what Erskine says on the subject of interdiction, is almost the same as to read Voet. The description of such a person in the Scotch Summons is "lavish and prodigal, of weak and facile disposition, easily

imposed upon, and liable to be concussed to do deeds to his lesion or prejudice." Professor Bell says : "There are many cases which require protection, and yet in which no remedy by cognition (the process which corresponds to the inquest "de lunatico" of the English law) and curatory, can be obtained. The power of interposing in such cases (one of the most delicate that can be committed to a Judge) is vested in the Supreme Court. The occasions for its exercise are, I. Imbecility from age ; *from natural facility of temper* ; from organic affection ; II. Temporary incapacity, as delirium; III. Absence abroad" &c. *Principles*, p. 587. It appears to me that these passages throw light on the expression of Grotius "defect of *disposition*," and that if the persons before the Court are truly found to be of those "qui furiosum faciunt rerum suarum exitum," it is immaterial whether this madlike dissipation of their property is through vicious, sensual luxury or through facility of temper. Indeed, if there was found in a man either such extreme ignorance of the value of money through default of education or of mixing with other men (and such cases are quite supposable) that he might be approximated "in plurimis pupillo" ; or such carelessness of its value as to lead him to cast his whole wealth into the sea, with indifference to this act reducing him to beggary— I think that such silly profuse waste would be prodigality in the legal sense, and that the latter conduct equally with the crass ignorance above instanced would justify the interposition of the Courts. There is a passage in the Digest, in a different book from that in which the subject is specially treated, which strongly confirms this view. It will be found at the end of sect. 12 of tit V. of the 26th Book of the Digest : and it entirely ignores any reference to extravagance for luxury or vice's sake as an indispensable groundfor appointing Curators to prodigals : "non est novum, quosdam, etsi mentis suæ videbuntur ex sermonibus compotes esse, *tamen sic tractare bona ad se pertinentia, ut nisi subveniatur his, deducantur in egestatem, &c.*, and the words of the Glossator on the title in the Digest (XXVII tit 10) are worthy of careful note. Describing what is intended by the expression *et aliis* extra minores, at the head of the title, he says : "Bonis absentis non defensi, datur etiam curator.....et generaliter omnibus qui rebus suis superesse non possunt." He cites a high Dutch authority, namely, Cujacius : and the last words are taken verbatim from sect. 2 of the said title. Further down, in explanation of the word *prodigus*, he quotes the expression "sic largitio fundum non habet."

Now to apply this view of the law to the present case. The medical evidence shews the party to be a man of about 28 years of age, whose intellect though not disordered is of so inferior a character as to exhibit an appreciable degree of weakness ; and whose knowledge is little better than that of an almost entirely uneducated person, little better than that of a common Tamil cooly, although he has had the advantage of having been at an English school for eight years. The insane-like "facility" of his disposition, and his abnormal liability to be easily imposed upon and induced to grant deeds to his prejudice, is proved by an act of weak and silly folly which none but a man who was "mad," in a vulgar as distinguished from a precise use of the word, would commit. Being entitled to a share of an inheritance worth

about £300 or £400 (a fortune to a man in his position) from a Testamentary Case of this court, he is pounced upon by a Jew of a man and persuaded to execute a certain deed and otherwise agree to an arrangement, whereby that man is to get half the inheritance for the mere trouble of applying to the Court or administrator for it—for doing that, in fact, as an out-door proctor, which a duly admitted and licensed proctor would have done for him at the cost of only a guinea or two. Had there been anything in the case which rendered any doubt or difficulty about recovering the money at all considerable in proportion to the amount, such a speculation on the part of his "*Cozener*" might have had a decided air of imposition on his part, and senseless folly on the part of his victim,—but I have perused the testamentary proceedings and find that at the date of the deed there was nothing of the kind : and that the most that can be said is that there had previously been some question which at that time my predecessor had practically settled. So little idea has he of the value of money, and of the value of figures, that he considers he has received £50 of his money by four or five instalments of £4 or £5 each. Although he states that the person who has thus cozened him has drawn the whole of his £300, all that he himself has received besides the above vague sum is a promissory note for £100. In the deed extorted from his simplicity there is evidence that he was himself sensible of his own unfitness for business, for in it he states that he is "unable from various circumstances to transact, manage and carry on the business": and, asked by me what these circumstances were, his only explanation is the want of money. But (to say nothing of the various obvious means of getting over such a difficulty—even through means of the Court) it is well known that by the course of the Testamentary practice of the Court, the whole concerns of the *heirs* of an estate are managed by this Court itself, and an admitted heir (as this man is) has practically no, or very rare, occasion to expend any money even in objecting to an administrator's account, and that exceedingly little at any time. In this case there could be no occasion for any expenditure : and if he thought otherwise he was simply deceived in a matter so notorious to the bulk of the people that to be deceived argues him an imbecile.

I certainly think this man—though not incapable of the more trifling necessities of life—is incapable of managing money affairs of even so small an amount as a few hundreds of pounds, without being liable to be made the facile dupe of any designing knave, and that he is proved to have gone already a far way towards making a "*furiosum exitum*" of his property, and this through an *abnormal* "facility of disposition" amounting, in the language of the Scotch Process, to that of a person "lavish and prodigal ; of weak and facile disposition ; easily imposed upon ; and liable to be concussed to do deeds to his lesion or prejudice"—and which, I further think, would speedily reduce him "*in egestatem.*" Being so, it is proper in his own interest, as well as in that of others, that he should be placed under interdiction.

I do not think it necessary that the prayer of the application should be amended for this purpose. It is one of those acts which may lawfully

proceed "*ex nobili officio*" of the Judge, "who, if he perceive during the pendency of a suit that either of the litigants is, from the facility of his temper, subject to imposition, will interdict him *ex proprio motu*." These words are, indeed, quoted from a Scotch work of very high authority, but the Dutch Law is identical. See Van der Keessel, Thesis CLXV, where it is stated that "a prodigal may, whether the relatives apply for it or not, be interdicted by the superior magistrates from the administration of his property, and a curator may after due investigation be appointed."

A decree of Interdiction will be made, and a curator appointed on a fit person being suggested to and approved by the Court; and in conformity with the requirements of the Dutch Law, the decree of interdiction, and appointment, will be duly advertised to the public in the *Government Gazette* and one or more public newspapers.

When the appointment has been made it will be the duty of the curator to take advice, whether he should take steps to set aside the deed in question on another ground or grounds than the one of Insanity.

The alleged lunatic appealed.

Dias for the appellant.

Cur. adv. vult.

2nd July, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—Before affirming this order we have felt it our duty to ascertain that four points are clearly established.

First.—That by the Roman Dutch Law a "*Prodigus*" was liable to be restrained by interdict from disposing of his property, and to be placed under control of a curator; not to the restraint of his personal liberty, but so far as regards the management of his affairs.

Secondly.—That this power has devolved on our present District Courts.

Thirdly.—That this appellant, Ambrose Rodrigo, is such a "*Prodigus*" as the Roman Dutch Law contemplates; and

Fourthly.—That the learned District Judge was right in proceeding as he did by way of "*Nobile Judicium.*"

The first point is clear enough. The authorities cited in the very learned and able judgment of the District Judge show plainly that the Roman Dutch Law (like the laws almost of all civilized countries) followed the Roman Law in providing means for the appointment of curators of the estate of persons who extravagantly lavish away and waste their property.

The next point, whether this jurisdiction has devolved on our present District Courts, is one of much more difficulty, and we have felt considerable doubt about it. But after repeated and careful review of the whole subject, we think this jurisdiction does exist in our District Courts. It is clear that jurisdiction is not vested in any other tribunal here; and if we decided that our District Courts have it not, we must decide that this very

important and salutary branch of Roman Dutch Law has been struck away from the institutions of this Island since Ceylon came under British dominion.

But besides the general principle that the old laws of a conquered or ceded Colony remain in force, until they are changed by Royal Prerogative, or by Act of the Imperial Parliament, we know that soon after the English conquered and took possession of the Dutch settlements here, a Royal Proclamation in the name of His Britannic Majesty dated September 23rd, 1799, announced that the temporary Administration of Justice and Police in the settlements then in his Majesty's Dominion should as nearly as circumstances would permit and subject to certain powers of deviation be exercised by the British Governor in conformity to the laws and institutions that subsisted under the ancient Government of the United Provinces.

That pledge has been renewed in fuller terms at a comparatively recent period. The Ordinance No. 5 of 1835 (confirmed by the Crown) declares that "the laws and institutions which subsisted under the ancient Govern-"ment of the United Provinces shall continue to be administered, subject "nevertheless to such alterations as have been or shall hereafter by lawful "authority be ordained." Independently of this reservation of power to alter the old Roman Dutch Law, the British Sovereign had and has unquestionably by his or her Royal Prerogative the power to alter the law of this Colony, being a Crown Colony ; and the Imperial Parliament also had and has undoubted power to do so. But no Royal Proclamation, or Order in Council, or Act of Parliament, or Ordinance of the local legislature, has ever appeared which purports to deal with and alter this branch of the Roman Dutch Law about prodigals. If this branch of Roman Dutch Law has perished, it must be presumed to have perished accidentally, through the imperfect manner in which the Charters and Ordinances creating our new Courts were penned. But, if possible, rather than suppose this, and rather than act upon such a supposition, we should think it our duty to give full effect to any words in those Charters and Ordinances, which by any reasonable construction can be held to embrace and keep alive the Old Roman Dutch Law about the curatorship of prodigals, even although such words may be a little obscure, and may not follow accurately the phraseology of Roman Dutch Jurisprudence.

With respect, then, to the jurisdiction given by legislative instruments to our present District Courts in this matter, we find that the *Administration of Justice Ordinance* of 1868, expressly, in its 64th clause, gives the District Court Jurisdiction *inter alia* over the persons and estates of lunatics, but it does not mention prodigals. But it does go on at the end of that clause to give them jurisdiction in any other matters in which jurisdiction has heretofore been, is now, or may hereafter be given to the District Courts by Law.

The 73rd clause of the Ordinance is as follows :—"Each of the said "District Courts shall have the care and custody of the persons and estates "of all idiots, lunatics, and others of insane or *nonsane* mind, resident "within such Districts respectively, with full power to appoint guardians "and curators of all such persons, and their estates, and to take order for

" the maintenance of such persons, and the proper management of their " estates, and to take proper securities for such management from such " guardians and curators, and to call them to account, and to charge them " with any balance which may be due to any such persons aforesaid, or to " their estates, and to enforce the payment thereof, and to take order for " the secure investment of any such balances, and such guardians and " curators from time to time to remove and replace as occasion may " require."

This is a repetition of the 26th clause of the Charter of 1833, except some formal words at the commencement of the latter.

The word "Prodigal" does not occur in this clause, but there is a word which, we think, embodies the meaning of the word "*Prodigus*," as used in Roman Dutch Jurisprudence. Before, however, we discuss this, we will remark that the difficulty is not to be got over, (as at first seemed probable,) by taking the last words, (already quoted,) of clause 64 of the present Ordinance, in connection with the Charter of 1833, and also in connection with the Legislative Regulation No. 6 of 1833, which vested in the District Courts, then about to assume operation under the Charter of 1833, all powers and authorities exercised by the Courts then about to be abolished in the Island. The Courts then about to be abolished are enumerated in the Regulation, and are the Provincial Courts, the Courts of the Sitting Magistrates, and certain other local Courts there specified. None of these Courts can be supposed to have had the power in question. That the Provincial Courts had it not, is certain from Regulation 1 of 1805, and Regulation 2 of 1829. We may remark, however, that the old Dutch Land-raad Courts had not wholly ceased to exist here after the conquest of the Dutch settlements by the British. They seem to have continued in operation till 1805, when they appear to have been temporarily superseded by the Provincial Courts, though they were not formally abolished. But in 1810 the Land-raad Courts were restored, and the Provincial Courts put down by Charter ; and though the Provincial Courts were set up again in the following year, the Governor had power given to him to continue the re-establishment of the Land-raad Courts (See Thomson's *Institutes*, vol. 1, p. 351.)

The special words in the Charter of 1833, clause 26, and in the *Administration of Justice Ordinance* of 1868, clause 73, which, we think extend to the matter before us, are in the third line of the present clause. We will again look to these words, and also to part of the preceding line. It will be seen that the District Courts have jurisdiction in cases of all idiots and lunatics, and others of insane or non-sane mind. What is the meaning of the word "*non-sane*"? Are we to take it as a mere tautologous repetition of the word "*Insane*," and give it no force or operation ? Surely not, if it can fairly have a meaning ascribed to it, with which the meaning of the word "insane" is not identical or co-extensive. It is to be remembered that the word "insane" has long been taken to mean much more than the mere negation of a perfect state of mental health and vigour. Archbishop Whateley, in his Lessons on Mind, p. 173, says truly that "when the mind is impaired not by a *want* or a *weakness* of some of its powers, but

by an *irregular* action, this is called madness, or insanity, though the latter of these words originally signified merely being not in sound health." In the third Chapter of Shelford on Lunatics, the question of what constitutes "insanity" is fully discussed, and it is made clear that something much more than the absence of normal strength of mind must be shown, before a man can be legally pronounced insane. And Shelford alleges and proves that "Delusion is the test of insanity." Now, a man may have no positive morbid action operating in his mind, he may be quite free from delusions, and yet he may be so weak, so silly, so thoughtless, so easily led away ; he may so little show the qualities of a reasonable and reasoning being ; that no one could say of him that he deserved the epithet of "*Sanus*." *Sanus* when applied to the mind is explained thus in Facciolati's *Lexicon*. It means "sound in mind, in his senses, in his right mind, sober, wise, discreet." The compound word, coined out of Latin, the word "non-sane," used in our Ordinance, seems to us to denote the negation of these qualities. And in cases where these qualities are wanting, and the opposite evil qualities of folly, weakness, thoughtlessness, and excess are present to such an extent, that it is clear that the man will, unless restrained by law give his patrimony to the wind, and bring himself and all dependent on him to ruin and beggary, we have a case before us in which the Old Roman Law, and the Roman Dutch Law, would have placed the non-sane man under Curatorship as a *Prodigus*, and in which our District Courts, administering Roman Dutch Law, and being authorized to deal with "*non-sane*" persons, have exactly the same jurisdiction.

We have not omitted to observe that the 73rd clause of the Ordinance and the 26th clause of the Charter, give power to appoint guardians and curators of both persons and estates ; whereas by the Roman Law, in the case of Prodigals, it is only the estate that is placed under the control of the curator, and the personal liberty of the *Prodigus* is not abridged. But we think that the words of the clause are to be construed on the well known principle "*reddenda singula singulis*," and that the District Courts are empowered to place both estates and persons under curatorship in cases of insanity, where it is legally requisite, and to appoint a curator of the estate only in cases like the present, where such is the legal course.

We come now to the third point of this enquiry, whether the present appellant, Ambrose Rodrigo, has been proved to be a "*Prodigus*," within the meaning of the Roman Dutch Law. On this the judgment delivered by the learned District Judge is so full and clear, both as to facts and law, that we need do little more than record our assent to it. We must however, guard ourselves against being supposed to concur in calling Cujacius "a high Dutch authority." Jacques Cujas was a Frenchman, and the Universities of Bourges and Valence were the special scenes of his glory. But writers of other nations than his own have termed him the greatest of all Civil Lawyers, and his authority in support of the learned District Judge's interpretation of Roman Law, on our present subject, is very valuable.

With respect to the special question to which the District Judge has rightly devoted much pains and consideration, namely, whether a man can be such a "*Prodigus*" as to bring him under the interdict of Roman

Dutch Law (if the element of "*Luxuria*" does not enter into his prodigality) we will add a few additional reasons to show that in the eye of the law a man may be "*Prodigus*" without being "*Luxuriosus.*" The noun "*Prodigus*" comes from the verb "*Prodigo,*" the primary meaning of which, as used in the passage from Varro cited by Facciolati, is "to drive forth or out." Its metaphorical meaning, according to Festus, cited in the same Lexicon, is "*Immoderate rem effundere, longiores quam par est impensas facere, quasi "patrimonium foras agendo et perdendo.*" Cicero, in *De Officiis*, book 2, c. 16, distinguishes free-handed men into prodigals and generous men. He goes on to describe Prodigals thus :—

"*Prodigi, qui epulis et visceration ibus et gladiatorum muneribus, ludorum "venationumque apparatu pecunias profundunt in eas res, quarum me- "moriam aut brevem aut nullam omnino sint relicturi.*" It need hardly be explained that the "*Epulæ et visceraliones*" spoken of here, were not banquets made by the prodigal for his own luxurious self-indulgence, but donatives in the form of entertainments to the public. Cicero's prodigal might have been austerely sparing, so far as his own sensual gratification was concerned, and yet he was a prodigal if he wasted his substance by absurd public donation. Now, a man may waste his substance quite as effectually on absurd private donations, which is the form of the present appellant's prodigality. The essence of prodigality consists in foolishly and absurdly "*Patrimonium foras agendo.*" Perhaps Cicero's metaphor will serve better : the vice consists in the foolish and excessive *pouring forth.* The nature of the receptacle is only so far important as it serves to determine the folly and the excess of the pouring.

We now come to the last, but not the least important part of this enquiry,—whether the learned District Judge was right in acting as he did in this case,—"*Proprio motu,*"—and issuing an order treating this appellant as a Prodigal, when there was no proceeding before the Court against this appellant as a *Prodigal,* but the application made was, in effect, to have the appellant treated as a *Lunatic,* and an insane person ?

The learned District Judge properly rejected that application, but he considered that he had power to interdict the appellant as a prodigal, "*ex nobili judicio*" and "*ex proprio motu.*" He quotes in support of this the valuable Roman Dutch Authority of Van der Keessel, and he also quotes Erskine's *Institutes,* p. 183. We concur with him in giving considerable weight to the opinion of Scotch Jurists : for, not only is the Scotch Law like the Roman Dutch founded on the Roman Law, but it is well known that during the last century, and part of the preceding century it was usual for Scottish gentlemen, who intended to follow the legal profession, to receive part at least of their legal education in the Dutch Universities : and hence it is always probable that a doctrine of the Scottish Courts, (unless it can be proved to emanate from the local feudal law, or some other special source,) is not only a doctrine of Roman Law, but is also a doctrine of Roman Dutch Law. But there is still fuller and higher authority on the subject to be found in Voet, who in his Commentary on the 5th Book of the Pandects, title 1, par. 49, carefully and copiously describes the "*Nobile officium*" of the Judge, which he distinguishes from his or-

dinary, his "*mercenarium officium.*" Voet's words are as follows :—"*Officium judicis est, lites dirimere, audita utraque parte, auditis illis quorum interest, omnibusque observatis quæ vel nobilis vel mercenarii officii ratio exigit. Mercenarium Docti appellant quod actioni propositæ inhæret et subservit, &c.*" "*Nobile, quod nudæ notionis terminos egreditur, quo potissimum pertinent ea, quæ ad jurisdictionem et jus dicentis officium a Romanis legibus reducuntur, quorumque intuitu latissimum dicebatur esse jus dicentis officium in* l. 1 ff. *de jurisdictione. Utrumque regulariter judex demum rogatus impertitur, quandoque tamen et non rogatus ; sed frequentius in iis quæ nobili, quam quæ mercenario officio adscribi solent. Etenim nobilis officii vi etiam sponte ea expedit quæ ad publicam respiciunt utilitatem ; in sceleratos inquirit, provinciam malis purgat hominibus, tutores fama publica fraudis insimulatos sine accusatione a tutela repellit, si ipsi ex apertissimis liqueat rerum argumentis eos suspectos esse ; quæque id genus alia plura sunt.*"

The appointment of a curator to the estate of a manifest "*Prodigus*" seems to be completely within the class of cases which Voet here speaks of as fit subjects for the spontaneous exercise of the Judge's "*nobile officium.*" It is clearly a matter "*ad publicam respiciens utilitatem,*" inasmuch as the Roman Law holds the true principle that it is expedient for the common-wealth that no man shall misuse his property.

All that Voet requires as antecedent to the exercise of the "*nobile officium judicis,*" has been attended to in this case. There has been full enquiry into the appellant's state of mind ; both sides interested have been heard, the Judge has acted, "*audita utraque parte, auditis illis quorum interest.*" Without such inquiry and hearing the order would have been clearly bad.

While thus recognising the "*nobile officium judicis,*" we feel bound to say that the authority involved in it ought to be sparingly and very cautiously exercised. Otherwise it is likely to lead to arbitrary and vexatious interference with private, and with professional rights, and to much encroachment by the Judicial on the proper provinces of the Legislative and of the Executive powers. But in the present case we think that it has been exercised discreetly, and for the benefit of all parties interested, including the interests of the public ; and we accordingly affirm the proceeding.

Affirmed.

D. C., Colombo, No. 59,124. } SWARIS *v.* ALWIS.

Divorce—Marriage not followed by cohabitation—Adultery—Laches.

The plaintiff and his wife the defendant were married in the year 1860. They separated immediately after the marriage ceremony, and never cohabited, and the plaintiff never made the defendant any allowance for maintenance. For three years immediately before action the defendant was living in adultery

Plaintiff in 1871 brought the present action for a divorce *a vinculo* on the ground of the wife's adultery.

Held, that the plaintiff was on account of his *laches* not entitled to a divorce.

The plaintiff appealed against a decree of the District Judge (*T. Berwick*) dismissing his action for a divorce. The facts appear in the head-note and judgment.

Dias for the appellant.

The respondent did not appear.

Cur. adv vult.

3*rd July*, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—In this case the appellant went through the form of marriage with the respondent but left her at the Chapel door, never cohabited with her, never supplied her with any means for her maintenance, but totally deserted and abandoned her for ten years. At the end of the ten years, the appellant either from a wish to marry some one else, or from some other motive, sues for a divorce from the woman whom he has thus treated. He has proved the fact of the marriage, and he has proved that the respondent has for the last three years been living with another man as man and wife.

He contends that having proved these two facts, the marriage and the wife's adultery, he is absolutely entitled to a decree of divorce.

The learned Judge has held that this appellant's conduct has disentitled him to the relief prayed for by him. We think this ruling right and we incline to adopt the remarks made on this subject by the late Mr. Justice Thomson in the Second Volume of his *Institutes of Ceylon*, p. 104.

He there says, speaking with reference to our tribunals, and to the new Divorce Court in England, "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 of 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."

We are aware that this to some extent controverts a very high authority, that of Voet, to whose expositions of Roman Dutch Law we usually defer almost implicitly. Voet in his comment on Book 24 of the Pandects, title 2, paragraph 7, says :—"*Illud matrimonii dissolutionem ex causa "adulterii non impedit, quod mulier obtendit, se sævitia mariti, vitæ insidiis "e domo mariti expulsam, omnium egenam paupertatis tolerandæ gratia "adulterium perpetrasse, aut ex contumace atque maligna mariti abstinentia "foris quærere coactam, quod domi non invenerit. Quamvis enim ex hisce "probatis malis domesticis infelix merito censenda sit non tamen, propterea "in flagitium ruere debuit ; ac ad malendum malo tristi remedium atque "ita miseriam in scelus convertere ; sed potius judicis auxilium adversus "sævitiam aliosque malos mariti mores per legitimos tramites implorare.*"

But this is an opinion given by Voet, not on general principles of Roman Law, or on scientific inferences to be drawn from general principles, but on what is desirable and expedient as a practical rule, having regard to the manners and positions of the respective parties. Now, on these questions of expediency, the differences of time and place are to be attended to : and a rule that might have worked very well in the old European country of Holland at the time when Voet wrote, might work very badly in modern Ceylon. The rules pointed out in Thomson's *Institutes* seem to us to be by far the best for our adoption. Indeed, there is an element in the present case which would take it out of the law as laid down in Voet. That is the gross *laches* of the present applicant for relief. Altogether, we have no hesitation in affirming the decision of the District Court.

Affirmed.

D. C., Colombo, No. 60,355. } VAN GEYZEL *v.* LEVÆNA MARKAR.

In the Matter of Charles E. Ball, Proctor for the Defendant.

D. C., Colombo, No. 60,389. } GABRIEL *v.* MALLEAPPAH.

In the Matter of Archibald Stephen Andree, Proctor for the Plaintiff.

D. C., Colombo, No. 54,973. } RABOHAMY *v.* PUNCHAPPU.

In the Matter of James de Livera, Proctor for the Plaintiff.

D. C., Colombo, No. 60. } SELBY, Q. A. *v.* SILVA.

In the Matter of Cecil Prins Morgan, Proctor for the Plaintiff.

Contempt of Court—Removal of Court records by Proctors contrary to Orders of Court—Costs of Rule Nisi.

The District Court has power to make regulations forbidding the removal by proctors of records of Court from the record-room, and may punish breach of such regulations as a contempt of the Court.

Where a rule *nisi* is discharged unconditionally, the respondent cannot be ordered to pay the costs.

These were appeals by proctors of the parties in the cases from orders of the District Judge (*T. Berwick*) ordering the proctors to pay the costs of rules *nisi* issued at the instance of the Court, calling upon them to shew cause why they should not be dealt with as for a contempt of Court in having removed certain records from the record-room of the Court contrary to the orders of the Court. The rule in each case was discharged, the respondent being ordered to pay the costs of the rule.

11*th June*, 1872. *Morgan*, Q. A., for the appellants.

Cur. adv. vult.

9*th July*. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—The appellants in all these cases are proctors, who, contrary to the express regulations made by the learned Judge of the Colombo District Court, removed records of that Court from the record-room of the Court. There can be no question as to the District Judge's having power to see to the proper custody and the safety of the records of his Court, and the directions made by the District Judge of Colombo in this respect were reasonable and salutary. The practice of taking away records is very mischievous. Original deeds and documents filed in them are liable to be abstracted or mutilated, if such a course is allowed. The records themselves may be falsified or destroyed, and, without any criminal intent, they are very likely to be lost or defaced through negligence. It is also perfectly clear that a Judge, especially a Judge of a Court of Record, has a right to treat as contempt the wilful breach of his orders in this respect We do not suppose that any of the gentlemen who now come before us as appellants, had any formed deliberate intent to insult the Judge when they took the records against his orders ; but gross negligence and thoughtlessness in disobeying a well known regulation may amount to contempt of the Judge who made the rule.

We think that the District Judge only did his duty to the public when he caused the rules *nisi* in these cases to be served, and he would have been fully justified if he had made the rules absolute, declaring these gentlemen to have committed contempts, and fining them accordingly.

From a good feeling, which ought to be appreciated, he has refrained from doing so and has discharged the rules, ordering the appellants severally to pay the costs.

We have difficulty in seeing how payment of costs of a rule can be enforced when the rule has been discharged, and when the party has not come

under terms to pay the costs. We shall vary the form of these orders slightly so as to effectuate the learned District Judge's proper intentions.

Varied. Costs of rules to be paid by respondents within ten days; in default, rules to be made absolute, the respondents thereto adjudged guilty of contempt, and fined fifty rupees each.

D. C., Colombo, Insolvency, No. 880. } RE DON LOUIS.

Insolvency—Cause for refusing Certificate—Breach of promise of marriage—Ordinance 7 of 1853, sect. 151.

The circumstance that an insolvent has been condemned in damages for breach of promise of marriage does not fall within the category of "offences" specified in sect. 151 of the *Insolvency Ordinance* as disentitling the insolvent to a certificate.

The insolvent appealed against an order of the District Court refusing him a certificate of conformity. The facts sufficiently appear in the judgment.

Dias (*Grenier* with him) for the appellant.

Cur. adv. vult.

4th September, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—We do not think that clause 151, sect. 3, of the *Insolvents Ordinance* applies to a case like the present. In clause 36, the Legislature took care to express its intention that judgment debtors in actions for breach of promise of marriage, or for seduction, should not be entitled to immediate discharge upon adjudication. If the intention had been that such misconduct shall also bar the insolvent's right to a certificate, we should have found, in clause 151, words similar to those employed in clause 36. As the Ordinance stands, we think it would be a straining of words to make the phrase "contracted any of his debts by any manner of fraud" apply to a case where the defendant has been, against his will, made a judgment debtor in an action brought against him for misconduct, however morally fraudulent.

Set aside. Certificate of third-class to issue.

D. C., Galle, No. 31,470. } LIVERA *v.* SINNE LEBBE.

Stamp on pleading insufficient—Quashing proceedings.

The defendant was the owner of a house standing on plaintiff's land. Plaintiff sought to have the house appraised and sold with a right of preemption to the plaintiff. Defendant being in default of appearance, the Court nominated an appraiser, and on the day fixed for the consideration of his report, the District Judge upheld defendant's objection that the libel and processes were insufficiently stamped, and quashed all the proceedings.

The Supreme Court set this order aside, there having been no intention on the part of the plaintiff to file an insufficiently stamped pleading, and allowed plaintiff to file a new libel duly stamped.

This was an appeal by the plaintiff from an order of the District Judge (*L. F. Liesching*) quashing all the proceedings in the action. The facts sufficiently appear in the head-note and judgment.

Dias for the plaintiff, appellant.

Ferdinands for the defendant, respondent.

Cur. adv. vult.

4th September, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

STEWART, J.—There seems to have been no intention whatever on the part of the plaintiff to file his libel on an insufficient stamp.

It is ordered that the plaintiff be allowed to proceed with his case on filing a fresh libel on the correct stamp, and his supplying (if deficient) the correct stamps for the processes issued. Costs of appeal to stand over.

If the stamped documents as above required be not supplied within eight days of the plaintiff or his attorney being informed of this order of the Supreme Court, the judgment appealed from is to stand affirmed.

See Lorenz' Reports, part 3, p. 203, District Court Matara No. 19,441. June 15, 1859.

Set aside.

C. R., Colombo, No. 84,355. } PERERA *v.* LAYARD.

Police—Ordinance 16 *of* 1865, *sects.* 10, 34, 49—*Ordinance* 5 of 1867, *sect.* 1—*Police force quartered on village for misconduct of inhabitants—Cost of maintenance—Assessment.*

Where a Police Force is, under Ordinance 16 of 1865, sect. 10, quartered in any place, by Proclamation of the Governor, the cost of maintaining such force must be met by a tax upon the inhabitants of such place, according to their respective means, and not by a rate upon the lands situated in such place.

This was a proceeding under Ordinance 5 of 1867, to have the assessment of plaintiff's land in Ambatalenpahala for the purposes of a tax for maintaining a Force of Police set aside. The Governor, by Proclamation dated 12th August, published in the *Gazette* of 19th August 1871, quartered a Police Force in the village Mulhiriyawa and all the villages in Ambatalenpahala, "owing to the misconduct of the inhabitants thereof and owing to the prevalence of crime therein," and provided that "the tax payable on the annual value of all Houses and Buildings, Lands and Tenements whatsoever, within the said district, shall "be at the rate of three per cent. per annum." The plaintiff, on receipt of the notices of assessment, wrote to the Government Agent, objecting to the assessment on the ground that the lands were "not liable to be assessed on the notice served on "the owners "by the Ord. No. 16 of 1865"; "that the said tax is not leviable from the said premises under the provisions of the said Ordinance. That the assessment has been unduly, incorrectly and unlawfully made for the said tax." The plaintiff proved that the tax was assessed solely on lands, that no non-landowners were assessed, nor inquiry made as to the personal means of the inhabitants, and that the rate was based on an assessment which the Government Agent had caused to be made by the Assessors appointed by the Governor.

The Commissioner (*J. H. De Saram*) held the notice of objection sufficient, as section 49 of Ordinance 16 of 1865, which required the "specific grounds" of objection to be stated, applied to persons served with assessment notices under section 40, which only required service of notice on the owner of "every house, building, land or tenement liable to the payment of the tax." whereas the present was a case requiring a tax on the inhabitants. The Police Force in question was to be maintained by a tax on the inhabitants, for which purpose the Government Agent should "assess the proportion in which such cost was to be paid by the inhabitants according to his judgment of their respective means" (section 10). He accordingly set aside the assessment.

The Government Agent (the defendant) appealed.

5th September, 1872. *Morgan*, Q. A., for the appellant.

Coomaraswamy for the plaintiff, respondent.

Cur. adv. vult.

11th September. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY. C. J.— An attempt has been made to tax the plaintiff's lands in Ambatalenpahala by a rate such as the 84th section of the Police Force Ordinance describes, and such as that section would authorise where Proclamations appointing such a rate have been issued. But the only Proclamation that has been produced as justifying this rate, is a Proclamation under the 10th section directing a special Police Force to be quartered on Ambatalenpahala on account of the misconduct of the inhabitants.

This is a totally different matter. The cost of maintaining a special Police Force of this kind is to be defrayed by an assessment not on the lands and tenements of the district, but on the inhabitants personally according to the Government Agent's judgment of their respective means.

The statement of the Respondent's objection to the rate might have been more explicit, but it is not so meaningless or misleading as to make it bad under Ordinance 5 of 1867, section. 1.

Affirmed.

C. R., Kalutara, No. 29,608. } FERNANDO *v.* MORGAN, (*Queen's Advocate.*)

Conveyance of Land by Crown—Warranty of Title.

In conveyances of land from the Crown, the purchaser is not entitled to any covenant for title, and in the absence of express warranty he must be taken to have purchased at his own risk.

The plaintiffs purchased an allotment of land at a sale of Crown land held by the Government Agent, and obtained a grant which contained no express warranty of title. Plaintiffs were evicted by a third party in *D. C. Caltura* 25,079, in which the land was decreed to such third party, the Crown having due notice of the action. The Government Agent then refunded to plaintiffs the purchase-money, and plaintiffs now sued the Queen's Advocate to recover as damages £8 18*s* 0*d*. being the costs incurred in defending the District Court action. The defendant pleaded that "the Government is not bound to warrant and defend the title of purchasers of Crown lands, and is not liable to pay damages to the plaintiffs."

The Commissioner (*G. W. Paterson*) distinguished *D. C. Galle* 26,570,* as a case in which the purchaser had been held not entitled to recover from the Crown money expended in improvements before the title had vested in the purchaser under the conditions of sale; and gave judgment for the plaintiff. The defendant appealed.

R. F. Morgan, Q. A., for the appellant, relied on *D. C. Galle* 26,570,* and the authorities therein cited.

R. H. Morgan, for the plaintiffs, cited 2 Burge, Col. and For. Laws, 554; Voet *ad Pand.*, 21. 2. §§ 1, 23; VanLeeuwen, *Cens. For.*, Lib. 4, Cap. 49, N. 11.

Cur. adv. vult.

11*th September*, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

STEWART, J.—It is admitted that the sale by the Crown to the plaintiff was without any warranty.

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* For a note of this case see Appendix A. and Vanderstraaten's Reports, p. 15.

The amount of purchase money has been refunded, and the present action is for the recovery of the costs that the purchaser was put to in the suit brought against him by a third party who succeeded in obtaining judgment for the land.

No doubt according to the general law as laid down by Voet and other Dutch Law Authorities, an implied warranty exists on the part of the seller against the eviction of the purchaser. But this must be understood as between ordinary party and party, and when the purchaser does not expressly consent to take a defective title with all its faults.

In conveyances from the Crown the purchaser is not entitled to any covenant for title, and he must accordingly be taken to have purchased at his own risk. Sugden on Vendors, p. 755. Burge, vol. 2, p. 553. See also judgment of the Supreme Court in Galle, D. C. No. 26,570.

Set aside. Plaintiff non-suited.

C. R., Panadura, No. 13,969. } PERERA *v.* SAMERENAYEKE.

Crown Grant of Land—Condition—Forfeiture—Summary Resumption of Possession by Crown.

A grant of land by the Crown to the plaintiff in 1835 was subject to the conditions *first*, that if within three years the land was not brought into full and fair cultivation (according to the opinion of a majority of nine competent persons, to be assembled by the Government Agent for the purpose of inspecting the land at the expiration of the said period) the grantee should make good the value (on the appraisement of a majority of the nine persons) of the one-tenth share of the produce that the Government would have received had the land been duly cultivated, and the grant should be utterly void and of none effect; and *second*, that if at any time it should be made apparent to the majority of nine persons summoned as before that the land had been for one year neglected and uncultivated, the grant should be utterly void and of none effect.

In an action by the plaintiff in 1871 for a trespass on the land committed by the orders of Government,

Held, that the first condition could only be enforced at the expiration of the three years or within a reasonable time after.

Held also, that the right of the Crown to avail itself of a forfeiture on breach of the second condition had not been waived by lapse of time, but was enforceable at any time by the procedure provided by the grant, continuing non-cultivation being a continuing cause of forfeiture.

No nine competent persons having been assembled for the purpose of enforcing the forfeiture,

Held, that the Crown could not summarily resume possession of the land, although it had never been brought into cultivation, and that the plaintiff was therefore entitled to judgment.

The plaintiff claimed £3 15*s* 0*d*. as damages caused by the defendant (a Vidane Aratchy) seizing, sequestering and selling a piece of *del* timber belonging to the plaintiff. The defendant pleaded that the land from which the timber had been felled was Government property, and that he

had sold the timber by public auction upon the order of the Modliar of the Corle. The other facts of the case appear in the head-note and in the judgment.

The Commissioner (*Rowley Smythe*) held that plaintiff, having failed to fulfil the conditions of the Grant, could take no benefit under it, and dismissed the action. Plaintiff appealed.

5th September, 1872. *Dias*, and *Jas. Alwis*, for the appellant.
Morgan, Q. A., for the respondent.

Cur. adv. vult.

11th September. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—In this case the substantial question was, whether the Crown had a right to resume possession summarily of certain lands which had been granted by the Crown to the plaintiff in 1835, and which had never been brought into a state of cultivation.

The Crown Grant dated October 12th 1835 recites an application by plaintiff for the land, and the willingness of the Governor to encourage cultivation; and then the deed by its operative part grants the land to the now plaintiff, subject to certain conditions.

The first of these conditions requires the now plaintiff to pay annually to the Crown a specified portion of the produce of the land.

The next two conditions are the important ones and we will cite them *verbatim* :—

"That if the said Hettigey Hendrick Perera, his heirs, executors, or "assigns shall not within three years from the date of this Grant well and "truly bring the said piece of ground into full and fair cultivation accord- "ing to the opinion of a majority of nine competent persons to be assem- "bled by the Government Agent for the purpose of inspecting the same at "the expiration of the said period, the said Hettigey Hendrick Perera, his "Heirs, Executors, Administrators and Assigns shall pay and make good on "the estimate and appraisement of a majority of the same persons, the "full value of the one-tenth share of produce to which Government would "have been entitled, if the land had been duly cultivated for each year "from the date of this grant, and the said grant shall be utterly void and "of none effect."

This condition gave the Crown the right at the end of three years, if the land was not brought into proper cultivation, to obtain the avoiding and setting aside of the grant by a judgment of non-cultivation pronounced by a tribunal to be composed in a specific manner.

It seems clear that the Crown could only enforce the condition at the end of the specified three years or within a reasonable time after. We must consider this right of exacting a forfeiture to have been waived in the present instance by reason of lapse of time, besides the circumstance that a particular mode of enforcing the forfeiture was directed which has not been followed.

But there follows in the Crown Grant another condition the words of which run thus :—

" That if at any time hereafter it shall happen and be made apparent, " according to the opinion of a majority of nine competent persons to be " assembled as before described, that the said land has been for one year " neglected and uncultivated, then and in such case this grant shall be " utterly void and of none effect."

We do not think that the right of the Crown to avail itself of this last mentioned cause of forfeiture has been waived by omitting to enforce it for so long a time. Continuing non-cultivation is a continuing cause of forfeiture ; and it is open to the Crown in such cases to get rid by proper measures of the negligent holders of the land at any time when the land shall have been for one year neglected and uncultivated. Not merely the letter of the covenant, but the reason of the thing, makes it fit that it should be so. The very object of the grant is that the land should be cultivated. The negligent holder who lets it lie waste for any long period defeats this object, and he also deprives the Crown of its portion of the produce, the receipt of which is evidently part of the consideration for which the land was granted. The continued existence also of tracts of waste jungle in districts where it is desired to promote cultivation and the arts of civilization is an obstruction to enlightened Government policy ; and it is an especial annoyance to neighbouring land owners, who keep their grounds in good order and properly utilized for the benefit of the owner, and also of society. But though this last mentioned condition in the Crown Grant is a salutary one and does not lose its force by time, it must be set in action in the manner which the grant has appointed. This condition does not simply say that if the land is neglected for a year the grant is to be void It says that " if it shall happen *and be made apparent* according to the opinion of nine competent persons assembled " &c., " that the land has been for one year neglected and uncultivated, then and in such case this grant shall be utterly void and of none effect."

Now, in the first instance, no nine competent persons had been even assembled. The avoidance of the grant is only practicable by the neglected state of the land for the specified period being made apparent to this inspecting jury of nine men, and by their opinion to that effect expressed.

It follows that we must consider the grant to be still in existence, and the plaintiff to be entitled to sue for a trespass on his land, even though the act complained of was done by the orders of the Government.

Set aside. Judgment for plaintiff.

D. C., Colombo, No. 39,186. } MAMMIE *v.* COOTTY ALLIE.

Insolvency—Protection, duration of—Execution against person—Ordinance 7 of 1853, sects. 34, 89.

The defendant was adjudicated insolvent on 13th July 1865, when an order protecting his person from arrest was made. The second sitting, fixed for 5th,

October 1865, was simply adjourned to 12th October, on which day an assignee was appointed and the sitting again simply adjourned. No further order as to protection was made, and no further steps taken in the matter. In August 1872, the defendant was arrested on a writ of execution against his person, and committed.

Held, that the arrest and committal were valid.

The defendant appealed against an order committing him to prison upon arrest in execution of a writ against his person. The facts sufficiently appear in the head-note and judgment.

11*th September*, 1872. *Grenier* for the appellant.

Cur. adv. vult.

12*th September*. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—It seems to us that this order was right. The protection granted on July 13th 1865, enured until the Insolvent surrendered, and also until the day for his examination, which by the 89th clause of the Insolvent Ordinance is to be taken as the day of the second public sitting. Any protection beyond that day could only be granted by an appointment made by the Judge as mentioned in the 34th sect. No such appointment of further protection has been made and the Insolvent was consequently liable to arrest.

Affirmed.

C. R., Panwila, No. 3,721. } MACKELVIE *v.* EDORIS.

Obligation quasi ex contractu—*Adjoining lands—Damage caused by neglected condition of neighbour's land*—Damnum absque injuria—Culpa.

Plaintiff and defendants owned adjoining lands planted with coffee. Defendants' land was overgrown with weeds, and the seeds of such weeds being blown and carried into plaintiff's land entailed upon him double the expense for weeding that was incurred when defendants' land was kept free from weeds.

Held, that defendants' omission to keep their land clean was mere *culpa*, and therefore not actionable unless a legal right had been injured by it; and that there was nothing to show sufficiently any right on the part of plaintiff which had been injured by that omission.

The plaintiff, and the two defendants, were the owners of adjoining lands. The plaintiff sued to recover Rs. 95, damages sustained by the plaintiff, in that "the defendants, by not weeding and clearing their land as they should, have injured the land of the plaintiff." The defendants pleaded not guilty, and further that their land was always kept clean by weeding. Evidence was led for the plaintiff to show that defendants' land, which was planted with coffee, was overgrown with the weeds known as Spanish needle

and *Hulantalawa*, or goat-weed ; that the former grew to a height of six feet and was most destructive to the coffee growing on plaintiff's land ; that the seeds of these weeds were blown by the wind, and carried by passengers and cattle, from defendants' into plaintiff's land ; and that the weeding of the thirteen acres adjoining the defendants' land now cost 4*s* 9*d*, and sometimes 7s, a month per acre, as against 2s, the cost when defendants' land was clean and free from weeds. The Commissioner (*B. F. Hartshorne*) " came to the conclusion with much hesitation that the excessive quantity of " weeds on the plaintiff's land was owing to the neglect of the defendants " ; and, regarding the obligation of the defendants as arising *quasi ex contractu*, (Sandars' Justinian, Introd. sect. 87, and note to lib. iii, tit. 27) gave judgment for the plaintiff against the defendants jointly and severally. The defendants appealed.

12*th June*, 1872. *Dias* for the appellants.

Ferdinands, D. Q. A., for the plaintiff, respondent.

Cur. adv. vult.

9*th October*, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—The plaint does not set forth any act of commission on the part of the defendants whatever, and with respect to the charge of omission there is nothing to shew sufficiently any right on the part of the plaintiff which has been injured by that omission. It is a mere case of *culpa*, and mere *culpa* is not actionable unless a legal right has been injured by it.

It is necessary to be strict in these matters, for this judgment against the defendants on these pleadings, if upheld, might be made a precedent for fixing enormous liabilities on parties, without justice.

The Supreme Court distinctly wishes to be understood as deciding this case on its own special circumstances ; and as not laying down a general rule that a man can never become legally liable to his neighbours for mischief caused to them by his faults or defaults as to the management of his own land.

The defendants ought to have demurred to this plaint, and much expense would have been thereby saved. We therefore direct that each party pay his own costs both of the action and of the appeal.

Set aside, plaintiff non-suited.

D. C., Galle, No. 26,416. } SILVA *v.* DANIEL.

Partition—Ordinance 10 *of* 1863, *sect.* 4—*Notice to warrant and defend title—Refund of purchase-money.*

In a partition suit a party is not entitled to a decree against his vendor for refund of the purchase-money in default of the vendor warranting and defending his sale to such party of any interest in the land under partition.

The plaintiff filed his libel on 17th July 1867, praying simply for a partition of certain land. The defendants filed answer denying the correctness of the various shares allotted in the libel. On 13th October 1869, the plaintiff obtained a rule *nisi* on one *Harmanis de Silva* to show cause why he "should not defend and warrant the sale made by him, in failure refund the purchase money with costs." Upon this, *De Silva* intervened in support of his conveyance to the plaintiff. At the trial on 31st January 1872, the District Judge (*L. F. Liesching*) non-suited the plaintiff, holding that the "action could not proceed in its present form, part of the "plaintiff's prayer, by the rule of October 13th, 1869, being that his "vendor should warrant and defend the sale made by him and in failure "refund purchase money with costs. The Partition Ordinance is intended "to dispose of claims of parties in possession of or owning the land. The "intervenient is not an owner now, and to call on him to warrant and "defend his sale is to introduce into a partition case an element of a "foreign nature." The plaintiff appealed.

2nd October, 1872. There was no appearance of parties.

Cur. adv. vult.

9th October. The judgment of the Court (CREASY, C. J., and STEWART J.) was delivered by

STEWART, J.—The sale by the intervenient to the plaintiff is not disputed, nor do the defendants deny that the seller to the plaintiff was in possession of and entitled to a certain interest in the land in question. The contention on their part is as to the extent of that interest, the defendants claiming more and allowing the plaintiff less than the shares stated in the application.

The 2nd section of the Ordinance No. 10 of 1863 authorises any owner of landed property belonging in common to two or more owners, to apply as therein pointed out for a partition or sale; and the plaintiff, having purchased the interest of the intervenient, must be regarded as owner and entitled to such shares as the intervenient may have had.

The present case seems to us clearly to fall within the 4th section, which makes provision not only where the defendants "dispute the title of the plaintiff," but also where "they shall claim larger shares or interests than the plaintiffs have stated to belong to them."

As respects the notice issued by the plaintiff to his seller, the proceeding was a proper and prudent one so far as it required the intervenient to warrant and defend the sale, but in view of the peculiar character of the proceedings in a suit for partition under the Ordinance, the plaintiff was in error in applying in the event of failure for the refunding of the purchase money.

The latter part of the motion ought not to have been granted; and the claim so far might have been rejected at the trial. The same is hereby disallowed.

Sent back for trial. Costs to stand over.

D. C., Nuwara Kalawiya, No. 156. } WANASINHA BANDA *v.* PUNCHI MENIKA.

Practice—Appeal out of time—Laches—*Jurisdiction of single judge—Ordinance* 11 *of* 1868, *sec.* 27.

A defendant in July 1872, sought leave to appeal out of time against a judgment passed in 1859, and filed an affidavit deposing that she had not prosecuted the appeal because the Judge who had pronounced the judgment had thereafter sent for the parties and promised to settle amicably any disputes that might arise among them in consequence of it.

The Supreme Court refused the application.

Observations on the principles which should govern such applications.

A single Judge of the Supreme Court has no jurisdiction to allow an appeal out of time against a District Court final judgment.

The first defendant, on 30th July 1872, presented to the Supreme Court a petition praying for leave to appeal, notwithstanding the lapse of time, against the judgment in favour of the plaintiff pronounced by the District Judge *(Flanderka)* in 1859. She filed an affidavit deposing that she had filed a petition of appeal in due time, but had been dissuaded from appealing by the action of the District Judge, who was also Assistant Government Agent, and who had, after the decision, sent for the parties and promised to settle amicably all disputes that might arise in consequence of the judgment. TEMPLE, J., who sat in Court on 30th July, allowed the application, on learning that the District Judge recommended it ; and the order issued on 31st July. Upon its attention being called to the matter subsequently, the Supreme Court, on 4th September 1872, directed a rule to issue calling upon the first defendant to show cause " why the order of 31st July 1872 should not be declared null and void, and why order " should not be made that no appeal in this case be allowed."

27th *September*, 1872. *Dias* showed cause.

Cur. adv. vult.

9*th October*. The judgment of the Court (CREASY, C. J., and STEWART, J.) was delivered by

CREASY, C. J.—This case was decided in the District Court of Anuradhapura in favor of the plaintiff by the then District Judge Mr. *Flanderka*, on the 28th of October 1859.

On the 24th July 1872 the then District Judge, Mr. *Davids*, wrote and sent a letter to the Registrar of the Supreme Court which was as follows:—

No. 62. District Court,
Anuradhapura, 24th July, 1872.

SIR,—I have the honor to forward herewith case No.156 of the District Court of Nuwara Kalawiya decided in 1859 by Mr. *J. L. Flanderka* the then District Judge of Anuradhapura, together with a petition from the 1st defendant to the Hon'ble the Supreme Court, and an affidavit affirmed to before me.

I beg to recommend that the appeal be received notwithstanding the lapse of time, and especially because the dispute has created much ill-feeling in the District, and it is very desirable that there should be a decision of the Supreme Court of the Island in the matter.

I have, &c.,

T. W. RHYS DAVIDS.

The Registrar of the
Hon'ble the Supreme Court,
Colombo.

On the 31st day of July 1872, application for leave to appeal notwithstanding the lapse of time was made to a single Judge of the Supreme Court. On its being stated that the District Judge recommended the allowance of the appeal the order of the 31st of July which we now declare null and void was made without further inquiry.

The time within which appeals from Judgments of the District Court to the Supreme Court must be made is fixed by Rule 1 of 12th December 1843 at ten clear days exclusive of Sundays and Public holidays. The rule states that on failure to file the petition of appeal within the specified time "the appeal cannot be received." This Rule has been affirmed by Ordinance.

Rule 5 of Rules and Orders of 1st October 1843, (confirmed by Ordinance and still in force) directs that any party appellant who shall fail to file his petition of appeal within the period limited shall not be allowed his appeal unless it shall be proved to the satisfaction of the District Court, that such omission was not imputable to any negligence or delay on the part of such appellant, in which case the matter shall be referred to the Supreme Court to decide the allowance or rejection of such appeal.

In some cases an appellant may be delayed in the filing of his appeal by causes not within his own control. The present is clearly not a case of this kind. This is a case where the litigant who now wishes to appeal is himself responsible for the delay. The principles on which the Courts act in allowing such appeals are well known, and they are clearly and fully stated in Mr. Justice Thomson's *Institutes*, vol. 1, p. 179. His words are as follows:—

"The principles on which appeals are to be allowed after delay occasioned by the appellant, were laid down in a case in which it was attempted to bring in appeal a case from a District Court after a lapse of three years, on the usual reference to the District Judge. The Judge only stated that to the best of his belief and knowledge the omission to file the petition of appeal was not imputable to any negligence on the part of the appellant. That report was held not to fulfil either the letter or the spirit of the rule. The rule should be construed that proof must be given before the District Judge accounting for the non-filing of the petition of appeal within the prescribed time. It is both negligence and delay not to file within that time unless upon good cause (which must be shewn) for not so doing. Mere ignorance that the judgment is un-

" sound is not such a cause. And the Court remarked that were any other " principle admitted no man who has his title to land established by a " judgment of a District Court not appealed against, could consider himself " the owner thereof even for a day, nor enter with safety upon any im- " provement of his estate."

In the case now before us it is sought to appeal against a District Court judgment more than twelve years after that judgment was given. The applicant's affidavit dated 23rd July 1872 asserts that a petition was originally filed in due time, but was not forwarded. The record shows that assertion to be untrue : as is indeed shewn by the very nature of the present application, which is for leave to appeal, and not for the hearing of an already entered appeal. To allow such an application would be to break in upon a long established system of practice, and to introduce into our jurisprudence a mischievous element of uncertainty and unfairness.

The District Judge who has recommended this appeal, does not state that it has been proved to his satisfaction that the omission to file this appeal in proper time was not imputable to any omission or delay on the part of the appellant. The only reasons which he gives for allowing it is that the dispute has created much ill-feeling in the district.

It is obvious that an infinity of ill-feeling would be created in every district, if matters which had been decided by the proper tribunals many years ago were permitted to be thus re-opened. By such a course the Prescription Ordinance would be to a great extent practically repealed, besides the evils pointed out in the passage already quoted from Thomson's Institutes.

Our District Judges have almost without exception shewn so much good sense and fairness in cases of litigants seeking to appeal out of time that it has become nearly a matter of course with us to adopt their recommendation. Such was the case in the present instance. But when the Judge who had granted the order was made aware of the staleness of the application he himself desired that the leave should be withdrawn, and it is with his full concurrence that the Rule *Nisi* to declare that order null and void was issued, and that this present Judgment is given.

The learned counsel who shewed cause against the rule *nisi* with his usual ability and fairness, admitted the right of this Court to cancel an order " *Quia improvide emanavit.*" But there is no need to revert to this principle on this occasion. This order is absolutely null as made by a single Judge. Appeals from final Judgments from the District Court can only be dealt with by the full Court or by two Judges of the Court under sect. 27 of Ordinance 11 of 1868. The present is not a case falling within the 28th section which gives a single Supreme Court Judge power to act in certain specified instances.

The Court as at present constituted and as constituted when the Rule *Nisi* was issued and argued, is qualified to deal with the application ; and we hereby order that it be disallowed.

Rule absolute.

C. R., Ratnapura, No. 7,799. } ABEYRATNE *v.* JAYASUNDARA.

Promissory note—Maker and Indorser sued together or successively.

The holder of a promissory note may sue the maker and indorser together, or successively, but cannot recover from either more than the amount due on the note.

The plaintiff, as indorsee of a promissory note for Rs. 40, sued the defendant, as payee and indorser, to recover the amount of the note with interest and a further sum of Rs. 7. 62½ cts. as costs incurred by plaintiff in suing the maker of the note, from whom he had been unable to recover anything, though he had obtained judgment against him. The defendant denied his liability, on the ground that the maker was possessed of property, and the plaintiff might with due diligence have realized his judgment. The Commissioner (*R. Reid*) took this view and dismissed the action. Plaintiff appealed.

Beven for the appellant.

Cur. adv. vult.

22*nd October*, 1872. The judgment of the Court (TEMPLE and STEWART, JJ.) was delivered by

STEWART, J.—It was competent for the holder of the note to enter actions against the drawer and the endorser at the same time, or to sue them successively. Smith's Mercantile Law, p. 262.* The plaintiff cannot, however, recover more than what is due on the note from one or other of the parties.

Reversed. Judgment for the plaintiff for Rs. 40 *and interest.*

D. C., Jaffna, No. 20,463, } PARASATTYUMMAH *v.* SATHOPULLE.

Donation—Concubine—Immoral consideration.

A donation is not void because made to a concubine, provided it was not made in order to induce the donee to come and live in illicit intercourse with the donor, or to continue to live in such intercourse, the donee being otherwise desirous to break it off.

This was an action in ejectment. The plaintiff claimed the lands in question as the widow, and natural guardian of the minor children, of one *Coomarasamy Ayer*. The defendant claimed titled under a deed of donation from *Coomarasamy*, dated 20th October 1869, which plaintiff impugned as a forgery, pleading also that *Coomarasamy* could not by the law of the

* See English *Rules of the Supreme Court*, 1883, Order xvi, rules 4, 6.—*Rep.*

Thesawalame donate the entirety of the lands. The deed professed to donate the lands to "*Sathopulleamma* [the defendant] widow of *Canaweddy*, now concubine of" the donor. Defendant, upon examination as a party at the trial stated as follows :—"I simply lived with *Coomarasamy*, "plaintiff's late husband, as his wife, during the lifetime of my own "husband *Canaweddy*. Whilst I so lived with *Coomarasamy*, he gave me "the donation in question, because I was living with him in concubinage." The due execution of the deed of donation was admitted at the trial. The District Judge (*A. H. Roosmalecocq*) held the deed invalid as made in consideration of the defendant's continuing her illicit connection with the donor *Coomarasamy*, and gave judgment for the plaintiff, expressing the opinion that, even if the consideration had not been illegal, the donation would have been good only to the extent of one-half of the lands, which had been acquired *pendente matrimonio*. The defendant appealed.

12*th November*, 1872. *Dias* for the appellant.

Cur. adv. vult.

19*th November*. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—This case has been erroneously treated in the Court below as a case of contract on account of concubinage; and the peculiar principles of Roman Law as to Donations have been lost sight of. It is only in a very lax sense of the word "contract," that a donation can be called a contract at all. See Voet *ad Pandectas*, 39. 5. 2. Donations *inter vivos* are complete when there has been tradition to a willing transferee, made with the design of passing the property; or when, even without tradition, the donor's intention to give and the donee's intention to receive have been clearly expressed. In the last mentioned case the donee can compel tradition. See Poste's *Gaius*, p. 158, and the passage from *Gaius* cited in the Digest, 41. 1. 3; and see Poste's *Gaius*, p. 335, and the passage in the Institutes, 2. 7. 2, commented on by Mr. *Poste*. In a true case of Donation there is no consideration in the legal sense of the word. A man makes a donation when he gives solely out of liberality or munificence, when "*propter nullam aliam causam facit, quam ut liberalitatem et munificentiam exerceat : hæc proprie donatio appellatur.*" Digest, 39. 5. 1. There is the same conclusive authority to show that a donation is not void, because the donor exercised his liberality and munificence under the influence of affection, whether of creditable affection or of discreditable affection. Indeed the Roman Jurist specifies this very case of a donation made out of affection for a whore, and declares that such donations are not illegal. "*Affectionis gratia, neque honestæ, neque inhonestæ donationes sunt prohibitæ; honestæ erga bene merentes amicos vel necessarios; inhonestæ, circa meretrices.*" Digest 39. 5. 5. There are also numerous authorities to be found in the Digest, and its commentators, that the Roman Law prohibition

against donations to wives, did not extend to donations to concubines. See Digest 8. 5. 31 ; Voet *ad Pand.* 24. 1. *num.* 15.

Unquestionably it is within the province of a Judge in cases of this kind, to inquire into the true nature of the transaction ; and if it is clearly proved that the nominal gift was really made by the man in order to induce the woman to come and live in illicit intercourse with him, or to continue to live in such intercourse, she being otherwise desirous to break it off, it would be the duty of the Judge to pronounce it to be a contract *ex turpi causa*, and to refuse the support of the law to it. But no such proof is given here. All that appears on the face of the deed is, that the donor says that she is "now my concubine"; which is mere matter of description. The parol evidence does not go further than the woman's statement, "He gave it me because I was living with him in concubinage," a clear case of a donation made to a *meretrix* under the influence of an "*inhonesta affectio*," which is certainly a kind of donation which the Roman code declares not to be prohibited by law.

The decree of the District Court will be set aside, and judgment entered for the plaintiff for half the lands in question, inasmuch as by the Tamil customary law the donor could only dispose of half his property, but judgment will be entered for the defendant for the other half of the lands, and the deed declared valid so far as regards half of the lands.

As the defendant claimed to retain twice as much as she was entitled to, each side is to pay their own costs.

Set aside.

D. C., Batticaloa, No. 16,836. } KANNAPPEN *v.* MAYLIPODY.

Fraudulent alienation—Insolvency—Claim in execution.

K., being indebted to the plaintiff in the sum of £9 2s 6d, and possessing other lands exceeding that sum in value, gifted the land in question to the defendants, his concubine and nephew. Plaintiff having obtained judgment against K.'s representatives seized this land in execution, when the defendants claimed it and stayed the sale. Plaintiff now sought to set aside the claim and have the land declared executable on the ground that the gift was fraudulent ; but did not aver or prove that K. owed other debts than that to plaintiff, or that his estate was insolvent, at the date of the gift or of the present action. The District Judge having given plaintiff judgment on the ground that the gift was in any event "liable to plaintiff's claim,"

Held (reversing his judgment) that no cause had been shown for avoiding the gift and that defendants were entitled to judgment.

D. C. Kandy 20,929 (Austin 123), and the general principles affecting fraudulent alienation of property, considered.

The defendants appealed against a judgment in favour of plaintiff, who sought to set aside a claim in execution made by defendants, upon which the sale of certain land in execution had been stayed. The facts fully appear in the judgment.

5th *November*, 1872. *Dias* for the defendants, appellants.
Grenier for the plaintiff, respondent.

Cur. adv. vult.

19*th November*. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—The plaintiff in his Libel states that he is a judgment creditor against the estate of Kandapody, and he prays that certain land should be declared the property of Kandapody and liable to be sold under his (the plaintiff's) writ, and that the opposition made by defendants to the sale should be set aside.

The defendants plead that they are owners of the said land, and they annex a Deed of Gift of the said land dated 17th October 1868. This deed purports to give the land to the defendants : they are required by it to deliver the produce to the donor during his life-time ; after his death they are to possess it according to their pleasure. The deed says "forever"; but it gives estates in remainder after their deaths. One of the defendants is the nephew of the donor, the other at the date of the deed of Gift was living with him as his wife, but was not married to him.

The plaintiff replies that the said deed of Gift was a fraudulent transfer.

At the trial two Court of Requests cases were put in, being the cases brought by plaintiff against the representatives of Kandapody, in which he obtained judgment. The parties also were examined at the trial ; but no witnesses were called. From the pleadings, from the Court of Requests cases, from the deed, and from the examination, we learn that the plaintiff was a creditor of Kandapody's to the amount of £9 2*s* 6*d* on two bonds, both of which had been granted for consideration by Kandapody to the plaintiff, before the deed of gift to the defendants. It also appears that at the time, when the bonds were made to plaintiff, Kandapody had other property besides the land subsequently gifted to defendants. The precise value of that property does not appear, but it was clearly much more than the amount of Kandapody's debt to plaintiff, and there is no proof that Kandapody owed any other debts. It does not appear that Kandapody had parted with any of that other property in the interval between his giving the last bond to plaintiff, and his making the deed of gift to defendants.

The issue which the parties were to try, was clearly as to whether the deed of gift was or was not fraudulent and void as against plaintiff who was a creditor for value at the time of its execution. The District Court has given no judgment whether the deed was fraudulent or not, but has held the donation to be in any event "liable to plaintiff's claim," and has therefore given judgment in favour of the plaintiff.

We think this judgment erroneous. We hold that the deed could not be successfully impeached, unless it were shown that Kandapody, in gifting away this land, defrauded his creditors ; and we think that not only is this left unproved but that there is proof the other way, and consequently we should not be justified in sending the case back for further hearing.

The District Judge seems to have held absolutely that if a man owes any debt at all, he cannot make any valid gift at all, but the property which he affects to give away will always be liable to the claim of the donor's creditor. If this be true, a man with thousands of pounds cannot make a perfectly valid gift of property worth a five pound note, if he happen at the

time to owe that amount to his tailor or any other of his trades people. But there is no such absurdity in our law. The authorities cited in support of this theory are, 1st, a case in Austin, p. 123. On examining that case, it appears that there were many special circumstances in it. The claimant under the alleged donation had allowed the land to be sold by the executors, and had himself been a bidder at the sale without saying a word about this deed of gift. Moreover, for all that appears in the report, the gift might have been extended to the bulk of the donor's property. It is not surprising that under such circumstances the donee's claim was dismissed with costs. The other authority cited is a passage in Thomson, vol. 1, p. 345, which is founded solely on this case in Austin, and has no weight beyond it.

Dismissing then the general proposition that gifted property, whether small or great, remains always liable to creditors, whether the debts were small or great, we are by no means obliged to adopt the equally monstrous theory that all gifts are valid as against all creditors, and that a man in a state of insolvency may cheat all who have trusted him by giving away his estate, or even any considerable part of it. The Roman Dutch Law will be found to follow a just and equitable middle course between extremes.

In the present case, as in a Jaffna case decided by us this morning, (D. C. Jaffna No. 20,463,*) sufficient attention has not been paid in the Court below to the Roman Law *de donationibus*. We pointed out in the Jaffna case the generally full liberty given by that law to a man in the gratuitous exercise of munificence, and we showed how acts of munificence are valid, though prompted by an "*inhonesta affectio*," as "*circa meretrices*," equally with acts of munificence inspired by an "*honesta affectio*," as "*erga bene merentes amicos*." (See Digest 39, 5.) A copy of that judgment is annexed to the present judgment, and may be referred to as part of it.

But besides the points common to this case and the Jaffna case, we have here to consider the effect of the provisions in the Civil Law to protect creditors. They are chiefly contained in the 42nd book of the Digest, title viii. "*Quæ in fraudem creditorum facta sunt, ut restituantur.*" They are commented on by Voet (p. 682 of his second volume), and by Burge (vol. III, p. 605.) See also Voet's commentary on Book xxxix of the Digest, title 5, sects. 6, 19 and 20. Their effect (so far as is material to the present case) may be stated thus :—An alienation by gift may be set aside, when a man gives away the whole or a considerable portion of his estate knowing that he is insolvent, and that he is diminishing the substance out of which his debts might be paid. He, who acts thus, will be considered to have intended the natural result of his acts, which is the defrauding of his creditors. And in such a case fraud on the part of the donor is sufficient to invalidate the donation, though the donee had no knowledge of the fraud, or of the circumstances whence it is inferred. "*Si cui donatum est, non esse quaerendum an sciente eo cui donatum, gestum sit, sed hoc tantum, an fraudentur creditores? nec videtur injuria affici is, qui ignoravit, cum lucrum extorqueatur, non damnum infligatur.*" Digest 42. 8. 6.

But in the present case, the first element necessary for restitution on

* See *ante* p. 67.

account of fraud is wanting. Kandapody was not insolvent at the time of the deed of gift, nor did the gift leave him insolvent. Burge says expressly as to this, "Neither a donation nor sale would be considered "fraudulent if the donor or vendor were solvent at the time he made it, "and if their disposition had not caused him to cease to be so." It does not even appear that Kandapody ever became insolvent or that his estate is not perfectly solvent at the present time, without having recourse to the land in question. And it would seem from Voet's commentary on Digest 42. 8. 1, that it is only when the property retained by the donor proves insufficient to meet the claims of creditors, that they can follow the property which has been injuriously gifted away by him.

Reversed. Judgment for plaintiff.

D. C., Jaffna, No. 20,905. } PARPATHY *v.* SUPPRAMANIAR.

Divorce—Malicious desertion.

In an action by the wife against the husband for a divorce on the ground of malicious desertion, the husband denying the desertion and pleading that he was always willing to receive the plaintiff as his wife, it appeared that the parties were living separate for six years, having only cohabited for two months after marriage, that the wife had never requested the husband to receive her into his house, nor sent him any letter or message with the same object, nor had the husband ever declared his unwillingness to receive her or to accede to such request if made. At the trial the wife expressed her unwillingness to be reconciled to her husband.

Held, that malicious desertion of the wife by the husband had not been established.

This was an action begun on 22nd November 1871 by the wife against the husband for a divorce *a vinculo* on the ground of malicious desertion and adultery commencing from January 1871. The defendant denied the desertion and adultery, and pleaded that he was always ready and willing to receive the plaintiff as his wife. In a former action by the wife for the same purpose, based on alleged malicious desertion by the husband, judgment went for the defendant with costs, on 29th August 1870. The parties were at the date of the former action, and ever since, living apart from each other, having cohabited for only two months after the marriage, which took place on 16th August 1866. The District Judge (*A. H. Roosmalecocq*) held that the judgment in the previous action made the question of malicious desertion *res judicata*, and that the evidence did not establish the adultery. He accordingly dismissed the action with costs. The plaintiff appealed.

19*th November*, 1872. *Morgan*, Q. A., for the appellant.

Ferdinands, D.Q.A., (*Grenier* with him) for the defendant, respondent.

Cur. adv vult.

20th November. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—We fully agree with the District Judge in holding that there has been no sufficient proof of adultery on the part of the husband.

With regard to the charge for malicious desertion, the case stands thus :—

At the time of the former action No. 19,338, the parties were, as a matter of fact, separate from each other ; and the judgment in that case must be taken to have decided that such separation was not caused by the husband having maliciously deserted the wife. The state of separation, in point of fact, has continued to the present time. Has anything, which can give that state of separation the legal character of separation caused by malicious desertion on the part of the husband, occurred since the decision of the old case? We can find nothing of the kind. The wife has never gone to the husband and requested him to receive her. She has never sent him any message or letter of request, or proposal for their reunion. And he has never announced that he would refuse to receive her if she came, or to assent to her requests if she made any. Nay more, in her examination in the present case, she states that she is not now willing to be reconciled to her husband. We cannot adjudicate this to be a sufficient cause for divorce on the ground of malicious desertion on the part of the husband.

There has, however, been in this case very considerable misconduct, morally speaking, on the husband's side, and we shall not allow his costs.

Affirmed. Costs divided.

D. C., Galle, No. 38,344. } DIAS *v.* SAMARAWICRAME.

Stamp—Promissory note payable on demand—Ordinance 11 *of* 1861, *sects.* 15, 20, [*repealed*]—*Ordinance* 9 *of* 1865, *sects.* 5, 7, [*repealed*].

The combined effect of the [repealed] Ordinances 11 of 1861, sects. 15, 20, and 9 of 1865, sects. 5, 7, is that a promissory note payable to order on demand may be stamped with an adhesive stamp of the proper value.

This was an action by the payee against the maker of a promissory note for £150, dated 31st January 1870, and payable to the plaintiff or order on demand. The stamp on the note was an adhesive penny "Receipt, Draft or Order" stamp, and bore only the signature of the maker across it. On motion for provisional judgment, on 18th October 1872, it was objected that the note was not duly stamped. The District Judge (*H. W. Gillman*) upheld the objection, and refused the motion. The plaintiff appealed.

12th November, 1872. *Dias* for the appellant.

Ferdinands, D.Q.A., for the defendant, respondent.

Cur. adv. vult.

26th November. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—The Supreme Court considers that the law in this case was correctly laid down in the case No. 40,079 Court of Requests, Galle,* a judgment which was written by the late Mr. Justice Lawson, a very high authority. In giving that judgment he doubtless considered, what was the full and rational effect of Ordinance No. 9 of 1865, sect. 5, when read, (as required by section 7,) as part and parcel of Ordinance No. 11 of 1861, and having special reference to clauses 15 and 20, in Ordinance No. 11 of 1861, and to the schedule. The Ordinance No. 9 of 1865 cured the omission of the words, "Promissory Note" in those clauses of the old Ordinance, and in the charging part of its schedule.

Set aside. Provisional judgment decreed.

D. C., Matara, No. 26,193. } SUPERMANIAN CHETTY *v.* GOONEWARDANE.

Donation in fraud of creditors—Debt incurred after donation—Action by creditor to set aside donation.

On 8th December 1866, G., being then not indebted to any person, gifted to the defendants, his children, one of his lands, subject to a *fidei commissum*, his wife joining in the gift. The gift was accepted by one of the donees on behalf of all, and the deed was registered on 31st January 1867. G. continued to live on the land with his children and sometimes had some of the fruits of the land. G. became indebted to plaintiff on a promissory note on 14th November 1867. Plaintiff, having obtained judgment on the note in April 1871, seized the land in execution, whereupon the defendants claimed it and stayed the sale. Plaintiff now sought to have the gift set aside as made in fraud of creditors, and the land declared liable to be sold in execution of his judgment.

Held, that no reason had been shown for holding the gift to be fraudulent.

The plaintiff appealed against a judgment of the District Judge (*G. W. Templer*) dismissing his action. The facts are sufficiently disclosed in the above head note and in the judgment of the Court.

26th November, 1872. *Morgan*, Q. A., for the appellant.

Cur. adv. vult.

3rd December. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ.) was delivered by

CREASY, C. J.—The distinct and sole issue in this case was whether, (as alleged in the words of the Libel) "the Deed of Gift was a fraudulent one, got up for the purpose of defrauding creditors." The pleadings did

* Vanderstraaten's Rep. 102.

not raise the question whether at the time of the plaintiff's execution there was not other property of the donors, to which the plaintiff ought to have resorted before he levied on the land which was the subject of the gift. The affidavits, now tendered by the plaintiff, apply to this irrelevant question, and have only a very remote bearing on the question, whether the donor, at the date of the gift several years before, had any other property : which last mentioned question might certainly affect the inquiry as to the donor's motives when he gifted away this particular land. The date of the gift of this land is 8th December 1866. One of the donees personally accepted it on behalf of all, and on the 31st of the following month, they all registered the Deed of Gift in the Registrar of Lands' Office for their District. This is a very important fact, and has weighed much with us in determining this case.

The plaintiff did not become a creditor of the donor until 14th November, 1867, when he lent him some money on a Promissory Note.

We entered very fully into the law as to donations in two judgments delivered by us during the present sittings, in D. C. Batticaloa, No. 16,836, (ante page 69) and in D. C. Jaffna, No. 20,463 (ante page 67).

In the first mentioned judgment we cited a passage from Burge, vol. 3, p. 607, that "Neither a donation nor sale would be considered fraudulent if the donor or vendor were solvent at the time he made it and if the disposition had not caused him to cease to be so." Now, it does not appear that the donor in the present case owed any man anything at the time of this Deed of Gift. (We will mention presently what we consider to be the true sense of a certain phrase in the Deed of Gift, which might be quoted as implying indebtedness.) The present plaintiff certainly did not become a creditor till a year afterwards, and he is the only creditor whom we hear of. Unquestionably if it were clearly proved that a Deed of Gift of the whole, or of the bulk, of his property had been made by a man solvent at the time, but deliberately intending to contract debts with people who might believe him to be still the possessor of that property, and so to defraud them, we should hold such a transaction to be fraudulent and void. But this does not appear to be a case of the kind. So far as the evidence goes, (irrespectively of the list of property afterwards signed by the plaintiff, and as to which his affidavits are tendered,) the Deed did not gift away all the donor's property ; and what is most important of all is the fact that the deed gifting this property was promptly and regularly registered by the parties, so that any one who chose could ascertain the fact of this deed's existence, and of the land having passed by it from the donor to the donees.

Secrecy, which is the usual badge of fraud, is proved not to have been practised on this occasion.

If the plaintiff had been a creditor at the time of the Deed of Gift, this would have been to a great extent immaterial ; but it is very important when we have to consider whether the donor intended to trap and defraud future creditors by pretending to be still owner of the land.

It is said that the donor continued to be in possession. But it seems to us that the children, the donees, had possession ; and the fact that the

donor, their father or father-in-law, continued to live on part of the land, and sometimes had some of the fruits of the land, does not prove that the family were living in a state of conspiracy against creditors.

It is urged that the father, the donor, held himself out to the world as continuing owner, by giving a certain notice to the District Road Committee about opening a road over this land. But when the whole passage of the examination is read, and when it is remembered that this was a hostile examination, during which words are almost put into a party's mouth, without there being any opportunity for him to explain them, there seems to be little force in this objection. The defendant said, "I remember the District Road Committee opening a road over this land "after the Gift Deed. My father-in-law gave *Mr. Liesching* notice of "action; we took steps in the matter." Here again the fact of the Registration of the deed is most important. The donor and his family could not expect that the execution of this deed would remain unknown to the authorities if any litigation about this land ensued.

It is urged that the peculiar phraseology of this deed, where it speaks of the land not being liable to the donor's debts, shows a fraudulent intention; and also that the donor could have had no honest intention in gifting the lands to these five donees, inasmuch as after the donor's death it would have become theirs by inheritance, without the necessity of any deed.

These arguments deserved, and have received consideration; but a careful examination of the special clause of the deed in question has by no means satisfied us that the donor framed it with a design of defrauding his creditors.

We will cite the material parts of the deed. The father and the mother appear in the deed as donors. They give the land to be possessed as follows:—"to be possessed by our said five children according to the "manner appointed by us from generation to generation; and have agreed "that the shares of said Battelewatte or Gederewatte may be possessed by "said five children or their heirs; and in case if any of said persons "happen or their heirs happen to die, having no issue, their shares should "devolve on the surviving persons or their heirs; and no person becom-"ing possessed of any tree or ground of said land can sell, gift, or "mortgage, or lease beyond a term of five years; besides these restrictions "after this our gift this land cannot be subjected for any of our debts, or "that of those who is to be the owners hereafter, or securities or fines "of Government or the public, neither can it be sold under a Writ; "besides of the five persons who obtain this gift, should there happen not "to survive any person by blood relationship, it should then revert to "the then reigning Government, and cannot happen otherwise."

It seems to us that this donor's great object was to create an entail of this land, so that it should continue to belong to his family, without the possibility of any part of it being alienated or encumbered or taken away from them. He winds up by making an ultimate remainder-man of the Government as if he thereby secured what we should call an effective Protector of the Settlement.

Whether the donor was a good Conveyancing Lawyer or not matters nothing. But we think it clear that the desire of leaving an inalienable and thoroughly secured family estate, the desire that has been so common in all nations and all ages, was the ruling idea in the mind of this Singhalese land-owner. He wished seemingly to have the satisfaction of feeling that he was the founder of a family, and to have that satisfaction at once. His mention of "our debts," among the things that were not to affect the entail, does not argue a consciousness of insolvency, or a design to become insolvent; but is no more than the expression of a purpose that the land should not, like the rest of his estate, be subject to contribution for any liabilities which he might be under at his death, but that it should pass at once intact as family property, and that it should remain intact to support the family, as long as any of the family existed. Whether he was not assuming entailing powers beyond the limits of law is immaterial. The question is whether he made the gift for the purpose of defrauding his creditors, and that does not appear to have been the case.

Affirmed.

C. R., Panadura, No. 15,014. } ISMAIL LEBBE *v.* MOHAMADO LEBBE.

Execution—Sale of mortgage bond in debtor's favour—Assignment to purchaser—Ordinance 7 of 1840, sects. 2, 20.

The Fiscal's Clerk, who sold in execution the debtor's interest in a mortgage bond executed in his favour by the defendant, granted to the purchaser the following document:

"*Levena Markan* has purchased the debt bond No. 6,958, dated 8th April 1868, for a sum of Rs. 30 sold under the writ No. 11,553 of the C. R. Panadura."

Held, that this was a sufficient assignment to *Levena Markan* of the execution-debtor's interest in the bond, and entitled the plaintiff, to whom *Levena Markan* had assigned his interest, to recover from the defendant the amount due upon the bond.

The defendant was indebted to one *Sadikka Lebbe*, upon a bond No. 6,958 dated 8th April 1868, secured by a mortgage of land, in the sum of £5, with interest thereon at the rate of 2*s.* 9*d.* per mensem. Upon writ of execution issued against the property of *Sadikka Lebbe*, his interest under the bond was sold and purchased by the execution-creditor, *Levena Markan*, to whom the Fiscal's Clerk conducting the sale gave the following document:—

"*Levena Markan* (the plaintiff) has purchased the Debt Bond No. 6958, "dated 8th April 1868, for a sum of Thirty Rupees sold under the writ "No. 11,553 of the C. R. Panadura.

"Panadura, 21st June, 1872.

"(Signed) L. DE FONSEKA."

By a notarial deed dated 27th July 1872 *Levena Markan* assigned his interest in the bond, among other things, to the plaintiff, who brought the present action to recover Rs. 100 as principal and interest due under the bond, but did not ask for a mortgage decree. The defendant denied that *Sadirka Lebbe's* interest had been validly assigned to *Levena Markan*, and at the trial contended that under Ordinance 7 of 1840, sect. 2, such assignment could only be by a notarial instrument. Evidence was given to show that according to the instructions of the Fiscal a stamped assignment had to be given to the purchaser, signed by the Fiscal before two witnesses. The Commissioner (*S. Haughton*) held that the instructions of the Fiscal regulating the sale of documents that confer an interest in land ought to be enforced, and nonsuited the plaintiff, who appealed.

29th October, 1872. *Dias* for the appellant.
Ferdinands, D. Q. A., for the defendant, respondent.

Cur. adv. vult.

5th December. The judgment of the Court (TEMPLE and STEWART, JJ.) was delivered by

STEWART, J.—It appears to us that the document of 21st June 1872 from the Fiscal's Officer is in effect an assignment.

The 20th section of Ordinance No 7 of 1840 exempts Certificates of sales by the Fiscal from the operation of the 2nd section.

Reversed. Judgment for plaintiff.

C. R. Kurunegala, No. 24,774 / 20,974 } PIADASSE TERUNNANSE *v* NAMBI NAIDE.

Buddhist law—Power of incumbent to lease or transfer temple and its appurtenances to another priest.

A Buddhist priest, the incumbent of a Temple, cannot lease or transfer his rights as such incumbent to another priest.

The plaintiff sued as incumbent of the *Rukmalle Vihare* to recover damages for non-performance of certain services due by the defendant as tenant of land belonging to the Vihare. The defendant denied plaintiff's title to sue, alleging that he was not the "owner or incumbent of the Temple, but a lessee under the proprietor, who was resident in Kandy and had no right according to the Rules of the Buddhist Religion to lease out the same." The Commissioner (*D. E. de Saram*) gave plaintiff judgment. Upon appeal by the defendant, the Supreme Court, on the 24th of October 1871, set this judgment aside and sent the case back for further evidence as to the "power of an incumbent of a Temple to lease out the Temple,

with the rights and services appertaining to it, to another priest," being inclined to the opinion, on the evidence as it stood, that such a power of lease was unknown to the Kandyan law. Before the second hearing *Darande Sumangala Unnanse*, "the lessor of the plaintiff," intervened in support of the plaintiff's case. After further evidence for the plaintiff, the Commissioner held that the deed was not a lease, but "a simple transfer from one priest to another (the former being unable to carry out the duties required of a resident incumbent) and that the conditions of the deed are not in any way repugnant to the tenets of the Buddhist Religion, as they especially enjoin that the Temple should be always properly repaired and maintained. In other respects also, the plaintiff in this case is simply to exercise his grantor's right. As regards the fee which the grantor is to receive, I do not think it invalidates the transfer in any way, as it has been explained that such a fee is only paid in recognition, and to keep alive the rights of the rightful incumbent. This Temple seems to have been held in precisely the same way, previous to this transfer, by other priests appointed by the incumbent." Judgment was again given for the plaintiff, and the defendant appealed.

The deed in question was in Singhalese and was dated the 24th of May 1865, and purported to be a "Paraveni deed" and to transfer to the plaintiff twenty-two lands (worth £200) in the village of Rukmalle, discribed as "given over to the villagers for *rajakaria* service" and as "possessed by me [the grantor] having been inherited from my tutor Kotagama Gunaratna Mahanayeke Unnanse, who died now about twenty years ago;" "to be possessed by him [the grantee] paying annually a sum of £1 15*s.* to the proprietor Sumangala Unnanse." The deed concluded as follows:—"Whereupon I do hereby give over to him the right and title I have in respect of the said premises, and in future I, my descendants, or any person who will obtain the letters of administration to my estate, shall not make any dispute by deed or word to this grant, and hence-forth the said [grantee] his descendants or any of his pupils who will obtain the letters of administration to his estate shall improve and possess the said lands, paying," &c.

Ferdinands, D. Q. A., for the appellant.
Dias (*Coomaraswamy* with him) for the plaintiff, respondent.

Cur. adv. vult.

5th December, 1872. The judgment of the Court (CREASY, C. J., TEMPLE and STEWART, JJ) was delivered by

STEWART, J.—If the Deed is bad as a Lease, the same reasons that make it invalid would apply in greater force to render it inoperative as a transfer in parveny.

See Austin p. 105, D. C. Matale No 19,169, where it was held that the incumbent of a Temple cannot alienate.

Set aside, plaintiff non-suited.

D. C., Colombo, No. 59,741. } GABRIEL *v.* COLENDE MARCAR.

***Indemnity—Contribution between wrong-doers—Wrongful sequestration of goods*—Ex turpi causâ non oritur actio.**

Plaintiff, the assignee of an insolvent estate, at the instance of the defendant, a creditor, procured the sequestration of certain shop goods as the property of the insolvent, defendant undertaking to indemnify the plaintiff against the consequences of the sequestration. A third party claimed the goods, and recovered damages against the plaintiff for a wrongful sequestration.

In an action by plaintiff on the indemnity, the court below held on the evidence that the plaintiff, before suing out the sequestration had taken no reasonable care to inquire whether the insolvent had any reasonable colour of title, and had blindly lent himself to the defendant in a case where he had the strongest reason for suspecting (if not knowing) the injustice of the claim; but that such conduct was not so "manifestly flagitious" as to fall within the rule *Turpes stipulationes nullius esse momenti*, and deprive him of the benefit of his indemnity. Judgment having been given for the plaintiff,

The Supreme Court, in appeal, affirmed the judgment, and

Held, that the rule against contribution between wrong-doers did not apply to this case, which fell within the exception to that rule established by *Betts* v. *Gibbins* (2 A. & E. 57).

The plaintiff sued to recover £405 14*s.* 8*d*, being damages and costs incurred by the plaintiff in consequence of certain acts done by him as assignee of the insolvent estate of *S. T. Aydroos Lebbe*, at the request of the defendant, who undertook by the following letter to indemnify him against such consequences:

Colombo, October, 1868.

H. D. Gabriel, Esq., Assignee
of the Insolvent Estate of
Siane Tamby Aydroos Lebbe.

SIR,—As one of the creditors of the abovenamed insolvent, I request that you will be good enough to take proceedings in Court and sequester the Shop No. 31 of Keyzer Street and 56 of Main Street, with the Account Books and Stores, therein and thereto belonging, ostensibly carried on, as the Shops of *Packeer Bawa* and *Samsee Lebbe Mahaminha Lebbe*, but really the property of the Insolvent. I have instructed my proctor, Mr. Thomasz, to supply you with the necessary information, and I hereby guarantee you against all costs and damages, which you may sustain or be made liable for by reason of such proceedings, undertaking hereby to indemnify you fully in the premises. I have," &c.

The amount claimed was made up of £150, awarded against plaintiff in an action brought by one *Ismail Lebbe* as damages for wrongful sequestration of his Shop goods, and £255 13*s.* 9*d.*, costs of the said action and in the insolvency proceedings. The other facts sufficiently appear in the judgment of the District Court.

25th April 1872. *Dias*, and *Ferdinands*, D. Q. A., for the plaintiff.
Coomaraswamy, *Morgan*, and *Grenier*, for the defendant.

18*th May*. BERWICK, D. J.—This is an action on a written indemnity whereby the defendant, who was one of the creditors of an insolvent, undertook to guarantee the plaintiff, who was then the Assignee of the Insolvent's estate, for all costs and damages that he might incur in taking "proceedings in Court" for sequestrating certain property which the defendant alleged to belong to the Insolvent, but which has after litigation been found not to be his—and for the seizure of which the true owner has recovered damages from the plaintiff in case No. 52,316.

The Answer contains only two pleas, one of which is that the plaintiff did not act under the authority of the Court, which plea can only mean that the plaintiff's proceedings were different from those, from the consequences of which defendant undertook to indemnify him. The other plea is "*non est factum*."

But another defence was raised at the trial, though not pleaded, which I shall first proceed to dispose of. It is grounded on the finding of the Court in the case No. 52,316 that the goods were not the property of the Insolvent but of the plaintiff in that case, and were unlawfully seized. It assumes that the present plaintiff seized them at the instance of the present defendant; and, as urged by *Mr. Coomaraswamy*, Counsel for the defendant, it is couched in the formula that there can be "no contribution betwixt tort-feasors." Considering, however, that the action is founded on a *contract to indemnify*, we will come more directly to the true point by inquiring whether the *contract* was to indemnify against doing an unlawful act, which would be within the Civil Law maxim *Ex turpi causa non oritur actio*.

What was the nature of the particular act in question, to which the defendant incited the plaintiff? *Prima facie* it was innocent enough. The defendant had alleged that the Insolvent and another were in league fraudulently to pass off the contents of two shops as the property of that other, and asked the plaintiff as Assignee to take legal steps to claim and have them sequestrated for the insolvent estate: which step would necessarily involve an action by the ostensible owner against the Assignee to try the true ownership and recover damages if the claim and seizure should prove unfounded. In all this there was clearly nothing improper; but the defendant's Counsel goes further, and in order to escape the consequences of the indemnity by which he persuaded plaintiff to comply with his request, asserts *his own client's fraud* in conspiring to prosecute this claim with full knowledge on the part of both himself and the plaintiff that they were involving themselves in a fraudulent claim which they knew to be an unjust and false one. If this were indeed made out by evidence, it would disclose (to use plain language) a very criminal attempt to steal, to which I would without hesitation apply Ulpian's rule, "*Turpes stipulationes nullius esse momenti*" (Dig. 45. 1. 26.) I am glad to say there is no evidence of so flagitious a contract as is depended on. The judgment in 52,316 has been put in evidence, and the most it establishes against the plaintiff is that he so facilely made himself the tool of others in making this claim and seizure, and did so with so much rashness and obvious reason for not relying on the assertions on which he acted, that his con-

duct was very reprehensible and made him deserve no consideration in the estimation of the damages he should pay for the wrongful seizure. The judgment, however, has not gone the length of saying that he prosecuted the sequestration *maliciously* or fraudulently. I have examined a great many English decisions with a view to the decision of the present case, and a great many texts and authorities in the Civil Law, but the most extreme application of the doctrine relied on that I can find is in Vinnius' Commentary on the Institutes (3. 20. 23), where it is said, "*Nec ea tantum quae aperte flagitiosa sunt in stipulationem deduci non possunt, verum etiam quae bonis moribus adversantur,—veluti si de futura successione contrahitur.*" The example given by him (from the Digest 45. 1. 61) has, however, been greatly modified by the Dutch Law (see Voet 2. 14. 16. 17). Voet also, enumerating unlawful contracts in the place just cited from his work, says, "*Nec turpia aut probrosa, in bonos mores incurrentia, aut invitantia ad delinquendum*;" but this clearly does not go further than the indisputable case of an indemnity against the commission of a breach of the Criminal Law. If the contract in question is to be held "*turpis aut probrosa*," it must be on the ground that the parties either conspired knowingly and fraudulently to *rob* the owner of the goods by a judicial procedure; or, second, that they maliciously and falsely conspired to use the process of the law to *harass* the owner by seizing the goods without probable cause; or, third, simply to seize the goods and make a random judicial claim to them without probable cause or colour of title. The first hypothesis would unquestionably make the agreement "*turpis et probrosa*," but there is no good reason for holding that the facts support that hypothesis. The second alternative I put aside, for the object was to get the goods for the estate, and not annoyance to the owner. If, therefore, they were not guilty of the first two alternatives, there remains only the last, and this I consider the true nature of the *defendant's* intention; while as regards the *plaintiff's* intention, I think that he simply took no reasonable pains to inquire whether there was a reasonable colour of title, and blindly lent himself to the defendant in a case where he had the strongest reason for suspecting (I will not say for knowing) the injustice of the claim. This conduct, I think, was discreditable enough, though, after great doubt, I do not think it so "manifestly flagitious" (to use the words of Vinnius) as to deprive him of the benefit of his indemnity. Not that I have arrived at this opinion without considerable consideration and doubt, and it is well that it should be known how very near the margin of the law the plaintiff's conduct has led him.

It has indeed been doubted by Mr. Justice Maule, in *Fry* v. *Nicholls* (2 C. B. 510), whether an action will lie against a party for conspiring to bring a civil action without probable cause; and a number of authorities are collected in Broom's *Legal Maxims*, p. 187, more or less illustrating a similar doubt; and there is abundant reason on grounds of public policy for not attempting to narrow men's discretions as to the circumstances under which they are to use or to abstain from the Courts of Justice. Yet, even if express malice or fraud be wanting, still where a party has sued another absolutely without any probable cause at all, or without using ready

means to his hand by which he might have learned the injustice of his claim, I am by no means clear that the *Civil Law* will give the sufferer no better damages than the costs of the suit. But it has been held in this country that an action does lie for suing out a malicious sequestration in a civil suit without probable cause, and it is impossible in reason to distinguish between an oppression and fraud on a man's person (as in the case of malicious prosecution or arrest) and an oppression and fraud executed on his goods.

In a case of doubt, however, whether the compact was one "*turpis et probrosa*" within the meaning of the law—in what I may call a case of legal ethics—I think that the following authorities will give me a safe guide.

In *Ward* v. *Lloyd* (6 M. & G. 85) it was held that "the intention to interfere with the course of public justice should distinctly appear." In *Adamson* v. *Jervis* (4 Bring 73) Best, C. J., commenting on *Merryweather* v. *Nixan*, said, "The rule that wrong-doers cannot have redress "or contribution against each other is confined to cases where the per- "son seeking redress must be presumed to have *known* that he was doing "an unlawful act." And Taunton, J., in *Betts* v. *Gibbons* (2 A. & E. 57) commenting on the same leading case, said "The law will not imply an "indemnity between wrong-doers. But the case is altered when the matter "is indifferent in itself, and *when it turns upon circumstances* whether the "act is wrong or not." In the same case Williams, J., made observations very pertinent to the present one, too long to quote conveniently at length, but amounting to this, that distinction is to be drawn between "*obviously unlawful acts*" and others. "The defendant (he says) requests the plain- "tiff to do an act which at the time was undoubtedly equivocal, because "it has been made a matter of argument to-day whether they were not "authorized in doing that act; but most certainly the act is so far doubt- "ful that there is not the least resemblance between this and any which "are of a *notoriously illegal* character." Again, in the notes to *Collins* v. *Blantern* in Smith's Leading Cases (page 348 of the 6th Ed.): "it seems "that a contract is not illegal or void simply because private rights are "interfered with by the act stipulated for, e. g. where the consideration "is a breach of contract or of private trust, the contract may be enforced, "and the persons injured by its performance are left to the ordinary means "of redress." See other illustrative cases cited in Chitty on Contracts, 8th Ed. pp. 471, 624, 636 With reference to the cases turning on indemnity bonds to Sheriffs, I may add that it does not appear to me that the proceeding against which the plaintiff in this case was to be indemnified was a clear violation of his legal duty, though I think that a better apprehension of his moral duty would have made him proceed with greater circumspection.

I have fully considered this part of the defence raised at the trial rather than appear to avoid the question by taking advantage of an omission in pleading. But strictly speaking the defendant's Counsel was not entitled to have it considered without amendment of his answer, for the defence was not pleaded as it ought to have been if intended to be relied on. It was said that the plea of *non est factum* was intended to apply to this illegality—like fraud, minority, &c., should be expressly plead-

ed and cannot be taken advantage of under the plea of *non est factum*. This has been well and long established. See the notes to *Collins* v. *Blantern* (1 Sm. L. C. 354.)

After the length at which I have considered this question I will not enter at large into another defence also taken only at the trial and not pleaded, viz. the alleged want of consideration, as it ought to have been pleaded if it was intended to rely on it. I only note (for the defendant's benefit) that it was argued that if the compact was not illegal, it was plaintiff's *duty* to comply with defendant's request to seize the property, and being so the indemnity was gratuitous, and therefore void for want of consideration. It will be enough to say that in this view I do not concur.

Defendant's Counsel also contended that the indemnity was to the plaintiff in his official capacity as Assignee and for the benefit of the estate: and not for damages recovered against him personally. I think this contention also unfounded.

I now come to the one gound of defence which has been pleaded (besides that of *non est factum*) viz. that the plaintiff did not pursue the authority of the Court. This argument is founded on the observations in the judgment in 52,316, and the record in the Insolvency case, where it appears (1) that the plaintiff (or his proctor) moved the Court for a sequestration, whereas the *Insolvency Ordinance* only speaks of a search warrant; (2) that the Court disallowed the motion for sequestration and granted a search warrant; (3) that notwithstanding this, parties and their proctors all through assumed that a sequestration had been allowed, and acted accordingly; (4) that whereas this Court only authorized the seizure of the *Insolvent's* goods, the plaintiff procured the seizure of the goods of another party, who recovered damages for this. The Court, however, finds that in all that was done the plaintiff closely pursued the request of the defendant, for which the indemnity was given. This request was "to take proceedings in Court to sequester;" and it was not to sequester the Insolvent's property but certain *specific goods* which the defendant expressly indicated. It cannot be justly said that the indemnity was against doing one act, and that the plaintiff or his proctor did another. It is proved abundantly that whatever technical irregularities there may have been in the process, and whatever blunders in the seizure of goods not belonging to the Insolvent, all was done in precise compliance with the defendant's desire and immediate instigation, and that, after the fact, these were all entirely homologated and adopted by the defendant, even to the defence of the suit for damages, to which the defendant was an active though outside party.

Judgment will be entered for the plaintiff for the whole amount of the claim in this case, except the Bill of Costs marked B, which, not having been taxed, must be reserved for the present.

The defendant appealed.

12th *December*, 1872. *Coomaraswamy* for the appellant.

Dias (*Ferdinands, D. Q. A.*, with him) for the plaintiff, respondent.

Cur. adv. vult.

17*th December*. The judgment of the Court (CREASY, C. J., and STEWART, J.) was delivered by

CREASY, C J.—The rule against contribution between wrong doers has been referred to in this case, but the case comes fairly within the exception to that rule cited in Broom's Legal Maxims, page 829, Ed. 1845, and taken from Lord Denman's judgment in *Betts* v. *Gibbins* (2 A. and E. 57). Lord Denman's words are :—" Where one party " induces another to do an act, which is not legally supportable, and yet " is not clearly in itself a breach of law, the party so inducing shall be, " answerable to the other for the consequences."

Affirmed.

APPENDIX.

APPENDIX A.

(To *Fernando* v. *Morgan*, *ante* p. 57).

D. C., Galle, No. 26,570. } WEERESOORIYE v. MORGAN, Q. A.

Plaintiff on 18th May 1867 bought a piece of Crown land, 13 acres in extent, at a sale held by the Government Agent, and paid the full purchase amount and fees, amounting to £41 10*s*., within a month of the sale, as required by the Conditions. On 25th May 1867 the plaintiff entered into a contract with certain persons to clear and plant the land, paying them £17 6*s*. 8*d*. The Crown thereafter refused to complete the sale and issue a grant, and plaintiff brought the present action in August 1867 to recover the purchase money, and also the £17 6*s*. 8*d*. as damages. The defendant pleaded a tender of the £41 10*s*., which he paid into Court, and denied the liability of the Crown for the damages. The Conditions of Sale provided that on payment of the purchase amount and fees a grant would be issued to the purchaser under the Public Seal of the Island; and that "on the purchaser having performed all the conditions "in the preceding clause mentioned on his part to be done and performed, "in order to obtain a grant of the said land, he will be let into posses- "sion thereof." Plaintiff paid the balance nine-tenths of the purchase money on the 4th June 1867. The evidence showed that plaintiff had on 25th May 1867 entered into a written contract with three persons to clear and plant the land for £26, of which £8 13*s*. 4*d*. had been paid at the signing of the contract, and £8 13*s*. 4*d*. subsequently. After about nine acres had been cleared (the clearing commencing about 9th June), the Mudaliyar stopped the work. Plaintiff was informed by the Government Agent on 24th July 1867 that the Government had cancelled the sale. The District Judge (*C. P. Walker*) gave judgment for the plaintiff. The defendant appealed.

Morgan, Q. A., for the appellant.

8th July, 1869. The Supreme Court think this judgment erroneous.

It is clear that the sale went off, not through any wilful unfairness on the part of those who acted for the Crown, but because it was found that there were difficulties as to title. The plaintiff is claiming for money laid out by him on the land before the time when, according to the meaning of the Conditions of Sale, he was entitled to take possession. We think that he must himself bear the consequences of his having acted in that manner. There are strong authorities in English Law to show that a purchaser who chooses to make improvements on the land before the title is ascertained does so at his own risk. See the judgment of Coltman, J., in *Worthington*

v. *Warrington* (8 C. B. 141) and Lord St. Leonards' *Law of Venders and Purchasers*, p. 363 (14th Ed.) But there may be some difference in the Roman Dutch Law as to this. See 2 Burge, p. 567. We give no opinion on this general question. The terms of the Conditions of Sale seem to us enough for the determination of this case. In such disputes it may be sometimes necessary to remember that the Crown is not bound to covenant for title. See Lord St. Leonards, p. 575; 2 Burge 553.

Set aside. Plaintiff non-suited.

[NOTE.—This case is reported in Vanderstraaten's Rep. p. 15.]

REPORTS

OF CASES DECIDED IN APPEAL IN THE YEAR 1875.

C. R., Panadura, No. 16,140. } *Perera* v. *Hendrick.*

Court of Requests—Arbitrator appointed by—Power to award larger sum than the Court of Requests.

An Arbitrator appointed by a Court of Requests cannot award a larger sum than the court itself has power to award.

Browne for plaintiff appellant. *Ondaatje* for defendant respondent.

19*th January*, 1875. MORGAN, C. J.,—The Arbitrators deriving their authority from a Court of Requests cannot award a larger sum than the court itself has jurisdiction to award.—Set aside and case sent back for trial.

P. C., Kalpitiya, No. 4,590. } *Seguladu* v. *Segu Meera.*

False evidence—Contempt—Prevarication.

The giving of false evidence does not necessarily constitute a contempt of court.

This was an appeal by a witness against a conviction for contempt of court.

22*nd January*, 1875. MORGAN, C. J.,—The appellants may have committed perjury, but the giving of false evidence, does not necessarily constitute a contempt of court, and there is nothing in the record of the appellant's evidence to shew that they were guilty of such prevarication as would render them punishable for contempt. The attention of the police magistrate is drawn to the following judgment of this court in the case No. 43,832 C. R. Colombo,—

"The Supreme Court has repeatedly pointed out the necessity of caution and forbearance in the employment by judges and commissioners of the power of committing for contempt, although the existence of such a power is indispensable for the due administration of justice, and it ought to be firmly put in force on proper occasions. But it would be hazardous in the extreme to give a general sanction to the use of this summary punish-

ment as it has been used by the commissioner of the Court of Requests on the present occasion, for such a merely constructive contempt as the attempt to deceive the court by false evidence. Without saying that there never can be cases of such flagrant and insolently audacious falsity as to amount to contempt of court, we have no hesitation in saying that such cases must be very extreme and very rare ; and that the present case is not one of them.

It may be well to bear in mind that the mere falsehood does not amount to prevarication, and we would draw attention to the valuable advice as to committals for contempt which is contained in the judgment of the Supreme Court delivered by Sir William Rowe on the 3rd June 1857 in case 18,928, C. R. Jaffna, which is reported in part 2 of Lorenz's reports, page 85."

D. C., Colombo, No. 65,685. } *Mantell* v. *Gunasekere.*

Fiscal's Sale—Misdescription. Rule *nisi* for setting aside sale.

The fiscal having sold certain immovable property, described in his advertisement as "all that house and ground bearing assessment No. 34," the defendant moved for a rule to have the sale set aside on the ground that the property sold consisted not only of the tenement No. 34 but of two other tenements numbered respectively 34*a* and 35*b*.

Held, that although the boundaries given included all the three tenements, the misdescription was a substantial one and a sufficient *prima facie* case for a rule had been made out.

This was an appeal from an order of the district court, discharging a motion by the defendant for a rule to have a fiscal's sale of certain houses, the property of the defendant, set aside.

Grenier for defendant appellant.

Layard for plaintiff and respondent.

Browne for claimant and respondent.

22*nd January*, 1875.—The judgment of the court (MORGAN, C. J., STEWART and CAYLEY, JJ.) setting aside the order appealed from was delivered by the Chief Justice as follows :—

The order of the 2nd day of December 1874 is set aside, and motion for rule applied for on the 2nd December 1874 allowed.

It appears to the Supreme Court that a sufficient case for rule has been made out by the applicant. The property is described in the Fiscal's advertisement as "all that house and ground bearing assessment No. 34," and it appears from the applicant's affidavit that the property sold consisted not only of the tenement No. 34, but of two other tenements numbered respectively 34*a* and 34*b*. This the Supreme Court thinks is a substantial misdescription. It is true that the boundaries given include all the three tenements, but intending purchasers, would be far more likely to be guided

by the assessment number of a house, which is patent, than by the description of boundaries, which would require further investigation; and the sale of a block of three small adjoining tenements might tempt investors to go to the auction and bid, who would not care to lay out their money in the purchase of one of such tenements only. The Supreme Court pronounce no opinion on the question whether the appellant has sustained any substantial injury by reason of the irregularity complained of; but it thinks that a sufficient *prima facie* case is made out for further enquiry.

P. C., Jaffna, No. 6,955. } *Valayutha Udayar* v. *Vetty Valen.*

Close season—Killing deer—Amount of fine—Ordinance No. 6 *of* 1872 *cl.* 11 *sub-sec.* 1 *and* 2.—*Construction of Statutes.*

A Police Magistrate has power to exercise a discretion in determining the amount of fine under subsection 1 of clause 11 of Ordinance No. 6 of 1872.

In a case of doubtful construction the legislature should be presumed to have given rather than withheld the power to exercise a discretion in determining the amount of fine.

P. C. Chilaw 10,071 approved and followed; P. C. Kalmunai 2240 (Grenier's Reports, 14) disapproved.

This was an appeal by the defendant from a sentence of the police magistrate upon a charge of killing a deer in the close season.

22*nd January*, 1875.—The judgment of the court was delivered as by CAYLEY, J. as follows :—

The judgment of the 5th day of January 1875 is amended by the amount of fine being reduced to ten rupees (Rs. 10.) Appellant has pleaded guilty to the charge of killing a deer in the close season, and the police magistrate has imposed the full amount of the fine, provided by the Ordinance No. 6 of 1872, that is Rs. 50. The defendant stated that the animal trespassed on his field, and this statement is somewhat borne out by the admission of complainant himself that the defendant's paddy crop had been destroyed by deer. In view of this and of the plea of guilty, the Supreme Court thinks that the fine should be reduced if it can be legally reduced. There are conflicting decisions of this court as to the necessity of imposing the full amount of the fine on a conviction for killing game in the close season, and the construction of the Ordinance No. 6 of 1872 with regard to this point is one of some difficulty. The 11th section enacts that any person who shall kill game during the close season, shall be "liable to a fine of Rs. 50"; that any person who kills game in a crown forest reserved shall be liable to a fine not less than Rs. 50; and that any person, who is found during the close season in possession of meat of game, which he is not able to account for satisfactorily shall be "liable to a fine *not exceeding* Rs. 50." It would appear from the distinction drawn by the 1st and 2nd sub-sections of the clause referred to (the former rendering the

killing of game during the close season liable to a fine of R. 50, and the latter rendering the killing of game in a reserved forest liable to a fine of *not less than* Rs. 50), that it was the intention of the legislature to give the court a discretion in the former case as to the amount of fine to be inflicted, and none in the latter, and this view was taken in the case No. 10,071 P. C. Chilaw by this court. On comparing however the 1st sub-section of the 11th clause with the 6th sub-section, it would appear from the expression in the latter, "liable to a fine *not exceeding* Rs. 50," that the legislature intended to confer no discretion as to the amount to be imposed when the words liable to a fine of Rs. 50 were used ; and this view was taken in the judgment of this court in 2,240 P. C. Kalmunai (Grenier's Reports, page 14.) In the Chilaw case No. 10,071 no counsel appeared and the previous judgment in the Kalmunai case was not brought to the notice of this court. It is important that the question should be settled definitively, and the Supreme Court thinks that the judgment in the Chilaw case should be adhered to. The Ordinance has left the question of discretion in doubt, and valuable as its provisions are, it must be remembered that it is a strictly penal enactment, creating a new branch of law and making a number of acts punishable as offences which have been hitherto perfectly lawful.

In construeing an enactment of this kind, the Supreme Court thinks that in a case of doubt the construction should be rather in favor of the offender than adverse to him. It is manifest that the gravity of the offence of killing game in the close season may vary considerably in different cases. The quantity killed, the circumstances under which the game is killed, the fact of previous convictions, and such like matters might reasonably be taken into consideration in determining the amount of fine to be imposed. And the power of a police magistrate to exercise a discretion in determining such amount is, we think, a valuable power, and one therefore which in a case of doubtful construction the legislature should be presumed to have given rather than withheld.

In the present case we think that the fine may properly be reduced, and it is accordingly reduced to Rs. 10.

C. R., Kandy, No. 56,925. } *D'Esterre & Co.* v. *Gibson.*

Order for goods—Price—Return of goods.

Defendant sent an order to plaintiff for certain goods in these terms "please deliver to bearer and state price [here followed a description of the goods]." The goods were delivered to bearer with a memo. of the price. Defendant being dissatisfied with the price returned the goods which the plaintiff declined to receive and then brought his action for goods sold and delivered.

Held, that the contract of sale was void in as much as no price had been agreed to.

Held, also that the delivery to the bearer of the order was not such an acceptance by the defendant as to render him liable, he having so soon as he was apprised of the price returned the goods.

In this action the plaintiff sued the defendant for the value of goods sold and delivered by him to the defendant. It was in evidence that the defendant sent an order to the plaintiff for the goods in these terms, "please deliver to bearer and state price [description of goods]." The goods were delivered to the bearer with a memo. of the price. The defendant, considering the price exorbitant, returned the goods but the plaintiff declined to receive them. The commissioner dismissed plaintiff's action with costs.

In appeal, *Ferdinands* for plaintiff appellant.

29*th January*, 1875.—The judgment of the Supreme Court was delivered by STEWART, J.,—

The judgment of the 16th day of October 1874 is affirmed.

It is essential to constitute a valid contract of sale that the price of the thing sold should be fixed by the parties to the agreement, or left by them to the determination of a third person. Where also the price is left exclusively in the discretion of either the purchaser or the seller, the contract cannot be enforced. Herbert's Grotius, p. 341, Vanderlinden p. 218.

Even admitting, therefore, that the order given by the defendant left it entirely to the seller to fix his own price without any further assent on the part of the purchaser being necessary, the contract would still be void.

Nor does the Supreme Court think that under the circumstances the delivery of the goods to the bearer of the order was such an acceptance by the defendant as to render him liable, he having as soon as he was apprised of the price returned the goods.

C. R., Colombo, No. 101,387. } *Francina Fonseka* v. *Gibbs.*

Master and servant—Register book—Character—Damages—Justification.

A master who does not justify the bad character given by him to his servant in the register book is liable in damages.

Pleas of justification ought to be strictly proved and to cover the particular imputation made.

Layard for defendant appellant.

The facts in this case appear sufficiently in the judgment in appeal, which was delivered by MORGAN, J.

29*th January*, 1875.—The judgment of the 30th day of October 1874 is set aside, and judgment entered in plaintiff's favor for fifty rupees with costs of suit.

Plaintiff who had been an ayah in the employ of defendant claims damages for describing her character in the Servant's Register Book, as "bad and deceitful." The defendant (Mr. Gibbs) pleaded that plaintiff had been guilty of misconduct whilst in his service "and that the defendant in-

serted as he was bound to do her true character." At the trial the plaintiff gave evidence negativing the charge and the defendant offered evidence in support of his plea. Mrs. Gibbs swore that she had occasion to find fault with plaintiff four times. Neglect of the children, refusing needlework and being unfaithful in her charge were her faults. She once entrusted the plaintiff with her keys with orders not to give them to any one else, that Mrs. Gibbs found the lock of the almirah broken, and that on questioning her, she told Mrs. Gibbs, that she had given the keys to the boy, that she was neglectful of the children on one occasion and lost them at the races. On another occasion she allowed the children to go into the water, and the little girl was nearly drowned—that she was obliged to dismiss her and that the character she gave was a true one.

The instances deposed to show that the plaintiff was neglectful of her duties and disobedient, but in no way justifies the charge that she was deceitful which conveys the meaning in ordinary language that she was "full of deceit, serving to mislead or insnare, trickish, fraudulent, cheating." A master may be inclined to give another trial to a servant charged with neglect or disobedience, but will naturally feel very disinclined to admit a bad and deceitful maid servant within his door.

Pleas of justification ought to be strictly proved, and to cover the particular imputation made. This cannot he said of the proof offered in this case. There is no evidence that her statement that she had given the key to the boy was false, no instances are given of the vague imputation of being "unfaithful in her charge," which Mrs. Gibbs swore to, and which in the absence of other instances must be taken in connection with the instances given. A servant in charge of children may be said to be unfaithful if she neglects the children, but this is a very different thing from being "bad and deceitful."

The learned commissioner has recorded as his judgment "plaintiff has failed to substantiate her claim." But this is not a correct view to take of the case. The defendant simply justified on the ground that the character given by him was a true character. Evidence that the imputation was unfounded was offered and it was incumbent on the defendant to shew that the charge as made was strictly and substantially true; and this he has failed to do. Every allowance must be made for employers who have to testify to the character of retiring servants, and every reasonable presumption made in their favor. But such employers must on the other hand, take care that they do not, by giving hasty and undeserved characters, ruin the prospects in life of a servant who depends upon service as a means of livelihood. The complainant in this case produced testimonials, all very strongly in her favor from Mrs. Strombe, Mrs. Rust, Mrs. Desberough, Mrs. Mitchells, Mrs. Adams, Mrs. Gray, Mrs. Hume, Mrs. Carver and Mrs. Rowlands in which she is spoken of as being "very attentive and desirous to please and particularly kind to children"—"perfectly honest and steady"—"thoroughly honest"—"very honest and steady,"—as "knowing her work thoroughly and being most respectable,"—as "honest and always steady,"—as "a very good lady's ayah and doing her work well"—"thoroughly honest and respectable,"—as "having punctu-

ally and faithfully discharged her duty and having conducted herself soberly and honestly," the effect of all which, the reward of life-long services, may be thoroughly lost to her by the last character of which she now complains.

D. C., Kandy, No. 162. } *In re Jusey Peries* and another.

Insolvency—Sequestration of estate of partners—Grant of certificate—Fraud—Application for rehearing—Ordinance No. 7 of 1853, *clause* 133.

J. P. and D. D. (partners) were adjudicated insolvents and obtained certificates. Afterwards a creditor moved for sequestration of the estate of P. P., S. P., and D. H. (partners of J. P. and D. D.) and that the same might be duly dealt with in the insolvency case, and further that the court might order a rehearing of the matter of the certificate already granted to J. P. and D. D.

Held that under the circumstances, the allowance of the certificate might be re-considered, but that as regards the application of the creditor to have the estate of P. P., S. P., and D, H. sequestered, the proper course was for him to come forward as petitioning creditor and apply that they might be adjudged insolvents *qua* partners of the insolvent firm.

Held also that it is only under very special circumstances that the matter of a certificate should be re-opened when there has been a considerable lapse of time between the grant and the application for the re-hearing.

Jusey Pieris and Don Domingo were adjudicated insolvents in this case and obtained certificates of the first class. Subsequently, a creditor on discovering that Pedro Perera, Silvestry Perera, and Don Hendrick were parters of Jusey Pieris and Don Domingo, moved that the estate of the three former might be sequestered and dealt with in this case, and that the court would order a rehearing of the matter of the certificate already granted to Jusey Pieris and Don Domingo with a view to the cancellation of the same. The motion was disallowed. As regards the first part of the motion, the District Judge (*Lawrie*) held as follows :—" It seems to me that the regular course would be for the creditor of the firm to come forward now as petitioning creditor and apply that those three men may be adjudged insolvents *qua* partners of the insolvent firm. Whether that be the right course or not, I don't find in the Insolvent's Ordinance any power given to the court to deal with the property of men who had not been declared bankrupt." The creditor appealed.

Layard for appellant.
Grenier for respondent.

29*th January*, 1875.—The following judgment was delivered by MORGAN, C. J.,—

The order of the 3rd of August 1874 is set aside, as respects the order for a rehearing under the 133rd section of the insolvency ordinance ; but affirmed as respects the sequestration applied for of the estate of Pedro Perera, Silvestry Perera and Don Hendrick. Costs to stand over.

The section referred to fixes no time after which the court is precluded from receiving applications to rehear a case ; but it is only under very special circumstances that the matter of a certificate should be reopened, when there has been a considerable lapse of time between the grant and the application for the rehearing. Every application must depend on its own merits. The facts found in the judgment in District Court Kandy 48,159, were evidently known at first to the insolvents, his partners and their subordinates, and it is only after differences arose between them that they became revealed to third parties. That judgment, affirmed in appeal, shews a case of gross fraud practised by the insolvents upon their creditors in suppressing the fact that they had partners, men probably who were able to meet the obligations of the firm ; and the applicant came forward within a reasonable time after that judgment.

The formal withdrawal by the Oriental Bank of the opposition to the issue of the certificate doubtless weighed with the learned District Judge, when he refused the application to grant a rehearing. But there is nothing to shew that the bank knew of the pendency of the case 43,159, and the unexplained loss of the original record prevents us from ascertaining in what stage the insolvency proceedings were when the above case was brought. This is clear, however, that the adjudication was made in 1864, and that the time fixed by the court for the application for the certificate expired in February 1869. The application was not, however, made till July 1870. The case 43,159, though instituted in June 1865, seems not to have been pressed on vigorously, and the last proceeding taken was in October 1867, when the 3rd defendant filed his answer. The case was formally struck off the list of pending cases in April 1870. In October 1871, it was allowed to be re-instituted. It was decided in appeal in June 1873. Assuming that the Bank knew of the pendency of that case, of which there is no evidence, the delay in proceeding to trial might well have led a creditor, utterly ignorant of the real facts of this case, to believe that nothing was likely to come out of it, and therefore to withdraw what seemed then a fruitless opposition.

The learned district judge thinks it not sufficiently shewn by the proceedings that the certificate was obtained either on false evidence, or by reasons of an improper suppression of evidence, or otherwise fraudulently obtained, so as to bring the case within the provisions of the clause 133 of the Ordinance 7 of 1853. It is however impossible to suppose that Mr. de Saram, the then district judge, would have granted them a certificate of the first class without any enquiry, if he had been aware that, up to that time, they had suppressed their cash book and the fact that they were trading in partnership with other persons. In the affidavit on which they applied for their certificate, they do not mention the existence of the other partners, but describe themselves only as trading under the firm of Jusey Pieris & Co., and they also in substance, if not in so many words, deny that they kept a cash book. It is clear that if they actually had other partners, and had really kept a cash book, the court was purposely deceived by the affidavit upon which the application for a certificate was made.

We pronounce of course at present no opinion as to whether the certificate was properly or improperly granted, but we think that a sufficient *prima facie* case has been made out to warrant a rehearing of the matter.

D. C., Galle, No. 34,639. } *P. and O. Company* v. *Boyd.*

Collision of ships—Contributory negligence—Damages—6th Port Rule of 6th January 1866—*Employment of pilot at the port of Galle.*

The owner of a ship which sustains an injury from collision with another ship cannot make the master of the latter liable in damages even if he were proved to have acted negligently, if plaintiff himself were guilty of negligence which substantially contributed to the injury, and were wanting in ordinary care which might have avoided the consequences of the defendant's negligence.

In determing the question of negligence it is material to consider whether the customary rules of navigation have or have not been observed.

Authority of Port Rules made under the Master Attendant's Ordinance considered; also the employment of pilots.

This was an action to recover Rs. 1,500 damages consequent on a collision of the ship "Dhoolia," of which the defendant was master, with the "Ellora," one of the company's vessels. The libel averred that the "Dhoolia" steamed into the Galle harbour and carelessly and negligently anchored in a dangerous position with the head towards the S.S. "Ellora," and that in consequence of such carelessness ran foul of the "Ellora," causing her serious damage, cutting her port life boat down to the keel, also 5 planks on the starboard quarter in way of the davit. The defendant pleaded 1st not guilty, 2nd denied negligence, 3rd denied that damage to the extent of Rs. 1,500 or any damage at all was caused, 4th that the steamer was in charge of a pilot whom he was bound to obey, 5th that the steamer was anchored at the place appointed by the Master Attendant, 6th that it was the duty of the "Ellora" under the Masters Attendant's Ordinance 6 of 1865 and Port Rule 6 of 6th January 1866 passed thereunder "to turn in board boats' davits and not to allow the boats or things belonging to the vessel to be suspended from the sides during the time she remained anchored in the harbour."

On these issues parties went to trial on the 14th October 1874 before the district judge and three assessors Blythe, Vanderspar and Hayley.

The assessors delivered their written opinion to the following effect :—

1.—Relying on Rule 6 of Port Rules passed on 6th January 1866 under clause 6 of Ordinance 6 of 1865, they exonerated S. S. "Dhoolia" from all liability, the "Ellora" having had her boats swung outside.

The learned district judge refused to adopt the opinion of the assessors and held that the "Dhoolia" did not exercise ordinary caution.

2.—That the 6th Port Rule of 6th January 1866 was ultra vires and that boats were not included in the term "other things."

3.—There was no contributory negligence on the part of the plaintiff.

4.—The employment of a pilot was not compulsory, and the voluntary employment of one did not absolve the defendant from liability.

5.—The 9th clause of Ordinance 6 of 1865 authorised the Master Attendant to select a place for the anchorage of the ship; a pilot could in no sense be considered the Master Attendant, nor had he under the Ordinance authority to act for the Master Attendant. The pilot employed by the master of the "Dhoolia" must be considered to be the servant of the person employing him, and the pilot having in the course of such employment selected a dangerous place for the anchoring of the vessel, the master of the "Dhoolia" must be held liable.

Judgment was thereupon entered for plaintiff as prayed with costs.

29*th January*, 1875.—The judgment of the court was delivered by MORGAN, C. J. as follows :

Pilot Jansz, whose evidence there is no reason to question, describes the circumstances under which the "Dhoolia" did damage to the boats of the "Ellora," which said damage is the cause of the action. The "Ellora" was not anchored in the Galle harbour; the "Dhoolia" entered the harbour in charge of the pilot. He wanted to get to windward of the "Ellora," but could not, because there was the "Maria Louisa" in the way; so he took her to lee-ward of the "Ellora," and anchored her there. As the "Dhoolia" was a heavy ship, he could not take her to the berth he intended. As there was room to lee-ward of the "Ellora," he got in there and steamed ahead to get clear of a Dutch Frigate which was ahead of the "Ellora." When he was steaming ahead and saw that the Dutch Frigate was cleared, he stopped and then he observed that the "Dhoolia" was approaching the "Ellora," so he went full speed astern. There was a heavy swell which caught the "Dhoolia" and he broached the "Ellora's boats. The boats were damaged. They would not have been damaged if they had turned in board. Nothing happened to the ship. There was plenty of room there to anchor the ship. He (the pilot) selected the place of anchorage.

There was thus no negligence on the part of the defendant. But even if it were proved that he acted negligently, he will not be liable, if it appear that the plaintiff or his agents were guilty of negligence which substantially contributed to the injury, and that he might by ordinary care have avoided the consequences of the defendant's negligence (Maude and Pollock on Merchant Shipping, p. 462.)

It is always very material in enquiring into the question of negligence to consider whether the customary rules of navigation have or have not been observed. The Master Attendant's Ordinance (No. 6 of 1865) authorises the Government to make regulations for the following among other matters,—

"For the removal or proper hanging or placing of anchors, spars and other things, in or attached to vessels in any such port (section 6 art. 4)" and (after specifying several matters) "for regulating all other matters "necessary to provide in every respect for the preservation of the ports

"and the better regulation of the shipping therein," and not specially provided for by the Ordinance (sec. 6 art. 4.) The port regulations were enacted under the Ordinance on the 6th January 1866. The clause provides as follows :—

"All vessels are to rig in their jib and driver booms and to turn in "board boats davits ; vessels laying with their yards square, or with spars, "anchors, or other things projecting from their sides which may occasion "fouling with another vessel will do so at their own risk, and shall re-"move such anchers spars or things when required by the master attendant,"

The assessors (Messrs. Blythe, Vanderspaar and Hayley) gave it as their opinion, that as the damage was injury to two of the Ellora's boats which were hung at the davits outside at variance with the Port rules, the "Dhoolia" could not be held liable for the same. The learned acting district judge took a different view and held that the rule referred to was one which the Government were not authorised to make under the Ordinance. The Supreme Court does not however concur with him in this view ; the rule was one which the Government were fully empowered to make under either the 4th or 14th article of section 6, and it is a rule reasonable and necessary in any port, much more in a port so small and usually so crowded as the port of Galle. Had the plaintiffs or their agents obeyed this rule, the damage they complain of would have been prevented; by not doing so, they substantially contributed to an injury which they might by ordinary care have avoided.

The provisions in the Ordinance touching pilots have not been proclaimed in Galle, and proclamation is necessary for their validity. But whether proclaimed or not, the vessel was under the care of a duly licensed pilot. It is for the Master Attendant (sec. 9) to appoint the place in the harbour, where a vessel is to cast anchor and all pilots (sec. 18) under the control and subject to the orders of the Master Attendant. The work of assigning berth to vessels is confided to pilots who act in this respect as the agent of the Master Attendant, and in assigning a berth to the "Dhoolia" that pilot conformed to the general instructions he had received from the Master Attendant. Every reasonable precaution which a vessel could take was taken by the "Dhoolia ;" the ordinary precaution necessary to avoid damage of this description was neglected by the "Ellora."

Set aside.

D. C., Colombo, No. 66,046. } *Morgappa Chetty* v. *Omer Lebbe Markar* and another.

Confession of Judgment—Power of Attorney to Proctor—making of confession in Proctor's own name—sufficiency of such confession.

A confession of judgment under a valid power of attorney to a proctor, who had signed the confession in his own name and not in the formal manner "O. L. M. by his attorney F. C, L.," is not bad, if upon the whole instrument it can be collected that F. C. L.'s confession was made and signed on behalf of O. L. M.

Plaintiff sued defendants on a bond granted by them in favour of plaintiff and another,—the bond being according to its terms payable to either of the obligees.

Mr. F. C. Loos proctor, under a power of attorney granted to him by the defendants authorizing him to confess judgment, consented to judgment being entered against the defendants for the amount claimed. The plaintiff put in also an affidavit by the notary before whom the power of attorney had been executed as to its execution. Upon these materials judgment was entered in favour of the plaintiff for the amount claimed. Subsequently the defendant moved on affidavit to have the judgment so entered opened up.

Mr. Fitzroy Kelly who appeared for the defendants submitted the following points for the consideration of the court :—

1.—That the plaintiff was not the party with whom the bond was made and could not therefore sue upon it in his own name.

2.—That the action on the bond arose only upon breach of the conditions, of which there ought to have been, but was not any, evidence. The defendant produced an affidavit that there had been no breach of the conditions as wrongly alleged in the libel.

3.—That the confession of judgment ought to have been O. L. M. by his attorney F. C. Loos.

The following judgment was delivered by the learned district judge upholding the defendant's contention :—

The court thinks it must uphold the 3rd and formal objection, and this makes it unnecessary to deal with the others. There is no branch of English practice on which the English Courts are (for very obvious reasons) more strict in insisting on every technical formality being complied with than with warrants to confess judgment. These cannot in my opinion be distinguished from ordinary powers of attorney to sue or to be sued, to execute transfers of land &c., and it does not seem to be questioned that such powers of attorney can only be validly executed in one way, namely, thus A. B. by his attorney C. D. In this case the defect is even greater, for, Mr. Loos has not even appended to his own name the words "attorney for" A. B.

In the event of the defendants having any right of action for damages for irregularities in these or subsequent proceedings, they might be remediless against the principal who could shew that Mr. Loos had made his act his own act and not the act of the principal.

Judgment to be re-opened and execution not to proceed pending the appeal days and the decision of the appeal should one be taken. Liberty to defendants to be reserved to move for recall of writs as a natural sequence to this judgment hereafter.

Plaintiff appealed.

29th January, 1875.—The judgment of the Supreme Court was delivered by STEWART J. as follows :—

The Supreme Court does not consider that there is any rule or practice rendering it obligatory that a proctor acting under a valid and sufficient power of attorney to confess judgment, should sign the name of his client and constituent in the same manner as is usual under ordinary power of attorney.

The rule that the name of the principal should be signed is not without its exception even according to English law in regard to solemn instruments under seal (a distinction which does not obtain in Ceylon law) ; a more liberal exposition being allowed in cases of less solemn instruments if it can be collected upon the whole instrument, though informally signed, that the true object and intent are to bind the principal. Story on Agency, sec. 153, 154.

The admission filed and signed by Mr. Loos expressly recites that he is authorized by the power of attorney, which is produced, to confess judgment, leaving no conceivable doubt that the admission was made and signed on behalf of the defendant.

The first objection taken by the defendant is not in our opinion maintainable, the bond being payable to Raman Chetty or to the plaintiff.

The case is remanded for the court to hear and determine the application of the defendant on the second objection taken by them.

P. C., Mullativu, No, 8,621. } *Peranchepulley* v. *Sinnetamby* and others.

Tappal runner—Quitting service without notice—Ordinance No. 11 of 1865 *clause* 11.

A tappal runner is liable under the Labour Ordinance.
P. C., Manaar 3,873, Grenier P. C. 1,873 p. 4 followed.

This was an appeal by the defendants from a conviction and sentence of the police magistrate upon a charge of quitting service without leave or reasonable cause.

2nd February, 1875. MORGAN, C. J.,—The judgment affirmed.

The Supreme Court sitting collectively decided on the 3rd January 1873, (P. C., Manaar 3873. Grenier's Rep. P. C. 1873 p. 4) that tappal runners, even when employed under a contract, are liable under the Labour Ordinance.

D. C., Colombo, No. 66,140. } *Pieris* v. *Dochy Hamy* and others.

Namptissement—Denial of signature—Burden of proof—Dutch forms of procedure.

Upon a motion for provisional judgment upon a bond, where only one of three defendants denied her signature to it, the court may in its discretion grant provisional judgment against her, if she will not support her denial by an affidavit.

Three defendants were sued on a bond by which they had bound themselves jointly and severally. One of them (the second defendant) denied her signature to the bond. On an application for provisional judgment, the district judge required her to support her denial by an affidavit. From this order of the district judge the second defendant appealed.

Ferdinands for appellant.

2nd February, 1875. MORGAN, C. J.,—Under the Roman Dutch law (Voet tit. 42, tit. 1 sec. 7) should the defendant being present deny his signature the decree of provisional payment is delayed until the plaintiff shall have proved the signature. But the Dutch forms of proceedings are not compulsory on us and, only one of three defendants having denied her signature, the Supreme Court thinks the court exercised a wise discretion in this case in requiring her to support her denial by an affidavit.

D. C., Colombo, No. 3,383. } In re *Idroos Lebbe Markar*.

Administration—practice with regard to—English Ecclesiastical Courts.

The practice with regard to the administration of estates of deceased persons obtaining in Ceylon, though mainly founded upon the practice and regulations of the Ecclesiastical Courts in England, is not restricted to the mode of procedure adopted in those courts, much of the Ceylon system being analogous to the procedure in the English Equity Courts.

In accordance with the long established practice of the Ceylon courts a creditor should be allowed to contest the accounts of his creditor's estate when it is being administered, and not be subjected to the delay attendant upon the institution of a formal testamentary suit, unless the claim be of such a complicated nature as to render a separate action necessary.

Ferdinands and *Browne* for appellant.
Kelly for respondent.

5th February, 1875.—The judgment of the court was delivered by STEWART, J. as follows :—

The system of administration of estates of deceased perrons obtaining in our district courts, though mainly founded upon the practice and regulations of the Ecclesiastical Courts in England, is clearly not restricted

to the mode of procedure adopted in those courts, much of our system being analogous in several essential respects, as shewn by the learned district judge, to the procedure in the English Equity Courts.

The Supreme Court has however to point out that, in conformity with the long established practice in Ceylon, it will depend on the circumstances of each case whether a creditor should be left to his action or be admitted to contest the account of an executor or administrator in the testamentary proceedings.

If the claim or dispute be of such a complicated nature as to consider it desirable, or if for any other good and sufficient reason it would be expedient in the interest of all concerned, that the enquiry should form the subject of a separate suit, it will in such case be for the district judge in the exercise of his direction to order accordingly; on the other hand if it be substantially for the advantage of all interested, as the Supreme Court is of opinion it will be in the first instance, that inquiry and adjudication should take place (the matter in controversy admitting of summary disposal) without the delay attendant on the institution of a formal action, then the summary procedure which has been ordered in this case should be followed, the inclination of the court being always to avoid if practicable the necessity for further fresh litigation.

C. R., Colombo, No. 101,817. } *Walles* v. *Philippu Appu.*

Carriage hire—Prescription—Ordinance No. 22 of 1871 sec. 9 and 11.

A claim for carriage hire falls within the 11th and not the 9th sec. of Ordinance No. 22 of 1871.

This was an action for carriage hire. Defendant pleaded the 9th clause of Ordinance No. 22 of 1871 in bar of the plaintiff's claim. The commissioner having upheld the defendant's plea, plaintiff appealed.

In appeal the judgment of the court was delivered by STEWART, J. as follows :—

The judgment of the 29th day of November 1874 is set aside and judgment entered for plaintiff for amount claimed and costs.

The Supreme Court considers that the claim for carriage hire falls within the 11th, and not the 9th, section of the Ordinance.

P. C., Panadura, No. 23,638. } *Gunatilake* v. *Pieris.*

Fiscal's Ordinance, No. 4 of 1867, sec. 74—Refusal to quit land sold under writ—Encumbrance prior to judgment and issue of writ.

A mere refusal to quit land sold under a writ is not an offence under section 74 of Ordinance 4 of 1867, which authorises the fiscal to remove from it only the party condemned or some person claiming on his behalf, or some person claiming under a title created by the defendant subsequent to the seizure of such property. Consequently, such section does not apply to the case of a person in possession of the land in lieu of interest under a bond prior in date to that upon which judgment was obtained and writ issued.

The facts sufficiently appear the judgment of the Supreme Court.

Browne for appellant.

12*th February*, 1875. STEWART, J.,—The judgment of the 23rd day of January 1875 is set aside.

This case is distinguishable from Panadure P. C. case No. 23,241, In the latter, the defendant, who was the wife of the execution debtor. would not allow the purchaser of the land to be put in possession, whereas in the present case the appellant used neither violence nor abuse, but only refused to quit, being apparently quiescent all the time.

Besides, it would appear from the Kalutara D. C. case No. 26,347, in which the defendant has obtained a judgment, that she is in possession of the land in lieu of interest under a bond of prior date to that upon which judgment was obtained and writ issued in C. R. Panadure case No. 13,975.

The Supreme Court has also to point out that under the 74th clause of the Ordinance 4 of 1867, the court is only authorized to order the removal from the property of "a party condemned or some person claiming on his behalf, or of some person claiming under a title created by the defendant subsequently to the seizure of such property."

D. C., Colombo, No. 55,684. } *Freudenberg & Co.* v. *Cowell.*

Arrest under sec. 32 *of the Fiscal's Ordinance* 4 *of* 1867—"*Shall.*"

Before arresting a person under a writ of execution, it is not essential that the fiscal should repair to his dwelling house for the purpose of demanding payment of the amount of the writ.

The word "shall" in sec, 32 of Ordinance 4 of 1867 are merely directory.

Plaintiff having obtained judgment against defendant for a debt due by defendant to plaintiff, plaintiff's proctor moved for and obtained writs of execution against the property and person of the defendant. Defendant having been arrested and brought before the court, the plaintiff's proctor moved to have defendant committed as the writ against property was still unsatisfied.

Defendant's proctor filed defendant's affidavit and shewed cause on the following grounds.

1.—That defendant was a resident of Kandy and had been arrested at Colombo.

2.—That the fiscal had not repaired to the defendant's dwelling house and there required him to pay the amount of the writ or to point out property as required by the 32 clause of the Fiscal's Ordinance.

Upon this the learned district judge held the arrest invalid and discharged the defendant and delivered the following judgment:—

The ordinance for some reason which I cannot comprehend requires that before arrest of the person the fiscal shall not merely call on the defendant to surrender property, but shall repair to his dwelling house for the purpose. It seems an extraordinary provision, but I must carry out the Ordinance whatever I may think of it. It is sworn and not denied

that the fiscal did not repair to the defendant's dwelling house which is in Kandy, and that the writ was served on him when he was on a temporary visit to Colombo on business and stopping as a traveller for two nights at a hotel. It is urged on the plaintiffs behalf that the hotel was his dwelling house for the time, but this is not the meaning of the word "dwelling house" in any legal or other sense. It might be as well said that if a traveller stops at a rest house to take refreshment, that that was his dwelling house and process (say) could be left them for him.

The prisoner must be discharged, Mr. Loos moved for the same.

On appeal *Kelly* and *Grenier* for plaintiff appellant *Ferdinands* for defendant respondent.

16*th February*, 1875.—The judgment of the court was delivered by MORGAN, C. J., as follows :—

The order of the 11th day of December 1874 must be set aside and the arrest declared valid and legal. The use of the word "*shall*" will not make the Ordinance imperative if the provision is merely directory and no negative words are used (The King *v.* The Justices of Leicester, 7 B. & C.) The provision in clause 32 is directory, and the requirement that the fical should repair to the dwelling house within a certain time regulated by the distance of the defendant's residence from the fiscal's office is a proper and reasonable one when the Ordinance has to be carried into effect by a staff of men all not necessarily acquainted with their duties and wanting specific instructions. Negative words are not used, and it is nowhere provided that the non-compliance of any of the requirements in detail will invalidate the arrest. A fiscal neglecting such requirement and thereby causing substantial injury may lay himself open to a claim for damages, but the arrest itself is not bad. The defendant did not attempt to swear in this case that had he been applied to in his dwelling house, he would have been ready with property to satisfy the writ.

P. C., Colombo, No. 17,987. } *Sedo Hami* v. *Gunawardena.*

Arrest of offender—Duty of headmen—frivolous prosecution.

A headman is not bound to take into his custody a person charged with an offence, but may use his discretion as to doing so.

Where a criminal charge is laid, the complainant if he acted under the *bona fide* though mistaken belief in doing so should not be condemned to pay the defendant's expenses.

Dornhorst for complainant appellant.

23*rd February* 1875.—The judgment of the court was delivered by MORGAN, C. J.,—

Affirmed, except as respects that part of the order which makes the complainant pay the expenses of the defendants, which said part is hereby set aside.

The Supreme Court concurs with the learned police magistrate in considering that the accused was not bound to keep in custody the person charged by complainant with petty assault. Headman must use their own discretion in taking offenders into custody and producing them before that court, regard being had to the seriousness of the charge, and the probability of their escaping. When a person is charged with petty assault or other light offence, the person charging them should be referred to the ordinary process of the courts. But the wording of clause 7 of Ordinance 4 of 1841 might have misled the complainant, and a party seeking criminal justice should not be cast in expense when he merely commits an error of judgment.

D. C., Kandy, No. 59,273. } *Tikiri Kumarihami* v. *Loku Menika* and others.

Kandyan Law—Paternal inheritance—Beena marriage—Deega marriage.

Plaintiff was married out in deega to H., and being called back to the Mulgedera by her parents, lived with them; having her child with her. The plaintiff afterwards married in beena, and on the death of her associated fathers was given out in deega by her brothers, but she left her child by her beena husband behind her at the Mulgedera.

Held, that plaintiff having been recalled by her parents and having thereafter married in beena, her right to her fathers' estate revived, and that such revival was not affected by her subsequent deega marriage, as she had left her child behind her at the Mulgedera.

Ferdinands for plaintiff appellant.
Grenier for defendant respondent.

23*rd February* 1875.—The judgment of the court was delivered by MORGAN, C. J.,—

Set aside and judgment entered in plaintiffs' favor as claimed in his libel with costs of suit.

The plaintiff was first married in deega to Hataraleeadela, but she was called back to the Mulgedera by her parents and lived there with her child. She afterwards married Toradenia and although the evidence is conflicting in this respect, the Supreme Court concurs with the district court that that was a marriage in beena. Her right therefore to the paternal inheritance revived. She was subsequently, after the demise of both her associated fathers, married out in deega by her brothers to Dohegrinne, but she left her youngest child of the beena marriage at the parents' house. "If a daughter married in binna" says the late Mr. Solomons in his excellent manual on Kandyan Law, p. 17, "left her parents with her children in order to contract a second marriage in deega she forfeited for herself and children all right to inherit any portion of her parents' estate unless she left one or more of the children of the beena marriage at her parents' house."

D. C., Matara, No. 27,747. } *Aberan* v. *Louis.*

District Court—Power of, to alter its own judgment.

A district court has the power to alter its own judgment, if such judgment was obtained by fraud or gross irregularity.

Browne for plaintiff appellant.
Ferdinands for defendant respondent.

26*th February* 1875.—The judgment of the court was delivered by MORGAN, C. J.,—

Affirmed with costs.

The Supreme Court has held in D. C. Colombo, 52,589 (Civil Minutes, 7th November 1873) that a district court can alter or set aside its own judgment if it was obtained by fraud or gross irregularity (3 Lorenz p. 229.) Fraud is clearly shewn in this case on the part of plaintiff, who dictated the answer of which he now seeks to take advantage. It is also found by the district court that the defendant did not intend to admit his liability to pay the sum claimed by the plaintiff.

P. C., Batticaloa, No. 8,274. } *Meerwald* v. *Manuel.*

Master and servant—Peon—Clause 11 *of* 11 *of* 1865.

A peon whose duty it is to look after persons and prisoners is not a servant within the meaning of the eleventh clause of Ordinance 11 of 1865,.

16*th March* 1875. STEWART, J.,—The judgment of the police court of Batticaloa of the 5th day of March 1875 must be set aside.

It was held by the Supreme Court under the old Ordinance No. 5 of 1841, that a peon on the establishment of a district court did not come within the provisions of that enactment (B. and V. p. 29.)

The present Ordinance No. 11 of 1865 has no doubt in some respects a more extended application than the repealed Ordinance. But construing the word "servant" by the interpretation clause of the new Ordinance, which defines the term, to extend to and include menial domestics and *other like servants*, pioneers, kanganies and other laborers whether employed in agricultural and railway or other like work," the Supreme Court is of opinion, that a gaol guard or peon who has to watch and look after prisons and prisoners, and who in some matters is amenable to the provisions of the Prison Ordinance No. 18 of 1844, cannot be deemed a servant, *ejusdem generis* and within the meaning of the eleventh clause of the Ordinance No. 11 of 1865, under which the plaint is laid.

C. R., Negombo, No. 24,821. } *Jusey Perera* v. *Andivale Appu* and others.

Court of Requests—Power of, to punish parties bringing false cases.

Courts of Requests have no power to punish parties for bringing false cases, as for a contempt of court.

The facts of the case sufficiently appear from the judgment of the Supreme Court.

Browne for plaintiff appellant.
Grenier for defendant respondent.

Per Curiam :—So much of the judgment of the Court below as dismisses the claim is affirmed. The latter part of it directing that the expenses of the plaintiff be paid at the rate of 75 cents a day is set aside, and also the order of the 24th February, condemning the plaintiff to 14 days imprisonment.

The Supreme Court concurs with the learned commissioner in thinking that this is a false case. But whether the claim be true or false, the Court of Requests cannot go beyond the powers conferred on it by ordinance; and neither the Ordinance No. 11 of 1868 nor the rules of court make provisions for the payment of batta to a party, or for the punishment of a plaintiff for bringing a frivolous and vexatious suit.

Moreover, the fact of the Police Court being expressly empowered to punish parties who may have instituted prosecutions on false, frivolous or vexatious grounds and that similar power is withheld from Court of Requests, though both tribunals are now emanations of the same Ordinance, furnishes a strong argument for concluding that it could not have been intended to give Courts of Requests any such power.

See Lorenz's Reports, part 1, page 209, C. R. Kurnegale 6089, where it was held by the Supreme Court that making a false defence was not such a contempt as was contemplated by the 15th clause of the repealed Ordinance No. 10 of 1843. No costs in appeal.

P. C., Kandy, No. 101,594. } *Van Langenberg* v. *Meedin*.

Practice—Motion for—Postponement—Weights and Measures—Defective Measure—Proof of.

An application for a postponement by a defendant, if he finds that his witnesses are not in attendance, must be made before the case for the prosecution is closed.

A measure is not defective simply because the bottom of it appears to be battered in but there must be evidence to shew that it is not in conformity with the established standard measure.

23rd March 1875. CAYLEY J.,—Set aside, and defendant found not guilty.

It appears that the defendant did not apply for a postponement until the case for the prosecution was closed. If he had applied at the proper stage, he would have been entitled to a remand to enable him to summon his witnesses. There is however a defect in the proof. It is not proved that the measure in question was not in conformity with the established standard. The police magistrate has assumed that the measure was defective because the bottom of it appeared battered in. This is insufficient as pointed out by this court in case No. 764, P. C. Ratnapura (Beling and Vanderstraaten, p. 19.) In all cases of dispute about the correctness of any weight or measure, recourse should be had to the Cutchery model.

P. C., Panadura, No. 23,911. } *Colenda Marikar* v. *Gimanis* and others.

Pieris Sinno and another, witnesses appellants.

Contempt of Court—False evidence—Summary punishment.

False evidence does not always amount to prevarication, nor is it except in rare and glaring cases a contempt of court and punishable as such.

1st April 1875. CAYLEY, C. J.,—It was pointed out by this court in the case No. 43,832, C. R. Colombo, (Supreme Court Minutes 17th September 1868) that mere falsehood does not amount to prevarication; and this court observed also in that case that, without saying that there never could be cases of such flagrant and insolently audacious falsity as to amount to contempt of court, such cases much be very extreme and very rare. In the present case, the two witnesses who have been summarily punished for contempt for giving false evidence, stated that they did not see the complainant assaulted. These statements the police magistrate believes to be false. But there is nothing in the record to shew that this falsity was of that transparent and insolent character as to be summarily punishable. They may have committed perjury, But if these witnesses are summarily punishable, it is difficult to see in what cases perjury might not be made summarily punishable and the various safeguards and restrictions which the law requires in prosecution for perjury might in every case be dispensed with.

C, R., Balapitymodera, No. 23,628. } *Deonis de Soyza* v. *De Abrew.*

Decisory oath out of court.

A judge should not be a party to an agreement that a case should be decided not on the merits but by decisory oaths. He may however postpone the case to enable parties to carry out their own arrangemonts and to move for udgment accordingly.

7th May 1875. MORGAN, C. J.,—The judgment of the court below must be set aside, and the defendant must pay costs.

The court should be no party to any agreement that the case should depend upon the oath of either party to be taken at a Vihare. All that the court need do in a case where the parties are so disposed is simply to put off the case to enable the parties to carry out their agreement, and to move for judgment accordingly.

This case affords a good illustration of the inexpediency of the court formally sanctioning such an agreement, and making it a matter of record. The defendant objects to judgment in terms of the oath, on the ground that some pages were missing from the book on which the oath was taken,—an enquiry which no court ought to be called upon to make.

The defendant has however acted improperly in trying to upset his own arrangement, and ought therefore to be made to pay the costs.

The court should hear the case on the merits and give judgment upon the evidence.

P. C., Chavakachcheri, No. 24,430. } *Cartikaser Udeyar* v. *Katheramer.*

Paddy tax—Ordinance 14 *of* 1840, *sec.* 15—*breach of special agreement between Government Agent and cultivator.*

The 15th clause of Ordinance of 14 of 1840 enacts "that in every case wherein a special agreement shall have been made between the Government Agent and the proprietor or cultivator of any land for commuting the tax payable thereon, if the proprietor or cultivator shall commit any breach of such agreement, he shall be fined to the acount of double the sum payable by such agreement for the tax upon the land, for the year in which such breach shall be committed, and in default of payment he shall be imprisoned."

The defendant was charged with having cut the crop of a certain field without paying the commuted Government tythe which according to the special agreement enter into between the Government Agent and the defendant became due at the time the tythe ought to be given.

On appeal against an acquittal.

Clarence (Acting Q. A.) for complainant appellant.

Grenier for defendant respondent.

1st June 1875.—The judgment of the court affirming the decision of the court below was delivered by MORGAN, J.,—

The charge in this case is that the defendant cut the paddy crops of a certain land without paying the commuted tythe, in breach of the 15th clause of the Ordinance No. 14 of 1840. That clause renders a proprietor or cultivator liable to pay double tax if he shall commit a breach of the special agreement made between the Government and the proprietor or cultivator of any land for commuting the tax payable thereon. The agreement in question in this case made the tythe payable "at the time the tythe ought to be given." At the first trial the court gave judgment against the defendant construing the *usual time* to mean on the crop being reaped and thrashed. The Supreme Court set aside that decree, and remanded the case for further evidence, expressing its unwillingness to hold a party liable to pay double tax unless upon clear proof that he had committed default. According to the evidence, there seemed to have been no fixed time for demanding and recovering payments, and it had been received so late as September.

At the second trial Kanagaratne Mudaliar was examined and swore that the words are "generally understood to mean at the time of reaping," which varies in the several districts. "To my knowledge" he added, "reaping in Kunchchi takes place in February and March." He further explained the reasons which induced the late Mr. Dyke, whose great consideration for the natives and their interests formed a very prominent feature of his administration of the Northern Province, to word the Ordinance in the way he did. The agreement is however vague in its terms, and the loose practice of recovering payment for months, and allowing them to pay tax long after they had thrashed the paddy, cannot, owing to the abstract vagueness of the agreement, be disregarded. Indulgence given by a creditor to a debtor is no legal excuse, where the bond clearly defines the time of payment, but this cannot be said of the agreement in which the defendant is sued.

The Supreme Court concurs, therefore, in the view which the commissioner took of this case at the second trial.

D. C., Matara, No. 26,980. } *Don Louis* v. *Veyadb.*

Right to fish in the sea—Use of different kinds of net.

The right to fish on the coasts of Ceylon is common to everybody. The fact that one particular kind of net had been used for a large number of years does not prevent the use of any other kind of net.

Browne for plaintiff appellant.
Dias and *Grenier* for defendants respondents.

1*st June* 1875.—The judgment of the court was delivered by MORGAN, C. J.,—

The decree of the district court cannot be affirmed. The plaintiffs claim is dismissed with costs. A nonsuit will only lead to further and equally profitless litigation, and as the question raised is by no means new, there is no ground for dividing costs.

This is one of the many fishing cases, which have of late years become so common in Matara, and the Southern coast generally. The Supreme Court had no doubt from the commencement as to the correctness of the view taken by the district judge on the abstract question, but it was anxious, before giving judgment, to look into other cases in which the same point arose, to see if any rational distinction could be drawn between them and the present case. But there is no such ground of distinction. The principle is the same. The right to fish in the coast of this island, unless such right is abridged or qualified by prescription or otherwise, of which undoubted proof is furnished, is open to all, and (to use the words of this court in the case No. 26,827) "to hold that the use of the only known form of net for a number of years raised a custom by which any other form of net was excluded, would be a bar to any kind of improvement in this branch of industry."

It is not unnatural for villagers, who have for a series of years enjoyed a right of fishing in the coast immediately adjoining their villages, to feel dissatisfied if others come to share the right with them, and thus to abridge their wonted profits. It is not unnatural for them to feel dissatisfied at the use of new kinds of net by which fish are more easily or more plentifully caught. But these are the necessary results of advancing civilisation, and the sooner the villagers try to realize this fact, the better it will be for their own peace and comfort. The Government are willing to afford them every legitimate protection. It will prevent any attempt calculated to cause the wanton destruction of fish ; it will empower inhabitants to regulate the right of fishery, where such right undoubtedly exists ; but it cannot do more.

D. C., Colombo, No. 63,463. } *Valan Chetty* v. *Abraham Fernando.*

Proctor and client—Authority of Proctor to consent to open up final judgment.

A proctor cannot consent to open up judgment pronounced in his client's favor, unless specially authorised to do so by his client.

Grenier for defendant appellant.

1*st June* 1875.—The judgment of the court was delivered by MORGAN, C. J.,—

The decree of the District Court is set aside and the case remanded for a new trial. The plaintiff's proctor is disallowed all costs, and he is further required to refund to his client the costs received by him for allowing judgment to be open up.

In this case the plaintiff sought to recover from the defendant the sum of rupees two thousand on the common money counts. Judgment by default was entered against him on the 23rd February 1874. On the 5th March the court allowed writs of execution against the person and property of defendant. On the 14th April 1874, the proctor for defendant filed affidavit and moved that the judgment be opened up, and that he may be allowed to file the defendant's answer, the proctor for plaintiff consenting on payment of costs.

The case came on for trial on the 27th July, when the only evidence adduced was that of the plaintiff himself: "I affirm to the truth of the facts stated in my libel, and that I have not received payment of the amount I claim or any part of it." On this evidence, the court entered judgment for R2,000 for the plaintiff.

The defendant appealed against this judgment on the ground among others, that as the claim was wholly denied "plaintiff should have gone into full proof of the particulars of his libel."

When the case came before the Supreme Court in appeal, it called upon the proctor for plaintiff to explain his reasons for allowing judgment to be opened, and whether he had special authority for doing so. His explanation is as follows :—

"SIR,—With reference to your letter dated 11th December 1874, bearing No. 783, I have the honor to inform you that I had no special authority from the plaintiff to consent to the judgment being opened up, but in view of the affidavit dated 4th April 1874, sworn to by the defendants' proctor, filed of record, stating, among other things, that he had mislaid certain papers connected with the defence of this case, and as it is the usual practice among members of the bar to consent to pleadings being accepted after the due date, if the default is occasioned by the proctor on the opposite side, I as usual consented to the proctor for plaintiff filing answer, observing the professional etiquette of the Colombo bar, and did so on payment of costs. (Vide motion dated 27th March and 14th April 1874.) I believe my client has in no way been prejudiced, inasmuch he has tacitly consented to the steps taken by me by giving me further instructions, and giving me names of witnesses and by attending the trial of the said case, and by proceeding with the trial.

"The Registrar, Supreme Court, Colombo. I am, &c.,"

The Supreme Court considers the explanation eminently unsatisfactory. The authority of the proctor for plaintiff ceased when judgment was entered, excepting for certain specified purposes,—such as realizing the judgment, taking appeal, and giving security for such appeal &c. He admits that he had "no special authority" from his client to consent to the judgment being opened up, but the plea of his acting up to the usual practice among the members of the bar to "consent to pleadings being accepted after the due date, if the default is occasioned by the proctor on the opposite side," is a palpable evasion, for the question arises here after the judgment had been entered and even execution allowed. He proceeds,—"I as usual consented to the proctor for defendant filing answer, *observing the profes-*

sional etiquette of the Colombo bar, and I did so on payment of costs." It is no extenuation that the proctor took care that his costs should be paid, whilst he sacrificed the interest of his client, and there is no professional etiquette among respectable practitioners, if it be not a misnomer, to plead the sanction of "professional etiquette" to a gross dereliction of duty, to allow judgment once obtained to be opened up. The Supreme Court would take severer steps against him, but for the possibility that he acted from thoughtlessness, though thoughtlessness is, in itself, no excuse.

The decree of the district court, founded on the mere affirmation of the plaintiff, generally swearing to the libel, cannot be sustained. It would be very unsafe, in this country to give judgments on such evidence.

D. C., Trincomalie, No. 20,748. } *Wellapulla* v. *Sitambelem.*

Thesavalamai—Districts of Trincomalie and Batticaloa—Roman Dutch Law.

The law which governs the rights of parties in Trincomalie and Batticaloa is the Roman Dutch Law and not the Thesavalamai. Regulation 18 of 1800 restricted the operation of the Thesavalamai to the extent of governing the rights of the Tamils of the province of Jaffna, which never included Trincomalie and Batticaloa.

Grenier and *Ramanathan* for plaintiff appellant.
Ferdinands and Kelly for defendant respondent.

1st June 1875.—The Judgment of the Court was delivered by MORGAN, C. J.,—

The question involved in this case relates substantially to the applicability of the customs known as the Thesavalamai to the Tamil inhabitants of Trincomalie. Owing to its great importance, the Supreme Court was anxious to look into former cases in which the same point arose, directly or indirectly, and to search for authorities before pronouncing its decision.

The Thesavalamai, or customs of the country, was and is undoubtedly in force among the Tamils at Jaffna; was it also in force among the Tamils at Batticaloa and Trincomalie? At first sight it seemed reasonable to assume that it was in force among all the Tamils in the Northern and Eastern provinces. The judges of the Supreme Court, in their report upon the laws and judicial system in Ceylon, preparatory to the introduction of the Royal Charter of 1833, assumed that all the Tamils were governed by it. In answer to question 9, they state :—" So far as the Malabar inhabitants are concerned, a small collection of customs has been compiled, which is printed in English, and denominated the Thesavalamai" In answer to

question 91, it is stated that, "the laws applicable to property are very multiplied in Ceylon. The British have one code, the Dutch another, the Mahomedans a third, and the Malabar or Tamil inhabitants a fourth. The Sinhalese abide generally by the Dutch law."

Similar passages may be found in the Marshall's Digest, pp. 224 and 392. But the opinion of these learned men, though deserving of every respect, are not conclusive on the question. An exceptional custom, in derogation of the common law of the land, is not lightly to be presumed.

Mr. Class Isaaks, in his collection of the laws in 1707, prepared by the direction of Dr. Cornalis Joan Simons, the Governor of Ceylon, speaks of the Thesavalamai as a "description of the established customs, usages, and institutions, according to which civil cases are decided among the Malabar or Tamil inhabitants of the Province of Jaffna in the Island of Ceylon :"— Sir Alexander Johnston, in his Report as Chief Justice and first member of Council in Ceylon, dated 1814, to the English Government, says that "this collection supplied the rules according to which the several Dutch courts framed their decisions from the year 1707 to the period when Jaffna was surrendered to the British arms."

The Regulation No. 18 of 1806 contains the following clauses :—

"6th.—The Thesawalami or customs of the Malabar inhabitants of the province of Jaffna, as collected by order of Governor Simons in 1706, shall be considered to be in full force.

7th.—All questions between Malabar inhabitants of the said province or wherein a Malabar inhabitant is dependent shall be decided according to the said customs."

Did Batticaloa and Trincomalie ever form a part of the province of Jaffna ?

On this point we have a valuable report prepared for the Supreme Court by the late Mr. Grenier :—

"Having agreeably to the directions of the hon'ble the Chief Justice, made necessary enquiries with the view of ascertaining whether Batticaloa formed an integral part of the district of Jaffna, during the administration of the Dutch Government or not, I beg now to submit the result of my enquiries for the information of the Supreme Court.

"It appears that the first Agent of Government appointed to Jaffna, soon after the subjugation of the Island to the British arms, was Lieut. Colonel B. G. Barbet, who was styled or called Commissioner Extraordinary of Revenue and Commerce for the northern districts, with an assistant E. J. Van Lagan Esq. and that so far back as 1801. The jurisdiction of Lieut. Colonel Barbet, extended only to Calpentyn, Manaar, Vertelitivo, Puttalam, Mullativoe, Kaits and Point Pedro, and the vicinities thereof. It does not at all appear that Colonel Barbet had any control or jurisdiction, either of a political, revenue or magisterial nature, over Tincomalie and Batticaloa, which it is evident must have been therefore governed by a different functionary.

"So far it is beyond the possibility of a doubt that the country law or Thesavalamai was designed to have effect only in the province of Jaffna, of which Batticaloa or Trincomalie never formed a part or parcel.

"By the proclamation of 1833, dividing the districts, the northern province was said to consist of the country hitherto known as the district of Jaffna, Mannar and the Vanni, as the Dissaveny of Nuwarakalavia, and as the Island of Delft. By the words hitherto known, it must be evident that Batticaloa and Trincomalie were never known, or recognized, as parts of the northern province, but were always excluded therefrom.

"The Government Agent (Mr. Dyke,) on whom I called yesterday for information connected with the above enquiry, was pleased to inform me,—and indeed it was his decided opinion founded upon some public act of Colonel Barbet, which he had once seen, but which cannot be found out now,—that Batticaloa and Trincomalie never formed an integral part of the northern province, but in fact they were separate districts or provinces, not connected with Jaffna at all.

"Under all the circumstance as developed above, it appears most clearly and satisfactorily that Batticaloa and Trincomalie did not belong to the province or district of Jaffna, either under the Dutch or English Government, and that moreover, the Thesavalamai or country law, was never intended to be rendered applicable to Batticaloa and Trincomalee.

"This belief is further strengthened by various passages in the letter of Sir Alexander Johnston to His Majesty's Government, which forms the preface to the country law.

"*Note*—It also appears that there was a separate Governor at Trincomalie under the Dutch Government in 1786."

Mr. Grenier was long a resident of Jaffna, and held for many year the office of secretary of the district court. In that capacity he had abundant opportunities of forming an accurate opinion on the subject. He is supported by the late Mr. Dyke, than whom no higher authority could be quoted.

It will thus appear that the Thesavalamai was only in force among the Malabar inhabitants of the province of Jaffna, and that Batticaloa and Trincomalee never formed portions of the province of Jaffna.

We are next led to consider whether, though there is no positive law on the subject, the evidence of former precedents show that the customs in force among the Malabars at Jaffna were received, or acquiesced in, or acted upon, in Batticaloa or Trincomalie, for sufficient length of time, so as to give it the force of law.

In a few stray cases, it was assumed without any evidence that they were so received ; but when the point arose definitively for consideration a different conclusion was arrived at.

In Batticaloa case D. C., No. 13,925, the question was whether dowry property reverts to the grantor if the woman dies without issue, or, is it to form part of her estate to be divided among her heirs. The former would have been the case, if the customs as laid down in the Thesavalamai applied to Batticaloa : the latter, if the Thesavalamai did not apply, and the case was governed by the Roman Dutch law.

Mr. J. W. Birch, then district judge, held that "the court was perfectly unaware of any such custom having the force of law, or of any decision which can justify such a custom." The Supreme Court in appeal stated

that it "agreed with the finding of the district judge" and that it was "of opinion the decision must be regulated by Roman Dutch law." See decision of 1863 and 1864.

When the point was raised in this case, the district judge came to a like conclusion, but the evidence as to the existence or non-existence of the custom was not sufficiently full and satisfactory, and this court remanded the case for further hearing. It called the district judge's attention to certain authorities on the subject, and pointed out that it was "open to him to examine any person who from their position and experience might be able to give information as the alleged customary law. Search also should be made to discover if there are any old cases or decisions on the subject in the courts at Trincomalie.

This has been done, and, in an able and well considered judgment the district judge, Mr. Moir, recorded his reasons for considering that the case was to be governed by the Roman Dutch Law, and not by the Thesavalamai.

In that conclusion the Supreme Court concurred.

The decree of the district court will, therefore, stand affirmed ; but as the point raised was one of great importance and comparative novelty, we consider that the costs in both courts should be divided.

P. C., Colombo, No. 20,848. } *Rudd* v. *Abdul Cassim* and other.

Vagrants' Ordinance—Sub-section 4 *of clause* 3 *of Ordinance* 4 *of* 1841—"*Not having any visible means of subsistence and not giving a good account of oneself*."—"*Out-door proctors*."

Those who earn a livelihood by introducing suitors to proctors and receiving a reward or commission from such proctors, do not come within the purview of Ordinance 4 of 1841, clause 3 sub-sec. 4.

Such an occupation, though conducive to many evils, is not in itself unlawful.

Ondaatjie for defendants' appellant.

O. W. C. Morgan, D. Q. A., for complainant respondent.

3rd June 1875.—The judgment of the court was delivered by CAYLEY, J. as follows :—

The conviction and sentence of the police court of Colombo of the 17th day of May 1875 is set aside, and the defendants discharged.

In this case thirteen persons have been charged and found guilty under the 4th sub-section of 3rd clause of the Vagrants Ordinance of wandering abroad, and not having any visible means of subsistence, and not giving a good account of themselves. It appears that these persons were in the habit of frequenting the precincts of the police court, and earning their livelihood (or a portion of it), by introducing suitors to certain

proctors practising in that court, and receiving a reward or commission from the proctors to whom the clients were introduced, in consideration of the service so rendered. There is no doubt, that the prevalence of a system of this kind is a great evil, not only as giving to unprofessional persons over whom the judges have no immediate control, and for whose character there is no guarantee of any kind, a direct interest in encouraging litigation, but also as supplying unprincipled persons of this class with opportunities of defrauding ignorant native suitors of their money, under colour of procuring for them professional advice and assistance. Cases of dishonesty of this kind have been brought to our notice, in which the offenders have been severly punished; and a system that gives rise to such evils is deserving of the most emphatic condemnation. But it must not be forgotten that the existence of this practice of employing what are called "out-door proctors," is due not to persons who are so employed, but to those practitioners who employ them; and the Supreme Court concurs with the view expressed by the police magistrate that the conduct of such practitioners in soliciting business by making use of the services of persons of questionable repute to bring them clients and then rewarding these persons with a share of the fees, is highly unprofessional and discreditable. The practice is we believe condemned by all the respectable members of the legal profession, and it is one which the proctors themselves can and ought to put down, and this, without the aid of special legislation, as suggested by the police magistrate.

However desirable it may be that a practice so deservedly condemned should be put an end to, we must be none the less careful not to strain the operation of an Ordinance to meet a case to which it was not intended to apply, nor to uphold a conclusion on insufficient evidence, in order to check an admitted evil. The question in the present case simply amounts to this, —have defendants been proved to have wandered abroad without having any visible means of subsistance and not giving a good account of themselves? Now, according to the evidence, it appears that their wandering abroad consisted in nothing more than plying the occupation above referred to, namely, that of introducing clients to proctors; their visible means of subsistence were the gratuities which the proctors gave them for their services and the real account which they did or could have given of themselves, was that they were employed by duly qualified practioners to assist them in their business by introducing clients to them. Of course, visible means of subsistence must mean visible means which are lawful. And the question then arises, is there anything unlawful in introducing a client to a proctor, and receiving a reward for the service? We know of no law, by which such an act is punishable and we cannot think that the clause of the Vagrant Ordinance relating to wandering abroad without visible means of subsistence was ever intended, or construed to apply to the case of persons such as these defendants (most of whom dre proved to have fixed places of abode, and some to be possessed of property), on the ground that they are gaged in an occupation from which many evils no doubt follow, but which is not shown to be in itself an unlawful occupation.

It is found by the police magistrate that the defendant subsisted by "swindling." Had this been proved, the case would have presented a very different complexion. But on this point we think the proof has failed. It is true that Mr. Perera, one of the witnesses for the prosecution, says "all the defendants except No. 14 are out-door proctors. They take as much money as they can out of the suitors and then they get money from the unprincipled proctors. I have no doubt these men fleece the suitors. There calling is dishonest. They wander abroad. I swear that these people fleece the suitors." But this evidence is too general to establish that any of these defendants have committed any act of fraud. No specific instance is given by any witness for the prosecution of any persons, either client or proctor, who has been, to use the expression of the police magistrate, "swindled," that is, defrauded. Indeed, there is no reference in the evidence to any case, in which these defendants were paid by the suitors at all. It would appear rather that the proctors who employed them paid them their reward; and this, of course, voluntarily; so that there could be no "swindling" of the proctors.

It appears to us that these appellants have not been proved to have committed any offence under the Vagrant Ordinance, and that the conviction must accordingly be set aside, and the defendants discharged.

In the matter of *Allardyce* and *Widlake*.

4th June.—Mr. W. M. Conderlag (Deputy Registrar of the Supreme Court) appeared in person before the Supreme Court, and swore an affidavit setting out that in the *Times* of this morning an article was published having reference to the decision of the Supreme Court given yesterday in the case of *John Rudd* v. *Abdul Cassim* and others.

The article in question being read, it was ordered that Alexander Allardyce and Edward Winzer Widlake, do appear before the Supreme Court on Thursday next the 10th instant to answer to a charge of contempt of the said court and the judges thereof, in that they in the *Ceylon Times* Newspaper of the 4th day of June instant wrote and published an article containing a libel on the said court and the Judges thereof, in reference to the decision to the said court in the case of *John Rudd* v. *Abdul Casim* and others, No. 20,848, P. C., Colombo. Notices were issued accordingly.

10*th June*:—The fiscal of Colombo returned the order issued on the 4th instant duly served,

Browne for Allardyce, *Edgecombe* for Widlake.

Mr. Advocate *Browne* addressed the court and tendered an apology on behalf of his client.

The court having expressed itself on the conduct of the accused, Mr. Browne submitted the following apology in writing under the hand of Mr. Allardyce:—

"Accepting the opinion pronounced by your Lordships, after hearing the cause shown and explanation offered by my counsel, that I have written statements libelling your honorable court and the members of your Lord-

ships bench, I beg that your Lordships will receive my assurance that I never intended in any way to imply that your Lordships had acted wrongly in the discharge of your judicial duties or to make any injurious imputation against the honor, justice and rectitude of any of the judges of the Supreme Court. Each and every expression that bears any such meaning I beg leave to retract and for them to express my most sincere apology. I would only ask your Lordship's further to believe that nothing could give me greater regret than that anything I have ever written should have even been liable to be construed into the slightest reflection on your Lordship's honor and rectitude."

The apology was accepted, and the defendants were ordered to be discharged.

D. C., Galle, No. 35,916. } *The Cassa Maritima of Genoa* v. *Emannuel Schiaffino.*

Messrs. Kleinwort Cohen & Co., Plaintiffs in Civil suit No. 35,989, D. C. Galle, claimants appellants.

Hypothecation of cargo—Duty of the master—Bottomry bond—Communication with the owner.

A master cannot bottomry a ship without communication with his owner, if communication be practicable, and, *á fortiori* cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable. Such communication must state not merely the necessity for expenditure, but also the necessity for hypothecation.

Plaintiff had obtained judgment against the master of the ship *Maria Louisa* upon his bottomry bond. The consignees of the cargo had also obtained a judgment against the master for unathorized hypothecation, but an order was made that the proceeds of the sale of the cargo should be sequestered until the question of the validity of the bottomry bond could be decided upon.

The district judge (Mr. Lionel Lee) delivered his judgment on the 23rd of October 1874 upholding the claim of the consignees, as follows :—

"The consignees of the cargo Kleinwort Cohen & Co. London claim preference over the bottomry bond holders (the Cassa Marittima of Genoa) in respect of the proceeds sale of the cargo.

"The cargo which consisted of rice was shipped at Rangoon in June 1872, deliverable at Falmouth, Cowes, Plymouth or Queen's Town to the order of the shipper; Gerber Christian & Co. of Rangoon. The ship arrived at Trincomalie on the 8th October 1872 according to the master's evidence (in the case 35,916), but this statement is probably incorrect for there is a telegram of 19th September in answer to one reporting damages spoken of in the letter from Gerber Christian & Co., filed (x y z) on the 10th December 1872, 2 or 3 months after the arrival at Trincomalie. The master agreed to hypothecate the ship, freight and cargo for advance to be

made, and on the 30th March 1873 he executed the bond. He subsequently put in at Galle where, on the 30th August 1873, the cargo was after survey sold in accordance with the recommendation of the board of survey.

"I shall not now stay to enquire whether there existed any necessity for the hypothecation. The point will be fully before the court when the question of the disposition of the proceeds of the sale of the ship arises. For the purposes of this case, it is in my opinion only necessary to consider whether the master communicated with the owners of the cargo or attempted to do so before he hypothecated the cargo. That it was possible for him to have so communicated is sufficiently evidenced by the fact that he did telegraph to Gerber Christian & Co., sometime in September or October, two or three months before he agreed to hypothecate.

"That this communication did not inform the shippers, who were so far as the master's knowledge went also the owners of cargo, of any intention on his part to hypothecate the cargo or ship is proved by their letter of the 1st November 1872 begging for information. The master states in his evidence on the 23rd October that he telegraphed to the shippers the accident that had occurred, but that he did not telegraph to them his intention to hypothecate the goods. The owners were, so far as he knew, the shippers, and that he knew that they were to be so considered is evidenced in his statement in the case 35,989 where he says I telegraphed to the owners of the cargo. It is quite clear therefore that there was not only every facility for communication, but that there was also an insufficient communication and an enquiry for further information more than a month before the agreement to hypothecate which remained unanswered. In considering this neglect to reply to the telegram of the 19th September (October), it is useful to remember the relationship between the master and the owner of the ship. That the communication made to the shipper was insufficient is clear, for there was no communication of the intention to hypothecate (Abbott [Ed, xi, 1867] page 116, the *Oliver* 31, L. J, NS. Adm. 37.) That communication is necessary, where there is no cost or risk incident to the delay, is manifest from all the decisions. Mr. Jansz relied upon the case of the *Karnak* 37, L. J. NS. page 41 (but even in that case there was an attempt to communicate, page 47); a later case is *Smith* v. *The Bank of New South Wales* 27, L. J. R. 46, but in that case there must have been a delay of two or three months. In the *Onward* (L. J. R. 28, 206, April 1878) it is unequivocably laid down that where communication is practicable without risk from delay, the master has no authority to hypothecate. The extension of means of telegraphic communication and consequent facilities for obtaining instructions from the principal must of necessity lead the court to diminish an authority, as agent, acquired at a time when there was no possibility of communication without such delay as would imperil both the ship and the cargo. The greater the facility of this communication the less must be the delay, and consequently the less must be the master's authority.

"I am thus brought to the conclusion that the master might without risk from delay have communicated his intention to hypothecate the cargo and that the want of that communication invalidates the bond as to the cargo.

Hence I repel the claim of the plaintiff (the Cassa Marittima) and uphold the claim of consignee (Plff. in 35,989) and direct that the plaintiff's herein pay the costs of those proceedings."

In appeal the Supreme Court on 15th June, (Sir Richard Morgan A. C. J., Stewart and Cayley J. J.,) set aside the judgment of the district judge and dismissed the claim of the consignees with costs.

The consignees filed a petition for leave to appeal to the Privy Council, when the judgment of the Supreme Court of the 15th June 1875 came on in review on the 31st of August.

The Supreme Court (Sir Richard Morgan, A. C. J., Stewart and Cayley, J.J.,) adhered to former judgment.

In appeal to the Privy Council the judgment of the Supreme Court was set aside and the judgment of the district court restored with certain modifications.

Privy Council.

Present,—Lord Blackburn, Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Richard P. Collier.

Kleinwort, Cohen & Co., appellants.

and

The Cassa Marittima of Genoa, respondents.

Appeal from a judgment of the Supreme Court of the Island of Ceylon (June 15th, 1875) reversing a decree of the district court of Galle (October 23rd, 1874.)

Mr. *Cohen*, Q. C., and Mr. *Clarkson* for the appellants.

Mr. *Milward*, Q. C., and Mr. *R. E. Webster* for the respondent.

The judgment of their Lordships was delivered by Sir Montague E. Smith:—

The question in this case is, whether a bottomry bond given by the master of the *Maria Luisa* upon the ship and cargo to the respondents, who are a company at Genoa, is a good hypothecation as regards the cargo. The way in which the case before the lower court came up for decision was this: An action was brought upon the bottomry bond by the respondents against the master of the ship, and judgment was given in favor of the respondent, in that action. A second action was brought in the lower court by the present appellants, the owners of the cargo, against the master for what they contended was an authorized sale of the cargo. In that action judgment was also given for the plaintiffs, the present appellants, but an order was made that the proceeds of the cargo should be sequestrated until the question as to the validity of the bottomry bond could be decided, and the rights of the plaintiffs, as the owners of the cargo and of the respondents, as the lenders upon the bottomry bond, could be ascertained. It is unnecessary to detail at any length what the proceedings were, but in this latter proceeding, the question which has been already stated arose. It is admitted, that the law is not settled that a master cannot bottomry a ship, without communication with his owner, if communication be practicable, and a fortiori, cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable.

The law has been thus laid down in several cases which have been referred to at the bar, and it is only necessary to notice one or two of them. One of those cases was the *Bonaparte* 8 Moore, P. C., 459 in which the judgment was delivered by Lord Justice Knight Bruce. In that judgment, according to the corrected report of it in the subsequent case of the *Hamburg*, [B.. & Lush. 253,273 ; 8 C., 2 Moore, P. C. (N.S.) 289,320,] it was said : "That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate or even endeavour to communicate with the owner of the cargo, has not been alleged, and is a position that could not be maintained ; but it may safely, both on authority and on principle, be said, that in genera it is his duty to do so, or it is his duty in general to attempt to do so." Then follows the sentence which was not corrrectly reported in the original report of the *Bonaparte*. The passage is this : "If, according to the circumstances in which he is placed, it be reasonable that he should—if it be rational to expect that he may —obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt."

This duty was affirmed, and the cases referred to, in a recent decision of this Committee in the case of the *Australasian Steam Navigation Company* v. *Morse*. [Law Rep. 4 P. C. 222.]

The latest case on the subject, the *Onward*, [Law Rep. A. and E. 38, 55,] is in its facts extremely like the present, and there the law was thus stated by Sir Richard Phillimore. He cites the language of this tribunal in a judgment delivered by Sir John Jervis in the case of the *Oriental* [Moore, P. C., 398, 411,] to this effect : "There was not only power of communication, but an absolute communication made. It was made, and properly made, at the moment of the accident, communicated and received within a few hours, and by a means of communication, in existence which must be taken to be the proper mode or channel of communication,—not to send money, as suggested, because the electric telegraph will not carry money, but to send communication on the one hand and receive an answer on the other. There being the means of communication, and the authority in the master being founded on the impossibility of a communication, their Lordships are of opinion that there was no authority in the master to raise money on bottomry." Sir Richard Phillimore's observations following that situation are ; "In the opinion, therefore, of this appellate court, whose decisions are binding upon me, a statement of injuries done to the ships and of the consequent necessity of repairs which would entail considerable expenses, unaccompanied by a statement that a bottomry bond must be had recourse to, was not a sufficient communication to the owners." In this view of the law their Lordships entirely agree.

It is not necessary to go at any great length into the facts of the case, but those which are material to be considered are as follows :—The cargo, which was of rice, was shipped on board the *Maria Luisa* at Rangoon. The bill of lading stated that it was shipped by Gerber, Christian, & Co., who carry on business at Rangoon. The cargo is stated to be "10709 bags

new Rangoon cargo rice," and the destination of the ship was "Queen's Town, Plymouth, Falmouth, or Cowes," for orders, and the rice was made deliverable to order, that is, to the order of the shippers. It seems that the *Maria Luisa* sailed from Rangoon in July 1872, and it may be taken that in the course of her voyage she met with bad weather and received considerable damage. On the 7th of September 1872, she put into Trincomalie, and there according to the evidence of the master—and he is supported to some extent by other witnesses, the vessel required very considerable repair, she wanted re-coppering, new sails, and other things. For the purposes of the present decision, although their Lordship do not intend to affirm the facts—it may be assumed that she was in a state of distress requiring considerable repairs, that it was not possible to raise the money upon the personal credit of the owners of the ship, or of the master, and that the security of the ship alone was not sufficient for the advances which were required to repair the ship. It seems to have been thought by the learned judges in the court below that the cargo was in a damaged state, and that money was wanted either for the purpose of carrying the cargo on speedily, or for some necessary expenditure for the purpose of putting the cargo into better condition by drying it, or otherwise. Upon looking at the evidence, that appears to be a mistaken view of the facts. According to the master's evidence the cargo was landed at Trincomalie, and remained there for a considerable time until he re-shipped it; but when he did re-ship it, the rice was in good condition, and for any thing that appears nothing had been done to it except that, of course, when taken out of the ship it had beeen stored. A small quantity was thrown overboard, which appears to have been at the bottom of the ship, and damaged; but there is no evidence that the bulk of the cargo was in any way damaged so as to require its being carried on speedily, or any expenditure incurred for its preservation.

The master being at Trincomalie and under the necessity of raising money—which has been, for the purposes of this decision, assumed—it appears that he communicated with the agents of the present respondents, the *Cassa Marittima*, and agreed with them, on the 10th of December, 1872, to hypothecate the ships, cargo, and freight. The bottomry bond which was executed in pursuance of that agreement is dated the 12th of March, 1873. Taking the earlier of these dates, the 10th of December, their Lordships are of opinion that there was before that time a reasonable possibility of communicating to the owners of the cargo or those who represented the owners what was intended to be done, and that that communication not having been made there was a want of authority on the part of the master to execute the bond on the 12th of March, or indeed to enter into the agreement on the previous 10th of December.

It may be stated that the ship sailed from Trincomalie on the 11th of April, 1873, having re-shipped the rice; that she put into Point de Galle in May, 1873; and that in August of that year the cargo, being then, according to surveys, made at Galle, in a perishable condition and unfit to be carried on, was sold. In the present appeal their Lordships have nothing to do with the question whether this sale was a justifiable one or not. The

only question before them for determination is whether there was sufficient authority to execute the bottomry bond?

The duty of the master to communicate with the owners, or those who may be fairly taken to represent the owners, before taking this extreme step, being plain, let us see what he did. It appears that he considered Gerber, Christian & Co. as the owners of the cargo, and he had reason to do so. He knew no other owners. They were the shippers of the cargo, and had taken the bill of lading from him, making the cargo deliverable to their order, and throughout he appears to treat them as the owners of it, until at a later period, when probably the difficulty was made apparent, he says that he did not know who the real owners were, and therefore could not communicate with them. Mr. Webster, who appeared for the respondents, has very properly admitted that, if communication were necessary, Gerber, Christian & Co. were the persons to whom it should have been made; and he has not denied that the case resolves itself into the question whether, they being the persons to whom the communication ought to have been made, that which was in fact made to them was sufficient or not? The master telegraphed to them shortly after his arrival at Trincomalie; he says two days after the ship had put into that port; that she was leaking, and in want of repairs. It appears that Gerber, Christian & Co. telegraphed back to him requesting information, with more particularity as to the state of the ship and cargo. That telegram is dated the 19th of September, and no answer appears to have been given by the master to it. An important letter was put in evidence from Gerber, Christian & Co. to the master, complaining of his neglect in not giving them further particulars: "Our telegram of the 19th September, requesting you to be so good as to give us particulars of the damage suffered by your cargo, having remained unnoticed, we now beg to request you will be so good as to tell us when you intend to sail from Trincomalie after completing the repairs of your ship; if you are taking on all the rice shipped by us here; or, if any has been sold, how much, and all other particulars which may be of interest to us as shippers of the cargo." Now what was the duty of the master when he received this letter? If his duty was not clear before, there was now a distinct request by the shippers of the cargo to know what the state of the cargo was; whether it would be taken on; if any had been sold, how much had been sold; and all other particulars which might be of interest to them as shippers of the cargo. The master at the time he received this letter, or shortly after, must have contemplated hypothecating the cargo, and instead of communicating to those whom he knew to be the shippers of the cargo that he was going to hypothecate it, he maintains on absolute silence. This letter is dated the 1st of November. The agreement to hypothecate is not made until the 10th of December, long after its receipt. The rice was, upon the evidence, receiving no damage, yet the master undertakes to hypothecate it to the *Cassa Marittima* upon this bottomry bond, without giving the slightest intimation to the shippers that he was going to do so. This appears to their Lordships to be a strong case of dereliction of duty on the part of the master, when about to take the extreme course of hypothecating the cargo

for the needs of the ship. If Gerber, Christian & Co. had been communicated with, they might have said. "We will advance the money rather than you should raise it upon bottomry interest;" or they might have given him other directions which it might have been more for their interest that he should have followed than to have taken this unauthorized course.

Their Lordships cannot but observe that the learned judge who decided this case on appeal from the district judge seems to have given his decision under some mistake as to the facts. In one point of his judgment he says: "The shippers of the cargo therefore knew at a very early period that the cargo had suffered damage, and that the vessel wanted repairs. The telegram was sent, the defendant swore, as soon as he arrived at Trincomalie. Rice, when once heated and fermented, runs rapidly from bad to worse. Mr. Spence, one of the surveyors, says that the rice was much heated and discoloured, and the stench in the hold gave evidence of rapid decay going on in the cargo." It turns out that the rice was not heated and fermented at Trincomalie, although it was subsequently in that condition at Galle; and Mr. Spence was the surveyor not at Trincomalie but at Galle. Thus the learned judge appears to have transposed the state of things which existed at Galle to Trincomalie. Then he goes on: "The master himself swears that, so far as he knew, the shippers were the owners of the cargo, and this evidence is unrebutted." The learned judge, in that passage seems properly to have taken the view that Gerber & Co. were the right persons to be communicated with. Then he says: "From September, when he sent his telegram to Gerber, Christian & Co. till August, 1873, when the rice was sold, he received no instructions or offer of funds from them or from the parties who now claim the rice as consignees." Their Lorships cannot but observe that this passage involves an assumption which is erroneous in point of law. The judgment of the learned judge really amounts to this:—That Gerber, Christian & Co. were the proper persons to be communicated with, but that the communication made to them was sufficient, and that it become their duty, upon the slight information they had, at once to offer money to the master for the necessary repairs of the ship. Their Lordships think no such duty was imposed upon Gerber, Christian & Co. and that they did what men of business might reasonably be expected to do. Upon having the general information that the ship had received damage and wanted repairs, and that the cargo might also be damaged, they wrote to the master to know the particulars, and, as before observed, received no answer to the letter.

Under these circumstances their Lordships will humbly advice Her Majesty to reverse the judgment of the Supreme Court, and to affirm the decree of the district judge of Galle. The respondent must pay to the appellants their costs of the proceedings in the Supreme Court, and of the appeal to Her Majesty.

P. C., Kurunegala, No. 26,697. } *Fredrick Appu* v. *Paules Rodrigo.*

Ordinance 14 *of* 1867 *sect.* 4—*Vehicle for passengers.*

A cart is not a vehicle for passengers under section 4 of Ordinanee 14 of 1867 merely because the owner of the cart gives his servant a ride in it.

P. C. Colombo, 70,275 (Beling and Vanderstraaten, Part II. p. 25) distinguished.

Ferdinands for defendant appellant.

23rd September 1875.—The judgment of the court was delivered by CAYLEY, J.,—

The Supreme Court does not think that it has been proved that the cart in question was a vehicle for passengers in terms of the 4th section of the Ordinance No. 14 of 1867.

It was held in the case No. 70,275 P. C., Colombo, 2 Beling Report, 25, that if a cart owner takes passengers in his cart, he makes his cart for that occasion a vehicle for passengers. In the present case it is true that a man was in the cart in addition to the complainant who drove it, but the complainant states that this man was his own servant and there is no evidence to shew that he was riding in the cart in any other character. Under these circumstances we do not think that this man's presence in the cart rendered it a vehicle for passengers in the sense contemplated by the Ordinance.

D. C., Kalutara, No. 27,397. } *VanOuylenburg* and another v. *Harmanis Vederale* and others.

Damages—Plumbago mines wrongfully worked—Bonâ fide mistake of ownership—Mode of Assessing damages.

In a suit for an account of plumbago wrongfully quarried by the defendant, it being found that the working of the mine was carried on in the *bona fide* belief that it belonged to the defendant, the court held that the defendant was bound to pay the fair market value of the plumbago after deducting his working expenses.

Hilton v. *Woods*, 36 L. J. Chancery Division, 941, followed.

Layard for plaintiffs' appellants.
Grenier for defendants' respondents.

28th September 1875.—The judgment of the Supreme Court was delivered by CAYLEY, J. :—

The decree of the 12th day of May 1875 is affirmed as to the finding of the district court that the plumbago was quarried from the plaintiff's land and as to the order respecting costs, but the case is sent back for further hearing on the question of damages.

The evidence as to the position of the boundary line between the plaintiffs and the defendant's land is conflicting but the Supreme Court sees no sufficient reason for coming to a different conclusion from that arrived at by the district judge upon the evidence of Mr. Caldera.

We see no reason for doubting that the defendant's acted under an erroneous belief that they had a good title to the pit, and consequently in assessing the compensation due to the plaintiffs, we think that the defendants are entitled to deduct the working expenses of quarrying the plumbago (see *Hilton* v. *Woods*, 36 L. J., Chancery Division, page 941.) The learned district judge has given plaintiffs the ground share, which they would have received if the pit had been leased by them because the actual working expenses have not been proved. It is not however proved that this part of the pit was leased, and it is for the defendants to prove in deduction of damages how much was expended in quarrying ; this being within the knowledge of the defendants and not of the plaintiffs.

This court would recommend the parties to come to some agreement on this part of the case and thus avoid the expense of a further trial.

Each party will pay his own costs in appeal.

D. C., Kurunegala, No. 19,822. } *Sinna Odear* v. *Jamal.*

Original possession—Presumption as to continuance of such possession—Prescription—Planters share.

Ferdinands for defendants' appellant.

28*th September*, 1875—CAYLEY, J.—The decree of the court is set aside, and the case sent back for further hearing.

The plaintiff having admittedly entered into possession of the land as a planter must be presumed to have continued to hold on the same terms, until he distinctly proves that his title has been changed (see 419 D. C., Negombo, Supreme Court Minutes 5th August, 1862). This the plaintiff has not proved and his possession as a planter will not confer a prescriptive title upon him. He would, as appears by Mr. Jayetilleke's evidence be entitled to a half share of the land under the custom of the country if the planting had been completed. He has not however, satisfactorily proved that he has fully planted the land.

D. C., Colombo, No. 67,918. } *Abdul Cader* v. *Aya Samy.*

Sequestration—Dissolution of—Power of District Judge to dispense with security—Rules and Orders of Supreme Court, § 17 *of sec.* 1.

The district court is bound to require security in dissolving sequestration and has not the power to dispense with such security.

The discretion allowed the district court under clause 17 of section 1 of the Rules and Orders is only with regard to the nature and amount of security to be required.

5th November 1875.—The judgment of the Supreme Court was delivered by DIAS, J.,—

The order of the court below is set aside.

The Supreme Court thinks that under 17th clause of the Rules and Orders sec. 1, the district court is bound to require security in dissolving sequestration, and that it has no power to dispense with it altogether. Admitting that the primary object of the sequestration, under the 15th clause is to compel the appearance of the defendant, it will be seen that the 17th clause further specially provides that in default of the plaintiff giving security he shall be admitted to appear and defend the action, but the property shall remain under sequestration. The Supreme Court further thinks that the discretionary power of the district court, under clause 17, is confined to such matters as the amount and the nature of the security to be required.

D. C., Galle, No. 37,823. } *Bala Hami* v. *Ahamado.*

Agreement for future cohabitation—Parties thereto—Section 101 *of the Muhammadan Code of* 1806—*Roman Dutch Law.*

Suit by a Sinhalese woman against a Muhammadan on a contract which was for future cohabitation.

Held that although by section 101 of the Muhammadan Code of 1806 a contract of concubinage is legal, yet the party suing being a Sinhalese, the case was governed by the Roman Dutch Law, under which such a contract was void.

11th November 1875.—The judgment of the Supreme Court was delivered by CAYLEY, J.,—

The order of the court below is set aside and plaintiff's libel dismissed.

According to the translation of the document sued upon, which was made by the Interpreter of the district court, and which does not materially differ from that made by one of the Interpreters of this court, there can be no doubt that the agreement is one for future cohabitation. The defend-

ant agrees to pass with the plaintiff as her husband, and to give her two hundred and fifty rupees in case he should desert her, and the plaintiff agrees to live with the defendant as his wife, and in the event of leaving him without his consent, to forfeit her right to two hundred and fifty rupees. Such an agreement under the Roman Dutch Law is repugnant to good morals, and consequently void. (See Voet. lib. 25 tit. 7 sec. 3.) The defendant is a Moorman, and by the 101 section of the Muhammadan Code of 1806, concubinage amongst the Mohamedans is declared legal ; but the plaintiff setting up the contract is a Sinhalese woman, and, so far as she is concerned, the contract is immoral, and one which a court of law cannot assist her in enforcing.

Parties will pay their own costs respectfully,

The Chief Justice has taken no part in this judgment, not being present at the hearing of the appeal.

D. C., Kurunegala, No. 19,887. } *Punchy Menika* v. *Dingiri Menika.*

Kandyan Law—Grandchildren dying without issue—Right of grandmother to a life interest in their property.

A grandmother is, according to the law obtaining in all the Kandyan districts, except the Sabaragamuwe district, entitled to a life interest in the property of those of her grandchildren who die without issue.

Grenier for plaintiff appellant.
Ferdinands for defendant respondent.

11*th November* 1875.—The judgment of the Supreme Court was delivered by DIAS, J.,—

The decree of the court below is affirmed as to the judgment in favour of the 1st defendant, but set aside as to the nonsuit ; and plaintiff declared entitled to a life interest in one undivided moiety of the lands claimed.

It appears that the entirety of the land claimed belonged originally to Punchirala, who left two children, a daughter, Manikhami, and a son Appuhami. Manikhami married in beena and became the mother of the 1st defendant. Appuhami married the plaintiff and had issue, Dingiri Manika, who married one Kadurahami in beena. Kiri Ettena was the only surviving issue of this marriage. Appuhami, Dingiri Manika and Kiri Ettena are all dead, Kiri Ettena having been the last survivor. No question as to the plaintiff's right to maintenance out of her deceased husband's half share of the land claimed has been raised. The question at issue is whether Kiri Ettena's property devolved at her death upon her grandmother, the plaintiff, or upon the 1st defendant, her collateral relation on the side of her grandfather through whom the property came to her. Kapuralahami, the beena married father of Kiri Ettena has made no

claim, and according to the decision in the case No. 14,628 D. C., Kurunegala he would not be entitled to succeed to his deceased daughter's property. With regard to the right of the plaintiff to succeed to her deceased grandchild's property in reference to the collateral relatives, the question appears to be governed by the decision of the court in the case No. 940 D. C., Ratnapura (Morg. Dig. p. 201), in which it was held that a grandmother takes a life interest in the property of her deceased grandchild in all the Kandyan provinces except Saffragam, where she takes an absolute interest. The judgment of non-suit must accordingly be set aside, and judgment be entered for plaintiff declaring her entitled to a life interest in an undivided one half of the lands claimed, the judgment in favour of the 1st defendant to the other half will be affirmed.

Parties will pay their costs respectively in both courts.

The Chief Justice has taken no part in this judgment, not having been present at the hearing of the appeal.

D. C., Kalutara, No. 28,357. } *Manuel de Fonseka* v. *Carolis Perera.*

Last Will—Provision for forfeiture of share of heir impeaching the will —Validity of such clause.

A clause in a will that any heir under it disputing the directions of the will shall forfeit his share is valid, and not contrary to public policy. Such forfeiture however is not to take effect if it appears that there was reasonable and probable cause for disputing the will.

Browne for defendants appellants.

Ferdinands and *Grenier* for plaintiff respondent.

11*th November* 1875.—The facts sufficiently appear from the judgment of the Supreme Court which was delivered by CAYLEY, J.,—

The decree of the court below is affirmed. In this case a question of some difficulty and importance has been raised as to the operation in this country of a clause in a will providing that the share of any heir, who should dispute the directions of the will should be forfeited. The clause in question (11th), according to a translation, which has been agreed to as correct is as follows :—" Should there be any heir who goes to law against the directions herein directed, it is hereby directed that he shall not become entitled to the share which he shall be entitled to from the estate." The plaintiff, who is now suing the executors for his share of the estate, resisted probate in the testamentary case, impeaching the will on the grounds : (1) that it was forged, (2) that it contained dispositions contrary to facts ; and (3) that it contained dispositions bad in law which vitiated the will. The two latter grounds appear to have been inserted in the allegation filed in support of the caveat as reasons for suspecting the

will, rather than as substantive grounds of objection of probate. The real objection was that the will was forged, and the petition of appeal in the testamentary case went entirely on this ground. The plaintiff was unsuccessful in his attempt to overthrow the will, and the executors now resist the plaintiff's claim on the ground that he has forfeited his interest under the will by virtue of the 10th clause. The district judge has ably discussed the English authorities bearing on this question, and if the case is to be governed by the English decision, we agree with him that the plaintiff is entitled to judgment. The result of these decisions as summed up in Jarman on Wills, ii. pp. 52 and 53, appears to be that a condition not to dispute the will annexed to a devise of reality is valid and operative, but that a similar condition annexed to bequest of personalty will be regarded *in terrorem* only, and therefore inoperative, unless there is a gift over in the event of a breach of such condition, in which the case, the gift over will take effect. In the case of *Stevenson* v. *Abington* (11 W. R. 935) such a clause of forfeiture annexed to a bequest of personalty was treated as good, and the gift over upheld. In the case of *in re Dickson* (20 L. J. Chan. 33) cited by the district judge, Lord Cranworth seems to throw some doubt upon the legality of these conditions as contrary to the policy of the law, but he did not decide the question one way or the other. He merely states that such a condition has been considered as a *conditio rei non licitæ* and has accordingly been treated as a mere clause *in terrorem*, unless there has been a gift over on the condition being broken. When such a condition is spoken of as a *conditio rei non licitæ*, what is probably meant is that it is a condition which the law would not favour; for, if a condition is illegal altogether (such as one in total restraint of marriage), a gift over could not make it less so. The present will purports to dispose both of moveables and immoveables, but there is no gift over on a breach of the condition not to dispute the will. If the English law is applicable to the case, we should be disposed to consider it governed by the decisions relating to conditions annexed to bequests of personalty, rather than to those annexed to devises of realty; for in Ceylon immoveables pass to the executor in the same way as moveables and in applying the English law to testamentary matters here, the immoveable property of an estate is regarded in much the same position as the chattels real of a testator in English law. See *Staples* v. *de Saram*, S. C. Min. 17th July 1875, so that if the English law is to govern the case, the forfeiture clause must be treated as *in terrorem* only and, therefore, inoperative for want of a gift over.

We must however, be guided by the Roman Dutch law, which does not appear to make the validity or invalidity of clauses of this kind depend upon the existence or absence of a gift over. Under the civil law a legatee, who impugned a will *usque ad sententiam judicis* (except in certain specified cases) was deprived of the legacy as an *indignus* whether there was a clause of forfeiture in the will or not. (See the authorities quoted in Pothiers' Edition of the Pandects, vol. II. p. 442 et seq.) The Dutch law, however did not go so far as this. Groenewegen, indeed, appears to consider these provisions of the civil law altogether obsolete. Referring to the

Code lib. 9 tit. 23 sec. 6 (De Legg. Abr. p. 743) he says "*qui testamentum falsum dicit nec obtinet, perdit legatum sibi in eo relictum. Hoc autem moribus nostris non convenire videtur ex eo quod pœnæ legates privantes aliquem jure suo ab usu recesserunt* (see also p. 649 ad. cod. vi. tit. 3 sec. 2,) where he again says referring to a similar subject *moribus nostris ... ... pœnæ legates privantes aliquem jure suo in universum sunt absoletae.*

Voet, however, (lib. 24 tit. 9 sec. 3) does not entirely agree with Groenewegen, but thinks that a person who unsuccessfully impugns a will on the ground that it is forged or *inofficious* loses his benefit under the instrument, if in the opinion of the judge he had no probable cause of complaint. *Quod autem Groenewegio placet* (he says) *hodie relictis non privari eum qui testamentum falsum dixit aut inofficiosum nec obtinuit, tum demum admittendum videtur cum arbitrio judicis probabilem ita contendendi causam habuit nam si aperta calumnia falsi aut inofficios ilis mota sit nihil calumniatori praestandum esse dixi &c.* Whatever may have been the case with regard to penalties imposed by law upon legatees impugning a will it is clear from Voet (Lib. 24 tit. 6 sec. 3) that penalties of this kind imposed by a testator himself were recognized as valid. Voet lays down, that, where a testator has directed that an instituted heir or legatee should be content with or acquieses in the dispositions of the testator, and has declared that those who should litigate or dispute the will should be held *indigni*, still persons, who disobeyed those injunctions would not be deprived of the benefits bequeathed to them, if (1) they were successful in their suit ; or (2) they had a *probabilis causa litigandi.*

Following the authority of Voet, it appears to us that the forfeiture must depend upon the question whether or not the plaintiff had any *probabilis causa litigandi* when he contested the will. The district judge has found that he had not ; and, if we were to judge of the case by the plaintiff's conduct in the testamentary proceedings we should agree with the district judge that his opposition to the will was groundless ; for the plaintiff himself never attempted to prove any facts or shew any grounds in support of his *caveat*, but declined to take any part in the proceedings on the day which had been five weeks previously fixed for the hearing (and when the executors and their witnesses were present) on the untenable, and apparently frivolous ground that he had been too ill to retain a Colombo advocate, though he was represented throughout the proceedings by a proctor, who could have secured the services of counsel from Colombo, if such were thought necessary, and who was himself as legally competent as an advocate to conduct the case. It is possible, however, that his refusal to take any part in the testamentary proceedings may have arisen from an error of judgment, and we must consider the question of *probabilis causa* with reference to the facts proved at the trial of the present case. Now it appears to us that there were some *primâ facie* grounds for suspecting this will. The 8th clause makes a provision in the event of Sarah Fernando, a grand daughter of the testator, not bearing children ("if the said Sarah Fernando does not leave children &c."), whereas the said Sarah Fernando had a few days previously to the execution of the will given birth of a child in the presence of both the testators, and this child was

still living. Again, it was remarkable, that after the plaintiff had applied for letters of administration, the notary who had prepared and attested the will never said a word about it, though he was always present while the administration appraisers were making the inventory of the goods of the deceased. The will, indeed was not mentioned until three days after the plaintiff had applied for letters of administration, although several persons must have known of its comparatively recent execution. These grounds of suspicions were not perhaps very strong, but still not altogether unreasonable ; and in dealing with a question of forfeiture, we are not disposed to scrutinise too closely the measure of probability in the *causa litigandi*. Van Leeuwen (Comment. p. 248 of English translation) says that in the construction of these conditions of forfeiture "an exception is made in favour of an heir who does anything contrary to them under the idea that he might have been prejudiced thereby in his right, or that he may legally refuse it." This passage in the English translation is not very plan, but it certainly shews that considerable indulgence is to be shewn to an heir who disputes a will, by which his rights as heir are prejudiced.

The district judge considers that clauses of forfeiture of this kind are void altogether as against public policy, and has decided the case in plaintiff's favour on this ground. The view which we have taken of the case renders it unnecessary to decide this point, but it may be observed that these conditions have been held not to be contrary to public policy by a number of English decisions. In the case of a devise of realty such a condition has been held perfectly good and operative, (See *Cook* v. *Farner*, 15 M. and W. 727). In cases of bequests of personalty a condition of this kind has, it is true, not been favoured by the law and, therefore (like a condition in partial restraint of marriage) has been held inoperative unless supported by a gift over ; but has never been held altogether illegal (like a condition in total restraint of marriage) ; for in that case no gift over could legalize it. By Roman Dutch law such conditions have always been recognized as valid. The principle of requiring a *probabilis causa litigandi* appears to us to obviate the probable evil effects of such conditions, contemplated by the district judge ; for, though a duty is thrown upon every one to do his best to bring crime to light, and any condition, which would have a tendency to discourage persons from the performance of this duty, would be contrary to public policy ; still no duty is thrown upon a person to contest the genuineness of an instrument without having any reasonable grounds whatever for his impeachment. Public policy is interested in the discouragement, not the encouragement, of vexatious litigation.

The Chief Justice has taken no part in this judgment not having been present at the hearing of the appeal.

Affirmed.

D. C., Colombo, No. 996. } In the matter of the Insolvency of *Charles William Allsup*. *Gabriel*, provisional assignee, respondent. *Modeley*, special mortgagee, appellant.

Insolvency—Ordinance 7 of 1853 sections 76 and 111—Property specially mortgaged—Rights of assignee.

Specially mortgaged property of on Insolvent does not under sections 76 and 111 of Ordinance 7 of 1853 vest in the assignee in insolvency, but is liable to be sold in execution in satisfaction of the debt for which it was so mortgaged, the assignee himself having no greater power than the insolvent as to dealing with the property.

Ferdinands and *Layard* for appellant.
Grenier and *Browne* for respondent.

25*th November* 1875.—The judgment of the Supreme Court was delivered by CAYLEY, J.,—

In this case the only question raised is whether the execution debtor's assignee is entitled to take out the fiscal's hands specially mortgaged goods which have been seized under the special mortgagee's writ. We think that the assignee is not so entitled, but that the execution creditor can claim to have his writ duly executed by the fiscal nothwithstanding the execution debtor's bankruptcy which has supervened after the seizure. It is quite clear that the mortgagor, (who is the judgment debtor) could not himself have stayed the sale of the specially mortgaged property except by tendering the amount due on the judgment ; and the judgment debtor's assignee cannot, we think, be placed in a better position in this respect than the judgment debtor himself, unless there is something in the insolvency law clearly providing that such should be the case. It is very important that a special mortgagee's rights should remain intact, and unaffected by subsequent acts or defaults of the mortgagor ; and there appears to us to be nothing in the Ordinance No. 7 of 1853 to take away the right of such mortgagee to the full benefit of his writ of execution, notwithstanding bankruptcy of the judgment debtor before the property has been sold. On the contrary, it seems to us that the intention of 76th and 111th sections of the Ordinance was to preserve unimpaired, as much as possible, all the rights of a special mortgagee, in the event of the mortgagor's insolvency. It is true that all the insolvent's property, both real and personal, vest in the assignee upon the appointment ; but it only vests, (except where otherwise provided) subject to such rights as might have been enforced against the insolvent. In the present case the property has, by the judgment upon the mortgage, become specially bound and executable to satisfy the appellant's claim, and it must be regarded as vesting in the assignee subject to the right of the appellant to have his judgment executed by the fiscal in ordinary course. It is difficult to apply the English decisions in this branch of the law to cases arising here, because of the difference between the law of England and Roman Dutch law, both with respect to mortgages, and with respect to the concurrence of creditors in the proceeds of a sale

in execution. So far, however, as these decisions can be made applicable they appear to us to support the position contended for by the appellant. A mortgagee's interests might certainly be affected by the fiscal handing over the seized property to the assignee for sale, he (the mortgagee) having, as an unproved creditor, no voice in the choice of the assignee, or control over the sale.

The learned district judge has adverted to the fact that while the property was under seizure upon the appellant's writ, it was placed under sequestration in the insolvency proceedings; but we do not think that this materially affects the question, for we think that the subsequent sequestration must be taken to be controlled by the prior seizure, and subject to any rights that may have accrued to the judgment creditor by such seizure. The sale will be carried out by the fiscal in the usual course.

D. C., Colombo, No. 62,414. } *Marshall* and others v. *Stork*.

Admistrator—His purchase of property belonging to the estate—Impeachment of sale by heirs—Fraud—Lapse of time—Acquiescence on the part of the heirs.

Defendant was appointed official administrator of the estate of one Mr. Marshall, in February 1841.

On the 13th of May 1846, final account of the estate was closed by defendant, after notice to the attorney of the heirs of Mr. Marshall.

In 1873 an action was brought by the heirs of Mr. Marshall impeaching the correctness of defendants accounts and charging him with fraud especially with regard to the sale of a house and garden called Cinnamon Lodge, which the defendant had bought from the purchaser at Mr. Marshall's auction nine months after. It was alleged on the part of the plaintiffs that the first sale was a collusive one and that the real purchaser was the defendant himself and the property was sold for very much less than its real value. It was proved by the defendant that the sale had been previously advertised for in four issues of the leading newspaper in the island and that several persons, including the defendant himself, had bid for the property.

Held that although an executor or administrator buying his intestate's property is liable to have his act very narrowly scrutinised by the court, yet in the present instance the circumstances were such as to negative any fraud on the part of the defendant. The court relied on the fact that the sale sought to be impeached was an open transaction (the heirs of the deceased having been represented by an attorney, who was aware of the purchase by the defendant, and did not question the bona fide character of the transaction) and that (nearly thirty two years having elapsed between the purchase and the institution of the present action) it was impossible for the defendant to adduce evidence as to the value of the property at the time, as all the witnesses who could have spoken to its value then were dead.

The following judgment of the learned district judge (BERWICK) fully set at the facts of the case :—

One of the questions raised in the argument at the trial of this case,

on the point of prescription is whether, and how far, the new Prescription Ordinance is retrospective ; and as that very question was stated at the bar to have been already argued and to be awaiting decision in the Supreme Court, the judgment in the present suit lay over for decision.

Having however during the vacation considered the evidence, oral and documentary, on which the decision of the primary question involved in this suit depends, I have arrived at an opinion thereon, which, if correct, excludes the consideration of any question of prescription, and I do not think it expedient, under such circumstances, to delay the judgment longer.

The plaintiffs are the heirs of the deceased Mr. Marshall, a civil servant of this colony, who died here in January 1841 leaving considerable property in houses, cinnamon lands &c., but incumbered. The defendant was then the secretary of this court, and to him, in his official capacity as secretary, the administration of Mr. Marshall's intestate estate was committed by this court on the 25th February 1841. He is styled in the proceedings "official administrator." He from time to time filed provisional accounts in court, and on the 13th November 1846 he was duly sworn to his final account. This was done after a rule had been directed to issue to Mr, F. B. Norris, called in the order the attorney of the deceased, but who it appears was also the attorney of Mr. Marshall's widow and sons, to shew cause, if any, why the final account should not be sworn and passed. That Mr. Norris (who occupied a high public position as Surveyor General and Civil Engineer of the colony) represented and acted throughout in the interests of the absent heirs, the abovementioned widow and sons, (one of whom is the 1st plaintiff in the present suit), and held their power of attorney, is clear from the correspondence put in evidence, as well as from the proceedings in the testamentary suit, which shew that on various occasions, to wit, on 25th August 1842, 7th February 1843, 12th October 1843, 28th November 1843, 21st March 1846, he drew from the court large sums on their behalf which had been deposited by the administrator. The correspondence further shews that Mr. Norris interested himself actively in the affairs of his constituents, watching their interests, apparently, narrowly and zealously. The import of this observation will presently appear.

After the lapse of 32 (thirty two) years from the time of Mr. Marshall's death, and of 31 years from the date of the transaction impeached by the present suit, and nearly 28 years after the administrators final account, had been filed and sworn to, the present action has been instituted impeaching the administrator's accounts and charging him with fraud (see replication) in an alleged colourable sale for an inadequate price of a certain property called "Cinnamon Lodge" to Mr. Staples (another civil servant) in collusion with that gentleman for its subsequent reconveyance to himself. That there was a sale to Mr. Staples, on 1st May 1841, and that the defendant purchased this property for himself on 31st January 1842, and that the present value of the premises, the defendant's title to which is now in issue, is very large, are unquestionable facts ; and the *bona fides* of these transactions is the cardinal question for present decision in determining the present claim for ejectment and mesne profits.

Of the broad and general rules by which the duties and liabilities of trustees have to be determined, equally under the English Equity Law and under the Civil Law, which the former has followed in this respect as closely as mere technical differences of language admit of, there is no doubt, nor need for disquisition. A large degree of *onus* unquestionably lies on the defendant to shew the purity of the transaction and that it had its inception and execution in the *bona fide* interests of the trust estate, and not of himself. At the same time, conscientious and reasonable allowances must be made for the destruction of the means of proof by lapse of time, and the deaths of both Mr. Norris and Mr. Staples and other persons (notably the appraisers), who could by their testimony have thrown much light that has perished with them. And while, on the one hand, it is, under certain circumstances, incumbent on a trustee to prove affirmatively the *bona fides* of certain classes of transactions, it would on the other hand be unjust to presume *mala fides* from the mere absence of light which he has had no part in obscuring.

After careful consideration of all the evidence, it seems to me that, judging as well as I can from the materials which the lapse of a third of a century has left, I ought to hold that the sale by the administrator to Mr. Staples on 1st May 1841 was *not* a nominal, but a *bona fide*, sale, made without contemplation of any re-purchase by the administrator for himself, and that the explanation given by the latter of the circumstances under which he subsequently (9 months after) purchased from Mr. Staples, ought to be deemed satisfactory. That explanation is recorded in the evidence and therefore need not be here repeated, and I will limit myself to the admitted or clearly proved facts, which are strongly presumptive of *bona fides*, and to the points which have been pressed as evidencing the contrary.

First of all, the sale was by public auction, and that was duly and timeously advertised in the way calculated to give it the greatest publicity. It took place on the 17th of April, having been previously advertised in what was at that time the leading newspaper, the Colombo *Observer* and in four issues of it, to wit, the 5th, 8th, 12th and 15th April. Next, there was fair competition at the sale, there having been no less than 31 bids and a keen competition among five bidders, *exclusive* of Mr. Staples and of the administrator himself who bid once, evidently or presumably to enhance the price. The biddings terminated in a keen competition by alternate bids between Mr. Staples and one Abraham, after four other bidders, namely Dr. Misso, David Silva, A. Perera and Meera Lebbe (who all bid repeatedly) had been bid out of the field : and the property which started at an offer of £100 by Dr. Misso, was knocked down to Mr. Staples for £350. These facts are strongly demonstrative both of an honest sale and of the fair value having been realised in the open market. Again, it appears that the property which had been bought in small lots by Mr. Marshall cost him only £275 and there is nothing to shew that its value had been materially enhanced by him. I must, therefore, presume that the sale for £350 was both a fair and open one, and for full value.

Now, I come to another set of facts, connected with the defendant's

own purchase nine months after the sale by auction. This was as devoid of secrecy as the first sale. The defendant far from making any concealment of it, at once went to live on the premises and as his official position was a prominent one, it must have been notorious to all the world that he was living there and he appears to have built and reconstructed the house for his residence in such open manner that no one can doubt that it was probably notorious that he was openly acting as owner. I have already pointed out that Mr. Norris held a power of attorney from the heirs (this is admitted in the replication) and that he took an active (the correspondence proves a *warm*) part in the interest of the absent widow and heirs, and there is no reason to doubt the defendant's statement that he frequently visited him at this house, and it is very hard to reconcile Mr. Norris' knowledge and position and inaction on this matter with the existence of any good ground for supposing that the defendant's conduct in regard to it had been either fraudulent or reprehensible.

All these matters I think entitle the defendant's explanation of the circumstances of his purchase to be presumed credible in fact, as well as satisfactory in nature.

Various points have been urged as demonstrative of bad faith and covert intent in the first sale to Mr. Staples, of which six are most notable, which I will state briefly with the replies by defendant's counsel.

(1) "The sale by auction, by which Mr. Staples nominally purchased, "was advertised for the 1st May 1841 at 4 P.M. That (it is said) must have "been a sham auction, because the document A is the plan of a survey "of that very date, describing it as then the property of Mr. Staples. "Further the conditions of sale give no boundaries and the survey could "not have been for the purpose of the sale." To which the reply made is that the plan does not profess to have been made on the date written, but that it was the survey which was the basis of the *plan*, which was made on the 1st May and so stated in the document; and I would add that the publicity of and competition at the auction, already referred to, indicates any thing but a "sham sale."

(2) "Whereas in the accounts subsequent to the one of 20th March 1842 the name of the purchasers of all the other properties are given, no name is entered in the accounts on the purchaser of *this* one. His name is given as the purchaser of *other* houses, but not of this one." Mr. Advocate Dias' reply to this was in effect that no purchaser's name is ever mentioned in these accounts, excepting in the case of payment of interest or principal by a debtor to the estate, and there was no occasion to mention this purchaser's name, because when the money was paid the first account, dated 26th March 1842, had been already filed, and in that account none of the purchasers are named of any of the properties, the proved sale of which is there brought to account. And defendant has given more detailed explanations in his evidence which, whether clear or not, need only be referred to here.

(3) "The accounts shew that there was no necessity for the sale. Debts only £2000, moveables valued at £1500. The administrator was lending the trust money to Archdeacon Glennie and allowing parts of the price

of other properties sold to remain in the hands of the purchasers on mortgage." But surely it is usually right of an administrator in this country to realise house property at all events, if not all landed property, and to convert it into money when the heirs are abroad, and the documents and records shew that the widow was urgent for remittances of money, and that large sums, as well as cinnamon produce, were in fact remitted for her maintenance.

(4) That defendant after repurchasing the property was able to borrow £500 on it from the Loan Board, proving the value to have been at least £1000. But that was five years afterwards, in 1847, and the house had been rebuilt and, according to Mr. Stork, £600 at least laid out on it in the interval.

(5) The endorsement on the back of the conditions of sale in the hand-writing of the notary Mr. Drieberg in these words *Mr. Stork* [to be filled up after referring to original minutes in Supreme Court.]

This compared with the similar endorsement on the back of the conditions of sale of land bought by Mr. Armitage in the words "Marshall's estate, *Mr. Armitage*" is said to indicate Stork was the true, and Staples the nominal, purchaser. But Mr. Drieberg is dead, and I think that it would hardly be just to make this inference, which Mr. Drieberg, if alive, might contradict while explaining the endorsement.

(6) "That the sale was without the authority of the court.' 'But so do all the other sales seem equally to have been without the authority of the court. The courts here have long since described that an administrator does not require the authority of the court to sell, unless the letters of administration contain a special prohibition : and it was not until long after 1842 that the practice of inserting a special clause to that effect was introduced. At the time in question, it was not the practice to obtain the special authority of the court to sales by administrators.

I have gone with some detail into the various points of fact, believing that this would be most satisfactory to the parties concerned, as they are not in this country. It may be that, had as little explation been given to me, 20, 25, or 30 years ago as has been given now on some of them (separately or in the aggregate), I might have set aside the sale. I do not say that I would,—it is unnecessary to speak more positively as to whether I would or would not. But certainly at this distance of time, it would be absurd to expect full explanation, and it is impossible, through death and failure of memory, to obtain it.

I think as much explanation has been given as can reasonably be expected on the adverse points : and that on the other hand there are very positive circumstances, very strongly demonstrative of a *prima facie* honest *bona fide* public sale for the fair market value, without thought of subsequent transfer or benefit to the administrator personally : and (as already said) that the circumstances under which he afterwards acquired the property should be deemed to be satisfactorily and quite consistent, both legally and morally, with his official duties as a trustee.

Holding this as at once the fairest and most reasonable conclusion to

arrive at on the main issue in the case, it is needless to enter upon the various legal questions raised as to the effect of the Ordinance of Prescription :—its bearing on a trustee ; purchasers ; its retrospective operation or the contrary ; the disabilities of absent parties ; the effect of their having had an attorney in the Island, &c.

Judgment will be entered in terms of the prayer of the answer, dismissing the plaintiff's claim, and the plaintiffs shall pay defendants costs of suit.

On appeal, *Grenier* appeared for plaintiffs appellant; *Ferdinands* and *Cooke* for defendant respondent.

The Judgment of the Supreme Court was delivered by CAYLEY, J :—

The decree of the court below is affirmed. The facts of this case are fully and clearly set out in the judgment of the court below, and we think that the learned district judge has come to a correct conclusion of these facts.

There is no doubt that, by the law of this Island, an executor or administrator is not allowed to purchase either directly or indirectly any portion of his testator's or intestate's estate, unless all parties interested concur in the transaction ; and such a purchase is liable to be set aside, if relief is sought within a reasonable time (see the case of *Staples* v. *De Saram*, decided by this court on the 17th July 1867). And it is hardly necessary to observe that the immoveable property of a testator or intestate in Ceylon becomes vested in the executor or administrator equally with the moveable. Now when an executor or administrator is found in possession of a portion of the assets, the *onus* is undoubtedly thrown upon him to prove that he either acquired the same legitimately in the first instance, or that he has subsequently by lapse of time or otherwise perfected what might originally have been an impeachable title.

In the present case, the defendant contends that he has proved the *bona fides* and legality of his purchase with as much certainty as, after the lapse of upwards of 30 years, can be reasonably demanded. His contention is that the sale was a *bona fide* one to Mr. Staples without any understanding that the property should be conveyed to himself ; and in support of the *bona fides* of the transaction, he relies upon the evidence that the property was sold for its full value, by public auction, after due advertisement; that Staples paid for the property, entered into possession and exercised acts of ownership ; and that the defendant made no secret of his subsequent purchase, but at once entered into possession and built a house on the land, in which he has lived ever since. He complains (and not without reason) that the heirs have allowed upwards of 30 years to elapse before making their claim, during which time nearly all the persons concerned in the transaction have died and the best means of proof and explanation have perished. There is no doubt that the long delay in bringing this suit, which was not instituted until more than 30 years after the impeached sale and nearly 28 years after the final account in the testamentary proceedings was filed and the trust closed, is a ground for requiring less certainty of proof of *bona fides* than would have been considered necessary if the heirs

had exercised due diligence in ascertaining and enforcing their rights, unless it can be shewn that this delay of the heirs was due to concealment on the part of the defendant.

Now we do not think that any such concealment has been shown. In the first place, it is not probable that at that date any concealment of the mere fact that the defendant had purchased part of the assets himself by the agency of Staples would have been thought necessary. For until the case of *Staples* v. *De Saram* was decided (in 1867), it is well known that it was commonly considered in Ceylon that an executor or administrator had a perfect right to purchase any part of the estate for himself, provided that the sale was by public auction and a fair value given; and many titles here have been transmitted in this manner. Again, the plaintiffs have not proved that the defendant did anything to conceal the transaction, though the late Mr. Marshall's widow and children may not have been apprized of it. They had an attorney in Ceylon, Mr. Norris, an official holding a high position in the public service, who had full power to represent them in all matters connected with the estate of the deceased, and who appears to have actively interested himself in their affairs. It was with him that the defendant mainly dealt in his administration; and there is strong reason for believing as pointed out by the learned district judge, that this attorney was perfectly well aware of the defendant's purchase. The defendant at once entered into possession of the land and built a substantial house upon it, where he took up his abode and has lived ever since, and where he not unfrequently had interviews with Mr. Norris himself on the subject of the administration. The probabilities certainly are that Mr. Norris knew and acquiesced in the defendant's purchase, either considering it fair and *bona fide* or considering that the full value had been given for the property and that consequently no advantage would accrue to the estate by the sale being set aside.

The principal circumstance urged by the appellant in proof of this concealment is that the name, neither of Staples nor of the defendant, occurs in the testamentary accounts as that of the purchaser of this property. If the sale to Staples were *bona fide*, the defendant's name would naturally not appear as a purchaser, but the absence of Staples' name has not been satisfactory explained. At the same time, it is difficult to see what motive the defendant (if acting dishonestly) could have had in keeping Staples name out of the accounts, seeing that the insertion of this name as purchaser would have given a colour of *bona fides* to the defendant's purchase and tended to divert suspicion.

Assuming, then, that there was no concealment by the defendant of his purchase, has he given such satisfactory proof of the *bona fides* of the sale to Staples and his purchase from Staples as the lapse of time and the other circumstances of the cause will admit. Upon this point we see no reason to differ from the conclusions arrived at by the learned district judge. It is, we think, satisfactorily proved that the full value was given for the property. It is true that there are other circumstances in the case which undoubtedly do give some colour to the charge of *mala fides*; but we must not forget that the lapse of time has placed the defendant at a

great disadvantage in meeting and explaining these circumstances of suspicion. Messrs. Norris and Staples are dead, and so are the appraizers, the auctioneer and the notary, who was employed to prepare the transfers. What possibly might have been easily explained 25 years ago is now no longer so. There have been no doubt some irregularities and defaults on the part of the defendant in the testamentary proceedings : irregularities and defaults of a kind far too common in Ceylon at that time and long subsequently. But the intestate's heirs were fully and actively represented here by a competent agent, who took no steps to set aside any of the acts of the administrator and who appears to have been satisfied with and to have acquiesced in the final accounts, when the trust was closed. Under these circumstances we do not think that the irregularities referred to and the absence of fully satisfactory explanation on some of the other matters connected with the administration should, after the lapse of nearly one third of a century, be considered as depriving of all credit the direct oral evidence of *bona fides* given by the defendant. We follow the district judge in deciding in defendant's favour on the ground that the sale to Staples was a *bona fide* sale. Even, however, assuming that the defendant did employ Staples to bid for and purchase on his behalf, we think that there is sufficient reason to presume that Norris knew of and acquiesced in this purchase ; and we think that the knowledge and acquiescence of Norris must be regarded as the knowledge and acquiescence of his constituents, Marshall's heirs. The heirs themselves may not have been informed by Norris of the fact that the defendant was in occupation of this property ; but then they left the management of their affairs to Norris and gave him full power and authority to represent them in every thing connected with the estate. The delay of the heirs in instituting these proceedings has received no adequate explanation. Even though their agent left them in ignorance of this transaction they might have instituted inquiries into the administration 25 years ago as easily as two or three years ago.

The action is in form one of ejectment ; and the plaintiffs are by their libel seeking to eject the defendant without any offer to repay him his purchase money, of which the intestate's estate got the benefit, or to make him any compensation for the money which he has expended in permanently improving the property, by means of which its value has so much increased. In any view of the case, the plaintiffs cannot claim this. All that they could be entitled to would be a reconveyance on equitable terms. The right to open up such a transaction is merely equitable ; and we think that the laches of the heirs and the presumed acquiescence of their agent have debarred the plaintiffs from such equitable relief even though the transaction might have originally been impeachable.

In the view that the district court and this court have taken of the case, it is not necessary to discuss the question of prescription.

D, C., Colombo, No. 54,764. } *Jeronis Pieris* v. *The Queen's Advocate.*

Mortgagee parting with title deeds of property mortgaged—Sale by mortgagor of such property—Mortgage of property, so sold, to innocent party—Competing claims of the two mortgagees to the property—Duties of Queen's Advocate—Statements in petition of appeal reflecting on the impartiality of the Judge.

This was an action in form to determine the liability of a land to be sold in execution for a debt due to the defendant upon a bond whereby the said land was specially mortgaged to him. The same land had been mortgaged originally to the plaintiff. By parting with the title deeds, he enabled the owner (Silva) to sell it to one Fernando, who conveyed it one Cooray, who mortgaged it with the Government as security for the due payment of certain instalmeuts payable in respect of an arrack farm. Plaintiff, having put his bond in suit in case No. 52,734, recovered judgment and proceeded to sell the property, but the sale was stayed by the Government Agent, who asserted title to the land as mortgagee. At the trial of the present suit (54,764), the parties thereto agreed that the court should treat it as a question of preference between two creditors over the property and the proceeds thereof, when sold, as security for these respective claims.

The learned district judge declared the land liable to be sold under the plaintiff's writ No. 52,734, and ordered that the proceeds of the sale to the extent of about £48 be paid to the plaintiff and the remainder be held applicable to meet the defendant's claims.

Both parties appealed.

Clarence, D. Q. A. and *Grenier* for defendant appellant.

Ferdinands for plaintiff respondent.

16*th December*, 1875.—The judgment of the Supreme Court, which fully sets out the facts of the case, was delivered by CAYLEY, J :—

The decree of the court below is set aside, and plaintiff's libel dismissed with costs.

This is an appeal by the Queen's Advocate representing the Crown, the defendant in the case, against a judgment of the district court, declaring the liability of a garden called Miripenne-watte to be sold under a writ issued in the case No. 2734, and ordering that the proceeds of the sale to the extent of £48 0*s*. 7*d*. with certain interest be paid to the plaintiff and the remainder be held applicable to meet the defendants claim.

Both sides have appealed : the Queen's Advocate, against the judgment generally ; and the plaintiff, against the limitation of the amount of his claim. The view that we take of the defendant's case renders it unnecessary to consider the plaintiff's appeal.

The facts of the case appear to these. The garden in question was with several other properties, mortgaged by Bastian Silva to the plaintiff' by two deeds of mortgage, one dated the 18th May 1864, and the other the 22nd September 1866. On the 28th August 1867, Bastian Silva wrote to the plaintiff as follows :—

"Sir,—Out of the title deeds mortgaged to you for the sum of £300, and £200 due by me, I request that you will let me have the deed of Miripenne-watte at Digarolle dated 24th December 1863, No. 1680. I will sell that land and deliver to you, as a mortgage for the debt due by me, the title deeds of the two portions of the same gardens which I will purchase in lieu thereof, and I also undertake to bring and pay you on the 9th September £200 in cash, on account of the deed so to be received by me, and when I so bring and deliver £200, and the new deeds, I request you will release from mortgage the said deed No. 1680.

Yours faitnfully,

(Signed) B. SILVA."

Nothing seems to have been done on the receipt of this letter, but on the 1st April following plaintiff delivered to B. Silva the deed in question, to which the other documents of title were attached, and obtained from him a receipt in which Silva promised to return the deed in ten days.

Silva never returned the deed to the plaintiff, but, on the 6th April 1868 sold the property to his brother-in-law Agustino Fernando. On the 8th October 1868, Agustino Fernando and several persons transferred a number of lands to David Cooray (or Kure) in order that he might mortgage them with the Government as security for the instalments of the purchase money due in respect of the arrack farm of Udunuwera and Yatinuwera for the year ending the 30th June 1869 which Kure and another had purchased from the Crown. The garden Miripenne-watte was included in this transfer.

On the 12th January 1869 the plaintiff put his two mortgages in suit in the case No. 52,374, district court, Colombo, against Bastian Silva, and obtained judgment on the 2nd February 1869, on an admission entered up under a warrent of attorney to confess judgment.

It appears from the fiscal's return to the writ of execution issued on this judgment, that on the 30th March 1869 the properties specially mortgaged to the plaintiff were seized and sold with the exception of Miripenne-watte. It is not shown by this return whether any process of seizure was put in force with regard to Miripenne-watte, but the sale whether the property had been duly seized or not, was stayed by the Government Agent of Kandy, on the ground that the property had been mortgaged to the Crown to secure the arrack rent of Udunuwera and Yatinuwera for 1868, and 1869.

On the 30th June 1869 David Kure, in partnership with one Saverial Fernando, again became the purchaser of the above mentioned arrack farm for the year ending 30th June 1870, and again mortgaged with the Crown the garden Miripenne-watte with several other properties,—the title deeds of which had been previously deposited with the Government as security for the arrack rent for 1868 and 1869 ; and a few days afterwards, (on the 6th July 1869) Miripenne-watte together with several other lands was again formally transferred by Agustino Fernando to David Kure, for the express purpose of being so mortgaged with the Government. This deed

in point of fact, operated as a confirmation of the mortgage executed in favour of the Government a few days previous. Neither the transfer by B. Silva to Agustino Fernando of the 6th April 1868, nor those by Agustino Fernando to David Kure of the 8th October 1868, and the 6th July 1869 were registered; whereas the mortgage in favour of plaintiff were duly registered. The officers of Government on whom the business of obtaining security for the purchase money of these arrack farms devolved appear to have been satisfied with the possession of the title deeds, and to have made no further enquiry. It is to be regretted that no search was made in the register for incumbrances before the Government accepted the security. Mr. Clarence, the acting Queen's Advocate, who appeared for the defendant at the hearing of the appeal, pointed out the great difficulty and frequent inefficacy of these searches, where a number of small native holdings with common appellations are concerned. This perhaps accounts for the absence of any search in the present case; but at the same time it is to be regretted that this precaution against fraud was not taken, especially as it was apparent in the face of the above transfers that they had never been registered.

In any view of the case there were laches on both sides,—laches on the part of the plaintiff in allowing his debtor to retain possession of the title deeds, and on the part of the officers of Government in not making a proper search for incumbrances in the Registrar General's office.

We do not, however, think that the case turns upon a question of comparison of laches. The contention of the defendant is that the plaintiff handed the title deeds over to Bastian Silva for the express purpose that Bastian Silva might sell the land and pay off a portion of his debt to the plaintiff out of the proceeds of the sale, and that, in point of fact, Bastian Silva did carry out this arrangement. If this view of the case is established, the plaintiff must be held to be barred from making any claim under his mortgage in respect of this particular land; for, if he authorized Silva to sell the land, and gave up the muniments of title for that purpose, and himself ratified the sale by accepting the purchase money, it is clear that he cannot now repudiate the transaction. Indeed, his mortgage, so far as relates to the hypothec of Miripenne-watte must be taken as discharged.

This part of the case resolves itself into a question of fact. The learned district judge has decided on this question adversely to the Crown. We are always reluctant to interfere with a finding on facts by the district court; but we think that the learned district judge has come to a wrong conclusion in the present case, by reason of certain erroneous impressions conceived by him with regard to the evidence taken at the second trial, to which we think he has not attached sufficient weight.

At the first hearing of the case, the plaintiff swore that he declined to comply with Bastian Silva's request contained in the letter above referred to of the 28th August 1867, and that some months afterwards Bastian Silva came to him personally and asked him for a loan of the title deeds mortgaged with him, saying that he (Silva) wanted them in order to have a survey made of the adjoining properties, which he proposed to purchase, and that the plaintiff let him have the documents on this request,

taking the receipt above referred to of the 1st April 1868. Silva, on the other hand, swore in effect that the plaintiff gave him the deed in order that he might sell the land, and pay the proceeds of the sale to plaintiff; and that it was agreed that, if he failed to sell the land, he would return the deeds; that he did sell the land for £160 to Agustino Fernando who paid him this amount in instalments, and that he (Silva) paid this money to plaintiff. Agustino Fernando was then called to prove the payment of £160 to Silva. Upon this evidence the district judge decided in plaintiff's favour; and had the case rested here depending upon a balance of conflicting testimony, we should have hesitated before we interfered with the finding of the court below, though we should have felt considerable doubt as to the correctness of this finding, arising from the absence of any satisfactory explanation on the plaintiff's part why he allowed the deed to remain for months in Silva's hands, at a time when Silva was hopelessly involved in debt to him, and must have been much pressed to meet his liabilities, and notwithstanding that by the terms of the receipt the deed was to be returned in ten days.

After the decision of the district court, a letter was discovered, which the Queen's Advocate had written to his deputy at Kandy, giving an account of an interview which the Queen's Advocate had had with the plaintiff and Bastian Silva regarding the plaintiff's claim. The evidence of what passed at this interview was considered by the Supreme Court of sufficient importance to warrant the case being sent back for further hearing upon payment of costs by the defendant. This letter, which both parties at the hearing of the appeal desired should be read, is as follows :—

Colombo, August 25th, 1869.

SIR,—In reply to your letter 594 of the 4th instant, I have the honor to state that I had Bastian Silva, Agustino Fernando, and Jeronis Pieris yesterday before me. Jeronis Pieris produced a receipt (of which I annex copy) to account for his parting with the deeds. But Bastian Silva states that he got the deeds with the view of selling the property, and under a promise to return either the deeds or the money; and that, having sold the property he paid the proceeds to Pieris. Pieris admits the receipt of the money, but says it was on general account. I am inclined from what passed before me to believe Silva's statement, and have directed Pieris to bring his action to establish his claim, which he has agreed to do.

I cannot understand why the agent accepted the mortgage without asking a certificate of registration of the sale by Bastian Silva to Agustino Fernando. Had such a certificate being applied for the existence of the mortgage would have been traced.

I have &c.,

The Deputy Queen's Advocate, Kandy. (Signed) RICHARD MORGAN.

At the second trial Sir Richard Morgan, the Queen's Advocate, having had his memory refreshed by the above letter, was called as a witness and deposed to what passed at the interview between himself plaintiff and Silva, substantially to the same effect as the account given in the letter.

Now the evidence given by the Queen's Advocate, though it does not go so far as proving any admission by the plaintiff that he had delivered the deeds to his debtor in order that the land might be sold and his debt paid out of the proceeds, still it certainly does add considerable corroboration in our minds, to Silva's evidence given at the first trial. The Queen's Advocate proves that when Silva and the plaintiff were confronted together in his office, before the action was brought, Silva gave the same account of the transaction which he afterwards gave in court, and that after some discussion and dispute plaintiff admitted that he had received the money, and stated that he had carried it to a general account.

The learned district judge mistrusts the evidence of the Queen's Advocate. But, although the conversation took place some years ago, the substance of it was embodied in a letter written by the witness the day after the interview, when the subject was fresh in his mind; and considering the distinguished position and high character of Sir Richard Morgan, we should require very strong ground indeed before we should be disposed to doubt his evidence; and we are unanimously of opinion that there are no such grounds. The learned district judge's adverse opinion appears to be derived from the unfavourable view taken by him of the Queen's Advocate's conduct with regard to this interview. He has apparently assumed the case to be one, in which an adverse advocate procures an interview with the opposite party, in the absence of that party's legal adverse, with a view of obtaining admissions or statements, which might afterwards be used against him at the trial. Such at least appears to us, from the language of the judgment given the court below, to have been the impression of the learned district judge. Such a view of the case is however, in our opinion altogether erroneous. In the first place, at the time of this interview no action had been brought, nor can the Queen's Advocate, though the nominal defendant when the action was brought be considered in this matter as the counsel for defence in this cause. The Queen's Advocate as well as being first law adviser of the Crown in this colony, is at the head of the legal department of the Government. He is the officer ultimately responsible for the management of all the legal business in which the Government, as representing the public, is interested he has no personal interest whatever in these matters; but while it is his duty to take care, so far as in him lies, that the Government should be secured from fraudulent claims, it is also his duty to see that the public money should not be wasted in the maintenance of untenable defences against just demands. Before claims are insisted upon, or resisted on behalf of the Government in a country like this, some preliminary discussion or correspondence with the parties concerned is generally necessary, with a view of ascertaining whether the expense of litigation may not be avoided. And when parties come attended, as the plaintiff was in this case, by a well qualified legal adviser, the disadvantage to one side, contemplated by the district judge, is necessarily obviated. In the present case the Queen's Advocate was apprized by his deputy at Kandy of the plaintiff's claim, and before any action had been brought, he sent for the parties, (*i.e.* the plaintiff B. Silva, and Fernando): or at all events these persons came before him, not as the

learned district judge has assumed; without the protection of legal advice,—for the plaintiff was accompanied on the occasion by his proctor Mr. Prins, as was stated by his own counsel to the judge in the district court, after judgment had been given; and was again admitted by him in this court at the hearing of the appeal. Business of this kind must be performed by some one on behalf of the Crown. Whether it is desirable that it should devolve upon some officer of Government other than the Queen's Advocate, it is not for us to express any opinion. But we do think that the circumstances of this interview should in any way deprive the Quean's Advocate's evidence of one tittle of that credict to which, considering his position and character, it is unquestionably entitled. The learned district judge in discussing this evidence says that we should not expect the plaintiff to confide in the counsel for his adversary (the Crown) that he had no "ground whatever for his claim, or to make admissions that went conclusively to prove the Queen's Advocate's case." But the plaintiff never gave utterance to any such confidences or made any such admissions. He admitted the receipt of the money, but did not admit that he had authorized the sale or that the money was the proceeds of such sale, or that he had taken it in payment of his mortgage. So far as can he gathered from the evidence no confidenees were asked for or given. Silva and the plaintiff disputed together about the transaction and the Queen's Advocate not being able, under such circumstances to admit the claim against the Government told the plaintiff that he must bring his action to substantiate it. After this, the matter appears to have passed entirely out of the Queen's Advocate's hands, the conduct of the case being left to the deputy Queen's Advocate for the Island and was not again brought to the notice of the Queen's Advocate until judgment had been given against the Crown. There appears to us, as we have already observed, nothing in the nature or circumstances of this interview to throw discredict upon the evidence of the Queen's Advocate, and we have no hesitation in saying that we implicitly believe this evidence.

The learned district judge has some what severely animadverted upon the fact that the Queen's Advocate's letter to his deputy at Kandy was not produced at the second trial. He says that the Queen's Advocate "might have refreshed his memory by producing and referring to that letter and thus have removed all uncertainty as to what actually passed, and have let us know exactly what was said, but this has not been done though it ought to have been." These remarks, which in effect charge the Queen's Advocate with improperly withholding this letter, appear to have been made under a misapprehension. No secret was made of this letter. The plaintiff's counsel admitted, at the hearing of this appeal; that it was shown to him before the trial in the district court; and the Queen's Advocate states that he had it with him in court when he gave his evidence. It was not in itself evidence, and, as no one asked for it; and as the Queen's Advocate had already refreshed his memory with it, and given his evidence substantially, in accordance with the statements contained in it, there was no necessity for its production. It was, however, read in this court at the desire of both parties, and now forms part of these proceedings.

This letter no doubt gives a correct account of what occurred at the interview. It does not show that the plaintiff admitted that the deeds were delivered to Silva in order that the garden might be sold, and the proceeds of the sale paid to the plaintiff; nor that the plaintiff admitted that the land was sold and the proceeds paid to him. But it does show that the plaintiff admitted the receipt of the money, which Silva stated he had obtained by the sale of the property: and Silva is thus far corroborated. It is true that what passed at the interview is by no means conclusive, but when considered in connection with the fact that Silva (who was hopelessly involved in debt to the plaintiff, and who it is propable as the plaintiff knew, had no other means of procuring money) had formerly asked the plaintiff for the deed in order to sell the land, and pay the money to the plaintiff; and had subsequently procured the deed from the plaintiff, and had been allowed to retain it for an indefinite time, without any effectual attempt being made by plaintiff to get it back, and had afterwards paid the plaintiff the amount for which he sold the land; it leads us to believe that in point fact, the plaintiff authorized the sale and knowingly accepted the proceeds towards the satisfaction of his claim against Silva. In this view of the case we think that the plaintiffs claim must be dismissed.

We would willingly end our judgment here, but the learned district judge has in a note to his judgment expressly called our attention to the general tone and contents of the petition of appeal, which he considered trespass beyond the just limits of respect to his court; and one of the statements in the petition of appeal he characterizes as uncandid. That this case should give rise to anything which might have the appearance of recrimination between these two important public officers; both of whom are doubtless actuated by a conscientious desire to perform with zeal and rectitude the duties with which they are entrusted is much to be deplored. The learned Queen's Advocate appears from his petition of appeal to have deeply felt the observations of the learned district judge with regard to the interview between himself. B. Silva and plaintiff, and particularly the assumption of the learned district judge that this interview took place in the absence of plaintiff's legal adviser; he also feels deeply the charge that he did not produce a letter at the trial, which he ought to have produced, the inference being that that letter would have given a different complexion to his oral evidence. We have already pointed out that the learned district judge was in error in supposing that the plaintiff was not attented by his proctor at the interview referred to, and was also in error in supposing that the learned Queen's Advocate had any desire or intention to withhold from the court or the opposite side the letter which he wrote to his deputy. We have also given our reasons for considering that the learned district judge has taken an erroneous view of the character and circumstances of the interview; and it appears to us that the reflections made by him upon the conduct of the Queen's Advocate with regard to that interview are based upon a misapprehension and are not warranted by the facts of the case. As, however, we are called upon to pronounce an opinion on the subject we have to observe that there are one or two expressions in the petition of appeal of which we do not approve, as they

might be construed as reflecting upon the impartiality of the judge. We do not say that they necessarily bear, (much less they are intended to bear), this construction, but they might be considered open to it, and consequently might with advantage have been modified or avoided : for as the learned Queen's Advocate, whose public and private charater stands so high amongst us, would be the first to admit de fide et officio judicis non recipitur questio.

D. C., Colombo, No. 61,113. } *Fernando* v. *Bastian Pieris.*

Jeronis Pieris, intervenient.

Fiscal's sale does not wipe off prior incumbrances—Land under sequestration—Mortgage thereof.

A fiscal's sale has not the effect of wiping off encumbrances prior to that on which the land was sold.

A mortgage of land under sequestration is invalid, it being for that time in the custody of the law.

Ferdinands, Browne and *Ondaatje* for plaintiff appellant.
Grenier for intervenient.

16*th December,* 1875.—The judgment of the Supreme Court was delivered by CAYLEY, J., as follows :—

The decree of the court below is affirmed.

The plaintiff bases his title to the share of the garden in dispute on a fiscal's conveyance dated January 9th 1871, upon a sale in execution in case 53,844, in which suit the same plaintiff had obtained judgment against one Istaven Mendis upon a bond bearing date July 15th, 1863, whereby the share of land in question had been specially mortgaged to the plaintiff. That action was instituted on June 3rd, 1869, and judgment obtained on the 19th July following.

It is unnecessary to refer to the claim set up by the present defendant, the judgment of the district court appealed from, and now under consideration, being confined to the contention between the plaintiff and the intervenient, who claims three-fourths of the whole land, which it is admitted by both parties originally belonged to Anthony Mendis, who left four children of whom Istaven, the execution debtor in 53,844 was one.

The plaintiff at the hearing in the district court restricted his demand to Istaven's $\frac{1}{4}$ share, with which therefore we have only now to do.

This $\frac{1}{2}$ (included in the $\frac{3}{4}$) the intervenient claims by purchase as per fiscal's conveyance of July 21st 1870, on a sale upon a writ issued in case 52,734 against L. Bastain Silva, who was the then owner by vertue of a conveyance from the fiscal dated June 11th 1866, upon a prior sale in execution in case, 30,404 wherein Bastian Siva, had obtained judgment against Istaven Mendis on a general mortgage bond of May 8th 1858.

It was contended on behalf of the plaintiff that though his conveyance was latest in date (January 9th 1871), still that by virtue of prior special mortgage of July 15th 1863, on which the sale and purchase proceeded, and his title depended, the land vested in him notwithstanding all intermediate sales.

The learned district judge held, the sales under which the intervenient claimed being judicial, that by operation of law the conveyance of the fiscal cleared off the plaintiff's prior special mortgage and consequently that the intervenient was entitled to judgment. The learned district judge was also further of opinion that the intervenient ought to have judgment inasmuch as the land at the time of the special mortgage to the plaintiff was under judicial sequestration by the fiscal in case 30,404 under Bastian Silva's writ against Istaven Mendis.

We agree with the learned district judge on the latter point; which we shall first briefly consider.

The case 30,404 against Istaven was, we find, instituted on June 6th, 1861, judgment duly obtained, and writ of execution issued on June 10th, 1863. To this writ the fiscal made his return on the 21st July following certifying that he had caused the share of land now in question to be seized: which seizure according to the report of the officer who effected the same was made on the 22nd June preceding, the land being then already under seizure on another writ. It will thus be seen that the land was actually in the custody of the law at the time of the special mortgage to the plaintiff on the 15th June, 1863.

The officer who made the seizure was examined *de bene esse*, and certainly he does not appear to have given a very lucid account of the process adopted in effecting the sequestration. But it should be remembered that this witness (as stated at the bar) is an infirm old man who was speaking of a transaction that took place 12 years ago. Moreover the fact that the plaintiff was a resident of the village, and the sale took place by public auction on the spot after due publication, goes far to establish that the plaintiff could not have been ignorant of the proceedings then going on.

Holding then, that the land was under judicial seizure from June 22nd, how does this sequestration affect the plaintiff's subsequent special mortgage of July 15th, 1863? The arrest in execution by the fiscal must in our opinion be taken (see Lorenz's Civil Practice, p. 47 and the authorities there cited) to have passed the property "out of the estate of the defendant into the hands of the state" giving "plaintiff a *pignus prætorium* thereon;" and accordingly rendering the plaintiff's subsequent special mortgage of no validity against the sale in execution on which the title of the intervenient is founded.

As respects the other point we entirely differ from the conclusion of the learned district judge that a fiscal's sale wipes off all previous mortgages, and we unanimously adhere to the judgment of this court in Caltura district court 24,582, (Grenier's Reports, 1873, p. 22,) in which we consider the law to be correctly stated as it has hitherto been understood and practised in this Island. The present judges of this court, whose experience on the bench and at the bar has extended in the case of two of them to 30, and

in the case of the other to 12 years, have no hesitation in declaring that a fiscal's sale has always been deemed by them to confer (in the absence of fraud, actual or constructive), no more nor less right on the purchaser than the title, whatever it may have been, of the execution debtor, subject to all its encumbrances.

Further, dealing with the question merely as one of expediency which, however, we desire to keep quite distinct from that of law, we entertain a strong conviction of the danger to commercial as well as other interests of this colony, if the view of the court below were upheld, and lands specially mortgaged rendered liable to be brought to sale, (whether the mortgagee assents or no, or is apprized or not of the sale,) by any judgment creditor of the mortgagor (even supposing there be no collusion) at possibly a time when, owing to temporary causes, the property would not fetch its proper value or the sum secured by the special mortgage, notwithstanding that the mortgagee may be content to wait in well grounded hope of a more favourable period for recovering his money. To quote the words of Sir R. Morgan, then Acting Chief Justice, in D. C. Kandy, 58,351, (July 8th, 1875) :— "No more dangereus doctrine to the best interests of the country can be inculcated than that a mortgagee, say an English capitalist, can be deprived of his right by a quiet fiscal's sale of the premises mortgaged, held at Badulla or any other place."

In this very case we have a forcible illustration of how easily fiscal's sales may be brought about, no less than four such judicial sales taking place within as many years.

But to revert to the legal aspect of the case. It should be remembered that the Roman Dutch Law does not obtain in Ceylon in its integrity and in all its details, much less in its modes of procedure. See 60,664 District Court Colombo, Grenier's Report 1873, 129. We have therefore to consider, even supposing the strict Roman Dutch Law to be as stated by the learned district judge, whether this portion of that law, which depends to a great extent on the mode of procedure adopted with reference to the execution of judgments, prevails in Ceylon.

Now, the mode of procedure is regulated here by the fiscal's ordinance and long usage, as declared by the judgment of this court. By that ordinance no provision whatever is made for creditors giving security for the restitution of the proceeds of property sold on a writ of execution. Nor is there any mode prescribed how the fact of a land about to be sold being especially mortgaged is to be discovered by the fiscal. This essential precaution of taking security, forming the very foundation of the modern Dutch practice failing, the system raised on it cannot subsist.

Judging from the practice and decisions of our court we are of opinion that the law adopted in Ceylon is as we find it in Voet, lib. 20, tit. 1, sec. 13, summarized by Burge vol. 3, p. 200, and in accordance with this state of the law. The conveyance by the fiscal prescribed by the Fiscal's Ordinance No. 4 of 1867 recites that the purchaser "becomes entitled to all the right title, and interest of the debtor in the property," and the assignment is in the same terms.

The extent of the title conferred by a fiscal's conveyance was determined

so long ago as 1833; see Morgan's Digest, p. 12, D. C. Negombo 7,999, where it was held that a "sale in execution is an assignment by operation of law, and the purchaser must take the property subject to the same conditions and liable to the same forfeitures as it was subject and liable to in the hands of the original owners. See also the other cases cited by Mr. Justice Thomson in his Institutes vol. 1 p. 355, and specially Galle, D. C. 15,547 (November 3rd 1853) where it was similarly determined by the collective court "that a fiscal's sale is not of necessity binding so as to give an irresponsible title to the purchaser against all claimants. It should seem that the fiscal only sells the debtor's interest in the land and that the purchaser should make himself aware of the extent of such interest according to the rule *caveat emptor*."

These authorities abundantly support the decision of this court in D. C. Caltura 24,582, Grenier's Report 1873, p. 23 (the correctness of which has been questioned) as well as our later decision in D. C. Kandy 58,135.

The learned district judge in a more recent judgment has endeavoured to draw a distinction between the Galle case 15,547 and the Caltura case 24,582, on the ground that the parties in the former claimed totally irrespective of any derivative right from the mortgagor. But this difference does not affect the principle of the decisions, the ground on which they proceded being the same in all, viz., as to the extent of the interests transferred. The old case in Morgan's Digest, p. 12, which does not seem to have been before the learned district judge, is conclusive on the point.

It only remains for us to declare that we are clearly of opinion that by the law of Ceylon, a subsequent sale in execution by the fiscal does not, *per se*, deprive a prior special mortgagee of recourse to the property specially mortgaged to him.

The judgmont of the district court will, however, be affirmed, on the ground that the land was under judicial sequestration at the time of the mortgage to the plaintiff.

D. C., Colombo, No. 65,558. } *Alla Pitcha* v. *Karpen Chetty* and *Liesching*.

Fiscal's sale in execution—Prior encumbrances—Proper procedure to revise irregularity or error in a suit.

A fiscal's sale does not wipe off incumbrances prior to that on which the sale took place. It is not the province of a fresh suit to show irregularity or error of fact or of law in another suit, which must be shown in the suit itself on application to the original court to amend such irregularity or error or by way of appeal from, or review of the judgment.

Gavin v. *Hudden* 8 Moore's P. C. Reports N. S. Part I, p. 90 followed.

Ferdinands, *Browne* and *Dornhorst* for 1st defendant appellant.

Layard for 2nd defendant.

Grenier for respondent.

16*th December*, 1875.—The judgment of the Supreme Court was delivered by STEWART, A. C. J.,—

The decree of the court below is set aside.

The plaintiff claims the premises in question on a conveyance from the fiscal dated February 20th, 1870, granted in pursuance of a sale in execution against the effects of Cader Mohideen Sultan Saibo, since deceased.

The 1st defendant is the administrator of one Supramanian Chetty Sinayen Chetty, to whom the same premises had been specially mortgaged by bond bearing date March 27th, 1869.

The 1st defendant put this bond in suit in case 20,307 of the district court of Chilaw, (the debtors were resident and the bond executed in that district), obtained judgment on January 26th, 1874, on a warrant of attorney to confess judgment, sued out writ of execution, and caused the fiscal of Colombo to seize the property specially mortgaged by the bond.

Sultan Saibo, the debtor, was alive at the time that the above judgment was given, as also when the seizure of the property was made which, according to the return on the writ was effected on the 4th February, he not having died until the 4th or 5th May of the same year.

The plaintiff brings this action against the two defendants (the 2nd defendant is the fiscal) to set aside the seizure of the premises in dispute and to be declared the owner thereof.

The learned district judge considered the case in the three following aspects :—

1st.—Whether after the sale in execution to the plaintiff the land remains liable on the 1st defendant's mortgage ?

2nd.—Whether the seizure on the 1st defendant's judgment is valid ; the judgment debtor having been then dead (as supposed by the district judge) and no defendant substituted in his room ?

3rd.—The validity of the 1st defendant's judgment in the Chilaw case, this being questioned on the ground that the decision proceeded on a warrant to confess judgment addressed to a proctor of the Supreme Court and district courts, whereas the confession was made by a proctor who was only a proctor of the district court of Chilaw.

We shall follow the same order adopted by the learned district judge.

1st.—It is unnecessary for us, to enter upon this point, we having fully considered the question here raised in our judgment delivered this day in D. C. Colombo 61,113. For the reasons given in that judgment, we hold that the sale in execution to the plaintiff cannot and does not wipe off the prior special mortgage on which the claim of the present 1st defendant is based. Further, as respects the sale in execution on which the plaintiff relies, and the distribution of the proceeds of that sale, it is clear that the fiscal, having obtained an indemnity from the plaintiff in the execution suit, sold the land regardless of and entirely ignoring the special mortgage to Sinayen Chetty, of which he had been apprized by the proctor of the 1st defendant.

As respects the second point, the learned district judge was in error in supposing that the judgment debtor was dead at the time of the seizure

of the land. The land was seized by the fiscal on the 4th of February ; the debtor did not die until May.

Following the judgment of the Privy Council in the case of *Gavin* v. *Hadden*, Moore's Privy Council cases, vol. 8, part I, p. 90 it appears to us that, even if there was any irregularity in the mode in which judgment was obtained by the present 1st defendant in the Chilaw district court against Sultan Saibo, it was not competent for the district court of Colombo to question the correctness of the judgment of the Chilaw court. It was for Sultan Saibo, who was alive at the time of the seizure and lived for several months after or for his representatives if he did not acquiesce in the judgment to appeal or otherwise to proceed in the Chilaw case to have that judgment set aside.

As laid down by the Privy Council whose supreme authority we are bound to follow, " it is not the province of a fresh suit to show irregularity or error of fact or of law in another suit ; otherwise there would be no end of litigation, and the humblest court in the kingdom might be called on to set aside the decision of the highest.

" Irregularity, error of fact or of law, must be shown in the suit itself, must be rectified by application to the original court or by way of appeal from or review of the judgment."

We are accordingly of opinion that the plaintiff should be non-suited —and he is hereby non-suited with costs.

D. C., Colombo, No. 6,8764. } *Sinne Lebbe* v. *Pieris.*

District Court—Jurisdiction—Cause of action—Ordinance No. 11 *of* 1868 *sec.* 65.

A promissory note made at Colombo and payable at Kandy, the makers of the note being resident at Kandy at the time of action, may be sued upon in the District Court of Colombo under section 65 of Ordinance 11 of 1868 as part of the cause of action (the making of the note) was at Colombo.

In this case plaintiff sued the defendants upon two promissory notes made by the defendants in Colombo but payable at Kandy. The defendants were at the time of action resident at Kandy. Upon motion by proctor for plaintiff for a warrant in mesne process against the defendants under Ordinance No. 15 of 1856, the learned district judge refused the motion on the ground that " the defendants were not residents within his jurisdiction. The only other ground on which the court could exercise jurisdiction in this case is the *locus* of the cause of action. Now although the notes may have been signed in Colombo, it is expressly contracted that they shall be payable in Kandy. The cause of action is the non-payment of the notes when due in Kandy. The cause of action is therefore wholly in Kandy. If I contract to deliver 1,000 casks of rum in London, I cannot be compelled to deliver them in Ceylon, and I can only be sued for damages in

Ceylon for breach of my contract provided I am found to be resident in Ceylon."

Plaintiff appealed from the judgment.

Ferdinands for appellant.

17*th December*, 1875.—The judgment of the court was delivered by CAYLEY, J.,—

The order of the court below is set aside, and case sent back for further enquiry and consideration.

We think that the cause of action arose in part in the district of Colombo, where the notes were made, and consequently that, under the 65th section of Ordinance No. 11 of 1868, the district court of Colombo has jurisdiction to entertain the case. A cause of action on a contract may be divisible ; part has reference to the contract itself and part to the performance. See the observations of Wilde B. in *Aris* v. *Orchard*, 30 L. J. Exch. 21. The words of the 65th section of the Ordinance No. 11 of 1868, giving jurisdiction to the district court of the district "in which the cause of action shall have arisen wholly, or as to any part," correspond very nearly with the 1st section of the Country Courts Amendment Act, 1867, and under that act it has been held that an action may be brought on a bill of exchange in the district in which it was drawn, although it was accepted and made payable in another district, *Trevor* v. *Wilkinson*, Law Times, vol. 31 N. S., p. 731. Again, in the case of *Green* v. *Beach*, Law Rep. 8, Exch. 208, it was held that where an offer to buy goods was made at Blackburn, and accepted at Manchester and the goods were to be delivered at Manchester, part of the cause of action arose in the Blackburn district. In this case, the offer alone was held to be part of the cause of action, and a fortiori, the entire contract, as in the present case, must be considered part of the cause of action. See also *Borthwick* v. *Watten*, 24 L. J., C. P. 83.

D. C., Cololombo, No. 64,401. } *The Ceylon Company* (Limited) v. *The Queen's Advocate.*

Action against the Crown—Ceylon Government Railway—Carriers by Railway—Loss of Goods—Ordinance No. 10 *of* 1865 *sec.* 13*—Responsibility of the Crown for negligence of its servants—Burden of proof—Nature of evidence as to negligence.*

The proper person to be sued in an action arising ex contractu by a subject against the Crown is the Queen's Advocate.

The Government of Ceylon as owners of the Ceylon Government Railway are responsible as carriers by land for loss of goods entrusted to them to be carried, where such loss is occasioned by the negligence of its servants, there being nothing in section 13 of Ordinance 10 of 1865 which relieves them from any such responsibility, although the burden of proving negligence is on the party asserting it.

In proving negligence it is not necessary to prove that any particular person is to blame.

Browne for plaintiff appellant.

Sir Richard Morgan (Queen's Advocate) for defendant respondent.

17*th December*, 1875.—The judgment of the court was delivered by CAYLEY, J.,—

This is an action against the Queen's Advocate as representing the Crown, for the recovery of the value of a cow entrusted to the Ceylon Government Railway, for conveyance from Colombo to Gampola, and also for the recovery of the freight paid in advance, the cow having during the transit escaped from the truck, in which it had been placed, and been killed.

There is no evidence as to the precise manner in which the accident occurred. The truck was one of those ordinarily used by the railway officials for the conveyance of cattle. The door was properly closed and secured in the usual manner at Colombo, and was found properly closed when the train arrived at its destination, and there is no reason for supposing that it became open during the journey. The cow had been tied by the plaintiff's coolie to one of the lower railways of the truck with a rope supplied by the plaintiffs. There can be no doubt that the cow lost her life by jumping out of the truck, while the train was in motion. There is no evidence that the cow was of unusual size, strength or agility or of a vicious or unusually timid disposition.

The question is, whether under the above circumstances the Crown is liable to make good to the plaintiffs the damage which they have sustained by the loss of the animal.

It is not necessary to consider the question of the liability of the Crown to be sued in the name of the Queen's Advocate in an action of this kind. This question was fully considered and determined by this court in *Fraser's Case* (26,793 D. C. Galle, Supreme Court Minutes 16th July 1868) and is not raised here ; and the liability of the Crown or of the Government under certain circumstances for loss or injury to articles or goods carried by its railway is recognized by the 13th section of Ordinance No. 10 of 1865. That clause is as follows :—

"The Government shall in no case be liable for loss or injury to any articles or goods to be carried by the railway, unless such loss or injury shall have been caused by negligence or misconduct on the part of their agents or servants, and unless the articles or goods in respect of which compensation is claimed, shall have been booked and paid for, in conformity with this Ordinance or the Rules and Regulations in that behalf provided."

It will be seen that by this clause the Government limit the responsibility, which might otherwise attach to them as carriers, to losses incurred through the negligence or misconduct of their agents.

The simple question, then, to be determined, as it appears to us, is this :—Was the animal lost by the negligence of the railway officials, who undertook to carry it to Gampola? The burden of proving this is, no doubt, thrown upon the plaintiff ; but we do not think (as the learned district judge seems to consider) that it is necessary for the plaintiffs to shew negligence on the part of any particular agent of the Government. Under the 8th section of the English Carriers Act (11 Geo. IV. and I. Wm. IV. c. 68,) where it is enacted that nothing in the act shall protect

a common carrier from liability to answer for losses or injury arising from the felonious act of any servant in his employ, it has been held that it is not necessary to shew in order to charge the carrier, that the taking was by any particular servant or servants, but that it is enough if there is proof to satisfy the jury that the taking was by some one who was more or less one of the company's servants, without specifying particularly which of them. (See *Vaughton* v. *The London and North Western Railway Company*, 43 L. J. Exch. 75, and *Queen* v. *The Great Western Railway Company*, 44 L. J. Q. B. 130), and similarly it appears to us that if the animal can be shown to have been lost by the negligence of any agent of Government, it is unnecessary to prove that any particular persons to blame.

Have then the plaintiffs proved that the animal was lost by the negligence of some agent or servant of the Government? It appears to us that they have made out a *prima facie* case of negligence on the part of some person or another concerned in the traffic management of the railway. It has been shown that the animal, about which there was nothing unusual either with regard to size, activity or disposition, after being entrusted to the railway servants for safe carriage, escaped, during the journey, from the truck in which it had been placed, not by means of any accidental opening of the door, or by any accidental damage to the vehicle, but by getting through the aperture between the side walls and the proof. It appears to us that this is *prima facie* evidence that the animal was not properly secured, and that the plaintiffs have made out a case, which requires explanation on the part of the defendant. (See *Simpson* v. *London General Omnibus Company*, 42 L. J. C. P., 112.) The learned district judge however, has held that the employment of an improperly constructed truck cannot be considered negligence on the part of the railway servants, who have no choice in the selection and use of their rolling stock, but he appears to consider that such would be negligence on the part of the employers, that is the Government. We fail, however, to see how the acts of the Government in this respect can be disassociated from the acts of its agents. The Government or the Crown cannot itself be guilty of negligence or misconduct or, indeed, act at all in matters of this kind, except by means of agents, and it appears to us that, whenever negligence is proved in the conveyance of goods which the Government have by their agents undertaken to carry on their railway, such negligence, whether it consist in the employment of faultily constructed rolling stock or otherwise, must be deemed to be the negligence of agents employed by the Crown. If imperfectly protected trucks are supplied to the railway, it is the duty of the persons responsible for the traffic management to see that the defects are remedied or other precautions taken, such as raising the side walls and such like, before placing cattle in them for carriage.

Has, then the defendant rebutted the *prima facie* case which we think the plaintiffs have made out? His defence is that the railway servants used a truck of the ordinary form employed on this railway; that from the opening of this line in 1866 to October 1874, they have carried 5887 head of cattle, and that four only have escaped, of which the plaintiff's

cow was either the first or the second. Mr. Robinson has described the truck used on this occasion ; and a plan of it was put in by consent at the hearing of this appeal. From this plan it appears that the truck is closed in by wooden walls to the height of 3 feet 9½ inches ; above these there is an aperture 2 feet 1 inch in height and 5 feet 6 inches in length. Above this aperture comes the roof. According to his recorded evidence Mr. Robinson says :—" I know the English trucks ; the type was always the same. They do not always have walls, but they generally do, and, when they do have walls, it is from 1 feet 11 to 2 feet 3 inches. The opening is 2 feet 4 inches on the Belgian lines, where there is a great transit of cattle,"

This evidence as recorded, is not very clear, but Mr. Robinson explained in this court, at the hearing of this appeal, that what he meant was, not that the walls of the English trucks are only from 1 feet 11 to 2 feet 3 inches high, but that that is the extent of the aperture above the walls.

Now, it does not appear to us sufficient merely to show that the truck was of the ordinary form used on this line. What the defendant had to show was that the truck was reasonably sufficient to secure cattle carried in it from injury from the ordinary incidents of a railway journey. The case of *Blower* v. *The Great Western Railway* was referred to by both sides. That was an action for the value of a bullock delivered to the defendants to carry and alleged to have been lost by their negligence. The animal jumped out of the truck and was killed, and the question was whether or not the company were guilty of negligence. The sides of the truck, in which the animal was conveyed, were formed of boards to the height of about 5 feet from the floor, and about 18 inches above the sides there was an iron bar of about 1¼ inch in diameter and about 2 feet above the bar there was a strong iron top rail. When the train arrived at its destination, the animal was found missing ; the door of the truck remained fastened and the side boards and rails were in proper order, but the iron bar on the side of the truck, in which the bullock had been put, was bent and had some hair sticking to it, evidently showing that the animal had made violent and extraordinary efforts to escape. The country court judge, by whom the case was tried, found that the escape of the animal was wholly attributable to its own efforts and exertions, and that neither the death of the animal nor its escape from the truck, was occasioned by or attributable to the negligence of the company, and that the truck was in every respect proper and reasonably sufficient for the conveyance of the bullock and the cattle loaded therein. He decided, however, in favour of the plaintiff on the ground that the defendants were still liable as common carriers. When the case was heard in appeal, Mr. Justice Willes in reversing the judgment of the country court on the ground that the accident was the result of some inherent vice in the animal itself said :—" Was, then, what happened in the course of the journey the result of negligence on the part of the company's servants ? Or was it attributable to some inherent vice in the bullock, which led to its own destruction ? The facts founded in the case seem to me to be conclusive in favour of the latter view. It is found that the bullock in question was put into a proper and sufficient truck

ordinarily used by the company for the conveyance of similar cattle along their railway, and was loaded in the proper and usual way. That could not have been found, unless the truck was sufficient to secure the cattle from injury from the ordinary incidents of a railway journey, including fright occasioned by their novel position and passing objects. The company are clearly bound to provide trucks that are sufficient to retain cattle under the ordinary incidents of a railway journey, but their liability in this respect extends no further. The case expressly finds that the truck was in every respect proper and reasonably sufficient for the conveyance of the bullock and cattle loaded therein."

Now, it seems clear from the above case that a failure to provide trucks that are sufficient to retain cattle under the ordinary incidents of a railway journey, would be negligence on the part of the railway company, and it appears to us that in the present case (having regard to the nature of the accident) the defendant was called upon to rebut the *prima facie* case made out by the plaintiff's by showing that a sufficiently protected conveyance was used.

In the case above cited the court was of opinion that the accident occurred through the inherent vice of the animal and there was strong evidence that it was one of unusual strength or timidity from the circumstance that it succeeded in breaking out of a truck so well protected as the one described. The animal not only succeeded in getting out of a truck of which the side walls were 5 feet high from the floor, with an iron bar 1½ feet above these sides, but managed to bend the bar, which was 1¼ inch in diameter. In the present case there are no such circumstances. It is true that the truck used was similar to those ordinarily used on the line, but it is not shown that cattle trucks with sides only 3 feet 9½ inches in height and with no further protection are used in any other lines. There was evidence that, so far as concerns the aperture above the side walls, the truck did not materially differ from cattle trucks used in Europe, but this is not important as that height of the side walls, and in this respect a very noticeable difference exists between this truck and those used on the Great Western Railway, as is shown by the evidence in Blower's case, There the walls of the truck were 5 feet high, and 18 inches above the walls was an iron bar 1¼ inches in diameter, so that an animal, in order to escape, would have to jump or climb more than 6½ feet before it could get out, whereas in the present case it had to jump or climb 3 feet 9½ inches only. Sides so low as this, without any other protection, certainly seem scarcely sufficient to retain even ordinary cattle, when subject to the terrors of a railway journey. It is true that nearly 6,000 cattle have travelled by this line and only four have escaped. But three of these (if not all four) so escaped in the course of one year or thereabouts, a fact which tends very much to shew that the trucks are insufficiently protected. Whether similarly protected trucks have always been used, since the line was opened, is not proved, but supposing that such were the case and that nearly 6,000 head have been conveyed safely, we do not think that this in itself (without regard to the construction of the vehicle) shews conclusively that the trucks were suffi-

cient. In the case of *Longmore* v. *The Great Western Railway Company* (35 L. J. C. P., 135) the company were held liable in an action for negligence for not providing a proper rail to the foot bridge, by reason of which the plaintiff's husband fell and was killed, although it was proved that the bridge had been used by thousands of persons and by the deceased himself frequently, without any accident. It is not, of course, necessary for the defendant to shew that that the truck was of the best possible form that science could devise, but in order to rebut the *prima facie* case of negligence made out by the plaintiffs, he should shew that the truck was reasonably sufficient to meet all ordinary dangers incidental to the carriage of live stock by railway, and this in our opinion he has failed to shew.

We accordingly think that the judgment of the district court should be reversed and judgment entered for the plaintiffs as prayed.

P. C., Galle, No. 91,953. } *Denis Hami* v. *Dingiya.*

Labour Ordinance, No. 11 *of* 1865—*Liability of dhoby—Refusal to bring cloths required for a funeral.*

The refusal on the part of a dhoby to bring the cloths required for a funeral and to remove the soiled cloths of the complainant's deceased father, according to an alleged custom among "natives," is not an offence, even assuming him to be a domestic servant and liable as such under the provisions of the Labour Ordinance.

Layard for defendant appellant.

15*th June*, 1875.—Judgment of the court was delivered by MORGAN, C. J.,—

The judgment of the court below is set aside, and the defendant declared not guilty.

Assuming that dhobies are under the operation of the Labour Ordinance, the Supreme Court is certainly not prepared to strain the question of their liability to the extent attempted in this case. The alleged acts of misconduct are that the dhoby did not bring the cloths wanted for a funeral according to an alleged custom among "natives," and that he would not remove the soiled clothes of the deceased father of the complainant.

P. C., Galle, No. 92,210. } *Sinno Appu* v. *Silva* and another.

Headman—Duties of—Section 163 *of Ordinance* 11 *of* 1868.

A headman is bound, under the provisions of section 163 of Ordinance 11 of 1868, to arrest persons charged with offences of a serious nature, even though the person charged does not reside within his district.

Ferdinands for defendant appellant.

17*th June*, 1875.—The judgment of the Supreme Court (MORGAN, C. J., STEWART, J., and CAYLEY, J.) was delivered by CAYLEY, J.,—

The judgment of the court below is affirmed.

In this case the defendants and appellants, who are police officers, have been found guilty of neglect of duty under the 163rd clause of the Ordinance No. 11 of 1868. It appears that their respective districts adjoin each other, and that on the 22nd of April last a murder was committed in the 2nd defendant's district, and within a few fathoms from the limit of the 1st defendant's district. The murderer remained for some time after committing the crime at his house, which is situated in the 2nd defendant's district, and twenty fathoms distance from the limit of the 1st defendant's district. The 1st defendant was urged to arrest, but he declined to go beyond the limit of his district. The 2nd defendant was then pressed to arrest the man, but he declined to do anything on the plea of suffering from diabetes and the result was that the murderer made off, and has never since been heard of. The 1st defendant appeals on the ground that by the 144th section of the Ordinance No. 11 of 1868, he is only required to arrest offenders within his own district, and that according to a certain book of instructions published by Mr. Lee and issued to headmen, no headman is allowed to arrest an offender residing beyond his district unless armed with a warrant. So far as relates to the Ordinance, we do not think that it was intended to exempt police officers from the performance of a duty which is imposed upon every member of the community, namely, that of pursuing and arresting any person whom he knows to have committed a serious crime, such as murder, culpable homicide &c., (see sect. 146 of the Ordinance.) Mr. Lee's book of instructions is not before us; but even if the construction put on the rule by the 1st defendant be correct, these instructions are not invested with any legal authority, and cannot be regarded as effecting any alteration in the law. It is difficult to believe that any hard and fast rule, that in no case may a headman go even a few yards beyond his district to arrest a serious offender without a warrant, has been imposed upon headmen by authority. A rule more likely to result in miscarriage of justice could hardly have been framed, but it is probable that the construction of the rule referred to is correctly stated by the police magistrate, who considers that it does not apply to cases of a serious nature.

In the case of the 2nd defendant, this court is not satisfied that he was prevented by illness from doing anything at all. He might have procured assistance, if unable personably to effect the arrest without it.

D. C., Colombo, No. 64,673. } *Kulendevelan Chetty* v. *George Wall & Co.*

Contract to supply rice—Time for fulfilment of—Tender of quality inferior to that stipulated for.

A contract to supply rice within a fixed time is not complied with by the tender of rice of a quality inferior to that stipulated for; nor is an offer on the last day fixed for delivery to have rice in plaintiff's store surveyed at all evidence of readiness on the part of the plaintiff to deliver rice of the quality agreed upon.

Grenier for plaintiff appellant.

Clarence, A. Q. A., and *Ferdinands* for defendant respondent.

22*nd June*, 1875.—The facts sufficiently appear from the judgment of the Supreme Court (MORGAN, C. J., STEWART, J., and CAYLEY, J.) which was delivered by the Chief Justice,—

This is an action for damages for non-acceptance of certain rice, which the plaintiff agreed to sell and the defendants to purchase on the 27th November 1873. The contract as set out in the libel, and admitted by the answer, was that the plaintiff should sell to the defendants and the defendants should buy from the plaintiff within four months 2,500 bushels of good merchantable Calunda rice at the rate of Rs. 3·25 per bushel, payable on delivery; and the question to be determined is whether the plaintiff was ready and willing to deliver this rice within the time stipulated. The evidence is very conflicting, but we see no reasons for disagreeing with the learned judge of the court below in his findings of the facts. He has had the advantage of hearing the evidence given orally in court, and is therefore, in a better position than this court to form a correct opinion as to the veracity of the witnesses. It appears that the plaintiff, who, as is shown by the evidence of his own surveyors, had in his store large quantity of rice inferior to that contracted for, made several attempts to pass this rice off on the defendants, by sending them samples of it, all of which were rejected; and if the evidence of the plaintiff's readiness and willingness to deliver the rice contracted for consisted merely of the evidence of these tenders of samples, the plaintiff would certainly have failed to make out his case. It was however, urged by plaintiff's counsel in appeal, that even though the rice tendered was inferior to that contracted for, still the plaintiff was ready and willing, after the rejection of these samples, and before the time for carrying out the contract had expired, to deliver rice of the contract quality; and in support of this contention he particularly referred to the letter written by the plaintiff's proctor and dated the 26th March. In this letter the writer, after referring to several letters written by the defendants, in which they expressed their refusal to take delivery of the rice represented by the samples, states as follows :—"In reply I beg to state that you are misinformed as to the rice—which my clients are ready to deliver to you—being of inferior quality. As there is a difference of opinion between yourselves and my clients as to the quality of the rice in question, and with a view to prevent litigation, permit me to suggest to you that four independent British Merchants be appointed—two by you and two by my clients—to survey the rice at my client's stores, my client paying any

reasonable charges such survey and inspection may entail, if the rice is not good merchantable Calunda, and vice versa."

To this letter the defendant sent no reply, and the reason they assign for not taking part in this survey is that they had no guarantee that the rice shown to the surveyor would be the same as the samples from time to time tendered. This letter was written on the last day of the four months, within which the delivery, according to the contract declared upon in the libel, was to be completed. There is no evidence as to time when this letter was received by the defendants. But even supposing it to have been received on the day, on which it purports to have been written, we do not think, having regard to the previous conduct of the plaintiff, that the sending it proved that the plaintiff was ready and willing within the contract time to supply the rice stipulated for. The rice referred to in the letter is clearly the rice of which samples had been sent to the defendants, and not any other rice, which the plaintiff might have in his store. There is no reference made in the letter to any other rice. Nor is it a matter of surprise that the defendants (after the endeavours which the plaintiff had made from time to time to pass inferior rice upon them) declined to take any part in the proposed survey. The appointment of surveyors and their acceptance of office would have taken some few days, during which the price of rice was rapidly falling, and the stipulated time for delivery would have expired. Moreover, all that the surveyors could have proved (and this in fact was all that they did prove) would be that on the day, when the survey was made the plaintiff had in his store a quantity both of inferior rice and of rice equal to contract quality. The survey could not have determined whether the rice which the plaintiff from time to time tendered for delivery within the contract time was rice of the quality stipulated for.

This letter appears to us to amount to nothing more than an offer to appoint surveyors, which the defendants were not bound to accede to, and does not prove that the plaintiff was ready and willing to deliver, within the stipulated time any rice superior to the samples, which were from time to time tendered and which are proved by the evidence to have been inferior to the quality contracted for.

D. C., Colombo, No. 65,096. } *Boyd Moss* v. *Ferguson.*

Defamation—Injury to feelings—Palinode—Dutch forms of apology.

Words calculated to injure the feelings of a person are, under the Roman Dutch Law, defamatory, and in a greater degree the words likely to injure a person in his profession or in the esteem of others.

The Dutch forms of apology are obsolete, and compliance with them will not be insisted upon, but where an apology is necessary, one suitably adequate to the injury which resulted from and was a natural consequence of the words used should alone be decreed.

Clarence, A. Q. A. and *Ferdinands* for defendant appellant.
Browne and *Layard* for plaintiff respondent.

22*nd June*, 1875.—The judgment of the court (MORGAN, C. J., STEWART, J., and CAYLEY, J.) was delivered by the Chief Justice,—

The plaintiff, a surgeon by profession, complains in his libel that the defendant, who, is the proprietor, editor and publisher of the *Ceylon Observer* printed and published in the said paper of the 11th May 1874, the following words of and concerning him:—"There is a medical gentleman too, whose officious obtrusion has rendered necessary at the hands of one of the leaders of our society the warning rebuke that he had better devote to his patients the time he was wasting in party politics. All in vain we suspect,"—meaning thereby (this is the innuendo laid in the libel,) that the plaintiff had neglected his patients and had been censured for doing so. The plaintiff prayed that the defendant be decreed to make him honorable and profitable amends, and to pay the sum of Rs. 10,000 as damages, together with costs of suits.

At the trial the district court condemned the defendant to pay Rs.100 to the poor through the Secretary of the Friend-in-need Society, and to make an apology in a certain form of words prescribed by the judge.

The plaintiff does not appeal against this decision, so that we need not enter into the question as to his right to obtain damages in addition to the apology, but will confine ourselves to the consideration of the grounds urged by the defendant in support of his appeal. Those grounds are substantially as follows :—

1 —That the words used by him are not defamatory.

2 —That assuming that the words are defamatory, the case is not one calling for apology prescribed by the judge, which apology is described as "illegal and obsolete."

1.—That the words used are not defamatory. The learned Queen's Advocate who appeared for the defendant contended that the words, fairly interpreted do not convey the meaning that the plaintiffs patients were neglected by him, but only that the plaintiff had been asked to mind his own business ; and that the learned district judge was not justified in inviting the attention of the assessors to the whole article in which the alleged libel was contained and to take for their guidance, as the test, other words in the other parts of the article, reflecting upon the character of other persons of whom they were written. We consider that in ascertaining the meaning of any part of a writing, it is quite competent to the judge to look to the whole context, but that other words, used in reference to other persons, have no legitimate bearing upon the words used of and concerning the plaintiff. But we consider further that the words taken abstractedly are defamatory. The Roman Dutch Law makes injury to the feelings caused by defamatory expressions a ground of action, though no pecuniary damage may have been sustained. To say of a medical man, particularly one just commencing the practice of his profession in a given locality, that he had laid himself open to the rebuke that he had better devote to his patients the time he was wasting on party politics, and that such rebuke would be given in vain, is to say (for this is the meaning which the words would convey to ordinary men) that that medical men is wasting that time in party politics which he is bound to devote to his patients, and that

no rebuke would have the effect of inducing a change. Such words cannot but injure the feelings of the person referred to and would be calculated in injure him in his profession also, by lowering him in the estimation of those who do not know him well. Men, subject to physical suffering are usually exacting in their demands, and the first qualification they look to in those to whom they apply for relief is unremitting attention to their case, an attention which can hardly be expected from a person, who is addicted to wasting his time in party politics. The libel may be a mild one, and in no way reflecting on plaintiff's honour and good name, but it is nevertheless a libel.

The palinode or recantation of the imputation cast on a party is one of the remedies prescribed by the Roman Dutch Law, and the law of other continental states, which borrow their system from the civil law. It is valuable as calculated to reconcile animosities, to shorten litigation, and to reduce law expenses. But the form prescribed by the learned district judge so far from producing such results, is only calculated to embitter the state of feelings between the parties, and to render the prospect of reducing litigation of this class hopeless. The form prescribed is as follows,—"that defendant do ask pardon of the plaintiff in court for the injury he has done him, with a declaration that he is sorry for what has happened, and that he holds the plaintiff for a man of honor, against whose character, and against whose professional conduct towards his patients, he has nothing to say." A recantation must be appropriate and co-extensive with the imputation cast upon the injured man : there is not one word in the libel reflecting on Dr. Moss' honour, or his character.

The form prescribed is not only inappropriate, but it is obsolete. We asked the learned counsel who appeared for the parties, respectively, and the other learned gentlemen practising in our courts for information, but none could adduce a single instance, ever since those courts were established, in which such a form was used, before the judge prescribed the same in the present case. The mode of procedure followed in the Dutch Courts is by no means binding on us, and we have in no instance followed the antiquated and, in some instances, even absurd forms which that procedure prescribes in certain cases. Borthwick in his law of libel, mentions that "the mode of doing this sort of penance on the continent was quod verbarare os palma, deumque et actorem, deprecare reus cogitur, whence may have been borrowed the practice, which from the commissory records, appears to have been following in this country (Scotland) of making the delinquent stand at Church doors, and other public places, clothed in sackcloth, and say, 'false tongue, I lied'!" The writer proceeds to give the Scotch form of palinode which is milder than that set out in the old Dutch Law books, and adds, "in this form the ancient barbarous mode of expression is avoided. But it is not necessary that the recantation should be expressed even in this or any other set form. It may be adopted in any terms which the court may think clear and satisfactory."

The learned counsel for the plaintiff pressed for no particular form, but left it to us to prescribe an appropriate form. We have drawn out a form, which seems to us to appropriate and co-extensive with the imputa-

tion thrown on the plaintiff, and is further clear and satisfactory. On the plaintiff subscribing to the apology and publishing the same in his newspaper the formal judgment of the court will be entered up.

The defendant having subscribed to the following apology,—

" Accepting the opinion pronounced by your Lordships after hearing the appeal argued, that the words pr nted and published of and concerning Dr. Moss are defamatory, I beg to express my regret for having printed and published the same, and beg leave to retract the same and to offer my sincere apology for having printed and published them. Nothing was further from my intention than to hurt Dr. Moss in his professional capacity."

Colombo, 22nd June, 1875. (Signed) A. M. FERGUSON,"—

and undertaken to publish the same in the newspaper and the registrar having read the apology in open court,—

It is decreed that the judgment of the district court condemning the defendant to pay to the poor through the Secretary of the Friend-in-need Society one hundred rupees and to pay plaintiff the costs of the district court be and the same is hereby confirmed. It is further decreed that that part of the judgment of the district court which prescribes a certain form of apology be, and the same is hereby set aside, and the apology above inserted be, and the same is, hereby substituted therefor in its place.

Each party to pay his own costs in appeal.

D. C., Manaar, No. 6,817.

Fernando and others for themselves and as representatives of the members of the congregation of the Church at Media v. *The Right Reverend Father C. Bonjean*, Bishop of Media and Vicar Apostolic of Jaffna.

Roman Catholic Bishop—Right of, as Vicar Apostolic of Jóffna to all the churches and lands attached thereto within his vicariate—Intention of Founder of church—Proof of Usage.

The Roman Catholic Bishop at Jaffna has not, as Vicar Apostolic, the right of proprietorship over all the churches and lands attached thereto within his Vicariate, there being no law or usage having the form of law giving him such right, nor do the customs and discipline of the Church of Rome recognise such a right.

When the Supreme Court has to direct what shall be the management of a religious institution, in the absence of express proof of the founder's intentions, it will look to what has been the usage followed by its congregation and ministers and others officially interested in it, having regard to the customs and discipline of such religious institution, and will in the absence of evidence to the contrary presume that such usage has been in conformity with the original intentions of the founder.

Grenier for plaintiff appellants.

Dias and *Ferdinands* for defendant respondent.

22*nd June*, 1875.—The judgment of the Supreme Court (MORGAN, C.J., STEWART J., and CAYLEY, J.) was delivered by the Chief Justice,—

This is a suit by the plaintiffs (who describe themselves in their libel as "wardens or officers, members and representatives of the congregation" of a certain Roman Catholic Church in the Manaar district, commonly known as the Madu church,) against the Bishop and Vicar Apostolic of the northern vicariate of Ceylon, against the Missionary Apostolic of the district, in which the church is situate, and another person who has not appeared, and is reported to be dead. The plaintiffs allege in the libel that the church in question was built by their ancestors and the ancestors of the other members of the congregation upon land which belonged to them; that since the erection of the building they have had sole and prescriptive possession of the land and of the income, offerings and furniture of the church; and they pray that the defendants (whom they charge with having taken forcible possession of the church and premises) may be ejected therefrom, and the plaintiffs may be quieted in possession thereof: they further pray for a declaration that the 1st and 2nd defendants have no right over the temporalities of the church or to carry on divine service, without the permission of the congregation; and lastly, that the defendants may be condemned to return to the plaintiffs certain articles belonging to the church, which are specified in a list filed with the libel, and to pay Rs. 1,500 as damages.

The 1st and 2nd defendants, that is, the Bishop and missionary priest, after denying the right of the plaintiffs to represent the congregation and the allegation that the church was built solely by the plaintiffs' ancestors, plead that by law and usage the legal title to the church and the sole right to administer its affairs are vested in the 1st defendant, as Vicar Apostolic, and that the charge of the church and of its income, offerings and furniture belongs to the 2nd defendant, as the officiating priest, appointed by the 1st defendant; and the defendants pray (1) that the plaintiff's claim be dismissed; (2) that the 1st defendant's rights, as Vicar Apostolic, to the church and premises, income and furniture, as well as his right to nominate priests to the church may be declared and upheld; and (3) that the 2nd defendant's right to the possession of the church &c., as officiating priest, may also be declared and upheld.

The learned district judge has decided after a long trial, at which a great number of witnesses were heard on both sides, (1) that the 1st defendant, as Vicar Apostolic of the northern vicariate of Ceylon, is entitled to appoint the priests to officiate in the church, (2) that the 2nd defendant or other priest appointed by the Vicar Apostolic is entitled to officiate and receive the offerings: such offerings as consist of articles which can be used in the service of the church to be kept for the purposes; and (3) that the church and premises described in the libel are the property of the members of the Karaiyar caste residing within the limits of the Roman Catholic Mission, known as the Manaar—Mantotte Mission or trustees to be appointed by them. The judgment proceeds to prescribe the manner in which such trustees should be appointed, and to declare that they shall hold the said church and premises in trust for religious purposes only, and

shall have charge of the moveable property thereof, subject to the right of the officiating priest to use them for the purpose of performing the usual religious ceremonies.

Both parties have appealed: the plaintiffs against that part of the decree, which declares the right of the 1st defendant to appoint priests to officiate in the church; and the 1st and 2nd defendants against that part of the decree, which vests the church and the property belonging to it in the members of the Karaiyar caste, and empowers the latter to nominate officers, whose appointment should be obligatory on the 2nd defendant. The prayer of the plaintiff's petition of appeal is, that the plaintiffs as owners and proprietors of the church and its land or lands, and as representative of the other members of the congregation, may be declared to have the right of selecting priests, whom they choose, to officiate in the church; and that they may be empowered to appoint persons whom they consider fit and right to collect the offerings in the church the 1st and 2nd defendants in their petition of appeal pray that the 1st defendant's right to and possession as Vicar Apostolic of the church and prsmises, and its income offerings and furniture as well as his right to nominate priests to the church may be declared and upheld, and that the 2nd defendant's right as priest to the immediate possession of the church and premises and its income offerings and furniture may also be declared and upheld. The prayers in the respective petitions of appeal do not precisely correspond with the relief prayed for in the pleadings, but reading the petitions of appeal and the pleadings together, the substantial questions raised appear to us to be these :—

1.—In whom is the legal title to the fabric and to the land upon which it stands or which forms part of the precincts of the church vested? (As to the existence of any other lands appertaining to the church, the libel and the evidence are too indefinite to warrant a judgment with respect to them.)

2.—In whom is the power of appointing the officiating priest vested? In the Bishop, in the members of the Karaiyar caste?

3.—To whom belong the charge of the church and its furniture, the right to receive the offerings and generally manage and administer its affairs, including the power of appointing its subordinate officers? To the priest or to the caste?

On many of the points raised at the hearing the evidence is conflicting, and some of the witnesses on both the sides appear to us, even if not intending to deceive to have spoken with a degree of certainty which their means of knowledge scarcely justified, and the evidence appears in some parts of it marked with the animus that is frequently found to prevail in disputes of this kind. A careful perusal and comparison, however, of the different statements of the witnesses leads us to consider the following facts to be substantially made out.

The church is situated within what is called the Manaar—Mantotte Mission, of which the present 2nd defendant is the Missionary Apostolic, and which forms part of the northern vicariate, under the Episcopal charge of the 1st defendant. When and by whom the Madu church was originally

founded is left in complete obscurity. There is a tradition that six priests from Goa and Cochin were buried somewhere near the spot, where the church now stands ; and to this probably may be ascribed the sanctity, which now draws pilgrims to the place from various parts of Ceylon and India. It is possible also that there may be some sanctity attached to the spot, which is unconnected with Christianity ; for it appears from the evidence of the 4th witness for the plaintiffs that Mohemmadans make offerings there, under the belief that a Moorwoman, named Suleiha Nachiya, was buried there. At the earliest time to which the evidence goes back, namely some 55 or 60 years ago, it appears that the site in question was mere jungle upon which stood the ruins of some older church of the foundation of which we have no information (see the statements of the 11th and 13th witnesses for the defendants, whose evidence on this point we see no reason to doubt). About 50 years ago (the precise year is left in much uncertainty) a small new church with a thatched roof was built apparently on or neat the ruins of the old one. Upon the question who built this church, the evidence is very conflicting. The impression however, which we have formed from a perusal and comparison of the various parts of the testimony adduced, is that this church was built by a pious Burgher gentleman living at Manaar, of the name of Muyce with the assistance of the neighbouring villagers of Madu. This is proved by the 11th, 12th and 13th witnesses for the defendants, all of whom are aged persons and apparently disinterested witnesses ; and it is impossible to believe that this story about Mr. Muyce is a pure invention ; moreover it is not materially rebutted by any specific evidence on the other side. For many years there appears to have been no regular service performed in the Church but it was visited from time to time by a priest of the Manaar Mission. It is quite clear that it was under this Mission, or one of the churches of this Mission. This is proved by the plaintiff's 8th witness. At first the Mission was in charge of Goanese priests whose spiritual superior derived his authority from the Archbishop of Goa. About the year 1850 many unhappy disputes arose in Ceylon between the Goanese and European societies of Roman Catholics as to the jurisdiction of their respective spiritual superiors, and these disputes resulted in several law suits. The concordat of 1857 between the Pope and the King of Portugal, followed by a pastoral letter from the Archbishop of Goa (copies of which will be found in the case 1421, District Court Negombo, which has been put in evidence) was supposed to have settled these differences and to have fixed the jurisdiction of the spiritual Heads of the European society. But notwithstanding some jealousy still lingered between the Goanese and Italian Roman Catholic Missions in Ceylon. This was made very apparent in the Negombo case above referred to, which came before this court some years ago ; and it will be seen that the defendants in their first answer ascribe the attitude of the plaintiffs in this case to the instigation of certain Goa priests. Since the division of the Island into two vicariates, the Manaar or the Manaar—Mantotte Mission has formed part of the northern vicariate under the European Bishop and Vicar Apostolic.

It seems clear that until 1848 the services in this church were performed by Goa priests. The evidence is conflicting as to the regularity,

with which those services were held. Several of the witnesses for the plaintiffs say that the priest never came, except when he was fetched by some of the congregation ; the 8th witness, however, of the plaintiffs, who was a servant of one of these priests, states that his master used to go regularly once a year to the church to officiate and that he used to stay there one or two days. The first European priest who went to officiate there, was father Ciamini who according to the first defendant's evidence was appointed to the Manaar Mission in 1848, under Bishop Betta Chini. In 1850, the dispute between father Ciamini and father Joan, gave rise to the action No. 4828, D. C. Manaar. Whether any Goanese priests officiated after Ciamini left is uncertain ; but from 1856 or 1857, as is admitted by the plaintiff's 3rd witness, European priests exclusively have ministered there. In 1854 the church was again rebuilt ; and the evidence as to the persons by whom and under whose authority this rebuilding was effected, is somewhat conflicting. There can, however be little doubt that the church was rebuilt out of the offerings of the pilgrims, and others frequenting the place, assisted probably by the contributions and the labours of the villagers. We do not however, think it very material to ascertain by whom and out of what funds the church was rebuilt in 1854, because in the absence of any evidence to the contrary, we think that it must be presumed, that it was the intention of all parties concerned, that the new church should be held and managed upon the same footing as the old one and should be subject to the same ecclesiastical rules and discipline. Indeed, it is more than doubtful if the site of the old church could have been lawfully used for any other purpose.

Upon the issue as to the persons in whom the legal title to the fabric and to the ground, on which it stands, and which forms the actual precincts of the church is, we do not think that either side has made out a case entitling it to judgment. The plaintiffs base their right to the land and building, on the ground that the former has always belonged to them and their ancestors, and that the latter was erected solely by them and at their sole cost. But the ground as we have pointed out, was the site of a church built there long ago, of whose foundation no record of any kind is extant. That church fell into ruins and the land relapsed into jungle, when the piety of a Burgher gentleman, assisted by the villagers replaced those ruins by a humble thatched building. The plaintiffs have no deeds of any kind for the land, nor is it shown to be the property of any individuals. They claim it generally as the property of their caste, but supposing it did belong originally to the Karaiyar caste, as such it has been from time immemorial the site of a church and has been for upwards of 50 years frequented by worshippers from all parts of the Island ; and there is strong reason for thinking that any proprietory rights, which the caste might once have had, have long since been lost. On this point, however, we give no opinion. It is enough to say that we do not think that the church and land have been with sufficient certainty proved to be the property of the plaintiffs, so as to entitle them to judgment on this issue. The first defendant bases his claim to the church and lands on the ground that they are necessarily vested in him by virtue of his office as Vicar

Apostolic. He has not however proved that by any law or usage, having the force of law, or even that under the customs and discipline of the Roman Catholic Church in this Island, all the churches in each vicariate and the land attached to them necessarily become vested in the Vicar Apostolic, as proprietor, and we should require much stronger evidence, than that which has been adduced, before we acquiesce in such a position. We accordingly think that the defendants have failed to make out a case entitling them to judgmeat on this issue.

After all this question as to the bare legal title to the fabric and the ground attached to it does not appear to us of much practical importance. For in whomsoever they are vested, the premises can only be held and possessed upon trust for religious purposes, to be carried out in accordance with the doctrine, discipline and usages of the Roman Catholic Church in this Island. There is no evidence as we have observed of the original foundation of this church, and we must be guided by the principle laid down by this court in the Dowe case (No. 1421 D. C. Negombo above referred to) that, when the court has to direct what shall be the management of a religious institution, it will, in the absence of express proof of the founder's intentions, look to what has been the usage of the congregation and ministers and others officially interested in the subject; and will, in the absence of any proof to the contrary, presume that such usage has been in conformity with the original design. In considering then the 2nd and 3rd issues relating to the right to appoint the officiating priest and the right to have charge of the church and its appliances and to receive its income and manage its affairs, we must first regard the evidence of usage in this particular case, and if such evidence is not clear, we must look to the general laws and usage of the Roman Catholic Church in this country. It is true that the Romam Catholic Church is not in any way established here; but treating it as a religious society simply resting upon a consensual basis, the court is bound (as pointed out by the Judicial Committee of the Privy Council in the case of *Brown* v. *The Curate and Church Wardens of Montreal*. 44 L. J., P. C. Cases p. 1) to regard its laws and rules in determining the right of any aggrieved person, if these rights relate to a matter of a mixed spiritual and temporal character.

With regard to the power of appointing the officiating priest, the usage of this church does not appear to differ from that of other Roman Catholic Churches in Ceylon. The plaintiffs claim this power or rather the power of nomination; but they have not adduced a single instance, in which they have ever exercised it. It is true that they have adduced evidence to shew that originally the services were very irregularly performed, and then only when some members of the caste fetched the priest; but we are satisfied that the priest, who was so fetched was always the missionary of the Manaar or the Manaar—Mantotte Mission, who also visited the other churches in the district. The mere fact that members of the congregation conducted the Manaar missionary to the place, when his services were required, does not shew that they had the power of appointing whom they pleased to officiate permanently in the church, when the services became regular. The evidence of some of the plaintiff's own witnesses sufficiently proves,

that the church was always one of the churches under the Manaar Mission to which the priest was appointed by his own spiritual superior (see evidence of 8th witness.) At first, as we have shown, the Mission was in charge of the Goanese Society, afterwards the Goanese Mission was succeeded by the European ; but it is clear that under both societies, the priest was always appointed by the chief local dignitary of the church, whether Bishop, Vicar General or Vicar Apostolic. When Ceylon was divided into two vicariates, the Manaar—Mantotte Mission was included in the northern, and the Episcopal Vicar Apostolic of this vicariate has always exercised the right of appointing the priest to the different Missions in his province. The 9th witness for the plaintiffs says,—" The Madu church was one of the churches under the Manaar Mission. All the priests were appointed by the Bishop. According to the order of the Bishop the priest used to say mass." The 12th witness for the plaintiff speaks to the same effect, " After Goa priests the European priests went to the church under the authority of the Bishop. Invariably the priest appointed to the Mantotte Mission officiates at Madu." The evidence of the defendants' witnesses on this point is very strong, and this usage was found by this court to prevail with regard to the Doowe church in the Negombo case above referred to. Indeed there can be no doubt that the usage has always been for the chief spiritual dignitary of the diocese or vicariate to appoint the priests to this Mission and to the different churches belonging to it. During the disputes between the Goanese and the European Roman Catholics, there may have been a question whether the right was vested in the Vicars General of the one, or in the Vicars Apostolic of the other ; but as pointed out by the judgment of this court in the Doowe case, these appointments were always made by the chief local dignitary of the Roman Catholic Church whether Vicar General or Vicar Apostolic, and the concordat of 1857 was considered to have settled the question who are the chief local dignitaries of the Roman Catholic Church here now. Indeed the plaintiffs themselves do not claim the right of these appointments on behalf of the Archbishop of Goa or on behalf of any dignitary of the Goanese establishment, but for themselves as members of the Karaiyar caste. We are accordingly satisfied that the appointment of the priests to the church is now vested solely in the 1st defendant and his successors, as Vicars Apostolic of the northern vicariate.

With regard to the 3rd question, namely in whom is vested the right of taking charge of the church and its furniture, of receiving its offerings and generally administering its affairs, including the power of appointing its subordinate officers, there seems to be little doubt upon the evidence as to the usage both in this and in the other churches of this Mission. Many of the plaintiff's witnesses prove that these functions belonging to the officiating priest, under the control of the Bishop. The plaintiff's 5th witness a native officer of rank and position says distinctly. " The priest appoints officers of our church. This is the usual practice in all churches. . . . . The priests are entitled to the offerings but officers should collect them." The 8th witness for the plaintiff states, " all sorts of people go to the Madu church to make offerings. The offerings that come to the church were collected by the officers and paid over to the priest. They

kept anything that was necessary for the church and gave the rest to the priest. . . . . The officers were formerly appointed by the Goa priests and now by the European priests." The 12th witness for the plaintiffs says, "according to custom and usage, the Mupu is appointed by the priests . . . . . The offerings, according to custom and usage, belong to the priest." It may be observed that the 1st plaintiff himself admits that he was made "Presenty" by father Pouzin the 2nd defendant. The evidence of the defendant's witnesses, corroborated, as it is, by many of the witnesses, for the plaintiffs, appears to us to place it beyond all doubt that the usual administration of the affairs of the church and the charge of the building and the right to receive offerings are vested in the officiating priest, subject to the control of the Bishop and the due observance of ecclesiastical discipline, and upon trust for the uses and purposes of the Roman Catholic religion. And this corresponds with the usage held by this court to prevail in the Doowe church.

It was urged by the learned counsel for the plaintiffs, that, although the general usage of the Roman Catholic Churches in Ceylon may be such as the defendants contend for, still this general usage is not applicable to the Madu church, because it is a caste church, that is, a church founded for the use and benefit of members of a particular caste only. We were also strongly pressed to hold that, if we considered the right of appointing the subordinate officers to be vested in the priest, we should at least uphold the right of the Karaiyar caste to nominate these officers. We are not however satisfied that it has been proved that this church was founded solely for the use and benefit of this caste.

We have no evidence as to its original foundation, and we are satisfied that, when rebuilt about 50 years ago, the work was mainly due to the piety of a Burgher gentleman. Mr. Patchico Mudliyar (the 12th witness for the defendants) distinctly states that it is not a caste church ; and the 5th witness for the plaintiffs, the Udaiyar says that the church also belongs to another caste, the Vellalas. The 2nd plaintiff moreover himself admits that the people who go to the church as pilgrims, are of all castes and come from different parts of Ceylon and India. But even if this church should be considered to be what is called "a caste church," we are not satisfied that such churches are subject to different rules and discipline from those prevailing in other churches attached to the Roman Catholic Missions, with regard to the appointment of subordinate officers. A priest who desired to maintain that peace and harmony, which ought always to subsist between a Pastor and his flock, would no doubt endeavour to meet the wishes of the major part of the congregation by appointing such persons as after consultation would be found acceptable to them ; and this practice seems to have been generally observed. But upon the general question as to the eligibility of persons to be appointed by the priest, who have not been approved of by the congregation, we have not sufficient materials before us in the evidence to guide us to a final conclusion. It is earnestly to be desired that the good sense and good feeling of both sides will prevent any question of this kind being raised hereafter.

Having regard to the opinion, which we have formed upon the points submitted to us, we think that the decree of the court below should be amended and the following decree substituted for it ; and it is accordingly adjudged':—

1.—That the plaintiff's libel be dismissed.

2.—That the 1st defendant and his successors as Vicars Apostolic of the northern vicariate, are entitled to appoint from time to time the officiating priest to the said Madu church.

3.—That the 2nd defendant or other the priest so appointed, is entitled to the sole charge of the said church and its precincts with its furniture, and to receive the offerings and generally to manage, and administer its affairs and to appoint its necessary subordinate officers, subject to the control of the Vicar Apostolic of the said northern vicariate for the time being, and to the observance of the usages and discipline of the Roman Catholic Church in this Island each party to bear his own costs.

D. C., Kandy, No. 61,455. *Pula* v. *Doti* and another.

Kandyan deed of gift—Revocation of—Death of donee during the life time of donor.

A Kandyan deed of gift purporting to be made in consideration of the assistance rendered by the donee and for love and affection, and in order that the donor may have a decent funeral, is not void by the mere fact of the donee dying in the life time of the donor.

Ferdinands for plaintiff appellant,

2nd July, 1875.—The judgment of the court was delivered by CAYLEY, J.,—

The plaintiff claims under a deed of gift executed in his mother's favour by her 2nd husband. The learned district judge has dismissed the plaintiff's action on the ground that the donation became inoperative by reason of the donee's death in the donor's life-time. The grant, which is in favour of the donor's wife and his daughter, the first defendant, is expressed to be made in consideration of past assistance, and of affection and also for the purpose of obtaining future assistance and securing for the donor (after his death) proper funeral rites and ceremonies. It is recited that the wife had rendered assistance to the donor for twenty years, all recompense for which would be lost to her family if the deed became inoperative by reason of her death in the donor's life-time, but we can find no authority in Kandyan law in support of this position. Whether or not the donor had power to revoke a deed of this kind it is not necessary to determine ; for though he lived three years after his wife's death, he never attempted to exercise such power.

The gift does not appear to us to fall precisely under any of the cases mentioned in Perera's *Armour*, p. 91, where the circumstances under which

a revocable deed becomes null and void are set forth ; and we are not disposed without express authority to press the operation of Kandyan law any further in this direction, particularly in cases where the donor himself does not appear to have intended any revocation of the benefit which he expressly conferred upon his wife and her heir and descendants.

The case is sent back for further hearing in order to ascertain to what precisely the plaintiff is entitled. The deed of gift granted certain property to the plaintiff's mother and the 1st defendant jointly ; but the plaintiff in his libel claims specific portions of some of the lands.

D. C., Ratnapura, No. 10,413. } *Maduanwela* v. *Mudelihami* and others.

Service Tenure Ordinance, No. 4 *of* 1870, *sec.* 23—*Decision of Service Tenures' Commissioners—Appeal to Governor in Council—Time for such appeal—Validity of Governor's decision—Irregularity.*

It is competent for the Governor in Council to entertain an appeal from a decision of the Service Tenures' Commissioners, notwithstanding that such appeal was preferred later than a month after the decision of the commissioners had been made known to the appellant.

The limitation of time for the appeal provided in sec. 23 of Ordinance No. 4 of 1870, is only directory and not imperative, there being no negative words taking away the right to appeal unless it be availed of within the prescribed time.

The decision of the Governor in Council, being that of an independent tribunal having jurisdiction in the matter, cannot be impugned for irregularity of procedure.

Clarence, A. G. A. for defendant appellant.
Dias and *Layard* for plaintiff respondent.

2nd July, 1875.—The judgment of the Supreme Court was delivered by STEWART, J.,—

The contention in this case is as to whether the field "Dahahatchlaha" is the Maruvena property of the plaintiff or the Paraveni land of the 3rd, 4th and 5th defendants, subject to the performance by them of certain services to the plaintiff, as the admitted proprietor of the Maduwanwella Nindagama.

It appears from the evidence oral and written, that the Service Tenures' Commissioners on the 16th October 1871, after enquiry, held all the pangus in the said village "Maduwanwella" to be Maruvena only (see registry produced), and such their decision was communicated to the tenants on the 25th of the same month.

On the 24th of November following, the plaintiff instituted the suit 9,894 against four of the present defendants in respect of another field situate in the same pangu as the field in question was, and in that action by virtue of the register above referred to obtained judgment, the then

district judge holding that though the evidence satisfied him that the field was the paraveni property of the defendants, still under the 10th section of the Ordinance No. 4 of 1870 he was bound by the decision of the commissioners to decree it to be Maruvena ás prayed for by the plaintiff.

This judgment was affirmed by the Supreme Court, upon the information then before it, this court holding the decision of the commissioners to be final and binding on the district court.

Thereupon the defendants applied for redress to His Excellency the Governor, who after investigation, with the advice of the Executive Council, reversed the decision of the commissioners, as is proved by the following extract from the proceedings of the Executive Council produced in evidence.

"Read letter from the Service Tenuers' Commissioner, No. 29 of 7th April 1837, forwarding Service Tenures' case of Maduwanwella No. 42,794 and district court case No. 9,894 of Ratnapura and stating that the final decision of the commissioners dated 16th October 1871, was announced to the petitioners on the 25th of the same month.

"Resolved that the Service Tenures' Commissioner be informed that after a careful consideration of all the circumstances of the case, the Governor and Council have determined, that the decision of the Service Tenures' Commissioner be set aside, and the lands referred to be declared Paraveny."

Neither the date of the application of the petitioners to the Governor, nor the date of the decision of the Governor in Council is above given. From document F, however, we find that the petition to the Governor was sent on the 12th December 1872 and the decision of Government given on the 19th June 1873.

The district judge considered in view of the 'provisions of the 23rd clause of Ordinance No. 4 of 1870, that as more than one month had elapsed after the determination of the commissioners had been made known to the defendants before application was made to the Governor, His Excellency in Council had no power to accept the appeal, and that it followed that the decision of the Government reversing the finding of the commissioners was void, and consequently that the original finding of the commissioners was good and in force.

We are of opinion that the judgment of the district court is wrong and that it should be set aside and judgment given in accordance with the decision of the Governor in Council.

The 23rd clause referred to by the district judge enacts that any person aggrieved with the determination of the commissioners under section 10, or of the commissioners under section 15, shall be entitled to apply to the Governor for relief at any time within one month after such determination shall be made known to him. It shall be lawful for the Governor, with the advice of the Executive Council, upon such application to confirm the determination of the commissioners or agent or to alter or modify the same as to them shall appear right, and to cause his decision to be entered in the register and such decision so entered shall be deemed the determination as respects the pangu to which it relates."

In construing this section it should be borne in mind that the decision of the commissioners cannot be impugned or questioned in a court of law, that their determination is final and conclusive, and that any authority, in whom is vested the power of correcting their errors and giving relief to those who may most seriously be aggrieved by their proceedings is the Governor. If, therefore, there be any ambiguity in the provision, the inclination of this court should rather be to give the section a liberal construction, if fairly capable of such a rendering as would advance the remedy it was clearly designed to afford, than to restrict its character in such a manner as would neutralize in a great measure the benefits which it was intended to confer.

The enactment so far as relates to time within which the application is to be made, appears to us in strictness to be only directory, and not imperative : and therefore not precluding an appeal after the period specified. It directs that the person aggrieved "shall be entitled to apply to the Governor for relief &c.," but there are no negative words taking away the right unless it be availed of within any prescribed time.

We are strongly supported in thus construing this section by the case *King* v. *The Justices of Leicester*, 7 B. and C., p 6. There it was contended that the enactment in 54 G. 3 C.: 84 "that the Michaelmas quarter sessions thall be holden in the 1st week after the 11th October," were imperative. But it was held that the enactment was merely directory and that the session may notwithstanding be legally holden at any other time. "It has been asked" remarked Lord Tenterden, C. J. in that case, what language will make a statute imperative, if the 54 G. 3 C. 84 be not so? Negative words would have given it that effect, but those used are in the affirmative only."

Though we have deemed it desirable under the circumstances of this case to enter at some length into consideration of the true meaning of and the constructive to be put on the 23rd section of this Ordinance. We are further of opinion that the decision of the Governor in Council being that of an independent tribunal, having jurisdiction in the subject matter, is conclusive, and not subject to be reversed as to the regularity of the mode in which it was obtained. See *Boucher* v. *Lawson*, p. 89—cases in time of Lord Hardwicke,—also *Reg.* v. *Brenam*, 16 L. J. Q. B. 289, where it was held that the Court of Queen's Bench was bound to presume that the sentence, being passed by a court of competent jurisdiction, and unreversed, was warranted by law and valid.

It is accordingly decreed that the judgment of the district court of Ratnapura of the 8th December 1874 be and the same is hereby set aside, and it is further decreed that the suit of the plaintiff be dismissed with costs, except as to those of the 1st defendant, who will bear his own costs.

D. C. Kalutara, No. 62,519. } *Alston Scott & Co.* v. *Nannytamby* and *Tambyah.*

Conveyance of lands in fraud of creditor—Action by creditor against fraudulent alienor and alienee—Cancellation of deed and treatment of parties thereto as mortgagor and mortgagee—Accounting between them—Legal fraud.

N, being in insolvent circumstance, conveyed two cocoanut estates to T, his brother-in-law, subject to a private understanding that T was to re-convey them to him on being refunded the amount advanced. Plaintiffs, who were judgment creditors of N, seized the said estates at his request, but T claimed them as his and prevented the sale thereof. Plaintiffs now sued N and T, praying that the estates in question may be declared the property of N and be held executable under their writ.

The Supreme Court, reversing the judgment of the court below, decreed that the deed in question should not operation as conveyances but only as subsisting mortgages; that T should be treated as mortgagee in possession, and should render an account of the profits received and expenditure incurred by him in respect of the two estates; and that the estates should be liable to be sold under plaintiffs' writ, subject to the mortgages created for the respective amounts to be ascertained on the footing of the accounts ordered.

Legal fraud is an act unwarrantable in law to the prejudice of a third person, and not that crafty villainy or grossness of deceit to which the term 'fraud' is applied in common language.

Ferdinands and Cooke for plaintiffs appellants.

Brown for 1st defendant respondent. *Dias* and *Alwis* for 2nd defendant respondent.

2nd July, 1875.—The judgment of the Supreme court was delivered by the Chief Justice (SIR R. MORGAN),—

The plaintiffs, who are judgment creditors of the 1st defendant, bring this action to have two cocoanut estates called Diklande and Dambewinne, which they have caused to be seized on their writ of execution, declared to be the property of the 1st defendant and liable to be sold under their writ: the sale whereof was opposed and prevented by the 2nd defendant, who claims to be the owner of both properties by virtue of two deeds of conveyance from the 1st defendant who is his brother-in-law: Diklande being claimed on a deed bearing date 26th January 1865, the consideration of which is expressed to be £3,000 and Dambewenne on a deed of April 22nd of the same year, the expressed consideration being £1,750.

These deeds the plaintiffs allege to be fraudulent and to have been executed in collusion between the two defendants with intent to defraud and delay the creditors of the 1st defendant who was then in insolvent circumstances.

The 1st defendant, wholly denying fraud, pleads (*inter alia*) that the sales were not intended to operate as absolute and conclusive sales, or to transfer the possession of the said properties to the 2nd defendant; but that they were merely nominal sales and were intended to operate as

mortgages for the amount of £4,750, borrowed by the 1st defendant: the actual value of the estates, as he alleged, being £7,000.

The 2nd defendant on the other hand, insists that the amount paid £3,000 on the one conveyance and £1,750 on the other, represented the true value of the estates; that sale and not mortgage was intended, with the reservation that the 1st defendant was to be allowed to repurchase the estates, "if he could do so within 2 or 3 years," which however he failed to do.

On these issues the parties proceeded to trial, evidence was heard and the learned district judge gave judgment in favor of the 2nd defendant holding his title to the estates to be valid and indefeasible.

The testimony of the two defendants is so irreconcileable that we shall base our judgment (the other evidence being chiefly of a collateral nature) mainly on the broad features and undeniable facts of the case, deducible from the documentary evidence.

In the first place, it is manifest that the two deeds though purporting to be conveyances of sale, do not represent and record actual and genuine transactions, it being the intention of neither party at the time that they should operate as absolute transfers. Even taking the 2nd defendant's own version, as given in his answer to be true, namely, that it was intended that the 1st defendant should be allowed to re-purchase the properties, what in effect was that arrangement, but that the two conveyances to the 2nd defendant were only to operate as mortgages?

Independently of the statement in the carefully drawn answer of the 2nd defendant, there are also letters of this defendant produced in evidence in which he throughout deals with the transactions in question as mortgages, in some of his communications even strongly expostulating with the 1st defendant for not re-paying what was due.

These letters contain in themselves, irrespective of other proof, clear and cogent evidence that the 1st defendant, who unquestionably had previously very extensive dealings, was about 1865 (the 2nd defendant having ample knowledge of the fact) deeply embarrassed, hard pressed for money and not able to meet his engagements.

In letter marked B, July 15th 1866, we find the 2nd defendant writing to the 1st defendant as follows:—

"I have cast your accounts last night. To this date principal and interest amount to £5,700. Besides due, on loan account £250, nearly all amounting to £6,000. What benefit is there in my keeping your properties? I require money very much for building purposes. Therefore pay some on account of interest and thus reduce the amount. Otherwise arrange to raise the loan from others on the properties to free me from this. If you have no money send me promissory notes, that I may discount them."

In letter (marked C. no date) he writes: I used to hesitate before I lent money and not after I lent. However, did I ever call for the money to this moment? If the amount I lent is paid to me every one will be happy; this you know well. If the estate is worth £30,000, it is your property and is not mine. What a sum of money you acquired and spent

before this age. * * * If you are to get money any where recover and pay and take over the properties. Is that not a good thing? It is a greater pleasure for me to receive the money, than retaining the mortgages."

It will suffice to quote from another letter marked A. " I have received the letter which you wrote. You received the sum of £1,700 mortgaging Dambewinne and Sitawake on the 26th January 1865. You will know what the interest amounts to date * * * It is on account of your pressure and ruin that I came forward to advance you money on the mortgage, but not because I could not lay out elsewhere."

These letters appear to us to leave no reasonable doubt that mortgage and not sale was contemplated when the two deeds were executed. And we further are of opinion that the deeds were in law fraudulent, as tending to defeat and delay the 1st defendant's creditors, and consequently cannot be upheld as absolute transfers.

As respects the latter point, at the very outset we have the indisputable fact that when the conveyances were signed, an underlying secret arrangement existed that the 1st defendant was to get back the estates on refunding the amount advanced and that for a considerable time after the execution of the deeds the 1st defendant continued in possession of the estates. It is also clear that the 1st defendant was in the early part of 1865 in insolvent circumstances and unable to meet his engagements, and has continued so until the present time. He says that his difficulties began in the latter part of 1864, that he was solvent up to December 1864, and the 2nd defendant in his own letter, the one last referred to, pointedly asserts that it was to save the 1st defendant from ruin that he came forward. What then could have been the motive and reason for this pretended sale, if it were not to prevent the estates becoming available for the satisfaction of the 1st defendant's debts?

The case appears to us to contain an unusual number of those circumstances from which legal fraud cannot but be inferred, in the absence of satisfactory explanation, such as the fictitious nature of the conveyances (the deeds purporting to mean one thing, while the parties intended them to mean something else), the secret understanding that in a certain event the estates were to be re-conveyed, the relationship of the parties, the unquestionable embarrassments at the time of the 1st defendant, and lastly the continuance of possession by the ostensible vendor after the conveyances were executed. We use the expression "legal frand" for it is quite possible that the 2nd defendant conscientiously believed at the time that he was justified in assisting his brother-in-law by means of these impeached transactions. But the transactions are none the less invalid, as a fraud upon creditors and cannot be upheld. Fraud, in a legal sense, has been defined as an act unwarrantable in law to the prejudice of a third person, and not that crafty villany or grossness of deceit to which it is applied in common language (*Hardman* v. *Fisher*, Lofft, 472,476) and the transactions in question seem to us to have all the elements necessary to constitute such legal fraud.

The 2nd defendant endeavours to establish the *bona fides* of the

transactions by seekiug to show that the estates in 1865 were not worth more than they purport to have been sold for. We are not however satisfied as to this. Even laying aside Mr. Gabriel's evidence, we cannot acquiesce in the view that the bare fact of the 2nd defendant having taken Diklande in mortgage in November 1863 for £2,100, shows that the sum of £3,000 was an adequate price for the property in 1865; bearing in mind, as the evidence discloses, that about 180 acres had been planted in the interval, and that a portion of the estate came into bearing in 1867. Besides the agreement or understanding of February 1868, which we shall immediately notice, shows that at that date the 2nd defendant considered the properties to be worth £7,778. Further, if the estates were conveyed for their full value, whence the necessity for any secrecy on the subject? It is clear that both parties treated these deeds as mortgages, and if the transaction was in *bona fide* one, why were not the deeds in the usual form of mortgages? There must have been some motive for this secrecy, which the 2nd defendant has failed satisfactorily to explain.

It was also contended on behalf of this defendant that in February 1868 on an adjustment of accounts, a final opportunity was afforded the 1st defendant of paying off his liabilities to the 2nd defendant, which were found (including a sum then advanced) to amount to £7,778 and having the estates re-transferred to him, that it was then agreed that for this amount the 1st defendant should give a promissory note, which if he did not redeem within the stipulated time (three months), the properties were finally to vest in the 2nd defendant, and that of this opportunity the 1st defendant did not avail himself; and accordingly that whatever may have been the nature of the transaction at its inception, the 2nd defendant has now acquired a sufficient title. But the then existing creditors of the 1st defendant could not be prejudiced by this arrangement in 1868, even supposing it have been of any legal validity as between the parties. It does not appear to have been notarial, and if, as we hold to be the case, the deeds in question, though purporting to be conveyances, were in fact intended as mortgages, and are to be regarded only in that light, it may admit of considerable doubt whether the alleged abandonment by the 1st defendant of his right of redemption, unless the debt was paid within a certain time, was not in effect wholly invalid as a *pactum commissorium*. This latter point however, it becomes unnecessary to determine, for according to the documentary evidence, even subsequently to May 1868 the parties acted and dealt with each other as if the mortgages still subsisted. See Mr. Proctor John Prins' letter (marked letter L.) of November 30th, 1868, in which he writes to the 2nd defendant as follows :—

"Mr. Nanny Tamby requested me to ask you to send me the title deeds of the Diklande and Dambewinne estates, and a memorandum showing the amounts still due to you. It appears there were £4,750 due to you of which you received £3,000 by the sale of Avishawella, so there was a balance of £1,750 and interest on £3,000 to date of sale, and on £1,750 from that to the present.

"The money is ready and will be paid on the execution of the transfer, I can have the deed ready for signature to-morrow."

See also the late Mr. Martensz's letter of March 11th, 1869, where he writes to the 1st defendant "there is a large balance still due to Mr. Tambyah (2nd defendant), which I fear can never be recovered and your liability for this therefore continues."

For the above reasons we are of opinion that the judgment of this learned district judge is erroneous and should be set aside, and the two deeds of Diklande and Dambewinne respectively of January 26th and April 22nd, 1865, referred to in the libel, be held and deemed not to operate as conveyances, but as still subsisting mortgages of the said estates for the amount of consideration appearing therein, with interest thereon at 9 per cent per annum, and that the 2nd defendant should be treated as a mortgagee in possession, and the rights and liabilities of the plaintiffs and defendants be determined accordingly.

It is accordingly decreed that the claim of the defendant as the owner of the said two estates be, and the same is hereby, set aside, and it is further adjudged that the said estates be declared, and the same are hereby declared, to belong to the 1st defendant, and to be liable to be sold under the plaintiff's writ of execution subject to the respective mortgages thereof for the respective amounts to be ascertained as hereinafter directed.

That the 2nd defendant do within three months from this date (the time to be extended on due cause shown) furnish the district court with two accounts, one of the profits received and expenditure incurred by him from, and in respect of the said Diklande estate, and the other of the profits received and expenditure incurred by him from and in respect of the said Dambewinne estate; such accounts to carry interest on both sides at the rate of 9 per cent per annum, that the 1st defendant be entitled to credit in each account for the balance (if any) of profit over expenditure, and the 2nd defendant to credit as against the Diklande estate for the said principal sum of Rs. 30,000, together with interest at the rate of 9 per cent per annum, and as against the said Dambewinne estate for the said principal sum of Rs. 17,000 together with interest aforesaid such interest to run from the date of the aforesaid conveyances respectively. Neither account to be passed, without the opposite party having full opportunity of scrutinizing such accounts and being heard on any objection which he may have to make thereto.

In the event of the estates not being sold under plaintiff's writ and of 1st defendant paying to 2nd defendant such sum as shall be found due on a balance of account to be taken as aforesaid, it is further ordered that 2nd defendant shall at the request, cost and charges of the 1st defendant retransfer to him the said estates.

The cost of suit of the plaintiffs in both the courts to be paid by the 2nd defendant. The defendants will bear their own costs respectively.

D. C., Kandy, No. 59,767. } *Udanwita Loku Banda* v. *Giragame Ratemahatmeya* and two others.

Kandyan Law—Basnaike Nilame—Power of, to lease Temple lands for long periods.

The Basnaike Nilame of a Temple has not the power to grant long leases of Temple Lands, for instance, for 30 years.

Grenier for defendants appellants.
Ferdinands for plaintiff respondent.

The judgment of the Supreme Court was delivered by STEWART, J.,—

The plaintiff in this case, as the Basnaike Nilame of the Katragama Dewale in Kandy, sues to obtain possession, in trust for the said Dewale, of five boutiques which he alleges the 1st defendant, who was his predecessor in office as Basnaike Nilame, "fraudulently and in breach of trust, and in expectation of his removal from the said trust, by a deed dated March 10th, 1870, leased to the 2nd defendant, who was a Mohottala and servant of the 1st defendant, for a term of 30 years at a nominal rent of £10 per annum, whereas the said premises could be reasonably rented at £90 per annum."

The 2nd defendant is stated by the deed of August 12th, 1872, to have sublet the boutiques to the 3rd defendant, and the libel concludes by praying that the alleged fraudulent deed of March 10th, 1870, be set aside and cancelled ; the 3rd defendant ejected; and damages awarded to plaintiff against all the defendants.

The answer admitted the execution of both the deeds, and, specially denying that the first mentioned lease was fraudulent, maintained that the 1st defendant, as the Basnaike Nilame of the Katragama Dewale for the time being, was entitled to lease the premises in question, as he had done, the same being the property of the said Dewale. Evidence was adduced on both sides, and the learned district judge came to the conclusion that the plaintiff was entitled to judgment, on the ground that the rent secured by the lease granted by the 1st defendant was greatly below what he ought to have got,—the learned judge however, finding that in executing the lease for thirty years the 1st defendant did not exceed his powers, nor act otherwise than in good faith.

From this judgment the defendants have appealed. They deny that the rent was inadequate, and they also urge that neither by Roman Dutch Law, nor by any Kandyan Law, can a lease be set aside on the ground of insufficiency of the stipulated rent, unless there be *mala fides*.

The right of a Basnaike Nilame of a Dewale to enter into long leases has not as yet, we believe, been judicially determined. The question is one of great moment in the Kandyan Districts, and involving so many various interests, that we have felt it our duty to give the case now before us our most careful consideration.

We concur with the learned district judge in thinking, not only as respects the immediate question before us, but also in regard to other

cognate subjects, that it would be very desirable if the rights, powers, and duties of Basnaike Nilames, and similar officers were authoritatively settled and determined by legislative enactment. Situated, however, as we are, we have no alternative but to endeavour, from the materials at our command, to arrive at as satisfactory a conclusion as circumstances will allow of.

The contention on behalf of the plaintiff in the district court, and emphasized in appeal, may be briefly stated as follows, viz,—that a Basnaike Nilame of Dewale, or the incumbent of a temple, cannot grant a lease of a Dewale or Temple lands extending beyond the term of his office or incumbency, whether terminated by death or otherwise.

From the evidence adduced, it appears to us to be established that by law and usage during the Kandyan Government, long leases could not be granted and were consequently illegal. The Dewa Nilame, a leading chief and high authority, deposes "that during the Kandyan times it was not usual for Basnaike Nilames to lease out any Temple lands. But during this Government some of the Basnaike Nilames began to lease out fields and chenas . . . It is not usual to lease out temple lands or houses for long leases, but of late it has been done."

Another witness, Heniyewala Ratemahatmeya, states, "during Kandyan times a lease could not be given for longer than one or two years during the Kandyan Government, the Government had the supervision of part of the affairs of the Dewale. Now, the Basnaike Nilame has the sole management."

There is also other evidence to the same effect, from which we think we may safely conclude that, according to Kandyan Law as existing in 1815, when the Kandyan Provinces came under British Rule, Basnaike Nilames had not the power to grant leases of Dewale lands except for short periods: such short periods as without materially circumscribing the right and power of their successors, would allow of the incumbent entering into necessary engagements for the due execution of the trust. They were essentially trustees of the property, and revenues confided to their charge, and consequently bound to act only as administrators in the interest of the Dewales entrusted to their management.

Moreover, the withdrawal of Government supervision which, however, did not take place until 1853, cannot affect the question of rights and duties of Basnaike Nilame's either towards their Dewales or their successors. If under the Kandyan dynasty, long leases were not lawful, the mere discontinuance of Government surveillance can make no difference in regard to the duties of these functionaries; the change only rendering it all the more necessary that Basnaike Nilames, and others similarly situated, should be more scrupulous than even before, in not exceeding their powers and keeping within the law and usage.

It was contended on behalf of the appellant that for a considerable time, as shown by the evidence, it was not unusual for Basnaike Nilames to lease lands belonging to their Dewales for terms of ninety-nine years, and even in perpetuity.

Such a practice at the farthest, could not have existed prior to 1815.

The leases referred to are of much later date. But the Kandyan Law being as we have already pointed out, the onus of proving that it has become obsolete, or been otherwise abrogated, lies on the defendants. What, however, is the effect of the evidence adduced?

It seems that in 1865, owing to disputes respecting rights and powers of Basnaike Nilames &c., a meeting was held at the Maligawa, when it was resolved that Basnaike Nilames should be allowed to lease lands for any period not exceeding thirty years.

This assembly was apparently self-constituted. It may or may not have arrived at an equitable compromise. But if leases for 99 years was condemned as illegal, it is difficult to conceive how leases for so long a period as 30 years were tolerated. This committee obviously had no power either to alter the old or make new laws. But these proceedings are not without importance, indicating as they do that in 1865 there was no settled usage, and that no custom had grown up of that inflexible character and long standing essential to render it of force and binding.

We are accordingly of opinion that the deed of lease of March 10th, 1870, is bad and should be cancelled. It becomes unnecessary, therefore to enter upon the other points raised in the argument: and the decision we have formed being the same as that of the district court, the judgment of that court will be affirmed.

In conclusion, it may be desirable to point out that the present judgment is not to be understood as declaring that Basnaike Nilames, have not the power in any case of entering into leases binding on their successors of longer duration than one or two years. Every case will greatly depend on its own circumstances and the urgency of the need for a departure from ordinary usage: the guiding principle being that a Basnaike Nilame should execute his trust, consistently with the interest of the Dewale, as one terminating with himself, hampering his successor as little as possible.

D. C., Matara, No. 27,836. } *Wirakoon* v. *Jumeaux.*

Commodum—Damage to—Irresistible violence or unavoidable misfortune—Burden of proof.

The person to whom anything is lent gratuitously is bound to return it in the same state in which he borrowed it, unless prevented by irresistible violence or unavoidable misfortune; and it is for the borrower to show that the damage to the thing lent, was not due to any fault of his own.

Grenier for plaintiff appellant.
Ferdinands for defendant respondent.

The judgment of the Supreme Court was delivered by CAYLEY, J.,—

Set aside and the case is sent back for further hearing.

A person to whom a thing is gratuitously lent is bound to return it in the same state in which he borrowed it, unless prevented by irresistible violence or unavoidable misfortune (Herbert's Grot. p. 320, Henry's Vanderlinden p. 220), and it is for the borrower to show that the damage

to the thing lent was not due to any fault of his own. The defendant has not called any evidence but his advocate has produced a letter from him in which he states that he was prepared with evidence, but that the district judge deterred him by expressing an opinion at the close of the plaintiff's case that the plaintiff had failed to make out his claim.

Respondent to pay costs of appeal. Costs in the court below to stand over.

D. C., Kandy, No. 60.981. } *Holloway & Co.* v. *Mohamadu Meeden* and another, and *Ana Lana Muttu Carpen Chettys* co-defendant appellant.

Surety—Practice of making a surety to the performance of a judgment party to the original suit—New contract.

In certain cases, a person who becomes surety for the performance of the judgment, may be made a party defendant in the original suit in which the judgment is obtained, but a surety for the payment of a certain sum and the performance of a certain agreement, which contains terms and provisions which cannot be enforced under the judgment, cannot be made a party defendant to the suit.

The judgment of the Supreme Court was delivered by CAYLEY, J.,—

The order of the court below, making Karpen Chetty and Walliappa Chetty parties plaintiffs, is affirmed, but the order making Muttu Karpen Chetty a co-defendant is set aside.

In many cases a person who becomes surety, for the performance of a judgment may be made a party defendant in the original suit, in which the judgment is obtained (See 17,206, D. C. Batticaloa, Civil Minutes, 18th September 1874); but in the present case, the obligation entered into by Muttu Karpen Chetty is not expressed to be security for the judgment, but a security for the payment of a certain sum and the performance of a certain agreement which contains terms and provisions which could not be enforced under the judgment. The rate of interest in the judgment debt is raised, additional lands are mortgaged and there is a further stipulation for the delivery of coffee. The agreement appears to us to be substantially different from a mere undertaking to be answerable for the performance of a judgment and consequently we think that a fresh action should be brought upon it, before the surety can be made liable.

Each party will pay his own costs.

D. C., Colombo, No. 2,149.

Theft—Evidence—Charge for stealing a live animal—Proof of theft of a carcase.

Upon an indictment for stealing a live animal, evidence cannot be given of stealing a dead animal. An indictment for stealing a dead animal should state that it was dead.

Alwis for defendant appellant.

8th July, 1875.—The judgment of the Supreme Court was delivered by CAYLEY, J.,—

The charge as laid in the second information is different both in terms and in substance from that laid in the first, for it is quite clear that the theft of a live animal was charged in the first information; this is shown by the use of the words "bull" and "drive away," whereas in the second information the intent charged is the theft of the carcase.

In the case of *R.* v. *Edwards* (R. and R. 497), it was held that the proof of killing a sheep with intent to steal the carcase would not support an indictment for stealing the live animal, and Mr. Justice Holroyd observed that an indictment for stealing a dead animal should state that it was dead, for upon a general statement that a party stole the animal it is to be intended that he stole it alive. Proof of the killing of an animal might perhaps under certain circumstances be evidence of an attempt to steal it, but in the present case the evidence shews that the killing was quite independent of the original theft which was completed before the appellant became concerned in the killing. The offence charged in the first information is, therefore, not only in point of form different from that charged in the second, but is in point of fact a different offence and committed at a different time.

D. C., Colombo, No. 63,436. *Ramasamy Pulle* v. *Tamby Candoe.*

Compound interest—Dutch Usury Laws—Force of, in Ceylon—Rate of interest recoverable.

Compound interest is illegal and cannot be recovered even though expressly stipulated for.

Held also by MORGAN, A. C. J. and STEWART, J. (CAYLEY, J. *dissentiente*) that the Usury Laws of Holland, being in their nature merely local enactments and unsuited to the condition of affairs in Ceylon, were not introduced by the Dutch, and were not in force during their occupation of the Island, and that, therefore, any rate of interest stipulated for could be recovered.

Kelly and *Grenier* for plaintiff appellant.

Ferdinands for defendant respondent.

8th July, 1875.—CAYLEY, J.—In this case a question of great practical importance is raised, namely, whether interest exceeding 12 per cent.

per annum can be recovered on a bond secured by a mortgage of immoveable property, where a higher rate of interest is expressly reserved. It is with much regret and great submission that I feel compelled to disagree with the opinion of the majority of this court, and, in view of the difficulty of the question raised, I do so with some doubt and hesitation.

The mortgage in the present case contains a stipulation for the payment of interest at the rate of sixty per cent. per annum ; and the learned district judge has held that the plaintiff is entitled to recover principal with interest at the rate of 12 per cent. per annum only. He has not stated his reasons in this case for holding that the legal rate of interest is restricted to 12 per cent. per annum, but he went very fully into the question in a judgment given by him in the case No. 61,776 District Court, Colombo, against which no appeal was taken. In that decision I fully concur, and it will be seen that I have adopted much of his reasoning in my present judgment.

In dealing with the question before us, it will be important to consider (1) what were the provisions of the Civil Law with respect to interest, (2) how far these provisions were modified or superseded by the laws of the United Provinces, (3) whether the Dutch imported their Usury Laws into this Colony, and (4) what is the effect of the local Ordinances relating to the subject.

According to Tacitus (*Ann.* v. *16*), the Roman Law against Usury is as old as the XII. Tables, which prohibited the exaction of more than the *unciarium foenus*, which Niebuhr (*History of Rome*, vol. III) considers, and his opinion appears to be generally followed, to have been 1-12th of the capital or $8\frac{1}{3}$ per cent. for the year, that is, the old Cyclic year of 10 months ; and this would be equivalent to 10 per cent. for the Civil year of 12 months. Livy. (7. 16), on the other hand, represents the establishment of the *unciarium foenus* as due to a Rogation passed in the year 398 A. U. C. Niebuhr (*ib*) reconciles the two historians by supposing that the enactments of the XII. Tables with reference to this matter had been repealed and were re-enacted by the above Rogation. Whatever may have been its origin, we have the uncial rate of interest established as the maximum legal rate as early at least as A. U. C. 398, and, as Niebuhr observes, the uncial and half uncial rates form a standard "which does not differ from what we find in all times and countries ; for 3 and 12 per cent. are the limits on which persons can afford to lend or borrow money ; the latter is customary where capital is monopolized by a few persons, strangers to real industry, where business is scarce and the value of productive property as an investment for capital is very low ; the former, where the contrary is the case."

Subsequently the legal rate was reduced to the *semiunciarium foenus* (Tacit. *ib*), and we read of usurers being punished for a violation of the law against usury, by being condemned to pay a penalty equal to 4 times the loan.

Towards the close of the Republic the maximum rate of interest was fixed at one per cent. per mensem, (centesimœ usurœ) or 12 per cent. per annum. "The enactments" says Mommsen (*History of*

Rome, iv. p. 555, Dickson's translation) "that it was illegal to take a higher interest than one per cent. per month, or to take interest on arrears of interest, or to make a judicial claim for arrears of interest to a greater amount than a sum equal to the capital, were first introduced into the Roman Empire by Lucius Lucullus for Asia Minor and retained there by his better successors. Soon afterwards they were transferred to other provinces by edicts of the Governors, and ultimately at least a part of them was provided with the force of law in all provinces by a decree of the Roman Senate of 704 (A. U. C.) The fact that these Lucullan enactments afterwards appear in all their compass as imperial law, and so became the basis of the Roman, and indeed of modern legislation as to interest, may perhaps be traceable to an Ordinance of Cæsar."

After many changes, which it is not necessary here to discuss, Justinian at last fixed the rates of interest by a scale, which varied according to the condition of the creditor. (Cod. iv. tit. 32, sec. 26). Persons of illustrious rank (Illustres) were not allowed to lend money at a higher rate than 4 per cent; manufacturers and merchants were allowed to lend up to the rate of 8 per cent. But interest in maritime risks (which by the older law had been unlimited) was allowed up to 12 per cent. In all other cases the limit of 6 per cent. was fixed, notwithstanding the existence of any local custom to the contrary. Compound interest was also strictly prohibited (ib. sec. 28) and interest was not allowed to exceed the amount of principal (ib. sec. 27, 1.) By a previous section (10) of this title, it was laid down that the rule against interest exceeding the principal did not apply to interest paid from time to time, that is to say, it had reference only to accumulations of arrears of interest. This rule, however, was in effect abrogated by the 121st and 138th Novels, by the latter of which it was expressly laid down that, even where interest is paid from time to time, the principal must not be exceeded.

In order to ascertain in what respect these enactments of Justinian were altered or modified by the Law of the United Provinces, we naturally first consult the work of Grœnewegen *de Legibus Abrogatis*, published in 1648. In his commentary on the passages above cited from the Code, he lays down that merchants might stipulate for 12 per cent, but other persons for 8 per cent. only, and further that, where a pledge or mortgage was given for securing the principal, the Supreme Court of Holland allowed 6¼ per cent. only to be exacted, although the Provincial Court of Holland used in this case to allow 7 per cent. to be stipulated for. He adds that money lent on maritime risks was exempt from these restrictions, and that in such contracts not only 12 per cent, but even much more might be stipulated for. He further states that it is lawful for persons, who carry on the business of bankers or pawn-brokers (qui mensam fœnebrem exercent) by the licence of the Prince to stipulate for larger interests, but that it had been decided by both courts of Holland that a higher than the ordinary rate could not be exacted from such persons even by a partner. The rules that interest exceeding the capital and interest upon interest could not be recovered seem, according to Grœnewegen, to have been as strictly part of the Roman Dutch Law as of the Civil Law, except that the restriction

laid down in the Novels above referred to was superseded, and the old rule of the Code restored ; so that the restriction against interest exceeding capital was made applicable to accumulations of interest in arrears only, and not to interest paid from time to time. The latter rule (namely that arrears of interest should not exceed the principal,) says Sande, *in foro nostro* (*i. e.* Friesland) *est in viridi observentia* (Dec. Fris. III. 14, 5.) The rule, however, against compouud interest was held inapplicable to *annui reditus* (which indeed could hardly be regarded as interest) and to debts due to the Fisc or the state, (Grœn : *ib.*)

The following maximum rates, then, appear from Grœnewegen to be allowable :—

(1) In the case of merchants 12 per cent.

(2) In the case of licensed money-lenders more than 12 per cent ; but, limit not given.

(3) In the case of other persons, where the principal is secured; 6¼ or 7 per cent ; where the principal is unsecured, 8 per cent.

(4) In maritime risks no limit.

The authority which Grœnewegen gives for merchants being allowed to stipulate for 12 per cent. is the 5th section of the Placaat of Charles V of the 4th October, 1540 ; and on reference to the Placaat it will be found that all contracts under which a higher rate of interest may be charged are declared to be usurious, and therefore null and of no effect. This rule was, however, subsequently modified by the contract being regarded as void as to the excess only of interest above the *modus legitimus* (Voet. 22, tit. 1, sec. 5.)

Grotius, who is referred to by Grœnewegen in the above passage, says (Introd. III. c. 10, sec. 10, Herbert's translation p. 326) that in Holland between two burghers it is permitted to stipulate for the 16th penning (or 6¼ per cent.) for one year, but that among merchants, where the profit is greater, and therefore the laying out of the money is more highly appreciated, it is permitted to stipulate for a profit of 12 per cent. in the year. He, however, points out that interest upon interest (anatocismus) is not allowed. And again, in his works *De Jure Belli ac Pacis* (Lib. II. c. 12 sec. 22) he fixes 8 per cent. as the maximum amongst ordinary persons and 12 per cent. amongst merchants. *Apud Hollandos jam pridem concessum est aliis quidem octo nummos in centum mercatoribus autem duodecim pro usu annali exigere.*

It will be seen from the above passages that Grotius and Grœnewegen generally agree ; Vander Keessel, however, (who published his *Theses* in 1800) lays down a more restricted scale. In commenting upon the above cited chapter from Grotius' *Introduction* (Thes : 545), he says that formerly there was a diversity of decisions as to the legal rates of interest in Holland, but that it was decided on the 6th May, 1610, that the court would not decree more than 6¼ per cent. in cases of mortgages, nor more than 7 per cent. in cases of unsecured debts, and that the Supreme Court held that, where there was no mortgage, it was lawful to contract for 7 or 8 per cent., but that in the absence of contract 6 per cent. only could be allowed. He subsequently (Thes : 547) cites the Placaat of Charles V of 1540,

which authorised merchants to stipulate for 12 per cent., but points out that this rate referred only to loans for one year or a less period, and that, after a decree of the court in 1590, this rate ceased to be recognized, and that not even merchants were allowed to stipulate for more than 5 per cent. This rate (continues Vander Keessel) was subsequently reduced to 5 and even 4 per cent; but the latter rates applied only to cases where the interest became due *ex mora* and not to cases of interest *ex pacto*.

Vander Keessel thus limits the rate of interest even amongst merchants to 8 per cent., and amongst other persons to 6 or 6¼ per cent. on mortgages, and to 7 or 8 on unsecured debts. On maritime risks he states that there was no restriction (*Thes.* 557.) He makes no express exceptions, however, in favour of licensed money lenders.

Vander Linden (*Inst.*, p. 218, Henry's translation) says generally that interest must not exceed 6 per cent, and that to stipulate for more is held usury and punishable, making no express exception in favour of merchants or licensed money lenders, and no distinction between secured and unsecured debts. He also lays down the rule that the amount of interest may not exceed the capital, and that compound interest is not allowed.

It will thus be seen that the tendency of the law of Holland from time to time was to restrict rather than augment the legal rates of interest. Vander Keessel, who wrote in the year 1800, and Vander Linden, whose work was published in 1806, are our most recent authorities, and they bring down the laws of Holland to within a few years of their final supersession in the mother country by the Code Napoleon in 1811. Reading these two authors in connection with each other, for Vander Linden treats only cursorily on the subject, it appears that about the time when Ceylon fell under the British dominion, the legal maximum rate of interest in Holland varied from 6 to 8 per cent, according to the nature of the contract. Neither Vander Linden nor Vander Keessel mentions the case of licensed bankers or money lenders; but Voet (Comment. Lib. XXII. tit. 1, sec. 3) following Grœnewegen, lays down that genuine banking transactions are not subject to the ordinary restrictions as to usury.

It is clear from the authorities that the maximum rate of interest allowed by the Roman Dutch Law varied at different times and in different places, but it appears that under no circumstances (except in the case of maritime risks and banking and mercantile transactions) was the rate of 8 per cent. allowed to be exceeded; and that in mercantile transactions 12 per cent. was the limit; with regard to the interest due *ex mora*, the rate varied according to local custom (Voet. ib. sec. 2.) But in all cases (except banking transactions and maritime risks) there was a *modus legitimus*, which might not be exceeded, and if a higher rate was stipulated for, the excess above the legitimate rate could be recovered, and, if it were paid by the debtor, it might be recovered back by him, or taken in reduction of the principal (Voet. ib. sec. 5.)

It is thus placed beyond all doubt that, from the very earliest to the very latest period of Roman Dutch Jurisprudence—and the same may be said of all times and all countries in which the Civil Law prevailed—restrictions against usury were firmly and authoritatively maintained. Not a single

exception has been adduced of any country whose system of Jurisprudence was based on the Civil Law, in which such restrictions were not observed. These restrictions differed in their details at different times and in different places; but their main principles were always and everywhere the same. These principles were:—(1) that interest (except in banking transactions and maritime risks) should not exceed a certain *modus legitimus*, which varied at different times and in different places, but never exceeded 12 per cent. per annum, (2) that compound interest should not be allowed, (3) that arrears of interest exceeding the capital should not be recoverable.

The question which now arises for consideration is how far the Dutch Usury Laws were imported into this island. As was shown in the case of *Thurburn* v. *Stewart*, 7 Moore P. C. C. (N. S.) p. 333, and in the case 3,627 D. C. Colombo, Gren. Rep. 1873 p. 59, there may be a question in our Courts as to what parts of the Roman Dutch Law were introduced into a colony. In the former case, it was held that the section of the above mentioned Placaat of Charles V of 1540 relating to the marriage settlements of merchants was of force in the colony of the Cape of Good Hope; in the latter, it was held that the Dutch Laws of Mortmain are not in force here.

At the time of the colonization of this Island by the Dutch (1638 to 1658), it is clear that the laws against usury formed a prominent part of the Jurisprudence of the United Provinces. The Dutch carried with them their laws generally into Ceylon. They were a commercial people and their settlement in this Island was mainly for commercial purposes. The law that allowed merchants to stipulate for a higher rate of interest than persons not engaged in trade, and that limited the interest to be charged by merchants and left unlimited that on maritime risks and banking obligations, appears to me to be clearly as much a part of the law merchant of Holland, as the clause of the Placaat of Charles V relating to the marriage settlements of merchants, and, as such, upon the authority of *Thurburn* v. *Stewart*, must be presumed to have been brought by the Dutch with them when they established their mercantile settlements here, unless the contrary is shewn. We have, however, no precise evidence one way or the other, as to how far the laws against usury were observed in Ceylon during the Dutch times. But it is quite clear from the recital with which the proclamation of the 12th March, 1800 commences, and which speaks of usurious mortgages, that the laws against usury were in some degree in force; for if there were no laws against usury, no mortgages could be usurious in strict language. Again the Courts of our Island have recognized that part of the Dutch Law against usury which disallows compound interest (see No. 22,593 D. C. Kalutara), and also the rule that arrears of interest may not exceed the principal; and how do these restrictions differ in principle from restrictions against the rate of interest exceeding some particular *modus legitimus*? If it is clear (as I think it is) that the former restrictions were introduced, I do not think that it should be assumed without proof that the latter were excluded. Laws relating to usury are not like Mortmain law, which are manifestly inapplicable to a Colony of this kind; and I cannot, in the absence of evidence, believe that the

Dutch, when they came here, threw off all the restrictions of the usury laws, relating to the legal rate of interest, at a time when usury was held in abhorrence by the law of every civilized nation.

What, then, was the *modus legitimus* observed by the Dutch settlers in this Island? It is probable that a trading community like the Dutch would regard all their colonial dealings as mercantile transactions, and would adopt as their legal rate the highest rate recognized by the law of the mother country, that is 12 per cent., and this view is supported by the proclamation of 12th March, 1800, which declares that the legal rate of all mortgages then existing or theretofore made, on which a higher rate than 12 per cent. had been reserved, was thereby reduced to 12 per cent. We may infer from this that 12 per cent. was a well recognized rate, and for 35 years, that is, from 1800 to 1835 (as will be shewn) the rate of 12 per cent, as the maximum legal rate, was established by legislative enactments. We have, however, no express authority as to the maximum legal rate of interest allowed in Ceylon during the Dutch time, and there is no absolute certainty that more than 8 per cent. could be taken, where no security was given, nor more than 6¼ or 7 per cent. where the debt was secured, except in cases of maritime risks and *bona fide* banking transactions. The probabilities, however, are in favour of 12 per cent., and I think that this rate may be fairly assumed in the absence of any express authority to the contrary. It was contended by the appellants' counsel that, if interest was limited to 12 per cent, by the law existing at the time, there was no necessity for that part of the proclamation of 12th March 1800, which reduces to that rate the interest on all their existing mortgages, on which a higher rate had been stipulated for; but an argument of equal cogency may be drawn in favor of the then existence of usury laws from that part of the proclamation, which declares that for all sums thereafter to be lent on mortgage, not amounting to 200 Rix dollars, 12 per cent. might be reserved; for, if any rate were previously lawful, whence the object of this provision? This proclamation, however, which was published four years after the British obtained the dominion of the maritime province, expressly purports to be declaratory and instructive as well as enactive; and I do not think that we should be justified in inferring from its language, in the absence of any express authority, that the Dutch laws against usury had been altogether abrogated, however much they may have been evaded or infringed. The object of this proclamation was materially to alter in many respects that old British law relating to interest on mortgages, and it appears to me to be intended not only to amend, but at the same time to consolidate and make known authoritatively, this branch of the law.

I must now consider how far the Dutch laws against usury have been affected by local legislation. The first statutory enactment on the subject is the proclamation above referred to of the 12th March 1800. This proclamation, after reciting that there was much reason to fear that great oppression was daily suffered by many of the poor landholders in these settlements from the destructive operation of heavy and usurious mortgages which their necessities obliged them to enter into with their more opulent

neighbours, *makes known* and *declares*, "that the legal interest of all sums lent on mortgage to any landholder, amounting to the sum of 200 Rix dollars or upwards, to be made on or after the 1st day of May 1800, is hereby fixed at 8 per cent. per annum and that all such mortgages reserving a higher rate of interest shall be null and void." The proclamation further declares that for all sums thereafter to be lent on such mortgages, not amounting to 200 Rix dollars, 12 per cent. interest per annum might be reserved. It also declares that interest paid in excess of the above rates shall be taken in discharge of the capital *pro tanto*. The proclamation then proceeds to make the declaration, to which I have previously referred, as to the reduction of interest on past mortgages to 12 per cent.

It will be observed that this proclamation materially alters the Roman Dutch Law by declaring usurious mortgages for sums amounting to 200 Rix dollars absolutely null and void : a provision corresponding with English Law at the time, but going beyond the Roman Dutch Law, which makes the contract void as to the excess only above the legitimate rate.

This proclamation deals with no contracts except mortgages of land ; but it was followed by a proclamation of 19th August 1800, which, after reciting the proclamation of 12th March, raises the legal rate of interest on money lent generally to the old Roman rate of 1 per cent. per month or 12 per cent. per annum. Both those proclamations remained in force until 1835 when they were repealed by the Ordinance 5 of 1835, which will be presently considered.

The next enactment to be considered is the Regulation 18 of 1823. This enactment is still unrepealed. After reciting that it is expedient to enact some settled rules for the purpose of establishing an uniformity of practice in the several Courts of Justice in the Island relative to interest on debts which may be the subject of suits in such courts, and for fixing the rate at which interest should be allowed when the particular rate has not been agreed upon between the parties, it enacts,—

(1) That interest shall be allowed wherever there has been an express agreement to pay it, or when from the custom of merchants or the usual dealing between the parties it may be inferred.

(2) That interest in the case of obligation to pay money on a certain day shall be allowed from such day, in default of payment.

(3) That in all cases, if payment shall be delayed after a demand in writing, interest shall be allowed from date of demand, and where no such demand, from commencement of suit.

(4) That in all cases where interest shall be allowed, if there is no agreement between the parties specifying any particular rate thereof, then in all such cases allowance of interest shall be made at the rate of 9 per cent. per annum.

It will be observed that the above regulation does not touch the question of the maximum rate of interest that may be stipulated for by express contract. That rate was still governed by the proclamation of 1800.

What, then, was the effect of the repealing Ordinance 2 of 1835 ? I have given my reasons for insisting that the laws against usury were not introduced by the proclamation of 1800, and consequently the repeal

of these proclamations merely restored the old Roman Dutch Law. The maximum legal rate of interest was probably not altered by this repeal because, as we have seen, there is no reason to believe that under the old Law, 12 per cent. was the established maximum rate in Ceylon. The really important effect of this repealing Ordinance was that usurious mortgages ceased to be null and void, though the excess of interest above *modus legitimus* could not be recovered. That the laws against excessive interest, as far as relates to stipulations for compound interest, still remained in force, is shown by the case No. 22,393 D. C. Kalutara to which I have already referred. In that case it was decided by this court that compound interest could not be recovered on a bond which was executed in 1837, notwithstanding that it was expressly stipulated for in the instrument. And again the rule that arrears of interest exceeding the principal cannot be recovered has always been acted upon in our Courts as well before as after the year 1852, and has never been seriously questioned, and, as I have before observed, the rules against compound interest and against arrears of interest not exceeding the capital are, after all, restrictions imposed by the laws against usury, and do not differ in principle from rules restraining the exaction of a rate per cent. beyond a certain *modus legitimus*. Whatever reasons may be given for holding that the Roman Dutch Usury Laws still subsisted with regard to the former are equally applicable to the case of the latter. Indeed, the restriction against compound interest would be futile, if the same result might be obtained by reserving an exorbitant rate of simple interest. For, what protection would it be to a debtor to disallow compound interest, if he were allowed to stipulate in the first instance to pay simple interest at the rate of cent. per cent ?

I now come to the Ordinance 5 of 1852 which was passed (as shewn by the preamble) for the purpose of introducing into Ceylon the Law of England in certain respects, and to assimilate the Kandyan Laws to the Laws of the maritime provinces. The Ordinance, after enacting that the law to be administered in this Colony in respect of contracts and questions upon or relating to bills of exchange, promissory notes and cheques and in respect of all matters connected with such instruments, should be the same as would be administered in England in the like case at the corresponding period of the contract had been entered into, or the act, in respect of which any such question would have arisen, had been done in England, adds the following proviso :—

" Provided that no person shall be prevented from recovering on any contract or engagement, any amount of interest expressly reserved thereby, or from recovering interest at the rate of 9 per cent. per annum on any contract or engagement, or in any case in which interest is payable by law, and no different rate of interest has been specially agreed upon between the parties. But the amount recoverable on account of interest or arrears of interest, shall in no case, exceed the principal. Provided also, that nothing in the preceeding sections contained, shall be deemed to deprive any plaintiff of his right, according to the law heretofore administered in the maritime provinces of this colony, to obtain an interlocutory or

provisional decree in any case in which he might have obtained the same before the passing of the Ordinance."

The question then arises, did this proviso repeal the existing laws against usury? I think not. As observed by the learned district judge in his judgment in the case No. 61,776, it is very important to consider what the law of England was with regard to interest at the time this Ordinance was passed, and I cannot do better than follow his reasoning with reference to this part of the case. At the time the Ordinance of 1852 was passed, the statute of Anne against usury was still in force as far as related to mortgages of land, but bills of exchange and promissory notes made payable at or within 12 months after the date thereof or not having more than 12 months to run, and all contracts for the loan or forbearance of money except on landed security, above the sum of £10 were temporarily taken out of the operation of the statute of Anne by the stat. 2 and 3 Vict. c. 37, the operation of which, though limited to a period ending on the 1st January, 1842, was continued by several subsequent statutes, and ultimately extended by 13 and 14 Vic. c. 56 to 1st January, 1856. All the usury statutes were repealed in 1854 by statute 17 and 18 Vic. c. 90; but when the Ordinance of 1852 was passed, the exemption of bills of exchange and promissory notes mentioned in the English Act from these usury laws was temporary only, and the proviso in question would seem to have been introduced with the object of preventing the operation of the English laws of usury in those classes of contracts to which, in other respects, the English law was made applicable, and also of extending to such contracts the Dutch law of namptissment. The proviso must be read in connection with the enactment which it qualifies, and not as introducing a new law with respect to matters which do not come within the purview of the Ordinance.

That this proviso did not operate as repealing the Kandyan law against usury, is shewn by the judgment of the court, sitting collectively, in the case No. 13,705 D. C. Badulla, decided on the 31st December 1851, in which it was held that that interest on a mortgage might not exceed the legal rate established by the Kandyan King. And by no possible construction can the proviso be construed as repealing the Dutch law against usury in the maritime provinces and at the same time leaving intact the Kandyan law against usury in the Kandyan provinces.

A case has recently been discovered (10,600 D. C. Batticaloa) decided by a single judge of this court on circuit at Jaffna, sitting with three native assessors, in which the court amended a decision of the district judge of Batticaloa and three assessors which cut down the interest on a bond sued upon from 40 per cent. to 6 per cent., on the ground that the Dutch law did not allow more than 6 per cent. to be stipulated for. The Supreme Court amended this decision and allowed the full 40 per cent. This judgment is no doubt an authority that the Dutch laws against excessive interest were not in force in 1846. But this judgment was one delivered by a single judge on circuit; it does not appear that any argument on the subject was heard; and no reasons whatever are recorded for the amendment of the decree of the court below. These circumstances deprive

this judgment of much of the authority to which it would be otherwise entitled, and I cannot consider it as an authority binding on the Supreme Court sitting collectively, as in the present case.

I confess that it is not without some hesitation that I have ventured to dissent from the majority of the court on this difficult question, especially as I am aware that it has been a common custom for some time back for money lenders in this country to reserve and exact exorbitant rates of interest, in their mortgages. It is true also that we have, as far as can be ascertained, no judicial decision of this court condemning this usage: and indeed cases may probably be found in which this court has affirmed judgments of lower courts, in which a higher rate of interest than 12 per cent. has been allowed, and which have been appealed against on other grounds. I do not, however, attach much importance to cases of this kind; for it is not the duty of this court sitting in appeal to raise objections which are waived or not insisted upon by the parties. In no single case, as far as I can ascertain, has this court upheld the validity of a stipulation for a higher rate than 12 per cent., in cases governed by the Dutch Law, (when the point has been fairly raised) except in the Batticaloa case above referred to. That the law against usury has been frequently evaded or disregarded, I freely admit, but evasions of the restrictions imposed by usury laws have ever been rife in all times and in all countries where such restrictions have been in force, and I cannot think that usage in this respect can be considered as having abrogated the law, or as a proof that the law against usury was never in force here. After all what evidence have we of this usage? We have none as to the usage in the Dutch times; and during British times any legal usage in this respect could only have commenced in 1835, because up to that time the proclamations of 1800 which rendered usurious mortgages absolutely null and void were still in force. The laws against usury have formed, until a comparatively recent date, so prominent a part of the municipal law in all times and countries, that I do not think it reasonable to hold that they were either never introduced into Ceylon or were subsequently abrogated merely because we find that a custom (possibly a recent one) has grown up of disregarding them, or because certain doubtful inferences may possibly be drawn against their existence from the language of the proclamations of 1800. Before the usury laws were repealed in England, they formed the subject of much discussion, and their repeal in the first instance was partial and tentative only; and in this country I certainly should expect to find express enactment, if they had been abrogated, or express and clear evidence to shew that they were never in force; and it seems to me that we have neither.

The question of the policy of retaining laws against usury is not one with which this court is concerned. That is a question for the legislature. I am not aware, however, that the restrictions againt compound interest and against recovering arrears of interest in excess of capital have ever been found burdensome; and as the restrictions with regard to the *modus legitimus* are not applicable to mercantile instruments, such as bills of exchange &c., since the Ordinance 5 of 1852, nor to maritime risks nor to banking transactions, I do not see how the restriction of the rate in

other contracts can seriously operate to impede commercial transactions. The practical effect of the restriction referred to is that mortgages of land must not carry a higher rate of interest than 12 per cent., and in view of the exorbitant rates of interest on such intruments, which have recently come to our notice (30, 40 and 60 per cent. being frequently reserved) I think that a restriction, which checks these improvident bargains, by which so many ignorant persons in this Island lose their lands and are reduced to poverty, is both wise and beneficial.

I accordingly think that, so far as relates to cases governed by the law of the maritime provinces (1) interest at the rate of 12 per cent. per annum may be lawfully stipulated for in any contract of loan ; (2) this rate may not be exceeded except in cases falling under English law (such as bills of exchange, &c.), including cases of banking transactions and maritime risks, (3) if more is stipulated for, the contract is not void except as to the excess above 12 per cent., and I accordingly think that the judgment of the court below should be affirmed.

STEWART, J.—I have given this case very careful attention, and regret that I am unable to agree with my learned brother Cayley in the conclusion that he has come to in the able judgment just delivered.

In the view I take of the question before us, it is unnecessary to enter at any length into a consideration of either Civil law, or of the Roman Dutch law, relating to interest, my opinion being mainly based on our local enactments, which I humbly think, and as I shall hereafter endeavour to show, comprise all our law on the subject.

The first legislative provisions respecting interest in our statute book are contained in the repealed proclamations of March 12th and August 19th, 1800. But before proceeding further it is essential to consider whether the Roman Dutch law rates of interest (or any of them) were in operation in the maritime provinces of Ceylon at the time of their cession to the British Crown. Here it may also be premised, that in the absence of any municipal or positive law prohibiting the payment of interest beyond a specified rate, there is nothing in the rates of natural equity and right to hinder persons in the situation respectively of lender and borrower of money, from entering into valid and binding stipulations, making their own terms, and agreeing to pay such rate of interest as they think proper. Grotius (Introduction, book 3 chap. 10) clearly lays down the abstract proposition that it is not inconsistent with natural law for a man who lends money to another to take interest for the use of it ; he views money given on loan much in the same light as he would any particular merchandize similarly dealt with ; no where throughout his observations does he state any limitation of interest as existing in *foro conscientiæ*, only adding towards the end of his remarks, that the municipal law has made provision, not in vain, in regard to the rates legally chargeable.

By the proclamation of September 23rd 1799, justice was to be administered in the recently acquired territories in Ceylon not in every particular according to the Roman Dutch law, but, subject to alterations, " in conformity to the laws and institutions that subsisted under the ancient government of the United Provinces."

Although therefore fully conceding that the general law of Holland was introduced into their settlements in Ceylon by the Dutch, it still by no means follows that the Roman Dutch Law regulating the rate of interest,—which fluctuated in the United provinces, under different circumstances between different persons and in different places, and which, as it appears to me, in its very nature was essentially municipal,—was ever in operation in this Island. Why should the rate of interest, which merchants in Holland were permitted to stipulate for be taken to be of universal application here, any more than the rate allowed between two burghers in any Dutch town in the Netherlands? The circumstances of Holland and the maritime districts of this Island were very dissimilar before and even towards the end of the last century. The risk and peril were obviously so great, in a country but little known, the cost of which was only in the occupation of our predecessors, its inhabitants more or less in an unsettled state, with constant reprisals from the interior, contrasted with the almost comparative safety attending the investment of money and mercantile transactions in such centres of commerce and civilization as the chief cities of Holland, that it is difficult to conceive that the scale of interest allowed in the dominant country would have afforded any criterion for the regulation of the rate recoverable here, or been deemed at all adequate, or ever been adopted, in this its distant and widely differently situated dependency.

Following the opinion expressed by this court in the plumbago case (Grenier's Rep., 1873), in which it was held that the onus of proof was on the Crown to establish that that part of the Roman Dutch Law, under which it claimed a right to levy a royalty, "was a portion of the laws and institutions which subsisted under the Dutch Government in Ceylon," it appears to me that in the present case it is incumbent on the party invoking the Roman Dutch Law to show, either by proclamation, regulation, ordinance, uniform usage having the force of legal custom, decisions, or other sufficient ground or reason, that the Dutch Law on the point in question obtaining in any Dutch town or city ever subsisted or does now subsist in this colony. Nothing of the kind has been done, all that is depended upon being the fluctuating and uncertain rules to be collected from Dutch Law books of the rates prevailing in different parts of Holland.

The only authority referred to in the argument as bearing on this part of the case was the judgment in Kalutara D. C. 23,393, Vand. Rep., p. 57, where compound interest on a bond was disallowed by the Supreme Court. But a distinction, I apprehend, may legitimately be drawn between that case and the present, the exaction of compound interest involving the infraction of a principle of fixed and general law, whereas the question before us is simply regarding a matter of detail relating merely to the rate chargeable as interest.

Leaving however conjecture, prior to British accession, aside, the tenor of the proclamation of March 12th 1800, furnishes to my mind strong intrinsic proof that the law of Holland relating to the rate of interest had no existence in Ceylon. The word "usurious" certainly occurs in the preamble to the enactment, but this expression taken with the word "heavy" with which it is coupled, and read with the context would seem to have

been used not as implying illegality but rather in its ordinary sense as synonymous with exorbitant. The object of the proclamation was to prevent the oppression arising from the exaction of heavy interest on mortgages, and if the practice so strongly denounced had in fact been illegal, and there had been any subsisting law on the subject, it is but reasonable to conclude that the existing law would have been referred to and the illegality of the exaction specially declared.

Not only was there no declaration in this proclamation of "heavy and usurious mortgages" being contrary to law, nor one word in it as to what was the legal rate of interest then subsisting. But the proclamation after enacting prospectively the maximum legal rate chargeable on mortgages, proceeded to reduce the interest on then existing mortgages in the following terms,—"we also declare that the legal interest of all mortgages now existing or heretofore made, on which an higher rate of interest than 12 per centum per annum has been reserved, is by these presents *reduced* to 12 per cent. per annum." If the Roman Dutch Law had been in operation as contended for, this portion of the proclamation would clearly have been superfluous, assuming that by that law agreements to pay interest above 12 per per annum would *ipso facto* have been void as to the excess. The rate being thus reduced by express legislation goes therefore far to show that there could have been no law then in force preventing parties from agreeing upon and stipulating for the payment of any rate of interest even though above 12 per cent.

Further, it is remarkable that neither of the two proclamations of 1800 affected unsecured debts, provision having been made by those enactments only as to interest on mortgages. What then was the rate for unsecured obligations? If more than 12 per centum was usually charged on mortgages we may surely safely and legitimately conclude that higher rates of interest obtained where no security existed:—and the latter class of cases undoubtedly having been left unprovided for by the proclamation, the reduction of interest having as above pointed out only extended to mortgage debts, the conclusion seems irresistible that up to early in 1800 it was competent for parties to stipulate for more than 12 per cent. per annum upon any kind of debts, and that in March 1800 the maximum rate for mortgages only was reduced to 12 per cent., parties being still left unfettered as before to fix their own rate in regard to unsecured liabilities.

The only two acts now in force relating to interest (both the proclamations of 1800 having been repealed in 1835) are the Regulation 18 of 1823 and the Ordinance 5 of 1852, sec. 3. If then, as I have endeavoured to show, the Roman Dutch Law regulating the rate of interest had no existence in Ceylon during the time of the Dutch,—it follows that all our positive and declared law on the subject is comprised within the above Regulation and Ordinance.

The Regulation No. 18 of 1823 which was expressly enacted "for fixing the rate at which interest shall be allowed where no particular rate has been agreed upon between the parties" makes no reference whatever to the proclamations of 1800 : an omission, as it seems to me, attributable to those proclamations having already, in 1823, fallen into desuetude and

become obsolete,— a conclusion in which I am confirmed by the fact that Sir C. Marshall, whose book deals with matters extending from 1823 to 1836, makes no allusion to them, that eminent judge, whose authority stands so high, refering only to the Regulation of 1823, in terms apparently as if it embraced all our law in relation to the rate of interest. Further, we have the Ordinance 5 of 1835, by which these proclamations were subsequently formally repealed together with sundry other old and obsolete enactments, explicitly stating as the ground for their repeal that " the provisions contained in many of the proclamations and regulations of Government heretofore passed have become obsolete, or are rendered inexpedient, or inapplicable to the present institutions."

At all events, whether the proclamations were or were not in operation in 1823,—it seems clear, from the 2nd and 5th sections of Regulation 18 of 1823 (laying aside mortgages executed before 1835, which alone the two proclamations alluded to could possibly regulate), that parties were at liberty from 1823 to stipulate for any rate of interest in regard to unsecured debts, by the 5th section it being enacted that 9 per centum per annum is to be allowed where there is no agreement between the parties specifying any particular rate, and the 2nd section permitting parties to make their own agreement as to interest without any restriction whatever either express or implied.

We now come to the all important Ordinance 5 of 1852 the first part of the 3rd section of which is as follows,—" Provided that no person shall be prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby, or from recovering interest at the rate of 9 per cent. per annum on any contract or engagement, or in any case in which interest is payable by law, and no different rate of interest has been specially agreed upon between the parties. But the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal."

It has been contended that the above is a mere proviso, and as such that it is limited in its operation to the class of cases comprehended in the preceding sections whereby the English Law was introduced into Ceylon in certain specified matters.

The word " provided" doubtless creates no little difficulty and embarrassment. Still the whole context of the ordinance should be taken together in determining its true intention and meaning; and considering that the section in question contains substantially the provisions of the Regulation of 1823, the intention may fairly be concluded to have been (and such intention is to be gathered from the Ordinance itself) by this special provision to declare that notwithstanding the introduction of the English Law in the cases previously mentioned, this alteration in the law was in no way to affect the local law of interest; advantage being taken of the opportunity to render the provisions of the Regulation of 1823 less ambiguous, and also to enact that the amount recoverable as interest shall not exceed the principal. It will be seen moreover that there is nothing in any part of the Ordinance restraining the operation of the 3rd section to the preceding sections. The words are as wide and universal as they

could well possibly be plainly, explicity and fully declaring "that no person shall be prevented from recovering on *any* contract . . . . *any* amount of interest expressly reserved thereby." The clause should, as it seems be regarded as a substantive and independent enactment.

It was however further argued that about 1852, the propriety of the retention of the English Usury Laws was being discussed in England, that those laws were then partially under suspension, and that this proviso in the Ordinance of 1852 was inserted with the object of securing uniformity, and to prevent complications arising. I cannot acquiesce in this conjecture. No allusion whatever was ever made in our legislature to the English Usury Laws: and speaking from my own knowledge as a law officer of the Crown at the time, I have no hesitation in declaring that there is no foundation for the surmise.

It has certainly so happened that subsequently the English usury laws have been repealed,—but dealing with the Ordinance itself, it is far from probable that our legislature would have so unhesitatingly anticipated their abolition, the presumption on the other hand being strong, for the reasons already stated, that the intention was by the insertion of the proviso to preserve intact the colonial law relating to interest. The correspondence, quoted at the bar, between the Governor and the judges of the Supreme Court preparatory to the introduction of this Ordinance into the Legislative Council tends to the same conclusion, viz., to establish that the 3rd section of the Ordinance 5 of 1852 had no connection whatever, either present or future, with the English Usury Laws; this theory of such supposed connection having been broached for the first time more than 20 years after the passing of the Ordinance.

Again, if this 3rd section is to be deemed only co-extensive with the prior sections, and not as a substantive reservation of the whole local law of interest, we shall have the anomaly of the legislature deliberately legalizing stipulations for the payment of interest even up to 100 per cent. in every case where the English Law was introduced: whilst on the other hand, upon bonds, whether with or without mortgages, and on other liabilities to which the English Law was not made applicable, interest could not be charged beyond the maximum Dutch Law rate of 12 per centum per annum.

I can find no warrant for arriving at such an inconsistent, inconvenient and anomalous construction.

But granting that the law deducible from the several enactments referred to is open to doubt, all room for speculation and controversy seems to me to be removed by the consistent usage of half a century, the numerous and uniform decisions in our several courts abundantly showing, that at least from 1823, parties recovered, as a matter of course, any rate of interest agreed upon, provided the same did not exceed the principal. The present question was only raised in 1873. *Contemparanea expositio est fortissima in lege.*

There is I believe only one old case, where the right of the parties to stipulate for the payment of any rate of interest was ever questioned; viz.

Batticaloa D. C. No. 10,600, in which the claim was founded on a bond whereby the defendant agreed to pay 40 per centum per annum. The judgment of the district judge was as follows,— "the court does not consider the plaintiff entitled to any such rate of interest. There is no Ordinance extant authorizing so high a rate of interest, while the Dutch Law expressly states the highest rate of interest that can be claimed (whatever be the stipulation of the bond) to be 6 per cent." The ground taken in the above judgment is almost identically the same as that now advanced, but that judgment was altered in appeal on the 11th February 1848, the Supreme Court (Mr. Justice Stark presiding), without comment, directing "that interest be allowed as set out in the bond libelled on." The Regulation of 1823 was expressly referred to in the petition of appeal. Why then, the omission of any reason or ground for the judgment of the Supreme Court, unless it be that it was considered that the law on the point was too clear to need discussion?

In Kandy District Court No. 27,021, Austin's Rep. p. 191, the Supreme Court (sitting collectively) reduced the interest on a bond to the amount of the principal. The reasons for the decision are not given, but as the case arose in the Kandyan provinces and the decision was delivered in 1858, the judgment may be safely presumed to have proceeded on the 3rd and 5th sections of the Ordinance 5 of 1832 : a decision clearly indicating that the 3rd section could not have been considered to be only coextensive with the provision in the prior sections introducing the English Law as therein limited; inasmuch as the interest claimed was not in respect of any contract of agreement in which the law of England had been introduced, but on an ordinary debt bond subject to the local law.

There is also another judgment of the Collective Court, so late as June 15th 1871, where, in altering a decision of the district court of Negombo in case No. 4,567, the Supreme Court allowed interest on a bond at the rate of 24 per centum per annum. For the above reasons I am of opinion that, by the law of this Island, it is lawful for parties to stipulate for the payment of any rate of interest, subject to the limitation that the amount recoverable as interest shall not exceed the principal.

The judgment of the district court of Colombo is set aside and the amount of interest stipulated in the bond is allowed.

8th July 1875.—MORGAN, A. C.J.—I very much regret that I cannot concur in the conclusion which my learned brother Cayley has arrived at in this case, the reasons for which have been very fully and ably stated by him, for one's personal sympathies incline generally to the side of the weak and the oppressed, who are the principal sufferers from the hard hearted and usurious contracts which their necessities often compel them to enter into. Having considered the question however in all its bearings, I feel that I am bound to come to the conclusion arrived at by my learned brother Stewart, who has succintly, but lucidly, given very strong reasons for that conclusion.

The first question for consideration is, what were the rates of interest which creditors could legally demand under the Roman Dutch Law?

The authorities on this point, are not consistent in every respect, but as to the rates bearing on this case they substantially agree as follows :—

On unsecured debts parties could stipulate for 7 or even 8 per cent. In the absence of express stipulation 6 per cent. only were allowed according to some writers (*a*). But Grotius quoting from *Christinoeus*, (*b*) says that the 16th penning (6¼ per cent.) only was allowed, and in some cases he adds that the Courts of Holland have even allowed the 20th penning (7-13th 16 per cent.) (*c*)

On secured debts, 6¼ per cent., was allowed in respect of a coventional debt, and 7 in respect of chirograph debts. Grotius (*d*) and Van Leeuwen (*e*) draw a distinction between the High Court of Holland which allowed 6¼ per cent., and the Court of Holland which allowed 7 per cent., if stipulated for, and 6¼ in the absence of express stipulation. Van Leeuwen annexes this qualification to the rule that, in such absence, interest was computed according to the custom of the country or place where the contract is made. (*f*)

Among merchants, says Grotius (*g*) "where the profit is greater and therefore the laying out of the money is more highly appreciated", 12 per cent. may be stipulated for Grœnewegen (*h*) and Voet are to the same effect (*i*), but Vander Keessel points out that the Placaat of Charles V of 1540 (art. 8) which permits merchants to stipulate for 12 per cent., is only to be understood in reference to bonds for a year or shorter period and not for any longer time, and he adds that this was not received in practice since the resolution of the court of the year 1590, after which, no one could stipulate for more than 6 per cent., and thatin cases where interest accrued due on delay and was not expressly stipulated for, even this was afterwards reduced to 5 or 4 per cent. (*k*). Van Leeuwen would seem to confine the rule as to 12 per cent. to pawn-brokers (Bank of loan or pawn-Lombard) who were, as he points out, according to the Council of Trent, placed formerly under the superintendence of Bishops (*l*) but since the abolition of the papal laws and of ecclesiastical tribunals, were placed under the magistrates "and all such Christian, political and reformed orders and means as would suit the best convenience and with the least

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(*a*) Vanderlinden, p. 218. Grotius 63, cap. x. § 10, p. 326. Vander Keessel Thes. 545, 31st, July 1621. Coren's Obs 4. Neostad's decis. Sup. Cr. 51. Holl Consult d. 3, st. 2 Cout. 9. December 1592.

(*b*) Vol. 1, decis. 1, decis. 93.

(*c*) Coren. Obs. 4, Neorstad Supr. Cur. decis., 3 Sande, lib 3, tit 14 def. 7.

(*d*) Vander Keessel, Thes. 545 Decis. et. resol. Vanden Hove, n. 311, Lœuriss' decisions 6th May, 1610.

(*e*) Grotius p. 326, Van Leeuwen 389, Coren's Obs. 4.

(*f*) Van Leeuwen, p. 389.

(*g*) Grotius, p. 326.

(*h*) Grœnewegen de legibus abrogatis p. 148.

(*i*) Decisen Resol. Vanden Hove, 1 N. 248.

(*k*) Vander Keessel, Thes. 547.

(*l*) Van Leeuwen's Comment, p. 344.

prejudice of the needy public, so that with honour and profit to the same the management may take place." (*a*)

In no case, and here the rule was uniform, was interest upon interest allowed, or could interest in arrear be recovered exceeding the principal amount. (*b*)

It would thus appear that the Dutch Law as to the rates of interest differed in the different provinces of the United States of the Netherlands; that they depended partially upon Placaats and Statutes and partially upon decisions and resolutions of courts and upon customs; and that such rates fluctuated from time to time.

The second question for consideration is, were the Dutch rates imported into this Colony in the time of the Dutch Government?

It would be well, in reference to this question, to bear in mind, the very sensible observation made by this court, in the Plumbago case. (*c*) "That the law of Holland in general became the law of Ceylon when occupied by the Dutch settlers is admitted by all; and we may here again usefully draw attention to the Royal Proclamation, when the English conquered the Island, which has been already referred to and the Ordinance of 1835, already cited, which enacts and declares, that the laws and institutions which subsisted under the ancient Government of the United Provinces shall continue to be administered. Undoubtedly, if it can be shown that any particular portion of the Roman Dutch Law, as prevalent in Holland, was essentially a local law of the mother country and entirely unsuited to the position of Dutch Colonists here, the presumption would follow, that such particular portion was not introduced in Ceylon; especially if proof could also be given of judicial decisions in the Colonial Courts against the existence here of that law, and of large classes of the community having notoriously and habitually acted in a manner wholly inconsistent with such a law, without receiving any punishment or animadversion from the tribunals or administrators of justice for so doing."

It is not easy, owing to want of authoritative Dutch records, to apply the standard above prescribed in every respect to the question now under consideration. But, as far as we can do so, there is every reason to believe, that the Dutch rates of interest were not introduced in this Colony, or if they were not introduced at an early period of the Dutch rule, they soon fell into disuse and became obsolete. My reasons for coming to this conclusion are as follows.

(1) Though it cannot be strictly said that the usury laws of the Roman Dutch Law were a local law in every respect, yet this is clear that (excepting as to the disallowance of compound interest and of interest in arrear in excess of principal) these rates varied in the different provinces of the Netherlands and at different times and as applying to

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(*a*) Resolutions of the States of Holland of 17th Nov. 1578 and 11th April 1584

(*b*) Vanderlinden, p. 218. Van Leeuwen p. 341. Grotius, p. 326. Vander Keessel Thes. 548, 549. Voet 22, 1. 5. and 22, 1, 20.

(*c*) Grenier's Report, Dt. Ct. Nov. 26, 1873.

different classes : witness for instance the rates allowed to secured debts ; to chirograph debts, and to unsecured debts ; the interest allowed in the case of express stipulation, and in the absence of such stipulation,—to rule as to resorting to custom or usage in the absence of express stipulation, to the distinction which Grotius draws between rates claimable by burghers and those claimable by merchants,—to Van Leeuwen's distinction between merchants and pawn-brokers, to Vander Keessel's distinction between debts payable within a year or shorter period and debts extending to a longer period, and other distinctions of a like character. We have adopted the general Roman Dutch Law as it prevailed in the United Netherlands, but we are not bound by what after all would seem to be the local laws or customs of the different provinces. Indeed, were it otherwise it would be difficult to say by what law, particular law or custom we should be bound. The difficulty strikes one at once why, if the rates differ so much as they seem to do, we should follow that allowed to merchants only or to pawn-brokers, and why we should adopt it as applicable to all bonds, whereas they would in Holland according to Vander Keessel, apply only to bonds paying within a year or less.

(2) Rates of interest chargeable on money lent must depend, to a certain extent at least, on the abundance or scarcity of money in a given locality and on the amount of risk which lenders of money incur. It does not seem reasonable that rates chargeable in a wealthy and commercial community, where money had a fixed and well known value, and where the risk arising from loans was limited, should also prevail in a country where money was scarce, trade limited and the value of landed property by no means well ascertained. It is not too much to say that abstractedly the Dutch rates were obviously unsuited to the position of the Dutch settlers in this country.

(3) We are happily not left to speculate on abstract probabilities. Though the country was ceded to the British in 1796, yet the first legislative enactment passed in Ceylon bears date the 18th December, 1798. In less than two years after the date, viz, on the 12th March, 1800, a proclamation was enacted which, after reciting that great oppression is daily suffered by many of the poorer land-holders in these settlements from the destructive operation of heavy and usurious mortgages which their necessities oblige them to enter into with their more opulent neighbours, enacted as follows :—"We do hereby make known and declare that the legal interest of all sums lent on mortgage to any land-holder, amounting to the sum of two hundred rix dollars lawful money of Ceylon or upwards, to be made on or after the first day of May in the present year 1800, is hereby fixed at 8 per cent. per annum, and that all such mortgages reserving a higher rate of interest shall be null and void. Provided always that it shall and may be lawful for the contracting parties in any such mortgages to assess the rate of the interest to be paid at any sum under 8 per cent., if they shall think proper to do so. And we further declare that all sums of money or other property according to its over valuation proved to have been received from the mortgagor by the mortgagee, under or pending such mortgage, over and above the said stated interest at 8 per cent.,

shall be held deemed and taken as payments made in or towards the discharge *pro tanto* of the capital sum lent on such mortgage,"

"We also declare that for all sums hereafter to be lent on such mortgage not amounting to two hundred rix dollars lawful money of Ceylon, 12 per cent. interest per annum may be reserved and taken; but that all and every payment and payments in money or other property, under or by colour of such mortgage, so far as the same shall on a fair calculation exceed the said interest as reserved, shall go in discharge or towards the discharge of the capital sum lent on such mortgage."

From this enactment the following conclusions may fairly be drawn,—

1st.—That in 1800 great oppression was daily suffered by the poorer land-holders from the destructive operation of high and usurious rates of interest.

2nd.—That, after the 1st day of May, 1800 (not declaratory but enactive), the rates on mortgage debts to land-holders were reduced in cases, of rix. 200 and under to 12 per cent., and in cases above rix. 200 to 8 per cent.

It is very improbable that this oppression commenced after 1796. The probabilities are that it must have commenced long before that period, and that it was one of the first evils which attracted the attention of the British Government. If so, the moderate rates of the Dutch Law could not have been adopted here: or, if adopted, must have been given up before 1800, and higher rates substituted in their stead. The remedy provided was not a recurrence to the Dutch rates, for which a simple declaratory law would have been sufficient, but the introduction of a higher rate, for the Dutch Law in no case allowed 12 or 8 per cent. on mortgages.

3rd.—If an oppressive rate of interest was exacted on mortgage debts and it was found necessary to reduce the same to 12 and 8 per cent., the conclusion naturally follows that rates must have been exacted an unsecured debts.

The expression heavy and usurious mortgages may seem to help the argument that the Dutch Law as to usury was in force in Ceylon. But, regard having had to what has already been stated, it seems to me that the expression was used in a popular, and not in a legal sense. Strictly speaking it is not the mortgages that were "heavy and usurious" but the rate of interest charged on them.

After a very careful consideration of the question, I have come to the conclusion, for the reasons already given, that the Dutch rates were not adopted in Ceylon by the Dutch settlers, or, if they had been adopted at first, they afterwards fell into disuse, and that higher rates were exacted at the time of the English settlement in this colony.

Before examining the question of the remaining tests prescribed in the plumbago case viz., how far judicial decisions could be quoted against the existence here of the Dutch rates, and how far large classes of the community here had notoriously and habitually exacted higher rates without receiving any punishment or animadversion from the tribunals or administrators of justice for so doing) it would be convenient to consider the further legislation of the English Government on the question of interest,

and the circumstances connected with it, so far as we are able to trace them.

Some five months after the proclamation of the 12th March, 1800, viz. 19th August 1800, another proclamation was issued that the Government were "induced by a conviction" that the rates allowed by the March proclamation afforded a return which was "not equal to the use of money within these settlements" and therefore increased the rates, even as to sums above rix. 200, to 12 per cent.

At an early stage of the British rule, public servants were paid their salaries by debentures. By this ingenious invention, Government were made to pay about 10 per cent. interest upon the capital which their servants received from themselves. This induced public servants to invest their money in these securities and, owing to this cause and the remission by a considerable number of the Dutch residents of property to Europe or Batavia, the money in circulation became scarce. This scarcity and the fact that the Government had to pay 10 per cent. render it the more improbable that private capitalists would have been content with the moderate rates of the Dutch Law. In 1812 the rate of the interest payable by the Government on debentures was reduced to 5 per cent.

The next legislation, after the proclamation of the 18th August 1800, was the Regulation No. 18 of 1823. By it general rules were laid down, to produce an uniformity of practice in the courts on the allowance of interest, and for determining the rate at which interest was to be allowed in the absence of any specific agreement. The 5th clause expressly enacted that in the latter case 9 per cent. was to be allowed. No maximum rate was fixed, no Dutch Law rule referred to, and the fair and natural inference from this provision is that except in case of mortgages where the rate of the proclamation of 1800 (12 per cent.) could not be exceeded, parties were allowed by specific agreement to agree on any rate they pleased.

By the Ordinance No 5 of 1835 a number of enactments, certain provisions in which had "become obsolete or were rendered inexpedient or inapplicable to the present institutions," were repealed, and among others, the proclamation of 1800.

Whatever uncertainty might attach to the rates adopted by the Dutch settlers or at the earlier period of the British rule, it is a matter within our personal knowledge that higher rates of interest than 12 per cent were levied from 1835 to 1852, and from 1852 to the present date—a period of 40 years. The Natucotayas and other Chetties seldom lent money under 18 per cent and even 24 and 30 per cent were exacted. The smaller money lenders lent money at 12, 15 and 18 per cent, and to the loan was frequently coupled the condition that, although the principal was to be reduced by monthly payments of Rs. 5, 10, 15 or 20 every month, yet the same sum payable as interest at the commencement for the entire loan was to be paid as interest until the last instalment of principal was to be paid off. The inhabitants of the Eastern, and I believe of some parts of the Northern Province as well, habitually carried on their cultivation by borrowing seed paddy to be repaid at the next harvest with 50 per cent. Similar

loans were also made in the Southern Province with this reasonable qualification, however, that should the next year's harvest fail, it was to be paid at the next successful harvest without any additional interest over and above the original 50 per cent.

The Ordinance No. 5 of 1852 was the next enactment in which the question of interest is referred to. It was an Ordinance brought forward "to introduce into the colony the law of England in certain matters and to restrict the operation of the Kandyan law."

The 1st clause introduced the law of England into this colony in maritime matters; the second clause did the same in respect of all contracts and questions relating to bills of exchange, promissory notes and cheques. And then came the 3rd clause which relates to questions as to interest.

"Provided that no person shall be prevented from recovering on any contract or engagement," (not any contract engagement referred to in the preceding sections, or even any *such* contract or engagement, but "any contract or engagement") any amount of interest expressly reserved thereby, or from recovering at the rate of 9 per centum per annum on any contract or engagement, or in any case in which interest is payable by law and no different rate of interest has been specially agreed upon between the parties, but the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal."

The words taken in the abstract, are large enough to cover any contract or engagement. The only difficulty arises from the word "provided" used at the beginning which it may fairly be argued confines the operation of this clause to maritime and commercial securities—viz., bills of exchange, promissory notes and cheques.

For the following reasons, however, I am of opinion that this should not be deemed to be the case in the present instance. Ordinarily a proviso is something engrafted in a previous enactment (*a*), but where the proviso is directly repugnant to the purview of it, the proviso should stand and be held a repeal of the purview because it speaks the last intention of the law-giver. It was compared to a will in which the latter part, if inconsistent with the former, supersedes and revokes it. (*b*)

This very section 3 contains a second proviso as to namptissement, and the 4th section is a proviso as to foreign contracts in which it is expressly stated that "*nothing in the preceding* sections contained, shall alter or affect the law in regard to any question arising upon a contract made abroad; which question shall be determined as if this ordinance had not been enacted."

The omission of reference to the preceding sections in the first proviso as to interest may fairly be deemed to show that it was not intended to restrict the operation of that provision to the case only of maritime or commercial contracts.

(*a*) *Kery* v. *Inhabitants of Taunton*, 9 B. and C. 36.

(*b*) *Dwarris on Statutes*, 660. *Attorney General* v. *The Governor and Company of the Chelsea Water Works*, Fitsgibbon 195.

The title of the bill is "to introduce into this colony the law of England in certain cases and to restrict the operation of the Kandyan Law." The preamble sets out that it is expedient that the law of England should be observed as the law of the colony in certain respects, and that the laws of the Kandyan Provinces should be assimilated as far as may be to the laws of the maritime provinces. Such assimilation does not necessarily imply restriction.

By Ordinance 1 of 1852 sec. 5, the sections into which an ordinance is divided, where there are more enactments than one, shall be deemed to be substantive enactments without any introductory words.

The restriction of the provision allowing any rate of interest to be stipulated for would lead to this anomaly, that whereas the rate of interest on bonds could not be above the Dutch Law rates, yet that in cases of bills of exchange, promissory notes and cheques, interest could be stipulated for up to 99 per cent.

It has been contended that it was with reference to the English Law as to the rates of interest on notes and bills that the proviso was inserted and that the course of legislation in England as to the usury laws throws light on the question what the local legislature intended when it enacted the proviso in the 3rd section of the Ordinance 5 of 1852.

The theories found on this assumption are ingenious, but there is no foundation for them in point of fact. The Chamber of Commerce in 1851 asked for changes in our laws. Their application was referred to the three judges of this court who recommended the introduction of the English law in maritime matters; in questions relating to bills and notes, and an assimilation of the laws of the Kandyan provinces with that of the maritime provinces, and ended by stating that "as it is an unsettled point what rate of interest was demandable in the Kandyan Provinces where none was stipulated for and recommended adverse, that in such case the interest payable should be as in the maritime provinces, nine per cent., and be so declared by Ordinance." It was this and not any regard to the statute of Anne and its temporary suspension by the Acts 8 and 9 Vict cap. 102 and 13 and 14 Vict cap. 56 (as one of the judges too can speak from personal knwoledge, he having been a law officer of the Crown in 1851 and 1852) which led to the enactment now under consideration.

We can now conveniently resume the trial of the question as to the introduction of the Dutch Usury Laws into Ceylon by the remaining tests laid down by the Supreme Court in the Plumbago case, whether there are judicial decisions against the existence here of such laws, and whether large classes of the community had acted notoriously and habitually in a manner inconsistent with such a law without drawing upon them punishment or animadversion.

The judicial decisions: Marshall neither in his report on the Charter nor in his Digest makes any reference to the Dutch rate of interest or the proclamations of 1800. He treats the question as settled by the Reg. of 1823.

In the Batticaloa case No 10600 the plaintiff claimed on the bond

at the stipulated rate (15*s*., a month as a sum under £20.) The district court (11th October, 1847) disallowed the rate as it was not authorized by the Dutch Law. The Supreme in appeal (Judge and 3 native assessors) set aside the judgment and allowed the interest stipulated for in the bond.

True this was the judgment of a single judge, but his deciding it, without reserving the question to the judges collectively, (which he was authorized to do wherein it was one of doubt or difficulty), shows that that learned judge felt that the point was one which had been well settled. We know that at Batticoloa and Kandy there were cases without number in which higher rates of interest were allowed, but which never came in appeal.

In the Caltura case 22,393, the Supreme Court disallowed compound interest. This, and the recovery of interest in arrear exceeding the principal, have never been allowed. Unlike the rates of interest which varied in the different provinces, the Dutch Law text books are agreed in this respect, and we can well understand our courts adopting and acting on this rule, without at the same time adopting different rates or any of them. The Ordinance 5 of 1852 whilst it allowed parties to stipulate for whatever interest they pleased, expressly provided that such interest was not to exceed the principal.

These decisions satisfy me that the judicial decisions so far as they go, show that the Dutch rates were not adopted in this colony, during at the least the British rule, and that it is open to parties to stipulate for what ever interest they please. The judgment of the district court should, therefore, be disallowed, and the interest stipulated for in the bond should be allowed.

D. C., Kandy, No. 58,135. } *Supramanien Chetty* v. *Muthu Carpen Chetty.*
Allagappa, intervenient.

Lease—Cancellation of decree of Court—Sections 13 *and* 17 *of Ordinance* 13 *of* 1866—*Judicial sale.*

A lease may not be cancelled by the lessor on non-payment of rent by the lessee without a decree of court. Although section 13 of Ordinance 13 of 1860 makes the amount due a first charge on the estate, yet it must be read along with section 17, which vests in the purchaser only the right title and interest of the proprietor.

Dias and *VanLangenberg* for plaintiff appellant.
Ferdinands for defendant respondent appellant.
Grenier for intervenient appellant.

8*th July*, 1875.—The judgment of the Supreme Court was delivered by the acting Chief Justice,—

The plaintiff in this case claims as mortgagee of certain lands leased by the High Priest of the Pusparama Vihare to Savapady, who assigned

his right in favour of Luther Lawton, who again assigned his right to Kalender Saiboe and Pariappa Chetty, by whom the mortgage was granted in favour of the plaintiff in 1859.

This land was sold by the Provincial Committee in 1870 for non-payment of the assessment under the Branch Roads Grant-in-Aid Ordinance of 1866, when it was purchased by Messrs. Siddi Lebbe Marikar Mohamadoo Casim Marikar and W. A. Joseph, who, in August 1871, conveyed their right to the defendant. The defendant claims that the sale by the provincial committee wiped off the mortgage in favour of the plaintiff.

Allegappa Chetty intervened claiming that as the lessor's assignees failed to pay rent, the High Priest cancelled the lease in their favour and granted a fresh lease in his, the intervenient's, favour.

The district court after hearing evidence, held, in an able and well considered judgment, that the Priest could not cancel the lease of his own authority, and without the decree of the court; that the sale by the provincial committee was regular, but that the sale in no way affected the mortgage; and that the purchasers took the land subject to the mortgage.

In these conclusions we entirely concur. Non-payment of rent under a lease like that held by the priest, does not of itself operate as a forfeiture. A judicial decree was wanted to have the lease cancelled, and it was pending a suit brought to obtain such decree that the second lease, (an obviously collusive proceeding,) was granted.

Section 13 of Ordinance No. 13 of 1866 makes the amount due by a proprietor a first charge on the estate, but it must be taken in connection, with section 17, which vests in the purchaser of the land "the right, title, and interest of the proprietor in default," and nothing more. The right, title and interest of the lessors was an encumbered one. The sale must be held subject to the encumberance.

We consider that even a judicial sale by the fiscal will not cancel existing mortgages, unless the mortgagee, knowing that the sale was to take place, wilfully failed to assert his right, or give notice of his mortgage, and thus allowed third parties to be defrauded. A judicial sale under our Ordinance is a very different proceeding from a judicial sale under the Roman Dutch Law. See the cases cited in Thomson's Institutes.

No more dangerous doctrine to the best interests of the country can be inculcated than that a mortgagee, say an English capitalist, can be deprived of his right by a quiet fiscal's sale of the premises mortgaged held at Badulla or any other place.

Affirmed.

D. C., Matara, No. 27,805. } *Lokuhamy* and others v. *Juan* and others.

Donation—Acceptance—Presumption of

Acceptance is as a rule necessary to render a donation complete; but acceptance may be fairly and reasonably presumed when there are circumstances to justify such a presumption.

Ferdinands for plaintiffs appellants.
Dias for defendants respondents.
Browne for intervenients respondents.

9th July, 1875.—The judgment of the Supreme Court was delivered by the acting Chief Justice,—

The decree of the court below is set aside and judgment entered for plaintiffs for the premises in dispute, subject to the provision mentioned hereunder as respects the intervenient. Defendants are to pay the costs of the plaintiff, and intervenient to pay his own costs.

Acceptance is, as a rule, necessary to render a donation complete, but there are many circumstances from which such acceptance may fairly and reasonably be implied in this case. The deeds of gift are dated 1845, and they settle property upon the three illegitimate children of the donee, two of whom were minors at the time. The natural guardian may by law accept a gift on behalf of the minors (Cod. lib. 8, tit. 54, c. 26, Voet, 39, 5. 12.) The donation reserved the right to the donor to possess the property till his death, and in such case the donation may be accepted even after death (Voet. 39. 5. 13.) The donor died in June 1874 ; the action was brought in the August following. Lokuhamy, the other donee, was married at the date of the gift ; but, though the defendants produce the deed in favour of the minors, yet they do not produce her deed. Lastly, every presumption should be made in favour of a deed 30 years old and calculated to uphold it.

The defendants plead that the donor sold some of the lands gifted to the plaintiffs, after the date of gift. Whether such sale was valid or not, is a question to be considered when the purchasers come forward to assert their title. One of these purchasers has intervened in this case; but in the absence of evidence, the court cannot ascertain whether or not he is an innocent purchaser without notice. Hence the reservation in the first paragraph of the judgment.

D. C. Colombo, No. 65,822. } *Durham Grindrod & Co.* v. *Meera Lebbe* and others.

Evidence—Admissibility of unstamped documents.

The mere fact that a document is unstamped is no objection to its being received in evidence, but the party producing it should be allowed the opportunity of getting it stamped after payment of the prescribed penalty if necessary.

Browne for plaintiff appellant.
Grenier for defendant respondent.

13*th July*, 1875.—The judgment of the Supreme Court was delivered by the acting Chief Justice,—

The decree of the court below is set aside, and the case remanded for further hearing with liberty to the plaintiffs to have the documents duly stamped on their paying the prescribed penalty or obtaining a remission thereof. Plaintiffs to pay the costs of the trial in the court below and of this appeal.

The district court has held in No. 63,498, that an unstamped promissory note may be stamped after execution and the court has confirmed that decision. It is reasonable that the plaintiffs should have a little indulgence in the present case.

D. C. Kalutara, No. 27,836. } *Fernando* v. *Scharnyuivel.*

Possession—Presumption of—Legal owner—Prescription.

The presumption of law is that the possession of a land is in the legal owner, and the burden of proving a prescriptive possession adverse to that of the legal owner lies on the person who sets up such a claim.

Dias and *Grenier* for plaintiff appellant.
Ferdinands for defendant respondent.

13*th July*, 1875.—The judgment of the Supreme Court was delivered by the acting Chief Justice,—

The land in dispute in this case is marked A and B in red in Mr. Stoddart's survey, and the questions for consideration are,—

1st—Within whose survey does the land fall?

2nd.—By whom was it possessed?

The district court, after much evidence, oral and documentary, found that it was part of Companiwella as asserted by defendant, and not part of Timbirigahawella as asserted by plaintiff, and that it falls within defendant's survey.

As to possession, the court further found that the plaintiff had not established a right by prescription—but that there was rather possession on the part of the defendant.

This court quite concurs with the district court in considering that A and B are portions of Companiwella and not of Timbirigahawella. The difficulty it felt however was on the question of prescription, and that difficulty arose principally from the great respect which this court always entertained for the opinions of so excellent and careful a judge as the late Mr. Jayetileka. Having, however, carefully examined this and the connected cases, this court has come to the following conclusions.

The presumption as to possession must always be in favor of the person having a legal title to the premises in dispute. But the circumstances of this case are peculiar. The land in dispute is situate in the town of Kalutara bordering on the high road, and in the immediate neighbourhood of the court house and other buildings. Unlike land in distant localities, it would not have escaped the attention of the people in the neighbourhood ;—by whom it was cultivated and possessed, and how far it extended could not be therefore open to much doubt or uncertainty.

This at least is established beyond doubt. Up to the time when Messrs. De Hoedt and Ebert tested the defendant's survey by that made by Mr. Stoddart in 1870, it was taken and regarded as portions not of Companiwella but of Timbirigahawella. Messrs. De Hoedt and Ebert discovered for the first time that the land formed part of Companiwella. Mr. Mantell in his survey gave it as portions of Timbirigaswella U and V and (according to Mr. Stoddart both in his report and evidence) that survey was correct according to the marked boundaries on the land. The land, the defendant admits, had been "cultivated up to the road on the west, off and on, for the last 30 or 40 years." By whom cultivated? Clearly not by the Scharnyuivels, father or son. According to the evidence it could only have been cultivated by the plaintiff.

It is material to note that, at the time of Mr. Mantell's survey, neither father nor son (Scharnyuivels) claimed the land, although they did claim other lands and also U and V as Companiwella—which they claimed by long possession. They did not produce their survey. The defendant knew of Mr. Mantell's survey, and their silence affords pregnant evidence that at that time they had no idea that they had any right to the land in dispute.

The case is therefore not like one in which the person in whom the legal title was vested had possession of the land though the evidence of such possession was weak. Here it is clear that the Scharnyuivels did not, until 1870, know that the Companiwella they purchased from Mr. Layard's attorneys included the portion in dispute. The fact is significant seeing that the father was an old resident of Kalutara, a large land-holder in and near Kalutara owning property adjoining this very land, and the last man to allow a foot of his land to be encroached upon by another.

It is impossible to believe, under these circumstances, that either defendant or his father ever possessed the land in dispute, and if they did not possess, but the land had nevertheless been cultivated "off and on"

for 30 or 40 years, the inference is almost inevitable that they must have been cultivated by the parties who persistently claimed title to the land, viz. plaintiffs and those under whom they claim a portion—Joran and the Graljies.

The evidence adduced by the plaintiffs abundantly establish this fact. It is not necessary to go through it in detail. But the Supreme Court will only refer to the evidence of Mr. De Hoedt who assessed the land for police purposes and who swears that the land was then assessed in the name of the plaintiffs and the Graljies—to the evidence of the joint assessor (7th witness) who supports De Hoedt—to the evidence of Samaranayaka that plaintiffs and Graljie paid the tax for 8 years and who produced his books in support of his story—to the evidence of the Modliyar Fonseka, who made enquiries as to the owner-ship of this land, in 1865, when, not the Scharnyuivels, but the plaintiffs and Graljies claimed the land to the evidence of Mr. Orr, a disinterested witness who has resided in Kalutara since 1859, who saw the land nearly every day and who swears that he knew that it had always been cultivated up to the road and that it was reputed to belong to the Graljies.

The district court placed much stress on the case 26,230—that case was brought against Mr. Fonseka by the present plaintiffs, Mr. Fonseka having purchased the land before Mr. Stoddart's survey. The district court decided the case in Mr. Fonseka's favor, but the Supreme Court set it aside remarking that "we have each of us carefully read and considered the evidence in this case and are of opinion that plaintiff has made out a strong case by oral, as well as documentary proof, entitling him to judgment." . . . .

"The land in question appears to have been in possession of the plaintiff and those under whom he claims, at least from 1827, the date of the grant of the adjoining land to Mr. C. E. Layard." . . . . "The oral evidence adduced on behalf of the plaintiff" (some of the witnesses examined in this case were also examined in that case) "shews that for 50 years the field has been cultivated by the Graljies or those connected with them. The cultivation before 1854 does not appear to have been either very regular or continuous. But from no part of the evidence does it appear, or is it even suggested, that at any time any persons other than the Graljies or their employes ever cultivated."

The portion B was not in dispute in that case. Although the wording of the libel admits of the argument that A was excluded, yet it is clear that the plaintiff claimed under both the bills of sale of 1854 and 1858 and filed both which give the road as the western boundary, showing that he must have claimed A ; the parties were not quite clear as to what portions Companiwella consisted of, and there is nothing in that case, which shows that he meant to relinquish his claim to A—much less to stop him.

The case 29,546 C. R. Kalutara bears on this case—the same land was in dispute. The commissioner after hearing evidence held that "the plaintiffs" (present defendant and his brother) "never, at any time, had actual possession of the land in dispute and that it was only about the

time of the Government sale that they, for the first time, learned from the survey of Messrs. De Hoedt and Ebert that this portion formed part of the land appearing in their (plaintiff's) survey."

For all these reasons, it is hereby decreed that the judgment of the district court of the 17th July last be, and the same is hereby set aside and that judgment be entered in favor of the plaintiffs for the land in dispute and costs of suit.

D. C. Matara, No. 27,430. } *Illangakoon Mudaliyar* v. *Perera* and others.

Prescription—Ordinance No. 22 *of* 1871—*Retrospective—Ordinance No.* 8 *of* 1834.

The Ordinance No. 22 of 1871 is not retrospective in its effect.

13*th July* 1875.—The judgment of the Supreme Court was delivered by STEWART, J.,—

This is an action on an administration bond drawn in the usual form, granted by the 1st defendant as executor, the 2nd defendant and the late husband of the 3rd defendant as securities, for the due administration of the estate of the late Peter Lamberton Perera.

The bond bears date January 12th 1863, and the action was only instituted on January 9th 1874. The defendants, among other pleas, pleaded prescription. Judgment was given against them, from which the 2nd and 3rd defendants have appealed. The plaintiff has also appealed on some minor points ; but we do not think there is sufficient ground to support his appeal. There is no appeal by the 1st defendant.

It is not disputed that, more than ten years having elapsed between the date of the bond and the institution of this action, the present suit would be prescribed if the 3rd section of the repealed Ordinance 8 of 1834 should be held applicable.

It is contended however that the parties are bound by the new Ordinance No. 22 of 1871, by the 6th section of which the term of prescription, in regard to bonds like the one before us, commences to run from the breach of the condition, which in this case took place within ten years of action brought.

The district judge was of opinion that as the new ordinance came into operation on the 1st January 1872, whilst this bond was still valid and in force, ten years not having then expired from its execution, the rights and liabilities of the parties were to be determined not under the old, but the present Ordinance.

We may take it as a well settled principle, that the laws enacted by the legislature should be construed as prospective, not as retrospective,

unless they are expressly made applicable to past transactions, and to such as are still pending. *Nova constitutio futuris formam imponere debet, non praeteritis.*

In the case of *Moon* v. *Durden*, 2. Exch: 22, it was observed by Baron Parke "that this rule, which is in effect that enactments in a statute are generally to be construed to be prospective and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and has been acted upon in many cases. . . . But this rule, which is one of construction only, will certainly yield to the intention of the legislature; and the question in this and every other similar case is, whether that intention has been sufficiently expressed." In that case the question was whether the 18th section of the 8 and 9 Vic. c. 109, which enacted that "all contracts and agreements by way of gaming or wager shall be null and void; and that no suit shall be brought or maintained in any court &c." included within its operation a wager made before the passing of the statute, and it was held by the majority of the court that the statute had not a retrospective operation, so as to defeat an action for a wager commenced before the statute passed.

In the recent case of *Evans* v. *Williams* (34 L. J. Chan. p. 661) V. C. Kindersley expressed his entire concurrence with the majority of the judges in their holding in the case of *Moon* v. *Durden*, and emphatically declared his own opinion that, unless it is clear that the legislature meant to make an act retrospective, so as to take away a man's right, the court would never put that interpretation on the act, So on the English statute of the limitations (3 and 4 Will: iv, c. 27), Lord Denman held that the 7th section had not a retrospective operation, and pointed out the hardship which a different construction would entail upon persons whose rights accrued previous to the statute being passed (Doe. dem. *Evans* v. *Richards*, 5 Q. B. 13, L. J. Q. B. 153.)

In the present case to hold that the new ordinance of prescription has a retrospective operation would materially affect the existing rights and liabilities of the defendants to their prejudice. When 1st and 2nd defendants and the late husband of the 3rd defendant executed the bond, they incurred a liability of a far more limited nature than that now sought to be enforced by means of the new ordinance. The liability which the 2nd defendant and the late husband of the 3rd defendant incurred was in fact that of sureties for an executor for a period of ten years, for at the expiration of ten years from the execution of the instrument, the bond under the old law would be prescribed, notwithstanding that there had been no breach of the condition. Under the new ordinance, the liability under such an instrument would in point of time become indefinite, for prescription would not necessarily begin to run until there had been a breach of the condition in the bond. The sureties (or their representatives for them) may reasonably say that they would never have become sureties, if their liability was to be one of indefinite extension.

There is no doubt as to the general principle that a statute should not be held to have a retrospective operation to the prejudice of existing rights, unless express words are found, or at least a clear intention that the statute

should have such effect is to be gathered. But in the present case we are not left to determine the question at issue upon general principles, for the Ordinance No. 22 of 1871 seems expressly to exclude from its operation all past transactions. The 1st section is as follows:—"The Ordinance No. 8 of 1834 is hereby repealed, except so far as respects all rights which shall have accrued, liabilities which shall have been incurred, and all proceedings or matters which shall have taken place before this Ordinance shall come into force."

These words are certainly very comprehensive. It was argued that the present liability had not been incurred before the new ordinance came into force, because there had been at that time no breach of the condition of the bond; but it appears to us that some kind of liability was incurred as soon as the instrument was signed, viz., a liability to make good any deficiency or loss arising from any default which might subsequently be committed by the executor in his administration of the estate. The Ordinance not only speaks of liabilities incurred, but of "all matters which shall have taken place," which seems to us to be as comprehensive an expression as could well have been devised for the purpose of including all kinds of previous transactions, and such a one as the present bond among them.

We think not only upon general principles but having regard to the express language of the Ordinance that the bond in question must be held to be governed by the Ordinance 8 of 1834; and consequently to be prescribed so far as relates to the 2nd and 3rd defendants.

The judgment of the district court of the 27th November 1874 is accordingly hereby set aside so far as it affects the 2nd and 3rd defendants, who however under the circumstances will bear their own costs. In other respects the judgment as against the 1st defendant, who has not appealed, will remain in force.

D. C. Kalutara, No. 27,651. } *James Perera* v. *Sardial Soyza.*

Last Will—Claim under impeached will.

Remarks by the Supreme Court on irregularities in proceedings had in a testamentary case.

13*th July* 1875.—The judgment of the Supreme Court was delivered by the acting Chief Justice,—

The Supreme Court has seldom seen a case which so teems with irregularities as this and the connected testamentary case No. 562 District Court of Kalutara. One Bodiawadogey Thomas Perera died in 1858. A document was produced purporting to be his last will, by which four persons were appointed his executors. The will was impeached on the ground of forgery, and allegations and counter allegations were filed. No steps

having been taken for a long time to prove the will, the heirs moved that the application for probate be set aside and letters of administration be given to them. An order to this effect was made by the court (Mr. Templer, district judge) on the 23rd February 1860. They failed to take any steps to sue out such letters, and on the 11th March 1861, a notice was issued to the heirs to show cause why their application for administration should not be rejected. The next entry is dated 25th April 1861 (Mr. De Saram district judge) to the effect that he found that letters of administration had already been issued, "although no record of it had been made." The administrators as appointed made default in filing inventory and accounts and notice after notice was issued calling upon them to purge their default. They paid no regard to the notices, nor did the court take any trouble to enforce its own orders. On the 4th November 1862, the court dropped the words "administrators" in its orders against the defaulters and began to call them "executors"—why or wherefore it does not appear. This new title was continued till the 10th August 1869, when the court for some reason or other unexplained began to call them administrator again. On the 2nd December 1869, the court returned to the former description "executors" and continued it till the 18th December 1871, when it fell back again upon "administrators," a title which was not afterwards altered. As a kind of compromise, however, for the change of appellation, the administrators were allowed in the accounts which were ultimately forced out of them to charge and receive credit for legacies granted by the impeached and unproved will, which was formerly set out in the accounts as the authority for those legacies. One party was allowed to sue the administrators in a formal action No. 24,378, as "administrators *with the will annexed.*" Fortified with this extraordinary precedent, the present plaintiff brought the present action to recover a legacy left to him by this impeached and unproved, but nevertheless tacitly adopted, will; and after a lapse of some sixteen years, the district court on the 19th October 1874, stumbled upon the discovery that plaintiff was no legatee at all, the will no will, and the defendants not administrators with the will annexed, and cut the knot by non-suiting plaintiff with costs.

The nonsuit must be affirmed, the will not having been proved ; but considering that all parties were mistaken and persisted in committing blunders from the first without taking the ordinary trouble to refer to the testamentary proceedings to ascertain how matters really stood, costs must be divided.

It is difficult for the Supreme Court to give any definite instructions as to the testamentary case, bristling as it does with inconsistencies and irregularities. It can only call the attention of the present learned district judge to the necessity of getting the estate case finally closed, and disallowing any item save such as are justifiable in case of simple intestacy, particularly any commission to the parties, who since April 1861 represented the estate whether as administrators, executors, or administrators with the will annexed and any costs to the proctors who were parties to such irregularities and inconsistencies, and should be answerable therefor.

D. C. Kandy, No. 55,042 } *Madar Saibu* v. *J. M. Robertson & Co.*

Fiscal's sale—Irregularity—Prevention from bidding, by fiscal's officer.

A fiscal's sale is not irregular simply because a judgment creditor was deterred from bidding at it by the fiscal's officer conducting it telling him that he could not, if he bought the property, get credit for the amount of his debt.

Dias and *VanLangenberg* for plaintiff appellant.
Ferdinands for defendant respondent.

13*th July* 1875.—The judgment of the Supreme Court was delivered by the acting Chief Justice,—

This is an action to set aside a fiscal's sale, which took place in 1869 under a private writ, and also a sale of the same property effected at the instance of the Provincial Road Committee under their satutary powers for non-payment of road assessment. As we think that sufficient ground has not been disclosed for setting aside the first sale, it is not necessary to consider the validity of the latter, the purchaser being the same in both.

The action was instituted in May 1871, but was pressed with so little vigour (the case having been taken off the roll a great number of times by consent) that it did not come on for trial until February 1875. It is now sought, after the death of the officer, who carried out the sale, to set it aside on the ground of certain alleged irregularities.

The first irregularity complained of is that the fiscal's officer deterred plaintiff's agent from bidding by telling him that he would not be allowed credit for the amount of his writ, if he purchased. But the fiscal's officer had no power either to give or withhold credit, except according to law ; and this would have been a question for the court if there was any dispute ; and it is the plaintiffs agent's own fault, if he was deterred from bidding by the expression of an erroneous opinion on the part of the fiscal's officer, who was not bound to give any opinion at all on the subject.

As to the alleged irregularities in the publication, we do not think those irregularities proved. The sale having been held by a public officer must be presumed to have been carried out with the proper formalities, and the meagre evidence now adduced, seven years after the sale was effected, is quite insufficient to establish this part of the case. It would create a dangerous precedent to hold that fiscal's sales would be set aside by evidence of this kind.

It is not necessary to consider the alleged agreement for the payment of the £275 ; for there is no claim to recover this sum, nor is the action in any way founded on this agreement. Moreover it was entered into after the fiscal's sale, and there could not have affected it.

D. C. Kandy,
No. 58,857.

Fiscal's sale—Eviction of purchaser—Action by purchaser against execution creditor for recovery of purchase money—Liability of execution creditor for pointing out for sale land not belonging to judgment debtor.

Per STEWART and CAYLEY, J.J. (MORGAN, A.C.J. *dissentiente*): a purchaser at a fiscal's sale, upon being evicted by the rightful owner, is not entitled to recover the purchase money drawn by the execution creditor, there being no warranty on the part of the execution creditor or privity between him and the fiscal. The judgment creditor not being guilty of fraud, the maxim *caveat emptor* must prevail.

Plaintiff purchased certain lands which were pointed out by the judgment creditor as the property of his judgment debtor at a fiscal's sale, and paid the money into court. The execution creditor drew that money. He was subsequently evicted from the lands he had so purchased by the rightful owner and brought the present action to recover the purchase money. He also claimed damages consequent on the eviction and costs. The learned district judge gave judgment for plaintiff as prayed for in his libel. Defendant appealed.

Ferdinands for defendant appellant.
Layard for plaintiff respondent.

13*th July* 1875.—MORGAN, A.C.J.,—I would gladly concur with the other judges in the view they take of this case; particularly as they are supported by a former judgment of this court, but I regret I am unable to do so.

The plaintiff purchased certain lands at a fiscal's sale for Rs. 84 which he paid into court. The execution creditor drew that money. The plaintiff was evicted from the lands on the ground that the execution debtor was not the rightful owner thereof. He now brings his action to recover from the execution creditor the purchase money paid by him, damages and costs. The plaintiff is not in my opinion entitled to damages and costs as there is no warranty at a fiscal's sale, but he is entitled, as it appears to me, to recover back from the execution creditor the purchase money he paid for the land.

When from ignorance, or error, or mistake, a payment is made of that which is not due, *solutio indibiti*, the law implies a contract on the part of him to whom it was made to return to him from whom it was received. The civil law described this remedy as the *condictio indebiti*. The execution creditor procured the sale of certain lands which did not belong to his debtor and received the purchase money in satisfaction of the debt due to him by the debtor. It is not shown that he acted fraudulently in procuring such sale, and it should be assumed that he was himself in error. He ought not therefore to be cast in damages and costs, but it is just that he should return the purchase money. Grotius B. 3, cap. 30, sec. 18 Vanderkeessel Thes. 796, 3 Burge 726, quoting from the Digest and Institutes.

"This kind of equitable action," said Lord Mansfield in *Moses* v. *Macfarlane* (the case itself was over-ruled but not on this point, and Smith quotes the words approvingly in his note on *Marriott* v. *Hampton*, 2 Leading Cases, 328) "to recover back money which ought not in justice to be kept, is very beneficial and therefore much encouraged. It lies only for money which, ex œquo et bono, the defendant ought to refund."

STEWART, J.,—It is with great reluctance and diffidence that I have arrived at a conclusion different from my Lord Chief Justice.

The question involved in this case was determined in the Colombo district court case 48472, reported in Vanderstraaten, p. 26, where it was held by the district court, and that judgment was subsequently affirmed in appeal by the collective court, that a purchaser at a fiscal's sale of land from which he is afterwards evicted by a third party claiming adversely to the execution debtor is not entitled to recover the purchase money from the execution creditor, there being no fraud or concealment on his part, and the money having been received by him in due course in liquidation of his judgment. It was considered in that case that the purchaser bought at his own risk, and that there was no contract, express or implied on the part of the judgment creditor.

The learned district judge had not the above decision before him when he gave his present judgment, the decision of the Supreme Court being only referred to in the judgment of his predecessor (see case 59375), whose decision however was in entire consonance with the former judgment of this court.

It is fully conceded in the judgment under review that no warranty whatever exists in a fiscal's sale: the judgment of the learned district judge being altogether based on "the principle of restitution, or the *condictio indebiti* of the civil law," or the implied contract of the English law.

To the above reasoning it is, in my opinion, a sufficient answer that there is no privity of contract, either express or implied, between a purchaser at a fiscal's sale and an execution creditor; and, further, that the fiscal by his conveyance merely transfers to the purchaser the interest of the execution debtor, whatever that may be. It is for the purchaser to make due enquiry as to the right and title of the execution debtor to the property about to be sold; the former knows, or ought to know, the risk he runs and not improbably is guided, in the bids he makes, by the doubtful or unimpeachable nature of the debtor's title.

In the absence of fraud or misrepresentation on the part of the judgment creditor, it appears to me that the principle of *caveat emptor* should apply, and I accordingly see no sufficient reason for deviating from the former decision of this court in the Colombo district court case 48472 already alluded to.

CAYLEY, J.,—In this case I concur with my brother Stewart.

The question raised has always appeared to me to be one of some doubt and difficulty, and I feel the force of many of the observations contained in the judgment of my Lord the Chief Justice. It seems unjust that the purchaser at a fiscal's sale should lose both his money and the

land, which he has purchased, if subsequently evicted by the rightful owner ; but at the same time all that the fiscal professes to sell to him is the title and interest of the execution debtor ; and, before he bids, he should make some inquiry into the execution debtor's title. At all events, he has a month before the sale is confirmed, during which any prudent purchaser would take care to investigate the title, before the money was paid over. It appears equally hard upon the execution creditor who probably gives credit to the execution creditor on the supposition that he is the actual as well as the ostensible owner of the property of which he is in possession, to require him at any time within the prescriptive period to pay back money which he has been allowed to draw by an order of court, because subsequently the purchaser is evicted by a third party. I do not think that the case is one of *condictio indebiti* for I am not satisfied that the purchaser has a superior equity to that of the execution creditor. In a case of difficulty of this kind, I feel bound (as I felt bound when sitting in the dictrict court of Kandy) by the previous decision of this court sitting collectively in the case No. 48472 D. C. Colombo (Vanderstraaten's report p. 26) and accordingly think that the plaintiff should be non-suited.

D. C. Kegalle, No. 2,336. } *Molligodde Umambuwa* v. *Puncha Weda.*

Paraveni land—Proprietor—Tenant—Right of tenants of paraveni lands to dig for plumbago—Right of proprietor to lease plumbago mines.

A tenant of a paraveni land has not the right to dig for his own use for plumbago to be found in his pangu, or do anything to permanently diminish its value ; nor has the proprietor a right to lease the mine to third parties.

13*th July* 1875.—The judgment of the Supreme Court was delivered by the acting Chief Justice, as follows—

The question raised in this case has reference to the right of the proprietor and tenant of a paraveny land to dig for plumbago to be found therein.

The proprietor asserting a right to the plumbago leased the mine on the land to a stranger. The tenant, on the other hand, not only prevent such stranger from digging for plumbago but contended that he, the tenant, had a right to dig for and appropriate the plumbago to his own use and benefit.

The district court held that the plaintiff had no right to lease the land to a third party nor had the defendant a right to dig for plumbago for his own use.

It is true that a paraveni tenant is a proprietor, in that he cannot be ejected so long as he performs services (Marshall's Dig. 305.) The Ordinnance No. 4 of 1870 prohibits the ejectment for default of performing services, but provides for the sale of the pangu subject to the services due to the proprietor.

Plumbago having only been recently discovered we have no precedent to guide us in coming to a conclusion and can only look to the argument which may be drawn from analogy from the Avisawella case No. 5303 in which the Supreme Court decided that in the absence of agreement authorising a tenant to appropriate or to cut down trees growing on the land, he had no right do so.

The right of both proprietor and tenant of a paraveni pangu being a qualified one, it is reasonable and consistent with principle that whilst the former should not be allowed to lease the mine or any interest therein to third parties, the tenant should not on the other hand be allowed to do any act which could permanently diminish the value of the land.

P. C. Colombo, No. 20,177. } *Don Cornelis* v. *Hendrik Perera.*

Gaming—Section 19 *of Ordinance* 4 *of* 1841—*Police Court jurisdiction—Queen's Advocate's certificate.*

A Police Court has no jurisdiction to try a charge under the 19th section of Ordinance 4 of 1841 without a certificate from the Queen's Advocate.

Grenier for defendant appellant.

Per Curiam:—Set a side for want of the requisite certificate from the Queen's Advocate.

This being a charge under the 19th section of Ordinance 4 of 1841 the police court had no jurisdiction to try the case without a certificate from the Queen's Advocate. See 3 Grenier, p. 4, P. C. Matara 72,597.

P. C. Kandy, No. 386. } *Silva* v. *Walayan.*

Arrack—Removing without a permit—District other than that in which the tavern is situate—Sections 27, 28, 32 *and* 33 *of Ordinance No.* 10 1844.

No permit is required for removing arrack to a district other than that in which the tavern is situate unless the quantity removed exceeds three quarts.

Section 32 of Ordinance 10 of 1844, which makes the use of permits necessary for removal of arrack, must be read in conjunction with sections 27, 28 and 33 of the same ordinance.

17*th August* 1875.—The judgment of the Supreme Court was delivered by STEWART, J.,—

The judgment of the court below is set aside, and defendant acquitted.

The defendant in this case was seized while removing two bottles of arrack without a permit in a district other than that in which the tavern is situated at which he purchased the arrack.

The 32nd section of the Ordinance No. 10 of 1844, under which the plaint is laid, must be read in connection with the 27th, 28th and 33rd sections, according to which no certificate is required for the sale, removal or possession of arrack not exceeding two quarts, wherever the person removing the arrack may be. See judgment of the Supreme Court, Galle R. C. No. 44,268, Beling's Reports pt. ii p. 1.

P. C. Jaffna, No. 1,740. } *Murphy* v. *Mayilvaganam.*

Tavern—Hours for closing taverns—Section 4 *of Ordinance* 22 *of* 1873 *and section* 37 *of Ordinance* 7 *of* 1873.

The object of the legislature in fixing the time within which taverns are under section 4 of Ordinance 22 of 1873 and section 37 of Ordinance 7 of 1873 to be closed is to prevent the sale of arrack during those hours.

Where it appeared that the tavern keeper kept his tavern open, not for the purpose of selling arrack but, for verification of the quantity of arrack then in the tavern in the presence of government officers preparatory to the opening of the new tavern on the following morning, it was held that he could not be prosecuted for failure to close the tavern, under the sections of the Ordinances mentioned.

17*th August* 1875.—The judgment of the Supreme Court was delivered by STEWART, J.,—

The judgment of the court below is set aside, and defendant acquitted.

The charge against the defendant is for not keeping his tavern closed on the 30th June between 8 o'clock at night and 5 o'clock the next morning, in breach of the 4th section of Ordinance 22 of 1873, and the 37th section of Ordinance 7 of 1873.

The obvious object of the provision in the 37th section of the last mentioned ordinance, requiring premises in which intoxicating liquor is sold by retail to be closed between the hours of 8 at night and 5 in the morning, is clearly to prevent the sale of intoxicating liquor at such places within the hours specified.

In the present case the evidence satisfactorily shows that on the night of the 30th June, (the last day of the arrack lease) the tavern in question was not closed until some time after 8 o'clock, owing to quite an exceptional circumstance, viz: that of the verification of the quantity of arrack then in the tavern, which was taking place in the presence of the manager and other officers of Government, preparatory to the new tavern which was to begin next morning,

Such verification, it will be perceived, could not well be commenced until 8 o'clock, the interest of the out going renter being to sell as much arrack as possible up to the termination of his rent.

Under the circumstances we do not think the defendant can be found guilty of the offence laid in the plaint.

If any arrack was really sold after 8 o'clock or the tavern kept open for the sale of arrack after that hour, the defendant should be proceeded against for breach of the latter part of the 37th section.

D. C. Colombo, No. 2,402. } In the matter of the Last Will and Testament of *John Asserappa.—Emily Asserappa*, and others appellant.

Husband and wife—Mutual last will—Widow and children in possession of joint estate—application of widow for division of joint estate—Delay in such application—rights of children under the will.

Where, under a mutual will, which provided that the surviving spouse should be guardian of the children and should possess and enjoy, until his or her demise, the entire estate owned in common, the widow continued in possession for 15 years and thereafter applied to the court for a division of the joint estate, *held* that, notwithstanding the delay, she was entitled to succeed in her application, at least as regards the immoveable property.

Held also that under the circumstances she could not be called upon to file a separate account of her intromissions with the minors' estate, and that the cost of the maintenance and education of the children and other charges in excess of receipts would have to be duly audited before the widow, as guardian, is allowed to diminish the capital due to them.

24th August 1875.—The following is the judgment of the Supreme Court, settling aside the order of the district court.

The application of the executrix for a division of the joint estate of herself and deceased husband appears to us to be just and reasonable and the same is hereby allowed subject to the qualification hereafter stated..

The mutual will of the executrix and her husband was proved so long ago as March 1860, since which the executrix and her children have been in possession of the whole of the joint estate.

By the first clause of the will, the survivor is appointed sole guardian of their children ; and by the third clause, "the survivor may continue to possess and enjoy all our estates and property mutually in common as at present, until his or her demise" &c.

It appears to the Supreme Court that now after the lapse of 15 years, to require a widow, who in terms of a mutual will continued to possess the joint estates in common with her children, to file as guardian of her children, a separate account of her intromissions with the minors' estate (which was never apportioned) is, under the circumstances of this case, to call upon her to give an account which, as she declares in her petition of appeal, it is impossible for her to furnish. It would doubtless have been desirable that the division, now sought to be attained, should have taken place long ago. But the delay affords no reason why, at least as regards the immoveable property, such division should not at once be made, and the application so far as it affects such property is accordingly to be allowed.

It would appear that all the children except one are of age. As respects the minor, it is ordered that the secretary of the district court of Colombo or such other person as the district judge may think fit, be appointed guardian of the said minor, in regard to the due appointment of his share of inheritance.

The last account rendered by the executrix shows a large balance in his favour. She may be fairly presumed to have spent the rents and

interest derived from the effects in her charge in the repairs of houses, the education of her children, and their and her own maintenance. But charges in excess of receipts and in diminution of principal stand on a very different footing.

So far as the heirs who have arrived at majority are concerned, if they acquiesce in the correctness of the account no scrutiny as regards their proportion will be necessary. If they object, further inquiry will have to be made. But in either contingency the minor's share of the alleged liability will have to be duly audited, before the executrix can be allowed to make any charge trenching upon the moveable assets of the estate, over and above the profits, interest and rents taken by her for the maintenance of herself and family

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D. C. Colombo, No. 64,381. } *Symonds* v. *Tottenham.*

Evidence—Refusal to produce documents on grounds of public policy—Privilege—Waiver of—Admissibility of certified copies in evidence—Ord. 12 of 1864—Costs.

The Colonial Secretary is entitled as a matter of right to withhold, on grounds of public policy, the production in evidence of letters written to him.

But having given certified copies of the documents in question to the plaintiff for the purposes of an action, the Colonial Secretary must be taken to have waived his privilege, and cannot therefore refuse to produce the original documents.

Certified copies, given in pursuance of Ordinance 12 of 1864, dispense with the necessity of producing the original documents.

A successful appellant is bound to pay the costs in appeal, if the reversal of the Ordinance is due to reception in appeal of affidavit of facts not laid before the court below.

Certain letters were written by defendant, a surveyor having a contract with the Government for surveying Temple lands, to the Colonial Secretary, reflecting on the character and reputation of the plaintiff, a government surveyor. The surveyor-general on behalf of the plaintiff wrote for and obtained from the Colonial Secretary certified copies of the letters written by defendant to the Colonial Secretary, stating that he wanted them for the purpose of being used in evidence. On the day of trial the Assistant Colonial Secretary, who represented the Colonial Secretary, on subpœna refused to produce the originals on grounds of public policy, whereupon plaintiff moved to tender in evidence the certified copies obtained from the Colonial Secretary.

The district judge upheld the objection of the Assistant Colonial Secretary, on the ground that the witness himself was the proper person to determine the question whether or not the production of the documents might be prejudicial to the public service, and refused to compel him to

produce them. He also ruled that, as the production of the originals could not be enforced, secondary evidence could not be given of their contents.

From this ruling of the district judge the plaintiff appealed.

Sir Richard Morgan, Q.A. and *Layard* for plaintiff appellant.
Ferdinands and *Browne* for defendant respondent.

9th September 1875.—The following is the judgment of the Supreme Court,—

This is an action for defamation founded upon certain letters written to the Colonial Secretary by the defendant who had been under a contract to perform certain surveying work for the Government which the plaintiff, who is in the Surveyor General's Department, was ordered to examine and report upon.

A subpœna was issued to the Colonial Secretary to produce these letters, and Mr. Swan, assistant Colonial Secretary, attended at the trial with the documents, but refused to produce them on the ground that their production would be detrimental to the public service. The learned district judge, on the authority of the case of *Beatson* v. *Skene* (29 L. J. Exch. 430), held that the witness himself was the proper person to determine the question whether or not the production of the documents might be prejudicial to the public service and refused to compel him to produce them. The learned district judge also held, upon the authority of Taylor on evidence 866, that, as the production of the originals could not be enforced, secondary evidence could not be given of their contents. We concur with the learned district judge as to the general principles laid down by him. It was held by the majority of the Court of Exchequer in the case of *Beatson* v. *Skene* that the question whether the production of documents would be injurious to the public service must be determined not by the judge but by the head of the department having the custody of the paper, and the rule then laid down was followed in the recent case of H. M. S. "Bellerophon," 44 L. J. Admty. p. 5. We also agree with the district judge that Mr. Swan, the principal assistant Colonial Secretary sufficiently represented the head of the department in this instance. We also agree with the district judge that, as a general rule, where the law is restrained by public policy from enforcing the production of documents, secondary evidence cannot be received of their contents. This rule is laid down by Taylor upon the authority of two American decisions, which we have not had the opportunity of consulting, and it may be doubtful whether the rule is one of universal application and not subject to any qualification or exception. However, upon the facts, as laid before the district judge, we should be disposed to consider his ruling right on both points, but the affidavit of Colonel Jervois, which was put in by the appellant's counsel at the hearing of the appeal, and the truth of which has not been disputed, gives a very different complexion to the case. It appears from the affidavit that the certified copies in question were procured by Colonel Jervois, the then head of the plaintiff's department, from the Colonial Secretary for the express purpose of being used in this case. Colonel Jervois, in his letter to the Colonial Secretary asking for the certified copies, states that

they are required to be produced in this case; and Mr. Swan, in reply forwards the certified copies which Colonel Jervois hands over to the plaintiff. The question which arises for consideration is not whether the Colonial Secretary is compellable to produce the originals, but whether having granted certified copies for production under the provisions of the Ordinance 12 of 1864, he can at trial object to these certified copies being read. We think that it would be unreasonable to allow this. The assistant Colonial Secretary never claimed this privilege when applied to for the certified copies, though he was informed of the purpose for which these copies were required; and the plaintiff went to trial relying upon the possession of these copies, which were not in any way improperly obtained by him but were procured for him by the head of his own department for the purposes of his action. We have no authority for holding that an officer of Government having granted certified copies of a document under the Ordinance 12 of 1864, with full knowledge of the purpose for which they were required, can at any time afterwards, without assigning any sufficient reason, put his veto on these copies being read; and we should require strong authority in support of such a position. The objection to the reading of these copies in the present case seems to us to be purely a technical one; for it is impossible now to treat these documents in any sense as secrets of state or to hold that their being put in evidence can be prejudicial to the public service. By granting certified copies the Colonial Secretary has already allowed the contents of the original letters to be divulged and, if the case of *Beatson* v. *Skene* is applicable to the present case, it appears to us that the present case falls under the exception referred to in that judgment, rather than under the general rule there laid down. In that case the court, in accordance with Mr. Baron Martin's view, expressed an opinion that cases might arise, where the matter would be so clear that the judge might ask for the production of a document in spite of some official scruples as to producing it. In the present case, it seems to us clear that the public service could not be prejudiced by the formal proof in court of these documents, copies having already been placed in plaintiff's hands by responsible officers of Government for the purpose of production.

There is no necessity now for the production of the original letters; for, as sufficient *prima facie* proof that the originals were signed by the defendant has been given, the certified copies are admissible under the Ordinance 12 of 1864.

The decree of the district court of Colombo is set aside, and case sent back for further hearing, with liberty to the plaintiff to read in evidence the certified copies F and G of the letters addressed by the defendant to the hon'ble Colonial Secretary and bearing date respectively 23rd February and 30th May 1872.

The case being sent back upon an affidavit of facts, which were not laid before the district judge at the trial, the plaintiff must pay the costs of appeal. The costs in the court below will stand over.

In the matter of *Madar Lebbe* deceased,

D. C. Colombo, No. 3,693. } *Sellatchy Umma* v. *Alia Marikan* and others.

Mohammedan law—Communis bonorum.

There is no community of property between husband and wife according to Mohammedan law.

Grenier for administratrix appellant.
Ferdinands and *Cooke* for respondents.

23rd September 1875.—The following judgment of the Supreme Court was delivered by CAYLEY, J.,—

The question raised in this case is whether the Roman Dutch law of community of goods between married persons applies to Mohammedans. The Supreme Court is clearly of opinion that it does not, and is somewhat surprised that the series of decisions which are opposed to the existence of such community, and the uninterrupted custom in our courts of treating the respective estates of Mohammedan husbands and wives as separate and distinct, should have left any room for doubt upon the subject.

It is true that the Mohammedan law of India or other places does not necessarily obtain in Ceylon, but as laid down by this court in case 59578 D. C. Colombo (Grenier D. C, reports, 1873 p. 28), the laws of the Mohammedan inhabitants of this Island, where not regulated by enactment, must be determined by usage and their laws as existing here. What then, has been the usage with regard to the point now raised? Since the time that courts have been established here with testamentary jurisdiction, a vast number of estates of Mohammedan persons have been administered to, and though for the sake of convenience a joint administration to the two estates, where both husband and wife are dead, has occasionally been granted, not one of the present judges of this court, either during his experience at the bar or on the bench, can call to mind a single case in which the property of Mohammedans in Ceylon has been either treated *inter vivos* or distributed after death upon the principle of community. The counsel for the respondent was not able to adduce a single instance of such dealing or distribution, nor could any member of the bar present at the hearing of the appeal adduce a single instance.

To hold now in opposition not only to the fundamental principles of Mohammedan law, but also to long established and undeviating custom, that the Dutch Law of *communio bonorum* prevails amongst the Moors, would unsettle half the title in the Island, which have been derived through Mohammedans and would in effect be to legislate and not to administer the law as it exists. Not only has no precedent been found for deviating from the long established usage of dealing with the property of Mohammedan spouses upon the principle of a separation of interest. but this usage has been confirmed by several decisions of this court.

It was held in No. 8337 D. C. Kandy (Morgan's Dig. p. 90) that a Mohammedan wife may bring an action without her husband, and in 1863 D. C. Chilaw (ibid p. 300) that a Moorish husband and wife may sue each other, both of which positions are quite inconsistent with the Dutch Law of *communio bonorum*. In the case No. 8859 C. R. Matara (Lorenz ii. p. 100) it was expressly decided by the collective court that a Mohammedan woman during coverture has an uncontrolled right to dispose of her property. Even the counsel for the respondent in that case did not argue that any community of goods subsisted between a Mohammedan husband and wife, but contended that the law required the husband's consent to an alienation of the wife's property, the right of alienation not depending upon the ownership of property but on the *status* of the person. Chief Justice Rowe, however, observed that the Mohammedan wife was absolute owner of her property. The learned district judge considers that this case has been over ruled by the case No. 76 C. R. Calpentyn (Lorenz iii. p. 200), but all that was decided in that case was, that the sale by a widow of her husband's property could not be sustained as against the creditors of his estate, and that the sale by the widow of a garden which was proved to have been the wife's dowry property, was good. The judgment states that the property did not enter into the community, and from the use of this expression, the learned district judge infers that the previous judgment in the Matara case must be considered as over-ruled. It seems to us quite clear that there was no intention of over-ruling the judgment in the Matara case. Two out of the judges who decided that case, decided the Calpentyn case; and yet the Matara case was not even referred to at the hearing of the Calpentyn case. In stating that the dowry did not enter the community, the court probably had in view the 1st section of the Code of 1806, in which it is laid down that dowry brought in marriage is not in common between husband and wife. This does not show that the Dutch Law of community exists with reference to all other property. Property may become vested in Mohammedan spouses in common by the terms of any particular grant or settlement, and all that the code says is that dowry property is not common. We certainly cannot consider that the express decision in the Matara case is inferentially over-ruled by the casual remark about community in the Calpentyn case, which turned upon a different point, and did not even refer to the former decision. In the case No. 2197 D. C. Colombo (Lorenz iii. p. 260) the district court granted separate administration to the respective estates of a Mohammedan husband and wife. This the Supreme Court set aside, *not* on the ground that the two estates formed one joint interest, but on the ground that, under the special circumstances of the case before it, a consolidation of the administration suits was desirable for the sake of *communio bonorum*; there would have been no necessity for any arguments as to convenience or any reference to the special circumstances of the case, for if the community subsisted joint administration would have been granted in the ordinary course. This is a decision clearly recognizing the general principle of Mohammedan law as to the separation of interest between husband and wife.

Again it is inconceivable that, if *communio bonorum* subsisted be-

tween Mohammedan spouses, it should have been entirely over-looked in the Mohammedan Code of 1806, which expressly deals with matters of succession and matrimonial affairs. Upon such matters, the law would have had a most important bearing and have given rise to many questions which would be left by the code quite undisposed of. How, for instance, would the community be regulated, where a man had several wives?

It appears to the Supreme Court to be clearly established both by uninterrupted usage and express decisions of our courts that the Dutch Law of community of goods is not applicable to Mohammedans in Ceylon, and the case must, therefore, go back to ascertain to whom the £600 in question really belonged, in order that the right of the parties may be determined upon the principle that no such community exists.

D. C. Kandy. No. 65,664. } *Macgregor* and *Law* v. *The Oriental Bank Corporation.*

Labor Ordinance—"estate or property"—preference of coolies over—18th clause of Ordinance 11 *of* 1865*—Crops severed from the land.*

Crops severed from the land are not "estate property" within the meaning of the 18th clause of Ordinance 11 of 1865, so that servants or artificers employed on a coffee estate have no preferent right over crops severed from the estate as against a special mortgagee.

Layard for defendant appellant..
Grenier for plaintiff respondent.

23*rd September* 1875.—The judgment of the Supreme Court was delivered by CAYLEY, J., as follows,—

In this case a claim is put forward by the plaintiffs, on behalf of certain coolies employed on a coffee estate, over the crops which were gathered and removed from the estate before the claim of the coolies was preferred. The claim is founded on the 18th clause of the Ordinance No. 11 of 1865. The defendants, who are special mortgagees of the coffee, dispute the plaintiff's claim on the ground that the coffee having been gathered and removed from the estate was no longer subject to the claim of the coolies under the 18th clause. The district judge having decided in favor of the plaintiffs, the defendants now appeal from that decision and after a careful consideration of the case, the Supreme Court is of opinion that the finding of the learned district judge is erroneous. The 18th clause gives the coolies a claim for three months' wages over the estate or property in which they are employed. The words "estate or property" would, no doubt, cover growing crops, but we do not think that they can be taken to include crops which have been severed and removed from the estate. After such severance the crops cease to be part of the estate or property in which the coolies have been employed.

The decree of the court below is set aside and the appellant's claim of preference over the coffee in dispute is declared and upheld.

REPORTS
OF CASES DECIDED IN APPEAL IN THE YEAR 1876.

MINUTE ON SIR R. H. MORGAN'S DEATH.

28th January, 1876.

Present :—The Hon'le CHARLES HENRY STEWART, Acting Chief Justice.
The Hon'ble RICHARD CAYLEY, Senior Puisne Justice.
The Hon'ble HENRY DIAS, Acting Second Puisne Justice.

The Acting Chief Justice, addressing the Bar, said :—

Mr. Deputy Queen's Advocate and gentlemen of the bar,

Myself and my colleagues will, I am sure, be only giving expression to and carrying out the desire of the bar and the public in adjourning the present civil and criminal sitting of the Supreme Court out of respect to the memory of the late Queen's Advocate, late Acting Chief Justice of the Island. His death, notwithstanding his previous illness, has come on us so unexpectedly as totally to unfit us, bench and bar, for business. He was only in his office at the beginning of the week, attending his duties as Executive Councillor, and has been cut off before the termination of the week.

Sir Richard Morgan has been taken from us at the comparatively early age of 55 years. In that time he achieved much. Born in this country, destitute of any influential friends, and with only his exertions to depend upon, he attained the summit of his profession as leader and head of the bar, and was for a time the chief administrator of justice in this Colony.

Whether we regard him as a public servant or lawyer, a citizen or friend, his loss will be irreparable. To the Government his loss will be great. He assisted in the legislation of this country for twenty five years, first as an unofficial member of the Legislative Council and since 1857 as Queen's Advocate. His legislation (we have only to refer to the statute book) is an imperishable monument of his industry and ability. There may be differences of opinion as to some portions of his work ; but it is impossible that it should be otherwise : he would not have been mortal had all his proceedings been completed without some fault being found in them. But, taken on the whole, there can be no question as to the usefulness of his labours.

As an Advocate his success was unrivalled, and his loss to this court will be incalculable. Never was there a counsel who was better prepared in his cases, or who more readily and well said all that could be properly urged on behalf of his client. The only wonder was how he found time to do his work so thoroughly and without the least perfunctoriness.

As a citizen also will his loss be felt by the various societies and charities to which so largely but unostentatiously he contributed, whether for the spread of religious instruction, or for the support of corporeal wants.

But who can tell how immeasurable his loss to his family. That is a subject I will not venture further to touch upon. Suffice it to say that in their great sorrow and deplorable bereavement they have the deep and sincere sympathy of all classes of the community.

Now, one word as to myself. It seems singular that it should devolve on me, just on the point of vacating my present office, to have the privilege of saying these few words on this mournful occasion in respect of the friend and companion of my youth, and the friend of my maturer years. We were at school together, in the same class, and since manhood at the same bar: colleagues in office as crown law officers, and colleagues on the bench. The connection has been severed; but on looking back, though we have occasionally in the struggle of life crossed each other's path, we never had an angry word. His loss I, as well as my brothers on the bench, shall ever deplore. He has left an example to rich and poor, high and low, what industry, integrity, and perseverance may effect. May that example be never lost on the inhabitants of this country generally, nor in particular on the bar, of which he was so distinguished a member and the chief ornament.

C. R. Avisawelle, No. 10,194. } *Johanis* v. *Apolina Haminey.*

Paddy-tax renter—Crown—Prescription.

To an action by the paddy-tax renter to recover the value of the Government share, the defendant pleaded a prescriptive right of exemption from the tax.

Held that the plaintiff represented the Crown and that the plea of prescription was inadmissible against him.

Layard for appellant.
Ferdinands for respondent.

1*st February*, 1876.—Dias, J.—This is an action by the plaintiff who is the purchaser of the paddy-tax for 1876, to recover the value of 45 bushels of paddy, being the 1-10th share of the produce of the defendants paddy field. The efendant pleads that his field is not subject to the paddy tax. Evidence was gone into on both sides, and the Commissioner dismissed the case, on the ground that the defendant had established a prescriptive right of exemption. The land seems to have been

originally purchased from the Crown in 1841, and since converted into a paddy field and regularly cultivated. The plaintiff in this case represents the Crown, and a plea of prescription is inadmissible against him, but the plaintiff having failed to establish the amount of the damage which he is entitled to, the case is sent back for evidence on that point.

P. C. Matara, No. 76,041. } *Charles* v. *Salman.*

Contempt of court—falsehood.

Mere falsehood does not amount to contempt of court.

In a previous case, in which the defendant and another had been charged with removing arrack with a licence, the complainant in this case gave evidence. Now the complainant charged defendant with assaulting him on the same occasion and in his evidence stated that he charged him before the police officer, whereas in the previous case he stated that he had not so charged him. Whereupon the magistrate charged the complainant with contempt of court and fined him Rs. 10 and the complainant appealed.

There was no appearance of counsel.

4th February 1876.—CAYLEY, J.,—

The court has repeatedly pointed out that mere falsehood does not amount to contempt of court.

The attention of the police magistrate is invited to the judgment of this court in case No. 43,832 C. R. Colombo. S. C. Minutes 17th September 1866.

P. C. Kalutara, No. 53,904. } *Pieris* v. *Cadersah.*

Toll, evasion of—"goods"—luggage—Ordinance No. 14 *of* 1867 *section* 19.

In a charge for evading payment of toll by removing goods, viz., a bundle of baskets and two other bundles each containing 100 walking sticks, from a vehicle on one side of a bridge to another on the other side, in breach of sec. 19 of the Ordinance No. 14 of 1867,

Held that for a conviction under the above clause, it made no difference whether the first vehicle was a hired one or not, and whether it was one for passengers or not.

Held also, that even if luggage were not "goods" within the meaning of the above clause, the bundles of sticks were not luggage, and the removing of them over the bridge from one vehicle into the other constituted a breach of that clause.

Grenier for appellant.

8th February, 1876.—The Supreme Court set aside the verdict of acquittal in the following judgment :—

STEWART, J.—This is a charge against the defendants for evading payment of toll by removing goods from a vehicle at Kalutara into another vehicle at Desaster Kalutara, in breach of the 19th section of the Ordinance No. 14 of 1876.

The evidence establishes that the defendants came as passengers in a hackery as far as the Kalutara bridge, bringing with them a bundle of baskets, and two other bundles each of the latter containing 100 sticks. They took these articles from the vehicle in which they had come thus far, walked across the bridge, and there getting into another vehicle went off carrying the bundles with them.

The magistrate acquitted the defendants on the ground, 1st that there was no proof that the sticks were brought in a hackery for hire ; 2nd that the vehicle was one for passengers, and 3rd that the things formed a part of the luggage of the defendant. As respect the two first grounds, it is sufficient to point out, that the ordinance under which the plaint is laid, so far as it affects the present charge makes no distinction between a hired vehicle, and any other, tolls being imposed by the 4th section on every kind of conveyance, the only difference consisting in the rates, which are leviable according to whether the vehicles are vehicles for carrying loads, or vehicles for passengers.

We do not consider either of the two first grounds to be entitled to any weight, nor can we uphold the conclusion of the magistrate on the 3rd ground.

By the 19th section of the Ordinance it is enacted that it shall not be lawful for any person in "order to avoid payment of any toll, whether "in whole or in part, to remove or cause to be removed, any goods from "any animal, vehicle or boat, one side of any road, bridge, ferry, canal, or "place appointed for the collection of tolls, to any other animal, vehicle "or boat, on the opposite side thereof, unless after payment of toll upon "the animal or vehicle on or in which the same shall have been brought "as a loaded animal or vehicle."

The question therefore, resolves itself into whether the articles, or any of them, removed by the defendants from the one vehicle into the other, constituted goods within the meaning of the ordinance,—the intention to avoid payments of toll being as it appear to us manifest.

The interpretation clause gives a very extensive meaning to the term "load", it being defined to include all description of goods, but not passengers. Luggage is not expressly excluded. But even if we give a most liberal construction to the enactment, and consider that a passenger may lawfully take with him personal accompaniments,—such as a bundle of baskets which the defendants had with them (the contents are not given, probably they only contained cloths) and other similar requisites, we cannot possibly so expend the meaning of the ordinance as to comprehend the 200 sticks removed by the defendant.

We are accordingly of opinion that these two bundles of sticks must be treated as goods, and that the defendant should be found guilty.

See in confirmation of the view taken in the judgment, the decision of the Supreme Court B. M. in Colombo 8445, reported in Grenier's Report 1873, p. 22.

D. C. Jaffna, No. 8,225. } *Meera Saibo* v. *Mahammado Ussen.*

Cause of action—payment of debt—action to obtain a receipt for such payment or refund of the amount paid.

The plaintiffs being indebted to defendant in a judgment gave a mortgage of certain property to defendant. Afterwards defendant agreed to receive in liquidation of the debt a certain sum in cash and some jewellery in pledge for the balance and to release the mortgaged property and grant a receipt to the debt. Accordingly defendant received the sum of money agreed upon and the pledge, but failed and refused to give a receipt for the original debt or to release the mortgaged property.

Held that plaintiff had a good cause of action against defendant for compelling him to grant a receipt and release the mortgaged property, or to refund the money paid and return the pledge.

The libel in substance set out the above facts and prayed that defendant may be compelled to grant a receipt and release the mortgaged property or to refund the money paid and return the pledge. The defendant demurred to the libel, substantially on the ground that there was no cause of action. The district judge upheld the demurrer, and plaintiffs appealed.

Grenier for appellant.

15*th February* 1876.—The judgment of the Supreme Court was delivered by STEWART, J.,—

This case is distinguishable from that reported in Grenier's Report 1873 part 2, p. 8, C. R. Jaffna 764, which was an action merely to compel the defendant to give a receipt for the payment of a sum of money due on a debt bond, or to refund the amount. In the present case the plaintiff sets out in the libel an express agreement, in terms of which he not only paid a certain sum in liquidation of the judgment in case No. 2883, but also pledged a necklace with the defendant, the value of which he alleges exceeds the balance due on the judgment. It is besides expressly alleged that the defendant understood on his part, as a part of the arrangement, to release the plaintiff's property from mortgage.

There is in our opinion a sufficient cause of action stated in the libel to render an answer from the defendant's necessary.

Set aside.

D. C., Colombo, Ins. No. 909. } In the matter of the insolvency of *Lebena Marikar*. Ex parte *The Oriental Bank Corporation*.

Insolvency—refusal of protection to insolvent—application for certificate "R"—notice of motion.

On the refusal or withdrawal of protection to insolvent, a proved creditor is entitled to apply for the certificate "R" without notice to insolvent.

In this case the protection to the insolvent was withdrawn on the 2nd July 1875. On the 29th October, the Oriental Bank Corporation a proved creditor, moved in terms of the 152nd section of the Insolvency Ordinance, that a certificare in the form "R" be issued to the assignee. The district judge disallowed the motion, holding that notice of motion was necessary. On an appeal by the Bank,

Layard appeared for appellant.

22*nd February* 1876.—STEWART, J.,—No notice to the insolvent is made necessary by the 152nd section of the Ordinance No. 7 of 1853 preparatory to the issue of the certificate therein referred to. On the refusal of further protection to the insolvent as was done in this case, the creditors, by virtue of the ordinance, obtained the right to apply for and receive the certificate sought for.

We do not think the 33rd section of the Rules and Orders can be legitimately made to include proceedings like the present.

P. C., Gampola, No. 27,753. } *Sangalingam Kangani* v. *Ernst*.

The Thoroughfares Ordinance, No. 10 *of* 1861 *sections* 81 *and* 83—*obstruction.*

Section 81 of Ordinance 10 of 1861 authorizes every chairman of a provincial or District Committee, the Commissioner of Roads, "and every person authorized in writing by any such chairman or commissioner" to exercise the powers conferred on officers in charge of works.

Section 83 provides a penalty for resisting, obstructing &c. any person acting under the authority of the Ordinance in the discharge of his duty.

In this case the complainant, a kangani, employed under an "inspector of roads" in the service of certain contractors, charged the defendants with obstructing him in the execution of his duty in breach of section 83. But there was no proof that he had any authority in writing in terms of section 81. Upon an appeal by defendants from a conviction,

Held, that section 83 must be read with section 81, and that the prosecution failed in the absence of proof that the complainant was authorized in writing in terms of section 81.

Grenier for appellant.
Layard for respondent.

2nd February 1876.—The Supreme Court set aside the conviction by the following judgment.

STEWART, J.,—The 83 section of the Ordinance, for breach whereof this charge has been instituted, must be taken in conjunction with the 81st section, which requires every person (other than the officers therein mentioned) exercising the several powers and authorities conferred by the ordinance to be authorized in writing by the officers specified in that section.

The complainant, when the alleged obstruction is stated to have occurred, was employed as a kangani under Mr. Hendry, an inspector of roads in the service of Messrs. Reid and Mitchell, road contracters. But neither Hendry nor any of his employers seems to have obtained the requisite authority ; at least no authority of any kind is referred to in the evidence. Nor does it appear that Hendry was at the time an officer in charge of works contemplated by the Ordinance 10 of 1861.

P. C., Matale, No. 11,202. } *Strachan* v. *Savile.*

Master and servant—plea of guilty—evidence—"surprise"—practice.

On a charge against a cooly for neglect of duty, whereby some coffee was stolen from a store, the defendant pleaded guilty, only admitting thereby the deficiency in the coffee, and the plea recorded was afterwards altered to one of not guilty,

Held that it was competent for the magistrate as a matter of judicial discretion to allow the defendant to withdraw his plea of guilty and enter a plea of not guilty and try the defendant on the merits.

A witness having been called as an expert at the instance of the court on the day of trial,

Held, that if the party was taken by surprise, application should have been made for a postponement of the trial, and that the alleged surprise was not a ground of appeal.

The plaint charged two defendants with neglect of duty "whereby 63 bushels of coffee have been stolen from the store of the Makulesse estate." The first record in the case was "1st accused brought up—pleads guilty." The accused was then remanded. On the day of trial the magistrate recorded, "as the charge is rather a wide one and I am of opinion that in pleading guilty accused only admits the deficiency of the 63 bushels and does not plead to any specific act of neglect, I shall enter a plea of not guilty in his favour." The magistrate having acquitted the accused after evidence heard, the complainant appealed. The rest of the facts appear in the judgment of the Supreme Court.

Layard for appellant.
Grenier for respondent.

7th March, 1876.—The judgment of the Supreme Court was delivered by ANDERSON, A.C.J.,—

Two parties, employees on a coffee estate, the one styled a "conductor" and the other a "night watcher" were charged with neglect of their duty whilst in the service of the complainant, whereby 63 bushels of coffee were stolen from a store of the estate, the property of the complainant, in breach of the Ordinance No. 11 of 1865 clause 11.

The 1st accused was originally brought before the magistrate alone, when he pleaded guilty and the case was remanded for a week in order to secure the attendance of the 2nd accused. On the case being called on again on the 14th of February, the 2nd accused, being present, pleaded not guilty, and therefore, the 1st accused being also present and represented by a legal adviser, the magistrate for certain reasons stated by him had a plea of not guilty entered for him and the case against both accused proceeded, before however the evidence was entered into, an objection was taken on the part of the 1st accused that as a "conductor" he did not come under the ordinance referred to in the plaint. This objection was overruled and evidence on the part of the prosecution entered into at the close of which the judge called a witness, an old coffee planter, who gave evidence as an expert to shew that differences in the weight of the coffee as originally stored and the weight of the coffee as ultimately found in the store might be and probably was occasioned by causes over which the accused could have had no control and thus negativing the charge of negligence.

The accused did not themselves call witnesses nor as far as appears from the papers forwarded to the Supreme Court was any defence offered for them beyond the objection before shewn and what may be gathered from the cross-examination of the witnesses for the prosecution.

The judgment was one of acquittal and the present appeal has been brought on certain specified grounds.

1st. That the 1st accused having originally pleaded guilty to the charge, the appellant was taken by surprise on the day of trial by the court allowing a plea of not guilty to be entered and went into court with evidence only to prove the actual deficiency in the coffee.

2nd. That the decision was given on the evidence of the expert which was entirely wrong and that had appellant expected that such evidence would have been given he would have been prepared to rebut it.

These grounds and others have been forcibly urged on the consideration of the court by the learned counsel for the appellant who also contended that the evidence produced on the part of the appellant as complainant established a case of negligence against both of the accused which ought to have resulted in their conviction and entitled him, the appellant, to have the judgment of acquittal set aside and one of conviction entered with an adequate punishment.

On the other hand the finding of the magistrate on the merits has been ably supported by counsel who has also pressed on the consideration of the court the validity of the objection raised at the trial that a conductor was not a servant within the meaning of the ordinance.

The court has fully considered the various points urged as aforesaid and has arrived at the conclusion that the judgment of the magistrate on the merits is right and that, putting out of consideration altogether the evidence of Mr. Tucker, valuable as that evidence undoubtedly might have been had the case been one of conflicting testimony, the accused was entitled to an acquittal upon the evidence as given for the prosecution.

This being the view taken by the court, the only questions which remain for consideration are those submitted on the part of the appellant.

First as to whether the plea of guilty as originally pleaded by the 1st accused ought to have been held binding as establishing his guilt, or whether it was a proper exercise of judicial discretion on the part of the magistrate in causing a plea of not guilty to be entered and thus throwing on the complainant the onus of proving the charge preferred by him and

Secondly. Whether the appellant is entitled to any and what consideration on the ground of surprise as set forth in his petition.

On both of these points the judgment of the court must be against the appellant. The magistrate from what took place before him did not consider what the 1st accused said as amounting to a plea of guilty of the charge but merely as admitting the deficiency which was alleged to exist in the coffee and under such a state of circumstances it would have been a manifest departure from substantial justice to have allowed a technicality to prevail and have thus closed the door on a full enquiry into the question of the responsibility of the accused for the deficiency so admitted to exist.

On the second point, it is sufficient to say that if the surprise now complained of was really felt at the time, the complainant should have applied to the court below to have adjourned the hearing of the case. He however did not do so, nor as far as is shewn in the papers in the case, did he in any way bring the subject before the notice of the magistrate and the Supreme Court cannot therefore treat it as a ground of appeal entitling the appellant to any relief.

The conclusions which the court have arrived at in the foregoing points, renders it unnecessary to consider the point raised at the hearing by the respondent's counsel as to whether a conductor is or is not a servant within the meaning of the Labour Ordinance of 1865.

Affirmed.

C. R. Kandy, No. 1,818. } *Ana Pitchey* v. *Kalloo.*

Pro. note—signature by a mark—validity of, without attestation.

The signing of a pro. note by means of a mark does not require attestation, but may be proved by external evidence.

This was an action on a promissory note, endorsed, against the maker. The endorsement was by means of a mark, and the commissioner non-

suited the plaintiff on the ground that there should have been attesting witness to the mark.

The plaintiff appealed.

14*th March* 1876.—The Supreme Court set aside the judgment of the court below and sent the case back for further proceedings, observing as follows,—

ANDERSON, A. C. J.—The commissioner was in error in non-suiting upon the mere production of the note as an attesting witness to the mark of the payee was unnecessary, and the defendant is entitled to recover if he proves by extrinsic evidence that the payee did make his mark on the back of the note and deliver it to him for the purpose of transferring to him his, the payee's, property and interest therein.

P. C. Colombo, No. 26,190. } *Markar Mudaliyar* v. *Uduma Lebbe Markar.*

Custodian of a burial ground—Notice of death to person claiming to be custodian—validity of such notice—Bye-law of the Colombo Municipal Council, chap. 28.

Where a Municipal bye-law required certain parties, in cases of deaths, to give information to the custodian of the burial ground respecting certain particulars required to be registered by such custodian,

Held, that the bye-law was satisfied when the information was given to a person who claimed to be and acted as custodian, though his title to the office was disputed by another person.

This prosecution was brought under chap. 28 of the bye-law of the Municipal Council of Colombo, which defined "custodian" as the "trustee, manager, proprietor, or person having sole or principal charge of a burial ground." The police magistrate convicted the defendant who appealed.

Grenier for appellant.
Browne for respondent.

17*th March* 1876.—The judgment of the Supreme Court, which sets out the facts of the case, was delivered by ANDERSON, A. C. J.,—

The defendant in this case has been proceeded against for an alleged breach of a bye-law of the Municipality of Colombo in omitting and refusing to give information to the complainant, who claims to be custodian and trustee of the Marandhan Mosque and burial ground, of the death of two of his children who died in July last and was buried in the burial ground attached to the mosque. The object of such desired information being to enable the custodian of the burial ground in which the interment took place to register the burials in accordance with certain municipal regulations or bye-laws.

The information in the instance referred to in the plaint was in fact given and the burial registered, but the information was given to and the

registration made by a party who claims in opposition to the complainant to be the proper custodian of the burial grounds, and this prosecution has doubtless been instituted with the view of establishing the right of the complainant to the office of custodian of the burial ground, a claim which it appears is contested and the right to the office of custodian publicly claimed and exercised by another party to whom the defendant reported the death which had occurred in his family and by whom the burials have been registered.

Such being the case, the provision of the bye-law has been substantially complied with and the judgment of the magistrate must consequently be set aside, but without prejudice to any civil proceedings which may hereafter be instituted by the complainant or any other party to ascertain and determine in whom the real right of custodian rests.

Set aside.

Letter from ex-Chief Justice Creasy to acting Chief Justice Stewart on the subject of Sir Richard Morgan's death, ordered to be recorded in the *Civil Minutes.*

"London, 29th Feb., 1876.

"Dear Stewart,—It has been with very deep regret that I have heard of the death of Sir Richard Morgan. Personally I experience the loss of a valuable friend, and with reference to official merits I feel convinced that the British Empire has lost in him one of the ablest and most promising public servants that our eastern dominions ever produced.

"In 1860, when I was about to leave England to take on myself the Chief Justiceship of Ceylon, Sir Charles MacCarthy (then Colonial Secretary for Ceylon, but in England on leave of absence) strongly and repeatedly recommended Richard Morgan to me as the most competent person in the Island to give me full and sound information and advice as to the various classes of its population, their requirements and habits as to all matters connected with the courts and as to the affairs of the colony generally. Sir Charles also spoke of him as being a man of kindly disposition and high honor, of whose willingness to assist me and of whose integrity I might be confident. Such was the opinion, which Sir Charles MacCarthy (no mean judge of men and manners) held of Sir Richard (then Mr.) Morgan in 1860, and I know Sir Charles continued o hold that opinion after he, as Governor, had long being familiar with our friend's merits as first law officer, as the chief minister of the Government in debate, and also as its confidential adviser you are aware too and how highly Sir Hercules Robinson esteemed him.

"I myself early sought, and throughout my residence in Ceylon I had, the benefit of his friendship. I found him all what I had been told, and more. His forensic merits were eminent. His knowledge of the complex laws of Ceylon was copious and accurate, and he was master of the principles of both Roman and English jurisprudence. His sagacity and readiness in dealing with facts were remarkable. He was a judicious as

well as a powerful cross-examiner and he was peculiarly effective in reply. He would have attained a high position at the English bar, if he had thought fit to practise there, and if life and health had been vouchsafed to him, so as to enable him to assume the station in the colony offered lately to him by Her Majesty's Secretary of State, he would have conferred honor on the chief judicial office which his native island could provide.

"I have said nothing about his domestic and private virtues, his cordial but discerning spirit of friendship, and his large-handed liberality. These are too well known in Ceylon to need any tribute of praise from me.

"In mutual condolence for the loss of our common friend,

I remain,

Yours very truly,

E. S. CREASY."

P. C. Colombo, No. 27,528. } *Keegel* v. *Wellon Appu.*

Ord. No. 7 of 1873 section 37—keeping arrack shop open after lawful hours—previous conviction of partner of defendant.

The section 37 of Ordinance No. 7 of 1873, prohibiting liquor shops to be open after certain hours, provides a higher penalty for a second or subsequent offence. The defendant was convicted of a breach of this section, and on proof that his partner in the liquor shop had been previously convicted of a similar offence, the magistrate inflicted the higher penalty on the defendant. On appeal,

Held, there was no previous conviction of the defendant within the meaning of the ordinance and that the higher penalty should not have been inflicted.

There was no appearance of counsel.

16*th May* 1876.—The following is the judgment of the Supreme Court.

CLARENCE, J.—The appellant was convicted by the police magistrate on a charge under the 37th clause of the Liquor Ordinance No. 7 of 1873 of keeping open an arrack shop for the sale of arrack after lawful hours. Under this enactment "any person who (commits the offence) shall for the first offence be liable to a fine not exceeding fifty rupees and for any subsequent offence to a fine not exceeding one hundred rupees." In this case the police magistrate has inflicted the fine of rupees one hundred upon proof that defendant is partner in the arrack shop with a man who was recently convicted on a similar charge. But no previous conviction having been proved against the defendant personally, he cannot now be considered as a person previously convicted.

Set aside.

D. C. Testy. Batticaloa, No. 47 A. } In the matter of the petition of *Swampillai Mathespillai.* Ex parte *L. F. Meerwald.*

Secretary of the District Court—liability of, for monies realized by sale of property in a testamentary matter—negligence—practice.

In this testamentary case the district judge ordered that an article lodged in court should be sold by public auction and the proceeds deposited in the Loan Board for the benefit of a minor. The article was sold and the proceeds appropriated by the chief clerk of the court. Upon a motion made, the district judge held the secretary of the court to be responsible for the money and ordered him to pay it into court.

Held that the secretary was not liable for the money, except upon proof that his departmental duty included the realizing of the money.

Grenier for appellant.
Ramanathan for respondent.

19th and 23rd May 1876.—The following judgment of the Supreme Court sets out the facts of the case.

CLARENCE, J.—In this testamentary case an order was made on the 23rd January 1874 "that the articles lodged in court be sold by public auction and the proceeds deposited in the Loan Board for the benefit of the minor." In December 1875 a motion was made on behalf of the minor for a notice on Mr. L. F. Meerwald, late secretary of the district court of Batticaloa, to shew cause why he should not pay into court the proceeds sale of the said articles if sold according to the order of the court of the 22nd January 1874.

Mr. Meerwald was secretary of the Batticaloa District Court at the time when the order of sale was made and carried out, but had since been removed to another station: Mr. Meerwald shewed cause against the rule abovementioned and called as a witness one De Neise, late chief clerk of the Batticaloa District Court, who admitted having sold the articles in question and received the proceeds. The witness says that he never handed the proceeds to Meerwald or any one else, and the inference to be drawn from his evidence is that he improperly converted the money to his own use. There is no suggestion in the case that Meerwald ever received any part of the money. The district judge held that Meerwald as secretary of the court was responsible to the estate for the money and made the rule absolute as against him with costs. From this order Meerwald appeals.

The Supreme Court is of opinion that the order was erroneous and that the rule should have been dismissed.

The claim against Meerwald is founded on the imputation of negligence,—an imputation that by reason of negligence he failed to realise for the estate the money which he should have realized in consequence of which they became lost to the estate; but he ought not to be cast on such a claim without a satisfactory formal proof that in the distribution departmentally of work among the court officers, his duty included the recovery of the money, and such proof we do not find. For this reason we

are of opinion that the order of the district judge must be set aside and the rule dismissed with costs.

In this view of the matter it becomes unnecessary to consider a question which we should otherwise have found it necessary to decide, viz., whether a claim like the present in which it is sought to make a late court officer responsible for money which never came to his hands, but which it is alleged he ought, but for his own default, to have received in a testamentary case, ought not to have been preferred in a separate action and not by way of motion in the testamentary case.

D. C. Jaffna, No. 1246. } *Visuwalingam* for himself and on behalf of his wife *Katiratchipelle* v. *Sabapathy.*

Husband and wife—action by husband—plea of non-joinder—Thesavalamei—practice.

Two persons, husband and wife, who were natives of Jaffna, granted a bond to defendant mortgaging certain inherited property of both. The husband now sued defendant to recover the bond alleging that the mortgage debt had been satisfied. The plea of non-joinder having been taken,

Held, that the wife should have been joined as plaintiff.

Ferdinands for appellant.
Grenier for respondent.

23*rd May* 1876.—The following judgment of the Supreme Court, which sets out the facts of the case, was delivered by CLARENCE, J.,—

Plaintiff suing for himself and on behalf of his wife prays a decree ordering the defendant to return a mortgage bond granted by the plaintiff and his wife with the title deeds of the mortgaged property, the plaintiff claiming that the mortgage debt has been satisfied. The bond purports to mortgage hereditary property of both husband and wife. Defendants in their answer plead amongst other matters that the plaintiff's wife should have been joined as a party. The libel and answer were filed in 1873. In January 1874 the case was referred to arbitration on joint application of both parties, and an investigation took place before arbitrators and umpire in the course of which there appeared no reference whatever to the point respecting the joinder of plaintiff's wife. The arbitrators and umpire disagreeing about their decision, negotiations took place respecting the naming of other arbitrators and umpire, and these negotiations proving abortive, on 30th November 1875, the case was set down for trial on plaintiff's motion. At the trial on 17th January 1876 defendant again raised the point respecting the joinder of plaintiff's wife, and the district judge decided the point in favor of defendant, allowing plaintiff eight days to amend his libel on payment of consequent costs in default plaintiff to be non-suited with costs. From this order plaintiff appeals.

Having in view the difference between the position of a wife under the Thesavalamei and under the Roman Dutch law in regard to her inherited property, the Supreme Court thinks the district judge was right in holding that the plaintiff's wife in this case should be joined as a party. But as the defendant appears to have waived this point when the case was referred to arbitration and revived it only on the trial day after the plaintiff had gone to the expense of bringing his witnesses for the trial, the Supreme Court thinks the defendant must bear all the plaintiff's costs of subpœnaing and bringing up his witnesses on the trial day. Appeal costs divided.

D. C. Colombo, No. 65,907. } *De Silva* v. *Sewetha Unanse.*

Fiscal's sale—payment of purchase money by purchaser to plaintiff—claim for credit—Ordinance No. 4 of 1867, clause 50.

A purchaser at a fiscal's sale, who was a stranger to the suit, paid part of the purchase money to the fiscal and the balance to the plaintiff.

Held that the purchaser was not entitled to credit for the amount paid to the plaintiff.

The appellant was purchaser at the sale held under writ sued out in this case. He paid part of the purchase amount to the fiscal and afterwards paid the balance to the plaintiff in the suit. He then obtained a rule *nisi* on the defendants in the case and the fiscal to shew cause why he should not be allowed credit for such balance. The district court discharged the rule and the purchaser appealed.

Ferdinands for appellant.
Layard for respondent.

30*th May* 1876.—The judgment of the Supreme Court was delivered by CLARENCE, J.,—

Appellant purchased immoveable property at the fiscal's sale in a suit wherein plaintiff had recovered judgment. He paid part of his purchase money to the fiscal and afterwards paid the balance to the plaintiff in the suit. He now appeals against a decision of the district judge refusing to make absolute a rule *nisi* on defendants and on the fiscal to shew cause why credit should not be given to the purchaser for such balance. The Supreme Court thinks the decision of the district judge was right. The 50th clause of the ordinance expressly authorises credit being given to the execution creditor when he purchases, but there is no mention in the ordinance of any such authority in favor of a stranger to the suit paying his purchase money to the plaintiff as in the present instance.

On the contrary the policy of the ordinance in such a case appears to be that the fiscal should receive and hold the money for distribution to such persons as shall ultimately prove entitled to it.

Affirmed.

D. C. Testy. Ratnapura, No. 356. } In the matter of the estate of *Unguhami Mohandiram*, deceased. *Mudianse* v. *Dingeri Hami*.

Kandyan Law—adoption, evidence of—administration, right to.

To establish an adoption under the Kandyan Law, there must be evidence of an unmistakeable acknowledgment of the child being adopted for the purpose of inheriting.

Appellant, as adopted son of a deceased person, applied for administration to his estate. The widow of the deceased opposed, on the ground that the applicant was not an adopted son of the deceased. The district judge, holding that the adoption was proved, granted administration to the applicant, and the opponent appealed.

Layard for appellant.

30*th May* 1876.—The judgment of the Supreme Court was delivered by CLARENCE, J.,—

In this case the question is whether the applicant as adopted son of the deceased is entitled to letters of administration to the deceased's estate. The Supreme Court is of opinion that the applicant has not sufficiently proved his adoption and the decision of the district judge to the contrary will therefore be reversed. The nature of the proof required is described in Marshall's judgment page 353. The applicant should have shewn an unmistakeable acknowledgment of this child being adopted for the purpose of inheriting. Here the evidence is very far from satisfying this requirement. The district judge holds that the lease bond filed by applicant is conclusive evidence of the adoption of applicant. This is a document executed after the deceased's death by which the opponent, deceased's widow, and applicant described "as adopted son" of deceased, purport to lease a house belonging to deceased's estate. This does not prove more than that the lessee, in his desire to obtain the concurrence of every possible person interested, insisted on applicants being so made a party to the instrument and that the widow consented. It goes to no more than this that at the time when the lease was executed, the question of adoption had been mooted. It is certainly not conclusive on the question. Had it been a document executed during the deceased's life-time and to which he was a party, different considerations would have arisen.

The administration must go to the opponent unless the district court thinks that under the circumstances the secretary of the court should be joined with her. Applicant must bear costs in the court below and in appeal.

B. of M. Colombo, No. 12,292. } *Leembruggen* v. *Rajapakse.*

Nuisance—owner of house—tenant, liability of—Ordinance No. 15 *of* 1862 *sec.* 1 *subs.* 1.

Ordinance No. 15 of 1862 sec. 1, subs. 1 enacts "whoever being the owner or occupier of any house &c., whether tenantable or otherwise, shall keep or suffer the same to be in a filthy and unwholesome state" shall be guilty of an offence.

Held, that under the above enactment, where a tenant is in occupation, the tenant and not the owner is liable.

In this case the owner of a house which was occupied by a tenant under a written lease was prosecuted for suffering the premises to be in a filthy state. The defendant was convicted, and he appealed.

Ondatjie for appellant.
Layard for respondent.

2*nd June* 1876.—The judgment of the Supreme Court was delivered by STEWART, J.,—

This is a charge under the 1st sub-section of the 1st section of the Ordinance No. 15 of 1862 against the defendant for allowing certain premises owned by him to remain in a filthy and offensive state.

The evidence shews that the premises were in the occupation, not of the owner the defendant, but of one Peter Pieres who is the tenant of the defendant under a written lease : upon these facts we think the tenant and not the owner liable to prosecution.

The sub-section of the Ordinance referred to is as follows "whosoever being the owner or occupier of any house, building or land in or near any road, street or public thoroughfare, whether tenantable or otherwise, shall keep or suffer the same to be in a filthy and unwholesome state, or overgrown with rank and noisome vegetation, so as to be a nuisance to or injurious to the health of any person &c." It was contended on behalf of the respondent that as the words "owner or occupier of any house &c." are followed by the words whether tenantable or otherwise, either owner or occupier could be prosecuted. To uphold this view we shall not only have to construe the word "tenantable" as including in the meaning actual occupation by the tenant but also to hold that an owner who may be precluded from access to premises in the occupation of his tenant is nevertheless open to criminal prosecution notwithstanding that he has no more right to enter upon those premises or exercise any control therein than a stranger. Moreover the expression "keep or suffer" seems to us to imply the existence of some power or control in the person charged in order to render him liable.

Set aside.

P. C. Tangalla, No. 40,246. } *Spittel* v. *Dingi Appu.*

Vaccination—liability of parent for non-vaccination of child—Ord. No. 9 of 1863 secs. 6 and 12.

Section 4 of the Ordinance No. 9 of 1863 provides for the appointment of a place for purposes of vaccination and for giving notice to residents of the days and hours at which an officer will attend at such place to vaccinate.

Section 6 requires parents and guardians to take children under their care to the officer at the appointed place for vaccination, and section 12 provides a penalty for parents and guardian not causing the children under their care to be vaccinated.

The defendant was charged under secs. 6 and 12 of the Ordinance for refusing to let his child vaccinated, but the evidence shewed that no place was appointed and no notice was given as required by section 4.

Held that the defendant was not liable under the Ordinance, the preliminary requirements of the ordinance not having been fulfilled.

Grenier for appellant.

2nd June 1876.—The judgment of the Supreme Court was as follows:

STEWART, J.—The defendant is charged with breach of the 6th and 12th sections of the Ordinance No. 9 of 1863 in having refused to get his child vaccinated by the complainant the sub-assistant colonial surgeon of Tangalla.

To render the defendant liable, it was essential that the preliminary requirements of the ordinance should have been complied with.

The 4th clause makes it the duty of the officer therein named to appoint a convenient place or places in each division for the performance of vaccination and to take the most effectual means for giving due notice of the days and hours at which an officer will attend at such places. The 6th clause further accordingly requires that every parent or guardian shall take or cause to be taken the child under his care to the officer at the place so appointed nearest to the residence of the child for the purpose of being vaccinated.

The penalty imposed by the 12th clause depends entirely on the existence of the conditions contemplated in the prior clauses, the parent or guardian being made punishable in case he does not cause the child to be vaccinated according to the provisions in this ordinance respectively contained.

It is in evidence however that no place has been appointed for vaccination in the division in which the defendant lives, nor was any notice given. All that appears is that the vaccinator came to the defendant's house and there demanded to vaccinate the child.

The defendant, not having failed to take his child to a place appointed for vaccination as required by the ordinance, this charge founded in the ordinance cannot be sustained.

Set aside.

P. C. Nuwera Eliya, No. 9,748. } *Downall* v. *D'Esterre* and two others.

Game—killing game without a license—Ord. No. 6 of 1872 sec. 5—"reside"—burden of proof.

Ordinance No. 6 of 1872 sec. 5 enacts: "No person shall kill game out of the division of the Korale, Vidana Arachchi or Mudaliyar in which he resides without taking out a license empowering him to do so."

The first defendant in this case was a "season visitor" at Nuwara Eliya *i.e.* a person who occupies a bungalow there for three or four months during the fashionable season for purposes of health or recreation. The 2nd defendant was the 1st defendant's butler, and the 3rd defendant was the keeper of the bungalow which the 1st defendant occupied and had been such for several years. All three killed game without any license.

Held that the 1st and 2nd defendants did not "reside" at Nuwara Eliya within the meaning of the Ordinance and therefore required a license to kill game there.

Held also, that in a charge under the above section of the Ordinance, the burden of proving the existence of a license was on the defendants.

Grenier for appellant.
Ferdinands D. Q. A. for respondent.

2nd June 1876.—The judgment of the Supreme Court sets out the facts of the case and was delivered by CLARENCE, J.,—

The charge against the defendant is, that they did on the 17th February 1876 at Nuwara Eliya, kill game (an elk) without license, in breach of the 5th clause of the Ordinance No. 6 of 1872. The 1st defendant is described by the witnesses for the defence as a "season visitor" in Nuwara Eliya, a visitor who occupies a bungalow in Nuwara Eliya for perhaps three, four or five months at the beginning of the year, during the fashionable Nuwara Eliya season. The 2nd defendant is the 1st defendant's butler. The 3rd defendant is bungalow keeper in charge of the bungalow occupied by the 1st defendant, and as such has been living in Nuwara Eliya for the last three years. It is indisputable that the three defendants killed the elk.

The 5th clause of the Ordinance No. 6 of 1872 enacts that no person shall kill game out of the division of the Korala, Vidana, Arachchi or Mudliyar in which he resides, without taking out an animal license, empowering him to do so. Such licenses may be granted by the Government Agents of the provinces. There is no evidence that the defendants had this license and no evidence that they had not. The magistrate convicted all three defendants.

In appeal it is urged (1) that the plaint is bad for want of negativing that the defendants were resident in Nuwara Eliya, since if they were resident there, they needed no license, (2) that the defendants were "resident" in Nuwara Eliya within the meaning of the ordinance; and (3) that the onus probandi of showing that the defendant had no license lay on the prosecution.

With regard to the first point, it is true that the plaint does not, as properly it should have done, negative the defendant's residence in Nuwara Eliya, but we are not disposed to decide the case on this technical objection, which was not taken in the court below, because it is palpable, in every part of the case, that both parties, defendants as well as complainant, treated the charge as a charge that the defendants, not being residents, killed the elk without license, in fact, the evidence for the defence was especially aimed at proving that the defendants were resident.

With regard to the 2nd point, the first two defendant's cases are identical, that of the 3rd defendant is different.

This 2nd point is one of some difficulty. We have to say what was the intention of the legislature in employing the word "resides" in the enactment in question, so far as concerns circumstances like those of the 1st defendant in this case. Not improbably, the case of such season visitors was not directly in contemplation when the ordinance was made, but we have nevertheless to assess the application of the enactment to the case, in view of the language and policy of the ordinance. This is an ordinance intended to prevent excessive destruction of game. It leaves to the subject the right of killing game in the district in which he resides, also described as his district, but forbids him to kill the game of other districts, without the Government Agent's license. So far as we can surmise the principle actuating this legislative distinction, the considerations seem to be, that men may in their own districts use the game thereof for food, and the men of one district are not to encroach on the game of other districts, except under the control of the Government Agent, and that although men's own interests may deter them from excessive destruction of game in their own district, it will be far less likely to deter them from doing so in other districts. Such considerations as these would indicate that the legislature can hardly have intended that a temporary sojourn for purposes of health or recreation in a new district should entitle the party to destroy game there without the Government Agent's sanction. We think, therefore, that a "season visitor" to Nuwara Eliya, such as the 1st defendant is proved to have been, is not to be considered as "residing" at Nuwara Eliya within the meaning of the ordinance. We consider the legislature as having intended an abiding or dwelling of a more permanent and home-like character than a mere sojourn of a few months at the equivalent of a "watering place." We therefore hold it proved that the 1st defendant was not "resident" in Nuwara Eliya, and consequently needed a licence to kill game. The 2nd defendant's case is governed by the same considerations. The 3rd defendant's case is different: he has been living for three years in Nuwara Eliya in charge of a bungalow, and we think that he is resident in Nuwara Eliya within the meaning of the ordinance.

With respect to the 3rd point, it is not easy to reconcile all the authorities, as to the extent to which the onus probandi may be shifted from a complainant to a defendant where the complainant alleges a negative, the affirmative of which it is peculiarly within the defendant's capacity to shew. But in the present case we think the onus probandi is with the defendants. The case is very similar to that class of the cases under the

old English Game Laws (before the statute 1 and 2 Vict. c. 32 had legislatively settled the burden of proof upon defendants) in which it was ruled that the burden lay on defendant of shewing that he had the license to kill game. These decisions were expressly approved by Lord Denman in *Doe. d Bridger* v. *Whitehead* (8 A and E, 571) one of the principal authorities usually relied on as narrowing the effect of earlier decisions on the subject. Thus holding it proved that the defendants were not resident in Nuwara Eliya, and that they killed the elk, they are, to borrow Lord Denman's words, proved to have done an act which was unlawful unless they were qualified by license, and thus the proof of shewing that qualification is thrown on them.

As regards the 1st and 2nd defendant the conviction and sentence are affirmed; as regards the 3rd defendant the conviction is set aside and the defendant acquitted.

D. C. Batticaloa, No. 17,875. } *Abayavere* v. *Fernando.*

Ex parte *Sinnetamby Valaiden*, claimant.

Preference and concurrence—fiscal's sale—assignment of an incumbrance —interest in land—Ord. No. 7 of 1840.

Plaintiff appellant, having at defendant's request paid money due on a mortgagee's writ against defendant in another suit, sued defendant and obtained judgment for the amount and sold the very land which had been originally mortgaged, Respondent, a judgment creditor in another suit against the same defendant, having put in a claim to the proceeds, the plaintiff appellant claimed preference, which was disallowed.

Held, that to entitle himself to stand in the shoes of the original mortgagee the plaintiff must shew either that he had an assignment of the incumbrance, or that defendant agreed by deed to the substitution of plaintiff in place of the original creditor and the acquittance mentioned payment as made with plaintiff's money.

Ferdinands D. Q. A. for plaintiff appellant.

The Supreme Court affirmed the judgment of the district court disallowing the appellant's claim for preference in the following judgment.

6th June 1876.—CLARENCE, J.,—The plaintiffs case, as exhibited in the libel and the answer of the defendant, in which he obtained judgment, is that one E. got judgment against defendant in district court case No. 16,817 Batticaloa, on a bond mortgaging a half share of a garden, and was about to sell defendant's property to satisfy his judgment, when plaintiff, at defendant's instance, and on defendants promise to give him a mortgage, stepped in and paid out the fiscal. On this transaction plaintiff sued defendant and got judgment. The fiscal sells land of defendants, which appears to be the godown in question, but the respondent puts in a claim to the proceeds claiming under a judgment obtained by him against

defendant in D. C. No. 18,112, Batticaloa. Plaintiff now appeals against a decision of the district judge ruling plaintiff to have no preferential right to this property seized and sold. It appears to us that the district judge's decision is right.

To entitle himself to stand, as he claims to stand, in the shoes of the original mortgagee and judgment creditor, the plaintiff must shew either that he had an express assignment of the incumbrance from that creditor; or that the defendant agreed that the plaintiff should be substituted in place of the original creditor and that the acquittance mentioned the payment as made with plaintiff's money. See Domat, iii. tit. i. The plaintiff does not show any assignment from the original creditor. He does allege a certain agreement by the debtor, but an agreement for substitution to an incumbrance on land is clearly an agreement for an interest affecting land, within the meaning of the 2nd clause of the Ordinance No. 7 of 1840.

Affirmed.

P. C. Galle, No. 94,541. } *Lokuhami* v. *de Silva.*

Maintenance—wife's adultery—liability of the husband under sec. 3 *of Ordinance No.* 4 *of* 1841.

A husband is not liable to punishment for not maintaining his wife who has been guilty of adultery.

The defendant was charged under the Ordinance with not maintaining his wife. It was proved that the wife had been guilty of adultery. The police magistrate nevertheless convicted the defendant, who therefore appealed to the Supreme Court.

Grenier for appellant,

8*th June* 1876.—The judgment of the Supreme Court was delivered by STEWART, J.,—

The defendant is not liable to punishment under the 3rd clause of Ordinance 4 of 1841 for not maintaining his wife, who is proved to have committed adultery. See *R.* v. *Fluitan*, 1 B and A 227, which is an authority in point, the section in the English statute being similar to the clause in our ordinance under which the plaint is laid.

Set aside.

D. C. Chilaw, No. 20,748. } *Suppramanian Chetty* v. *Mariamma et al.* *Paleniappa Chetty*, intervenient.

Security bond—liability of sureties—construction.

Where the condition of a security bond was that the defendants, two in number, should satisfy the judgment of the court or that they should surrender or be surrendered by their bail to be charged in execution,

Held, that the sureties were not liable unless both the alternatives were unfulfilled.

And where judgment was obtained against one of the two defendants, the other being expressly waived, and *nulla bona* was returned to the writ against the former,

Held, that there was not within the fair meaning of the instrument a judgment against the defendants unsatisfied, and that the liability of the sureties did not arise.

Cooke for appellant.
Grenier for respondent.

The following judgment of the Supreme Court fully sets out the facts of the case.

8th June 1876.—STEWART, J.,—In this case the two defendants Mariamma and Muttayah were sued for Rs. 111 odd, value of goods supplied ; and plaintiff obtained a writ of sequestration against their property. The defendants appeared and obtained a dissolution of the sequestration on giving, with two sureties, the bond which forms the subject of this appeal. The bond is a joint and several obligation in the sum of Rs. 150 by the defendants, the appellant, and one Mohiden, and the condition is that if the defendants Mariamma and Muttayah "do appear before the "District Court of Chilaw, and shall pay any sum or sums of money which "shall be awarded by the court, and shall abide by and perform the judg- "ment of the court, or shall surrender himself (sic) or be surrendered by "his bail abovenamed, to be charged in execution, then this obligation to "be void, otherwise to remain in full force."

In July 1873 plaintiff obtained a rule *nisi* on the 1st defendant alone to shew cause why judgment should not be entered against her for default of filing answer. In September the rule having been served on the 1st defendant, judgment was entered against 1st defendant for the sum claimed, plaintiff applying to waive and being allowed to waive, the 2nd defendant.

In December a writ of execution issued against the 1st defendant. In January 1876 the fiscal, made a return of *nulla bona* as to 1st defendant, and on the 25th of that month plaintiff obtained a rule *nisi* on the appellant and his co-surety Mohedeen calling on them as sureties under the bond, "to shew cause why they should not either pay the claim of the "plaintiff, or surrender property to meet it." At the hearing the rule *nisi* was discharged against Mohedeen, it not having been served on him; but it was made absolute as against the appellant and from that order the present appeal is taken.

No question was raised as to the mode of procedure adopted, consequently it is unnecessary to consider whether the plaintiff should not have obtained an assignment of the bond, and sued on it.

The bond in question is not very precisely worded, but its effect appears to be to allow the obligors two alternative conditions, either that the defendants shall satisfy the judgment of the court, or that they surrender, or be surrendered, by their bail, (appellant and Mohedeen) to be charged in execution. The learned district judge seems to have treated the bond as an obligation, whereby the bailsmen contracted to pay the plaintiff's claim, if the defendant's failed to do so. But such is not the true reading of the bond. The bond before us is a contract by the bailsman to pay a penalty if the defendants fail to satisfy the judgment, and in that event, if the defendants do not surrender or are not surrendered, to be charged in execution.

Now, in the first place, the plaintiff has not got judgment against both defendants, on the contrary he has expressly abstained from prosecuting his suit to judgment as against the 2nd defendant. There is not, therefore, within the fair meaning of the instrument, a judgment against the defendants not performed or satisfied. If that had been otherwise, if there had been judgment against both defendants not satisfied by either, the plaintiff should have shewn that the bailsmen had failed to surrender the defendants to be charged in execution ; and if, on the contrary, it had then appeared that the defendants had been surrendered, the condition of the bond would have been fulfilled, irrespective of any consideration whether or no the writ of execution produced any money. Evidently the printed form of bail bond made use of in the case is one intended for security given by a defendant on arrest in mesne process, and not upon sequestration.

Set aside.

D. C. Kalutara, No. 29,061. } *Ranesinghe* v. *Goonewardana.*

Misrepresentation—fraud—damages—evidence.

Plaintiff as vidana reported to the defendant as mudaliyar an alleged encroachment on crown land by certain parties by cultivating it with cocoanuts. The defendant then sued the trespassers in the Court of Requests, the plaint alleging that they cultivated the land with paddy. At the trial of the case the plaintiff gave evidence and deposed to the cocoanut cultivation. On account of the variation between the plaint and plaintiff's evidence, the commissioner dismissed the case and reported the plaintiff to the Government Agent who thereupon dismissed plaintiff from his post as vidana. Plaintiff now sues defendant for damages, for maliciously "charging" the trespassers with paddy cultivation with intent to injure plaintiff and cause him to be dismissed from office. The answer admitted the dismissal but denied that it was due to any wrongful act of defendant.

Held that plaintiff's dismissal was not the natural consequence of the error in the plaint, so as to entitle plaintiff to damages as against defendant.

Layard for appellant.
Ferdinands D. Q. A. for respondent.

9th June 1876. The following is the judgment of the Supreme Court, which was delivered by CLARENCE, J.,—

Plaintiff and defendant were Vidahn and Mudaliyar respectively. Plaintiff's libel alleges that he, in course of his duty as Vidahn, reported to the defendant, as Mudaliyar, that certain persons had encroached on crown land, and cleared and planted the same with coconuts and other trees ; that on this report defendant, as Mudaliyar, sued the encroaching persons in the Court of Requests, in which case the defendant "falsely, wickedly "and maliciously, and with intent to injure, harass, defraud and wholly "ruin the defendant, and to cause him to be dismissed from the service of "Government did falsely, wickedly and corruptly charge the aforesaid "persons" with cultivating crown lands with paddy. The libel goes on to allege that at the trial of the Court of Requests case, the present plaintiff deposed to the cocoanut cultivation, whereby the commissioner, in consequence of the false plaint mentioning paddy cultivation, disbelieved plaintiff and reported him to the Government Agent, who removed him from office. The defendant admits that defendant was removed from office on a report by the commissioner, but denies such removal was in consequence of any wrongful acts of defendant. The district judge holds that defendant was guilty of culpable negligence in not sueing that the plaint in the Court of Requests case was drawn in accordance with the report furnished to him by defendant, thinks it "doubtful whether plaintiff's dismissal "was brought about by this culpable negligence of defendants" and is "inclined to believe" that, had it not been for the variance between the plaint and plaintiff's evidence as to the cocoanut and paddy cultivation, plaintiff would not have been disbelieved and holds defendant liable in damages for his culpable carelessness in consequence of which plaintiff was dismissed from office." But on the ground that plaintiff's dismissal was not a natural consequence of defendant's negligence, the district judge awards nominal damages only.

The plaintiff's allegation of malice is not sustained by the evidence. It is not proved that the defendant was responsible for the mention in the Court of Requests plaint of paddy cultivation, instead of cocoanut cultivation. On the contrary the inference from the evidence is that the mistake was made by the proctor's clerk, and even had defendant's responsibility be shown, it is not proved plaintiff's dismissal was the natural consequence of the error in the plaint, so as to entitle plaintiff to damages as against defendant.

D. C. Galle, No. 36,121. } *Fernando* v. *Fernando.*

Jurisdiction—cause of action—"wholly or as to any part"—Ordinance No. 11 *of* 1868 *sec.* 65.

Plaintiff and defendant, entered into a partnership deed which was signed at Galle by plaintiff and at Batticaloa by defendant, by which plaintiff was to buy arrack in Galle and Colombo and send it to Batticaloa where defendant was to sell it. Accordingly plaintiff bought a large quantity of arrack at Galle

and forwarded it to defendant at Batticaloa. Plaintiff brought the present action in the District Court of Galle for the recovery of a certain balance of the partnership account. Defendant pleaded to the jurisdiction. The district court held that it had jurisdiction and gave judgment for plaintiff and the defendant appealed.

Held, that the deed having been signed by plaintiff at Galle and plaintiff having according to agreement bought the arrack at Galle, a part of the cause of action, within the meaning of sec. 65 of Ordinance No. 11 of 1868, sufficient to confer jurisdiction on the District Court of Galle did there arise.

Grenier for appellant.
Browne for respondent.

13*th June* 1876.—The facts of the case appear in the following judgment of the Supreme Court, which was delivered by CLARENCE, J.,—

The plaintiff, a resident of Panadura, sues defendants, residents of Batticaloa, in the Galle District Court, for Rs. 2,129 which he claims as due to him on the balance of accounts of a certain partnership created by a notarial agreement; and defendants contend that the Galle District Court has not territorial jurisdiction in the matter.

The agreement in question is between defendants, therein described as of Batticaloa, plaintiff therein described as of Panadura, and one Don Sinno who is not a party to this action therein described as of Galle. It was signed by the defendants at Batticaloa and by the plaintiff and Don Sinno of Galle.

It stipulates that the four partners should have the profit and loss of the Batticaloa arrack rent for the year 1872-1873, which the defendants had purchased; that the plaintiff and Don Sinno should buy arrack at Galle and Colombo with partnership moneys, and forward the same to defendants at Batticaloa, and that defendants should carry on the business at Batticaloa and "remit the joint funds of the company to buy arrack." At the expiration of the rent, partners were to meet (where is not stipulated) and settle accounts. Plaintiff alleges that in pursuance of this agreement, over 2,000 gallons of arrack were sent from Galle district to defendant at Batticaloa; that plaintiff's share of profits amounted to Rs. 2,477, and that defendant's had only paid him Rs. 348.

The question then is—whether within the meaning of the 65th sec. of the Ordinance No. 11 of 1868, "the cause of action arose wholly or in any part" within the Galle district.

Speaking with reference to claims *ex contractu*, "cause of action," standing by itself, is an ambiguous term. It may mean "all the facts which together constitute plaintiff's right or cause of complaint", or it may mean—"that act or omission of defendant which gives plaintiff his cause of complaint."

The 18th section of the English Common Law Procedure Act 1852 provided for service of process on a defendant out of the jurisdiction where the "cause of action" arises within the jurisdiction: and after very much difference of opinion it was recently announced in *Vaughan* v. *Weldon* L. R. 10, C. P. 343, a case to which we were referred in argu-

ment, that the judges had agreed to abide by the later meaning of the term, so far as concerns that section. Apart from the important difference in the context, the question arising in the construction of the term in that enactment was, of course, widely different from that arising from our own ordinance. Then the question was—the case being already within the jurisdiction—under what circumstances shall process be allowed to follow the defendants beyond the jurisdiction. Again when the enactment speak of "the whole cause of action" and of "parts of the cause of action", it is obvious that they contemplate the whole of the facts, which form the plaintiff's cause of complaint, and not the mere act or omission which is the immediate ground of action. The question is how much of this whole state of facts does our ordinance require to have happened within the district to found district court jurisdiction.

In the Charter of 1833, the term employed was "act, matter or thing, in respect of which the suit is brought" and Sir C. Marshall treated "act matter or thing" as equivalent to "cause of action." (Marshall's Judgments p. 257). In applying this to actions *ex contractu*, the Supreme Court did not restrict it to mean the defendant's act or omission which constitutes the immediate cause of complaint. Conversely, it would have been strangely inconvenient if the Supreme Court had held the term in the Charter to mean the whole of the facts which form the plaintiff's cause of complaint, for the result would have been that in all those cases in which those facts were distributed over more than one District, no District Court would have had jurisdiction, So, in D. C. Galle 1434, noticed in Marshall's Judgments, 258, the Supreme Court were prepared to hold that the Galle District Court had jurisdiction, if most of the transactions in question took place within the Galle district, and again the *Ritchie* v. *Bernard*, 1 Lorenz 147, where under a contract made in Colombo, plaintiff made advances to defendants to enable defendant to buy coffee in Kandy, and it appeared that part only of the advances were made in Colombo, plaintiff, who sued to recover his money, was entitled to sue in the Colombo District Court. The term now in question amounts to "the whole cause of action or any part thereof." A somewhat similar expression occurs in the 128th section of the English Country Courts Act 9 and 10 Vict. c. 95 which gives the superior courts concurrent jurisdiction, if plaintiff and defendant live more than twenty miles apart and the cause of action did not arise "wholly or in some material point within the defendant's district, and under that section it was held that the delivery of goods by plaintiff to defendant (*Bosey* v. *Wordsworth* 18 C. B. 325), and the signing of the agreement by defendant (*Norman v. Marchant*, 7 Exch. 723), were material points in the cause of action. The term we have now to deal with is "any part" of the *whole* cause of action. We are certainly not prepared to hold that the legislature in enacting that any part of the whole cause of action should confer jurisdiction, intended that any merely trifling item or component part of the whole collection of facts should be sufficient to do so. But we must consider the case before us. This is an action *ex contractu*. The *whole* "cause of action" is the agreement between the parties, the plaintiff's performance of his part and the defendant's

failure to perform his—of course as alleged. Neither plaintiff nor defendant resides at Galle, and the partnership trade of an arrack renter's business was carried on at Batticaloa. But the plaintiff signed the agreement at Galle, and claims to have collected, in pursuance of a stipulation in the agreement, a large quantity of arrack in the Galle district and forwarded it to the defendants at Batticaloa. This is certainly a part of the whole cause of action, and in our opinion, not a merely trifling part, but one too substantial to be neglected, and consequently one sufficient to found jurisdiction under the ordinance.

Affirmed.

D. C. Puttalam, No. 7,870. } *Baba Appu* v. *Henry Parker.*

Evasion of toll—Irrigation Superintending Officer—tank—Ordinance No. 14 *of* 1867 *sec.* 7*—interpretation of statute.*

Section 7 of Ordinance No. 14 of 1867 exempts from toll "all persons, vehicles, animals, or boats employed in the construction or repair of any road, bridge, canal or ferry, within 10 miles of the toll station."

The defendant in this case, a Government officer superintending the construction of a *tank*, was charged with passing, without paying toll, over a bridge which was over 10 miles from the tank itself but less than 10 miles from the nearest point of the high road.

Held, that the defendant by reason of his superintending the construction of the tank was not exempt from toll under the section 7 of the Ordinance.

Held also, that the ten miles should be reckoned from the tank itself and not from the nearest point of the high road.

The Police Magistate acquitted the defendant, and the complainant appealed.

There was no appearance of Counsel.

15*th June* 1876—The following is the judgment of the Supreme Court delivered by ANDERSON, A. C. J.,—

The defendant, who is described in the proceedings as an Irrigation Superintending Officer, was charged with having on the 2nd day of May 1876 passed over the toll bridge mentioned in the plaint, with intent to evade the payment of toll, in breach of the 17th clause of the ordinance No. 14 of 1867 : the answer to which charge in effect was, that he was at the time of so passing exempt from the payment of toll, the claim to such exemption being founded on the admitted fact that he was employed by Government in Superintending the erection of a public tank at Uswewa, and was proceeding from Puttalam to that place in the actual prosecution of his duties as Superintendant, which employment he contended came within the intent and meaning of the latter part of the 7th clause of the Ordinance, exempting from the payment of toll "all persons, vehicles, animals, or boats employed in the construction or repair of any road, bridge, canal, or ferry within ten miles of a toll station,"

To this the complainant in substance replied that the construction or repair of a tank is not a work included in the exemption relied on ; and, secondly, that the particular tank in question was situated at a greater distance from the toll station over which the defendant had passed than ten miles.

Upon the points so raised, and which were the only ones in dispute, the Police Magistrate gave judgment against the complainant, holding first that although tank work is not specially mentioned in the ordinance, that the ordinance must, nevertheless, be held to apply to such work equally with canal or ferry work, as otherwise the intent of the ordinance would be defeated ; and, secondly, that whether the tank itself was situated at a greater or lesser distance than ten miles from the toll station was immaterial, inasmuch as the measurement to satisfy the intention of the ordinance should be taken, not from the tank itself, but from the nearest point in the high road leading from the tank to the station,—which measurement the Magistrate found as a fact would give a distance of five and a half miles only.

Against the judgment the complainant has appealed, alleging as special grounds of such appeal the non-application of the 7th clause of the ordinance to tank work, and the miscalculation of distance on the part of the Magistrate.

The question thus raised having received our attentive consideration we have arrived at a very clear conclusion that the positions taken by the Magistrate are untenable, and that his judgment must be set aside.

The 7th clause of the Ordinance can only properly be held to apply to the particular persons and works specially mentioned in it, and no consideration of public convenience will justify a Court in extending its application to other persons or works. If the ordinance is defective the remedy lies with the legislative authority, and not with the judiciary, and the Magistrate, in this case, was essentially wrong in attempting to construe the enactment in question according to what he considered to be its intention, without confining himself, as he ought to have done, to its very plain and unambiguous language.

These observations apply also to the mode which the magistrate adopted in deciding the disputed question of distance. The distance referred to in the ordinance is the distance at which the particular work lies from the toll station, over which the right of free passage is claimed, ; and must be ascertained, like every other question of disputed distance, by actual measurement.

The judgment of acquittal is set aside, and judgment of conviction ordered, and defendant fined in the sum of one rupee.

Set aside.

D. C. Badulla, No. 20,203. *Petharetti Kangani* v. *Palaniretti Kangani.*

Arbitration—irregularity—ex parte *proceedings.*

Where a reference was made to two arbitrators and an umpire, and where one of the arbitrators disagreed with his colleagues and refused to take in the inquiry which continued in his absence, and the award as sent in was signed only by the other arbitrator and the umpire,

Held, that the award was invalid.

The parties in this case agreed to submit the matters in dispute to arbitration, and a commission issued to two arbitrators and an umpire, who were thereby authorized "to arbitrate and finally adjudicate the matter now in dispute between the said parties, Mr. Spooner" (the umpire) "to act jointly with the other two and to decide any point on which they may differ." The award was sent in signed only by the plaintiff's arbitrator and the umpire, the defendant's arbitrator having refused to take part in the proceedings. Thereupon the defendant sought to set aside the award on ground of the proceedings having been *ex parte*. The district judge, however, over-ruled the objection and made the award a rule of court, and the defendant appealed.

Ondatjie for the appellant.

Ferdinands D.Q.A. for the respondent.

15*th June* 1876.—The judgment of the Supreme Court was delivered by STEWART, J.,—

The proceedings disclose that the arbitrators and umpire having commenced their enquiry, the arbitrator of the defendant, owing to a disagreement with his colleagues, refused to take part in the further investigation and abruptly left the place accompanied by the defendant and his witnesses.

The award forwarded to the court was only signed by the plaintiff's arbitrator and the umpire; the arbitrator of the defendant refused to have anything to do with it.

It appears to us that, as the order of reference and the commission of appointment comprise the two arbitrators and the umpire jointly, all three should have taken part in the enquiry: and consequently the absence of the defendant's arbitrator from the meeting renders the award of the one arbitrator and umpire invalid.

The 15th clause of Ordinance No. 15 of 1856 provides that a reference to arbitration made under rule of court shall not be revocable by any party to such reference; and that the arbitrator or umpire should proceed with their enquiry, and make their award notwithstanding such revocation, and although the party making such revocation shall not attend the reference. But there is no such provision as regards a perverse arbitrator, the 1st clause only making provision for supplying in place of an arbitrator who refuses to act. It is obvious that the position of a party to a reference and that of an arbitrator are very different.

Set aside.

D. C. Tangalla, No. 39,776. } *Tottabadugey Tepo* v. *Christopher.*

Toll—Government officer—exemption from toll—Ordinance No. 14 *of* 1867 *sec.* 7.

An officer is exempt from the toll leviable under sec. 7 of the Toll Ordinance, only when passing the toll station on business actually connected with a work contemplated by that section.

Grenier for appellant.

The facts of the case are sufficiently set out in the judgment of the Supreme Court.

20*th June* 1876.—STEWART, J.,—The toll in question was out of the defendant's district, though within ten miles of its boundary. We think that the defendant when passing that toll was only to be considered as exempt from toll (under the provisions of the 7th clause of the Toll Ordinance) in virtue of his being employed on a road &c. within ten miles when actually passing the station on business connected with such road, canal &c.

He might, for instance, have occasion to set out from one road to another, to pass a toll outside his district in the course of his business. But here nothing of the kind appears. On the contrary, the facts of his passing with two carriages containing his wife and ayah, indicates plainly that he was not employed on such work as contemplated in exemption for toll, contained in the 7th section.

Set aside and defendant found guilty and fined five rupees.

C. R. Colombo, No. 107,927. } *Alwis* v. *Abelino Silva.*

Cattle trespass—feeding charges—liability of owner—Ord. No. 2 *of* 1835.

Defendant's cattle, which had been seized trespassing, were given in charge by the owner of the land to plaintiff, a headman, who now sued for the cost of the keep.

Held, that in the absence of a promise to pay such cost, the plaintiff could not maintain this action for want of privity.

One Thomis Fernando on 26th of February 1875 seized 7 head of cattle belonging to defendant while trespassing on his land. The damages were duly assessed, but defendant refused to pay the assessed damages as being excessive, and on 8th March 1875 Thomis Fernando gave the cattle in charge of plaintiff, a police headman. In a previous case Thomis Fernando recovered the cost of keep of ten animals while actually in his possession. The plaintiff brought the present action to recover the cost of maintenance of the animals while in his charge. The commissioner non-suited the plaintiff who appealed.

Grenier for appellant.

Dornhorst for respondent.

20th June 1876.—The judgment of the Supreme Court was delivered by CLARENCE, J.,—

Defendants cattle trespassed on the land of one Thomis, who seized the cattle and after some days gave them in charge of plaintiff, a peace officer, Thomis got the damages assessed as provided by the Ordinance No. 2 1835, and sued present defendant in the Court of Requests claiming for the damage and for the keep of the animals. The commissioner held that in respect of keep, Thomis could only recover the expense actually incurred while the cattle were in his own keeping, saying that the headman could recover from defendant the remainder of the keep. The defendant appealed against this decision, so far as it was against him, and that appeal was dismissed by the Supreme Court, but Thomis did not appeal against the order restricting his claim to the keep of the animals while actually in his own possession.

The ordinance authorizes the land owner in such cases to detain the animals till the damages are assessed, but says nothing about giving them in charge to a headman. Consequently, unless something is proved amounting to an implied promise to pay the headman for the cattle keep, the headman for want of privity cannot maintain this action. Nothing of the kind is proved, and the commissioner was therefore right in non-suiting the plaintiff.

Affirmed.

D. C. Kandy, No. 65,887. } *Supramanien Chetty* v. *Supramanien Chetty.*

Landlord and tenant—notice to quit—validity of.

A notice to quit given to the occupier of a house by a person who subsequently acquired the property but had no interest in it at the time at which he gave notice, is invalid.

The plaintiffs became owners by purchase on 6th April 1875 of a house of which defendant was tenant to the original owner. On 15th April plaintiffs resold the house to a third party, who in turn leased it to plaintiffs for three years. The lease was executed on 3rd May, but was by its terms to run from the 5th of the previous April. The plaintiffs gave defendant notice to quit on 27th April.

The libel averred a tenancy from 5th April and pleaded the notice of 27th April, and *inter alia* prayed in ejectment. The defendant denied the tenancy and the plaintiff's right to give the notice. The district judge gave plaintiffs judgment, and defendant appealed.

Grenier for the appellant.

20*th June* 1876.—The judgment of the Supreme Court was delivered by ANDERSON, A. C. J.,—

The plaintiff at the time at which he gave notice to the defendant to quit the house occupied by the latter, had no interest in the property. The notice, therefore, had no legal effect and the consequence is that the judgment of the district court, which is based on the validity of such notice, is erroneous.

The judgment of the district court in favour of plaintiff is set aside and judgment given for defendant, with costs.

D. C. Kandy, No. 64,643. } *Elphinstone* v. *Boustead.*

Action for damages—negligence—setting fire to jungle—pleading—evidence.

In an action for causing damage to a coffee estate into which fire had spread from a neighbouring land where jungle had been set fire to,

Held, that it was not necessary to prove negligence, even though averred in the libel, on the part of the defendant or his agents.

The plaintiffs were proprietors of "St. Andrew's", and the defendant proprietors of "Craigie Lea Estate" of which a certain piece of jungle was part and parcel. The libel averred that the defendants "by their servants and agents set fire to the said jungle and the fire spread to and over" the plaintiff's estate, causing considerable damage. The answer amounted to a general denial. The district judge gave judgment for plaintiffs, and the defendants appealed.

Ferdinands for appellants.

Cayley Q. A. (*Grenier* and *Browne*) with him for respondents.

22*nd June* 1876.—The judgment of the Supreme Court was delivered by STEWART, J.,—

The plaintiffs in this case sue for the recovery of Rs. 9652·50, being amount of damages sustained by them by reason of the agents and the servants of the defendant's negligently and carelessly setting fire to the jungle on an estate belonging to the defendants—which fire spread to and over a portion of the adjoining coffee estate belonging to the plaintiffs, causing damages thereto to the aforesaid amount.

The defendants, admitting that they were and are the owners of the jungle, deny that there was negligence or carelessness on the part of their servants and agents or that damage was suffered by the plaintiffs to the extent claimed.

Witnesses were called on both sides, and judgment was given for plaintiff for Rs. 4000, being damages at the rate of Rs. 500 per acre for 8 acres,

—the evidence showing that about 8 or 9 acres of young coffee between 2 and 3 years old had been burnt.

From this judgment the defendants have appealed on three grounds set out in their petition of appeal,—

1st,—that it was incumbent on the plaintiffs to prove negligence in the defendants;

2nd.—that whether in the abstract such proof was or was not necessary, it became necessary in this case, inasmuch as negligence was specially declared on in the libel, and

3rd.—that the damages were excessive.

The only point that was pressed on our attention on the argument before us was the 3rd, the learned counsel who appeared for the respondent's conceding,—on the authority of the recent cases of *Fletcher* v. *Ryland* 3 Law. Rep. H. L. 300, and the *Madras Railway Company* v. *Zemindar of Carventinegram*, judgment of Privy Council, July 3rd 1875, quoted by Sir Edward Creasy in his notes, title "action," Creasy's Reports, p. 14, that he was unable to maintain the 1st ground.

As respects the 2nd ground, it appears to us that it would have been superfluous for the plaintiffs to prove negligence in the defendants, if legal liability attached to them for the act complained of, independently of any negligence on their part.

The first point not having been discussed, it is scarcely necessary to enter upon it. But suffice it to say that it is unquestionable that the defendants by their agents deliberately set fire to an extensive clearing previously prepared by them to be burnt off causing thereby a great, uncontrollable and speading fire which indubitably occasioned, be the amouut small or great, damage to their neighbour. In the case of *Fletcher* v. *Rylands*, it was held by the Exchequer Chamber (the judgment was subsequently affirmed by the House of Lords),—"If a man brings upon his land anything which would not naturally come upon it and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned.

Lord Cranworth is reported as stating in the appeal before the House of Lords the principle of the decision as follows: "If a person brings and accumulates on his land anything which if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage . . . and the doctrine is founded in good sense. For when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound, sic uti suo ut non lædat alienum."

Adopting the law as above laid down by such authority, it becomes needless to determine whether the evidence adduced does or does not establish negligence on the part of the defendants. It appears to us that they must be held responsible for the consequences of their act, whether they in fact acted negligently or otherwise.

The learned district judge in assessing the amount of damage evidently had in view the evidence given by the witnesses on both sides. Mr. Shand a witness for the plaintiffs, estimated the loss, giving details for his conclusion at £70 per acre : and on the other hand, Mr. Martin a witness for the defendants valued the adjoining coffee from £60 to £65 an acre, and the coffee on the ground at £30 per acre. The expense of renewing the latter was not stated, nor how much of it consisted of singed and sawn down trees.

Looking to the proof we are of opinion that the learned district judge in decreeing damages at the rate of £50 per acre for 8 acres, did not award to the plaintiffs a larger sum than they were entitled to.

Affirmed.

P. C. Galle, No. 95,118. } *Marshall* v. *Hewagey Edoris.*

Resisting police officer in the execution of his duty—Ordinance No. 16 of 1865 secs. 52 and 75—endorsement of warrant—Ordinance No. 11 of 1868 secs. 150, 153 and 158.

Defendants were charged under sec. 75 of the Police Ordinance with resisting two constables while endeavouring to execute within the district of Galle a warrant issued by the justice of the peace of Balapitiya and addressed to the "police sergeant of Galle." The warrant did not purport to be endorsed by a justice of the peace of Galle, but bore the signature of the superintendent of police of the Southern Province. The defendants were convicted and they appealed.

Held, that the execution of the warrant was illegal, as it was not endorsed by a justice of the peace of Galle, and the prosecution therefore failed.

The constables having acted solely on the warrant and not on any information they had of the commission of a crime, and the proceedings having turned on the validity of the warrant, the Supreme Court refused to consider whether the constables were justified under sec. 52 of Ordinance No. 16 of 1865 in arresting the persons mentioned in the warrant as being suspected of a crime.

Grenier for appellants.
Ferdinands D. Q. A. for respondents.

23*rd June* 1876.—The conviction was set aside by the Supreme Court by the following judgments.

STEWART, J.—I am of opinion that the conviction should be set aside.

The defendants are charged with obstructing and resisting two police constables in the execution of their duty, in breach of the 75th clause of the Ordinance No. 16 of 1865.

The warrant in question was issued by the justice of the peace for Balapitiya for the arrest of a person charged with rape, the warrant being addressed to the police sergeant of Galle." The obstruction and resistance are proved to have taken place whilst the constables were endeavouring to execute the warrant within the district of Galle.

The warrant does not purport to be endorsed by a justice of the peace, but instead of such an endorsement, it bears the signature of Captain Graham, as superintendent of police for the Southern Province, that officer being an ex-officio justice of the peace for the province.

The Ordinance No. 11 of 1868 (see clauses 150, 153, 158) expressly enacts that an ordinary warrant issued by a justice of the peace, of one district, shall if required to be executed in another district be endorsed by the justice of the peace of the latter district.

It accordingly appears to me that to have rendered the execution of this warrant legal in the district of Galle, it ought to have been endorsed by a justice of the peace having jurisdiction therein. Here, not only was there an endorsement that Captain Graham was a justice of the peace for the district of Galle, but the subscription under his signature of his capacity as superintendent of police was calculated to shew that he acted in the latter and not in the former capacity.

The warrant not being addressed to the chief superintendent or provincial inspector of police (or the officer holding these offices under other special designations—see Ordinance No. 16 of 1867) in the mode prescribed by the 63rd section of the Ordinance No. 16 of 1865, it is unnecessary to consider its validity under that section.

The learned deputy Queen's Advocate endeavoured to support the conviction on the ground that constables are authorized by the 52nd section of the ordinance last quoted, to arrest any person who is charged on credible information, or whom they have reasonable ground to suspect of having been concerned in any grave or forcible crime or outrage.

It is manifest, however, from the whole tenor of the evidence and proceedings, that the constables in this case act on any information that they had received; but entirely on the warrant, with the execution of which they were entrusted by their superior officers.

CLARENCE, J.—I quite agree in the opinion of my learned brethren that the warrant as such was invalid within the Galle district, for want of proper endorsement by a justice of a peace.

With regard to the ulterior argument, that the conviction may be upheld on the ground that the constables were resisted in the execution of their duty in endeavouring to arrest a man whom they had reasonable ground to suspect of having been concerned in a grave crime. I do not think that the conviction can be supported on that ground either.

The argument, of course, is that the knowledge that a justice of the peace had granted a warrant against the party named on a charge of rape, though for technical reasons that warrant happened to have lost its validity the moment it crossed from the Balapitia into the Galle district, amounted to reasonable ground of suspicion.

It is not necessary for us to consider the question whether knowledge derived under such circumstances can, within the meaning of the 52nd clause of the Police Ordinance, constitute such reasonable ground of suspicion as would support a conviction for resisting the constable in the execution of his duty when endeavouring to arrest the party named in the warrant, because we have no evidence before us, in

the preent case, to show that these constables did or did not know, and we cannot, of course, supply deficiency in evidence in order to support a conviction. We are not entitled to presume more than that the constable knew that a justice of the psace warrant had been granted for the arrest of a certain individual, and justice of the peace warrants are granted on a very wide range of charges, including slight as well as grave ones.

ANDERSON, A. C. J.—I agree with my learned brothers in deciding that the judgments of the police magistrate must be set aside, and a judgment of acquittal entered, but I confine my judgment to a single ground.

With them I hold the warrant to be bad, and in my opinion that holding is decisive of the fate of the case.

The constables were armed with a document which had been delivered to them as a warrant, and throughout the entire proceedings they assume to act under that document as a valid warrant.

The judgment appealed against turns entirely on the question of the validity or the invalidity of the so-styled warrant. The magistrate in his judgment says, "I hold this warrant was a sufficient authority for the arrest of the accused Juanis. I find, therefore, all the defendants guilty of resistance to the constable in the execution of their duty."

Now such being the proceedings, and such the judgment appealed against, I am of opinion that we cannot properly entertain any question beyond that of the validity of the warrant, and that, that being decided adversely to the prosecution, the defendants are entitled as of right to an acquittal.

D. C. Matara, No. 28,393. } *Andris* v. *Seris Gajadira.*

Cause of action—estoppel—costs.

On conveying land to plaintiff, defendant omitted to except a planter's interest which then attached to the land. Plaintiff in a previous action obtained a decree of rescission of the contract and refund of the money, subject to his reconveying the land to defendant. But this he could not do, as he had created an incumbrance on the land in favour of a third party. The present action was brought to recover compensation for the wrongful act of the defendant. The district judge held the judgment in the previous case to be a bar to the present action. On an appeal by plaintiff,

Held, (CLARENCE J. *dissentiente*) that the judgment of rescission in the previous case was no bar to the present action for compensation, but only affected costs.

Grenier for appellant.
Ferdinands D. Q. A. for respondent.

The following judgments were delivered.

ANDERSON, A. C. J.—The defendant admits that in the conveyance which he gave to the plaintiff he omitted to insert words excepting the planter share, the right to which then existed and attached to the land sold to him.

In consequence of this omission not only was the value of the purchase lessened to the plaintiff, but the plaintiff relying on the defendant's conveyance, unsuccessfully defended a suit brought to recover the planter's share ; in which case the defendant, instead of admitting the error he had made, defended the plaintiff's right as his vendee. In such a state of circumstances the plaintiff's right of redress against the defendant in some form of action is clear,—and in the first instance he brought his action to have the contract rescinded praying for general relief, and obtained a decree of rescission ; but having unfortunately, on the faith of defendant's conveyance, disposed of a portion of the land he could not re-convey and the judgment be obtained in case No. 29,097 has been useless to him, but nevertheless the learned district judge relied on the proceedings in the case as evidence of acquiescence on his part and as forming a bar to the present action.

We do not take the same view of the case. The action for rescission might have been an ill judged procedure, and thinking it so we shall deal with it in considering the question of costs, and shall provide against its enforcement, but not viewing the judgment and proceedings of the plaintiff in that case as a bar to his right to recover compensation for the wrongful act of the defendant, the judgment of the district court in this case will be set aside.

It is consequently decreed that the judgment of the district court of Matara in case No. 28,393 be set aside, but without costs. Each party paying his own costs.

The judgment in case No. 29,097 is hereby declared inoperative, and this case is remitted back to the district court of Matara for assessment of plaintiff's damages.

The above judgment was concurred in by Mr. Justice Stewart.

CLARENCE, J.—In this case I have the misfortune to differ from the opinion of my brothers, and I need not say how probable it is that I may be wrong.

The defendant in 1872 purported to sell to plaintiff certain land, whereas a portion of the planter's share was not defendant's to sell. Plaintiff at once proceeded to mortgage the land and was of course perfectly justified in doing so. Finding afterwards that he could not obtain delivery of all that his purchase deed purported to transfer, he instituted case No. 27,097, D. C. Matara, in which he cited defendant to warrant his title and prayed a rescission of the contract and refund of purchase money in the alternative. The decree declared plaintiff entitled to rescission and refund on condition of his executing a re-conveyance free from incumbrance within thirty days. This he could not do having already encumbered it.

In D. C. No. 27,622, defendant sued plaintiff on a bond, which plaintiff had given defendant for part of the purchase money and obtained judgment. Plaintiff next sues defendant claiming compensation in respect of the different planter's share and the district judge has dismissed his libel holding the same barred by D. C. No. 29,097.

The defendant was of course in the wrong in purporting to sell to paintiff more than he had a right to convey, and the plaintiff was perfectly

justified in encumbering his purchase as soon as made, but having so encumbered it, the plaintiff made a great mistake in suing defendant for a rescission, which it was out of plaintiff's own power to complete. And yet at the time of that case plaintiff by his proctor announced that he contended for all that was mentioned in his purchase deed, a rescission, and would not accept a part of the property. Having placed it out of his own power to rescind, plaintiff should have sued for compensation, not rescission. He sued, however, deliberately for rescission, knowing that he himself could not carry out a rescission, and he obtained a decree for rescission, which he is unable, himself, to carry out. He now sues defendant for what he should have claimed in the first suit, viz. compensation. I do not put it that the judgment in D. C. No. 29,097 was technically a bar to the present action, but I think that on the principle nemo pro eadem causa bis vexari debet, the present suit ought not to have been brought. If, however, as a matter of indulgence the defendant be permitted now to sue for that compensation for which with his eyes open to his inability to accept any other, he declined to ask in his former suit, I am of opinion he should pay all the costs of the second suit.

D. C. Kandy, No. 68,121. } *Leechman & Co* v. *Southern Quilty & Co.*

Arrest in mesne process—affidavit of plaintiff—Ordinances No. 15 *of* 1856 *and No.* 18 *of* 1864*—practice.*

Where a warrant of arrest in mesne process was issued, upon the affidavit of the plaintiff's attorney and not of plaintiff himself who was in the island, and that of a third party,

Held that the issue of the warrant was irregular; and the plaintiff himself having subsequently sworn a supplementary affidavit in the same terms as the previous affidavit of his attorney,—

Held, that the plaintiff's subsequent affidavit did not validate the original issue of the warrant.

Ferdinands D. Q. A. for appellant.

Cayley Q. A. (*Grenier* with him) for respondent.

30*th June* 1876.—The facts of the case fully appear in the judgment of the Supreme Court which was delivered by STEWART, J.,—

This is an action instituted by the plaintiff, who is described as trading as Leechman & Co. against the defendant.

On the 19th May 1876 a motion was made in the district court for the arrest in mesne process of the 2nd defendant grounded on two affidavits, the first of which was from C. A. Leechman described as the attorney of the plaintiff, who deposed that the plaintiff has a sufficient cause of action, that he has no security to meet the same, and that the 2nd defendant was about to quit the island. The other affidavit was from a third party, who swore that the 2nd defendant was about to leave Ceylon.

The above motion of the plaintiff was allowed by the district judge on the same day. But the warrant of arrest, as well as the requisite bond, bears date the next day, viz. 10th May.

No steps seem to have been taken to enforce the warrant of arrest up to the 9th June, when upon the motion of the plaintiff's proctor, the warrant was extended and re-issued. On the 12th the defendant was ordered to appear to be examined on the 16th, and on that day after his examination, and the disposal of another motion, his advocate moved that the order allowing the warrant of arrest be discharged, and the warrant recalled. On this day a supplementary affidavit from the plaintiff himself was produced to the same effect as that of his attorney.

This motion of the defendant's advocate was refused and the present appeal is from the order thereon of the learned district judge.

It was contended on behalf of the appellant,—

1st. That the issuing of the warrant was irregular, inasmuch as there was no affidavit of the plaintiff as required by the 1st rule of the Ord. 15 of 1856.

2nd. That the affidavits in themselves are insufficient and do not meet the requirements of the rule.

3rd. That the order extending and re-issuing the warrant was invalid.

As regards the 1st point the rule provides—"If a plaintiff in any action, either at the commencement thereof, or at any subsequent period before judgment, shall by his own affidavit and examination if necessary, satisfy the district judge that he has a sufficient cause of action against the defendant to the amount of ten pounds or upwards, or has sustained damage to that amount, and that he has no adequate security to meet the same, and that he does verily believe, and if he shall show by the oath or affidavit of any third person that there is probable cause for believing that the defendant is about to quit the island, unless he be forthwith apprehended, such judge may order a warrant to arrest the body of the defendant until he shall give bail" &c.

It was argued by the learned Queen's Advocate, who appeared for the respondent, that an affidavit, be it from plaintiff or attorney, was not indispensable,—it being under the rule, in the discretion of the district judge to require or not an affidavit as may be deemed necessary, the words "if necessary" qualifying both affidavit and examination. We are however of opinion that such a construction is untenable, the words "if necessary" appearing to us from the context evidently only to apply to the word "examination" which immediately precedes them—such examination being obviously provided for with the view of the elucidation of any obscurity in the affidavit, or in case of other sufficient cause. To hold, moreover, that an affidavit of the plaintiff (or of his agent, where such is admissible) is not indispensable, would be to come to a conclusion directly at variance with long and well established practice.

We have further the amending Ordinance No. 18 of 1864, which clearly was enacted on the basis, that the plaintiff's own affidavit was essential under the Ordinance No. 15 of 1856, the new ordinance carefully making provision "that the plaintiff's own statement or affidavit . . . shall not indispensably be necessary for obtaining a warrant" in certain specified cases.

We have next to consider whether the affidavit of the plaintiff's attorney on which the warrant of arrest was granted, can be accepted under the Rules in lieu of the plaintiff's own affidavit, the plaintiff being in the island.

Now by the first Rule of the Ordinance 18 of 1864, three exceptions are made to the general provision already referred to which requires the plaintiff's own affidavit, viz.

A. Where the action is brought by the Queen's Advocate, in which case the affidavit may be made by some officer of the Crown.

B. Where the action is brought by a corporation, the affidavit may be made by the manager &c.

C. Where the plaintiff is absent from the island, or is unable from bodily or mental infirmity to make the required statement, or affidavit: and in such case it is provided that "the district judge may receive, instead of a statement or affidavit by the plaintiff, the affidavit of any agent of the plaintiff having lawful authority." The plaintiff was not only at the time in the island, but the proxy authorizing the institution of the action is in his name. It is manifest that this case does not fall within any of the exceptions. The maxim "expressio unius est exclusio alterius," clearly applies and accordingly we are of opinion that the affidavit of the attorney of the plaintiff on which the warrant of arrest in mesne process was issued was inadmissible, and that the proceedings founded thereupon are invalid. We also think that the respondent's subsequent affidavit of the 16th June cannot affect the question whether the warrant was or was not rightly ordered to be issued on the 9th May.

Our judgment being in favor of the appellant on the first point urged on his behalf, it becomes unnecessary to enter upon the other questions.

Set aside, and order for warrant discharged.

C. R. Tangalla, No. 17,849. } *Thomis Hami* et. al. v. *Desinge Juan* et. al.

Interest in land—Ordinance No. 7 of 1840—*cultivator's share—compensation for work and labour done.*

A person, who cultivates the field of another on a verbal agreement, can claim a cultivator's share as compensation for work and labour done.

C. R. Kandy 31530, 8th Dec. 1864, followed.

There was no appearance of counsel in appeal.

The facts of the case are set out in the following judgment of the Supreme Court.

4th July 1876.—CLARENCE, J.—Plaintiffs allege that at defendants' request, they repaired a Tank-dam, on defendants' verbal promise to allow plaintiffs to cultivate a certain extent of the field, and appropriate the "cultivator's share" thereof as remuneration for repairing the dam.

Plaintiffs further allege that they did repair the dam, and cultivate the land, but that defendants appropriated all the produce without allowing plaintiffs to have the cultivator's share, and plaintiffs claim Rs. 16·50 damages as for 7 pelas and 5 kurunies of paddy. The commissioner non-suited the plaintiffs for want of a notarial agreement under the Ordinance No. 7 of 1840. But if plaintiffs repaired a dam at defendants' request, plaintiffs are entitled to compensation on a quantum meruit. And again if defendants put plaintiffs in possession as cultivators and plaintiffs did cultivate accordingly, plaintiffs can claim a cultivator's share as compensation for work and labour done. On either of these states of facts, if proved, plaintiffs would be entitled to recover compensation. The defendants deny the truth of plaintiffs allegations, and the case must, therefore, go back for further hearing. Costs will be costs in the cause.

The law governing such cases as the present has been fully indicated in C. R. Kandy No. 31,530, 8th December 1864. (Ram. 1863-68, p. 129.)

D. C. Colombo, No. 3.

In the matter of a deed of arrangement or composition with creditors made by *Duncan Anderson & Co.* *Henry Bishop*, trustee under the liquidation by arrangement of the affairs of *John Anderson*, *John Duncan* and *George Grey Anderson*. Both parties appellants.

Partnership—liquidation—effect of bankruptcy in one country on property in another—jurisdiction—deed of composition, requisites—Ordinance No. 7 of 1853, *secs.* 134 *and* 136.

Two firms consisting of the same three persons carried on business in London and Colombo respectively under two different names and styles. The property of the Colombo firm consisted entirely of moveables. On the 29th July 1875 one of the partners, for himself and as attorney for the others by virtue of a power dated 22nd June 1875, filed a petition for liquidation of both firms in the London Court of Bankruptcy, and on 19th August 1875 a liquidator was appointed.

On 21st September 1875 the trustee under a deed of arrangement dated 18th August 1875, purporting to be between the members of the partnership under the Colombo style and 6-7th of the creditors, certified the same to the district court of Colombo under sec. 136 of Ordinance No 7 of 1853, and the district court declared it to be in accordance with sec. 134. But it appeared that one of the partners did not in fact sign the deed of arrangement. Upon subsequent motion in the district court on behalf of the London liquidator and several English creditors, the certificate of the Ceylon trustee and proceedings founded thereon were discharged as irregular.

Held, (it being proved that the London and Colombo firms were one and the same partnership) that the proceedings in the London Court of bankruptcy being prior in date, the London and not the Ceylon trustee was entitled to preference, such priority vesting in the former the property, being moveables, of the Colombo firm as well, and that the jurisdiction thus first exercised by the London Court should, in the interests of all concerned, be exclusive.

Held also, that even if the Ceylon deed of arrangement had been duly signed by all the partners, the two firms being one partnership, signature by 6-7th of the creditors of the Ceylon firm did not satisfy the requirements of sec. 134 of the Ordinance No. 7 of 1853, and that therefore, independently of the steps taken in London, the deed of 18th August 1875 was ineffectual for the purpose of liquidation by arrangement of the Colombo firm.

Layard (*Browne* with him) for Henry Bishop, trustee appellant.
Grenier (*Ferdinands D. Q. A.* with him) for insolvents appellants.

6*th July* 1876.—The judgment of the Supreme Court was delivered by STEWART, J.,—

The facts of this case are clearly set out in the able and elaborate judgment of the learned district judge.

The first proceeding before the district court of Colombo was on the 21st September 1875, when upon a certificate presented by George Macgregor, dated the first of that month certifying that a deed of arrangement or composition produced therewith, dated August 18th preceding had been entered into between John Duncan, John Anderson and George Grey Anderson carrying on business in Colombo under the style or firm of Duncan Anderson & Co., and their creditors, signed by and on behalf of 6-7th in number and value of the said creditors whose debts amount to ten pounds and upwards, and that he the said George Macgregor had been appointed trustee and liquidator under the said deed, "the district court declared that such deed of arrangement dated the said 18th day of August 1875, has been duly signed by or on behalf of such majority of creditors as required by the insolvency Ordinance 7 of 1853." On the 8th day of November 1875, a motion was made on behalf of Mr. H. Bishop, trustee under liquidation by arrangement in London of the affairs of John Anderson, John Duncan and George Grey Anderson of Philpot Lane, in the city of London, merchants trading under the style or firm of John Anderson & Co., and of Colombo, trading under the style or firm of Duncan Anderson & Co., and on behalf of several English creditors, for a rule on John Duncan and George Macgregor to show cause why the deed of arrangement of the 18th August, and the proceedings founded on the said deed should not be quashed as irregular for reasons stated in the affidavits filed with the motions.

The rule was allowed, and the parties having duly appeared and been heard by counsel, the learned district judge decreed as follows:—"That the certificate and proceedings of this court dated the 21st September 1875, will be discharged on the grounds, (1) that the deed therein referred to has not been signed by 6-7ths in number and value of the creditors of the parties designated debtors, (2) that the deed has not been signed by John Anderson, as erroneously stated in the said deed, certificate and proceedings, nor by any one duly authorized to execute it on his behalf. This order only applies to its own certificate and proceedings and is not intended to effect and be considered by itself..

From this judgment Mr. Duncan has appealed, and so have Mr.

Bishop and the English creditors. No appeal has been taken by Mr. Macgregor, the Ceylon liquidator.

1. The first and main issue for determination on the argument before us is as to the unity or otherwise of the London and Colombo firms.

2. Supposing the unity to be established, what effects have the proceedings in London on the partnership in Colombo.

3. Ought the district judge to have cancelled the Ceylon deed of arrangement, assuming it not to be in conformity with our insolvency Ordinance.

1. With respect to the first point we are of opinion that it has been clearly established that the Colombo firm was only a branch of the London house of John Anderson & Co. The partners in both were the same, the business of the same nature, the capital one, and the ratio of profits of the partners in either place the same.

On the 1st January 1873, we find the London firm notifying by the letter, the admission of Mr. John Duncan, as a partner in this firm, thus making its constituents to consist of John Anderson, John Duncan and George Grey Anderson. Simultaneously with this notice, another circular is issued by John Anderson & Co., dated at Colombo, announcing as follows :—"We have established ourselves as merchants and commission agents, at this port under the firm and style of Duncan Anderson & Co." It is manifest therefore that from the very outset it was the London firm that established itself here, though under a modified designation, the partners in both places being identical. Further we have the profit and loss account of what is styled the new firm (consisting of members as above) for the years ending December 31st 1873 and 1874, in both of which the Colombo firm is described as the "Colombo branch." The power of attorney dated June 22nd 1875 to which we shall have occasion to refer hereafter, also confirms the conclusion that there was in fact, but one partnership. In this document we find Messrs. Duncan and G. G. Anderson, when appointing their London partner John Anderson their attorney for the purpose of liquidating the two firms, expressly stating that they were "lately carrying on business jointly with John Anderson of ..... in London under the style or firm of John Anderson & Co., and in the said Island (of Ceylon under the style or firm of Duncan Anderson & Co.)

2. We agree with the views of the learned district judge as to the effect of a commission of bankruptcy in one country upon the moveable property of the bankrupt in another. In addition to the authorities cited in judgment, see Knapp's Priv. C. Rep. p. 259.

In considering whether the London or Colombo Liquidator (supposing the appointment of the latter to be valid), should have priority it is essential to have regard to the dates of the several steps in the proceedings.

The first act in priority of time is the power of attorney of June 22nd 1875, already alluded to, by which Messrs. Duncan and G. G. Anderson appointed Mr. John Anderson their attorney "to appear before the court of bankruptcy in London or any other court ..... and in their respective names to sign and deliver any and every petition, declaration ..... for the purpose of winding up their business in bankruptcy &c."

In pursuance of this power a liquidation of both firms was presented to the London Court of bankruptcy on the 29th of July 1875 by John Anderson for himself and on behalf of John Duncan and by George Grey Anderson, who had by that time returned to England. Subsequently agreeable to the provisions made in that respect, a meeting was held in London on the 19th August, and Mr. Bishop appointed liquidator, the certificate of such appointment being registered on the 11th Sept. 1875.

These proceedings were all consecutive and in due order, and must in our opinion be taken to have relation one to the other; and consequently to be looked upon as originating (as respects two of the partners) if not on the 22nd June the date of the Ceylon power of attorney at any rate as regards all on the 29th July, when the petition for liquidation of both firms was filed in the London Court of bankruptcy. See 6th and 11th sec. of the English Bankruptcy Act 1869 and *exparte* Duignan re Bissel, 19 W. Rep. p. 711—where it was held that the filing of a petition for liquidation is an act of bankruptcy available for adjudication and the title of the trustee in bankruptcy relates back to the time of the filing of the petition whether adjudication ensue or not.

The Ceylon deed of arrangement was only signed on the 18th August, at which time an act of bankruptcy had already been committed incapacitating Mr. Duncan, whether for himself or as attorney of his partners, from entering into any valid engagement.

Accordingly if we have to decide on the bare point of priority, it appears to us that the London and not the Ceylon trustee would be entitled to preference, such priority vesting on the former the property (the Colombo firm has only moveable effects) of both firms from considerably before the 18th August. We also think that the jurisdiction thus first exercised by the London Court of bankruptcy should, in the interest of all concerned, be exclusive so as to prevent confusion and possibly conflict of decisions between courts of different countries. See *Bank of Scotland* v. *Cuthbert and Rose*, pp. 47-8. In view however of the opinion we have formed on the 3rd point, it was scarcely necessary, except on general grounds, to enter upon the above questions, there being in fact no insolvency proceedings whatever now pending in the district court of Colombo affecting the bankrupts.

3rd. It is not disputed that the deed of arrangement of August 18th does not bear the signature of 6-7ths of the creditors of the conjoint firms, which, as already stated, we consider to be one partnership. And it also appears, that though purporting to be signed by all the three partners, Mr. Duncan had no legal authority to sign the deed on behalf of John Anderson, the power of attorney under which Mr. Duncan acted being insufficient. We have therefore no hesitation in holding independently of the steps taken in London, that this deed is ineffectual for the purpose mentioned in the 134th section of the Ordinance No. 7 of 1853, and that the learned district judge was right in cancelling his certificate of 21st September 1875, containing a declaration obviously made in error under a misconception of facts. It is difficult to perceive, if the deed be invalid for attaining the objects with which it was entered into viz., the liquidation

by arrangement of the Colombo firm, how it can be of avail for any other purpose. But we are not prepared to say that the learned district judge was wrong in confining his decree to only what was strictly pending before him, and not on a mere motion without notice to the creditors, who are parties to the deed, summarily quashing the document. He under a mistaken conclusion made an order and that order he has cancelled.

Judgment affirmed, parties bearing their own costs in appeal.

D. C. Galle, No. 36,921. } *Tomis* v. *Ahamado Lebbe Markar.*

Injunction—prescription—Ordinance No. 22 of 1871, sec. 10—malice and want of reasonable and probable cause, evidence of.

The plaintiff and defendant were co-owners of a land. In a previous suit present defendant obtained an *interim* injunction in February 1869, upon an affidavit alleging that plaintiff who was entitled to "a small share" was building a house on the "best portion" of the land. At the trial in 1873, however, he made no attempt to prove that plaintiff was building in the best portion or in any way beyond his rights, and the district court dissolved the injunction. That judgment was affirmed by the Supreme Court in appeal in February 1874. The present action was raised in August 1874 against defendant for maliciously and without any reasonable or probable cause applying for and obtaining the injunction. The district court gave judgment for plaintiff, and defendant appealed.

Held, that the cause of action accrued to plaintiff not upon the issue of the injunction but upon its dissolution, and that therefore the action was not prescribed.

Held also, that the defendant not having attempted to prove at the previous trial the allegations upon which he had obtained the injunction, malice and want of probable cause may properly be inferred.

Ferdinands D. Q. A. for appellant.
Browne for respondent.

The following judgment of the Supreme Court fully sets out the facts of the case.

7th July 1876.—CLARENCE, J.—Plaintiff claims damages, for that defendant "maliciously and without any reasonable or probable cause," obtained in a district court case an injunction restraining the completion of a building in course of execution in a certain land of which defendant owns 1-25th and plaintiff 2-5th in undivided shares.

The injunction was obtained in February 1869. In August 1873, the cause came to a hearing, when the district judge dissolved the injunction adjudging the shares of the land, and holding that the present plaintiff was not proved to have been building beyond his right to build on a piece of land of which he held an undivided share. In February 1874, the Supreme Court affirmed that decision, and the present action was

instituted in August following The district judge held the plaintiff entitled to Rs. 100 damages, and against that decision the plaintiff appeals.

The defendant's contention, that the claim is barred, for that the cause of action was the issue of the injunction in 1869, more than two years before the institution of suit, is clearly untenable. It is true that the injunction issued in 1869, but so long as it subsisted there was nothing to show that it was beyond the defendant's rights; in fact it may be said, upon the principle applied in *Whitworth* v. *Hall*, 2 B. and Ad. 698, to the issue of a commission of bankruptcy, that its very existence was evidence of its having been issued on probable cause. Until the injunction was dissolved, the plaintiff had no title to bring the present action. The action, therefore, is clearly not prescribed.

It remains to consider the main question in the case, whether the defendant obtained the injunction maliciously and without reasonable or probable cause. On this point the district judge has not recorded the reasons for his decision.

Now what are the facts? The present defendant originally filed his libel against one Juanis, a son of the present plaintiff, alleging that the defendant owned 2-5ths of the land, and Juanis who was entitled to "a small share of the land, "had prepared a site and was constructing a house on the best portion of the garden, thereby seriously damaging the same and considerably incommoding the [then] plaintiffs in the use and possession thereof." The injunction was obtained upon an affidavit, alleging *inter alia*, "that should the building be constructed, the plaintiff will sustain irremediable injury."

It appears that Juanis was building the house under the instructions of his father the present plaintiff, who was the owner of the 1-25th share. It was contended for the defendant in the present case that "reasonable and probable cause" might be inferred from the circumstance that the building was being carried on, not by the father who had a share in the land, but by the man Juanis, who had none. But this is a mere quibble. The whole proceedings show that the defendant knew that the building was being executed by or on behalf of the owners of the small share in land,—in fact, that was the allegation in his libel. We, therefore, take the case on the footing of an injunction obtained by defendant against the owner of the 1-25ths share, that is, the present plaintiff.

Granting that a single individual share-holder has a right to build on the common land, no doubt if the 1-25th share-holder be interrupted by injunction in his building, and made to hold his hand, till the question be decided, he suffers loss; but if the question, whether the building was not in excess of his rights was fairly open, no doubt it may show that his loss may be found to be of the character of *damnum absque injuria*, the doubts according to the benefit of the other party in such an action as the present.

Now in this case we have some guide to the circumstances under which the defendant applied for the injunction. We can extract his allegations and his proofs. The allegation on which the injunction was obtained is very distinct, that the building was being constructed on the best portion of the garden seriously damaging the same; and the defendant would

sustain irremediable injury. When the case came on to trial, the defendant adduced no evidence whatever to show that the 1-25th share-holder was building on the best part of the garden, or taking up too much ground with his building, or in any way encroaching thereby on the defendant's rights ; his evidence was simply confined to proving his own title to 2-5ths whereas the present plaintiff and other parties admitted her right as to 1-5th only, and at the trial of the present case nothing whatever was put forward in justification of defendant's action in obtaining the injunction, except the mere quibble before mentioned about Juanis. Now when a party obtains the *interim* interference of a court upon certain distinct statements, and in the subsequent proceedings on the merits, (to say nothing of proceedings in an action like the present) makes no attempt whatever either to subtantiate those statements or account for his having made them, the reasonable inference is that those statements were made without foundation, and in the case before us our inference is that when the defendant stated to the district judge that the building was on the best part of the garden, that it would seriously damage the garden and would occasion irremediable injury to the defendant, he had nothing more to go upon than the fact (which would have been quite insufficient to induce the district judge to grant an iujunction) that the owner of 1-25th share was erecting a building in the garden. It, therefore, appears to us that the defendant deliberately obtained the injunction by false statements which he made gratuitously without foundation, and this is tantamount to saying that he acted, in a legal sense, "maliciously and without reasonable and probable cause."

Affirmed.

C. R. Batticaloa, No. 7,408.

Cause of action—Secretary of District Court, liability of,—stamp money recovered in crown suit—Ordinance No. 11 *of* 1861.

The crown in this case sued the defendant, secretary of the district court of Batticaloa, for Rs. 5, being stamp money recovered in a crown suit in that court, but which had not been forwarded to the commissioner of stamps as provided by Ordinance No. 11 of 1861. Defendant pleaded that, by a certain distribution of the work of the court, all monetary transactions were entrusted to the head clerk of the court to whom the money had accordingly been paid, but adduced no evidence in support of this defence. The commissioner gave judgment for the crown. On appeal by defendant.

Held, that defendant was liable to account for the money.

D. C. Batticaloa 47 A, reported p. 248 *supra*, distinguished.

Grenier for appellant.

Ferdinands D. Q. A. for respondent.

The Supreme Court in its judgment observed as follows :

The defendant and appellant, late secretary of the Batticaloa district

court is sued by the Queen's Advocate on behalf of the crown for Rs. 5·00 money received by him as crown stamp money recovered in a Crown suit wherein the Crown obtained judgment and which it was contended defendant should have paid to the chief commissioner of stamps, but did not.

It is proved that the Deputy to the Queen's Advocate at Batticaloa having received the Rs. 5 stamp money in a crown suit, wherein the crown had got judgment, paid the money to defendant. The defence set up by defendant's answer is, "that by a certain distribution of work of the district court of Batticaloa, the then head clerk Mr. de Neise was entrusted with the conduct of all monetary transactions, and accordingly the amount in question was paid into his hands and received by him for the purpose of forwarding the same to the commissioner of stamps." No evidence was called in support of this defence.

The transaction in question took place before the passing of the present Stamp Ordinance 1871 and is therefore governed by the old Ordinance No. 11 of 1861. In part II of the schedule to that ordinance, the portion referring to district court suits, it is directed that stamp moneys such as those in the present case shall be paid "to the commissioner of stamps or to the secretary for and on behalf of such commissioner."—thus rendering it the secretary's duty to remit moneys so received to the commissioner.

This case therefore stands on a different footing from the district court Batticaloa case, against the same defendant recently decided by this court, in which this court held that the defendant's liability to account for certain moneys paid into court in a testamentary case had not been established. In that case there was nothing to show what were the duties of the defendant and by consequence what were his liabilities for neglect of those duties.

In the present case the duty of the defendant has been prescribed by ordinance. At the trial no evidence whatever was adduced for the defence, and as the record stands, the crown is entitled to judgment.

[The rest of the judgment deals with an affidavit submitted in appeal by defendant's counsel, and concludes by sending the case back for further proceedings.]

D. C. Chilaw, No. 20,307. } *Karpen Chetty* v. *Sultan Saibu* et. al. Ex parte *Sevettar Ossen Lebbe* claimant.

Fiscal's sale—sale of moveables—misdescription of property—power of court to set aside sales of moveables for irregularity—Fiscal's Ordinance —common law.

The courts in Ceylon have the power inherent in them at common law to rectify mistakes committed by the fiscal in selling moveables, notwithstanding the silence of the fiscal's ordinance on the subject.

Cayley Q. A. for appellant.

Ferdinands (*Grenier* with him) for respondent.

The facts of the case fully appear in the following judgment of the Supreme Court which was delivered by CLARENCE, J.,—

21*st July* 1876.—This was an appeal from the decision of the district judge discharging a rule obtained by appellant calling on the respondent the execution creditor in the suit to show cause, why the sale of certain ebony timber sold by the fiscal should not be set aside and the timber delivered to appellant, a stranger to the suit, who claims that the timber is his property. The district judge is right in declining, on the argument in this rule, to find that the timber was appellant's property, and this part of appellant's contention was not pressed in this court, appellant undertaking to institute a separate action to try his right to the timber.

We think however that the sale of ebony should under the circumstances be set aside. The evidence shows that by a mistake of the fiscal's department, the ebony was sold as 56 tons instead of 86 tons, a misdescription which could hardly fail to prejudice the sale. It is true that the fiscal's ordinance, while it prescribes the manner and extent in which mistakes in sale of immoveable property may be corrected, is silent on the corresponding point with regard to moveables. But we cannot regard this silence as repealing by implication the power inherent in the courts at common law of rectifying the results of a mistake made by the fiscal in selling the moveables. Under the circumstances our doubts have been whether the appellant as a mere claimant of the property in question, whose claim may or may not prove well founded, has *locus standi* to make his present application. Considering the injury appellant would probably sustain in the event of his succeeding in his claims, we think the sale should be set aside on appellant's instituting a separate suit to establish his right to the timber within a fortnight of notice of this order. Costs of suit in the court below and of this appeal to abide the result of appellant's separate action. In default of appellant's instituting his action within the time above specified, this appeal will be dismissed with costs.

D. C, Galle, No. 38,906 } *Chitterenaike* v. *Siman* et alios.

Partition—decree for sale—Ordinance No. 10 *of* 1863.

In a suit for partition of land, a decree of sale should be made only when partition is impracticable, the mere fact of the land being small not being a sufficient ground.

Grenier for respondent.

The following is the judgment of the Supreme Court.

28*th July* 1876.—ANDERSON A. C.J.—This was a partition case, but the district judge considering the property to be too small in extent, decreed a sale instead of a partition. Against this the plaintiff has appealed, and as we think that a decree of partition should have been made unless it could be shewn that a partition was impracticable, the order of sale will be set

aside, and the case sent back to the district court in order that evidence may be taken on the question of impossibility or otherwise of the partition prayed for, as, if it is found to be practicable, a decree of partition should be made.

Order for sale set aside and case referred back for further enquiry, hearing and adjudication.

The question of costs is reserved.

P. C. Haldummulla, No. 3,615. } *Campbell* v. *Perumal.*

Master and servant—harbouring a deserting cooly—notice in writing—Ordinance No. 11 *of* 1865 *sec.* 19.

The Ordinance No. 11 of 1865 sec. 19 enacts: "any person who shall wilfully and knowingly seduce or attempt to seduce from his service or employment any servant or journeyman artificer, bound by any contract to serve any other person or persons ..... or who shall wilfully and knowingly harbour or conceal any servant or journeyman artificer who shall have absented himself without leave from the service of such other person to whom he is so bound, or who shall wilfully and knowingly retain in his service any servant or journeyman artificer bound under any contract to serve any other person after receiving notice in writing that such servant or journeyman artificer is so bound as aforesaid, shall be guilty of an offence &c."

Held that in a charge under the above section for harbouring a deserting cooly, it is not necessary to prove that defendant received notice in writing of the contract of service, that requirement attaching only to a case of retaining in a person's service a servant bound under contract to another.

The defendant was charged with wilfully and knowingly harbouring a cooly who had deserted the complainant's service and was convicted, and he appealed.

Grenier for appellant.

In setting aside the judgment of the police court and sending the case back for evidence of knowledge on the part of defendant of the previous service of the cooly, the Supreme Court, *per* CLARENCE J., observed as follows:

It was argued in appeal that defendant could only be convicted under the 19th clause of the Ordinance on a charge of wilfully and knowingly harbouring a deserting cooly upon proof that defendant received notice in writing of the contract of service under which the cooly was bound.

The Supreme Court is of opinion that the words occurring in the clause 19 of the Ordinance "after receiving notice in writing that such servant or journeyman artificer is so bound as *aforesaid*" apply only to the offence of retaining in service servants or journeymen already bound to another master and not to the three previously mentioned offences of seducing

taking into service and harbouring such servants or journeymen. We cannot think that the legislature intended to enact that a person who wilfully and knowingly seduces a servant from his master's service, or wilfully and knowingly takes into his own service or wilfully and knowingly conceals a servant deserting from a master's service, is not open to conviction unless such person received written notice of the service. A master cannot tell before-hand who may be going to seduce his servant or harbour or take into employ servants who desert from him, nor can he in anticipation serve written notice on every individual who might by possibility do those things. But he can, after learning that a servant who has absconded from his service, has taken service with another person, send written notice to that person and so render that person amenable to the penalties prescribed, should he after such notice persist in retaining the servant, and this is all which is in our opinion the legislature intended to enact. The structure of the paragraph is also in our opinion more consonant with this construction than the opposite one.

P. C. Ratnapura, No. 668. } *Sandicon* v. *Solla Muttu.*

Master and servant—refusal to attend at the place of work after the expiration of a term of imprisonment awarded for desertion—termination of contract—Ordinance No. 11 *of* 1865 *secs.* 11 *and* 24.

The defendant had been convicted in a previous case on a charge of desertion and sentenced to a term of imprisonment, at the expiration of which he refused to return to service, and he was thereupon charged under sec. 11 of the Ordinance.

The magistrate acquitted the defendant on the ground that there was no order made in the previous case in terms of sec. 24 of the Ordinance, that no part of the imprisonment should be considered a part of the period of service.

On an appeal by the complainant,

Held, that the charge was sustainable, so long as there was no evidence of any determination of the contract of service since the previous conviction.

Browne for appellant.

5*th September* 1876.—CLARENCE, J.—Respondent, a cooly in the service of appellant, was convicted on a charge of desertion and sentenced to a term of imprisonment. Respondent was required by appellant to return to the estate, but refused to do so. Appellant thereupon preferred the present charge under clause 11 of the Ordinance No. 11 of 1865. The police magistrate held that respondent was entitled to an acquittal in consequence of his (the police magistrate's) having omitted to record the order mentioned in the 24th clause of the Ordinance, that no part of the term of imprisonment be considered a part of the period of service. This was wrong. The cooly was in the service of appellant when convicted and there is no evidence of any determination of the contract of service.

Set aside, and defendant found guilty.

C. R. Kandy, No. 2,652. } *Malhami* v. *Mudalihami.*

Cause of action—injury caused by one animal to another—action for compensation.

Defendant's buffalo chased the plaintiff's buffalo and drove it on to the Railway line, where it was killed by a passing train.

Held that plaintiff was entitled to compensation.

Dornhorst for appellant.

Grenier for respondent.

5th September, 1876.—The judgment of the Supreme Court was delivered by CLARENCE, J.,—

The finding of the commissioner on the facts, which we have no reason to suppose erroneous, amounts to this—that defendant's buffalo chased plaintiff's buffalo and drove it on the railway which was fenced, where it was killed by a passing train. Under these circumstances plaintiff is entitled to compensation (See 25,869 C. R. Jaffna, 29th October 1860 and 23,568 D. C. Kandy, September 11th 1851, Austin 153). Defendant's animal attacked plaintiff's, which in its fright broke through the railway fence. It was thus the act of defendant's animal, for which defendant is responsible, which drove plaintiff's animal on to the railway within danger from the trains for which the railway is constructed. The order non-suiting plaintiff is set aside and judgment entered for plaintiff for rupees twenty five and costs.

P. C. Matala, No. 12,443. } *Gordon* v. *Allegan Kangani.*

Master and servant—disobedience of orders—evidence—Ordinance No. 11 of 1865.

A cooly employed on an estate in one district is not liable under the Ordinance for disobeying an order to work in another estate in a remote district, without evidence of a general engagement.

The defendant was charged with wilful disobedience of orders under sec. 11 of Ordinance No. 11 of 1865, and was convicted.

Van Langenberg for appellant.

The following judgment of the Supreme Court sets out the facts of the case.

15th September 1876.—STEWART, J.—According to evidence the defendants were employed as coolies on Ambokke estate in Matala, and it would appear that they were liable also to work on Macculuso estate in

the same district. This alleged disobedience consists in not proceeding to Campion estate at the further end of Dickoya. The evidence does not disclose such a general engagement as rendered them liable to service at so remote a place from Matala as Campion estate. See Grenier's Reports, (P. C.) 1873, p. 13, 14 and 15.

Set aside and defendant acquitted.

P. C. Badulla, No. 18,939. } *Gray* v. *Adaikan Kangani.*

Master and servant—harbouring a deserting cooly—Ordinance No. 11 *of* 1865 *—evidence.*

Where a kangani on an estate in obedience to orders of his employer received into his gang and superintended the labour of a cooly who had deserted from another estate to the knowledge of the kangani,—

Held, that this did not amount to "harbouring," within the meaning of the ordinance.

VanLangenberg for appellant.
Ferdinands D. Q. A. for respondent.

The facts of the case are set out in the following judgment of the Supreme Court.

6*th October* 1876.—CLARENCE, J.—The appellant is charged under the 19th clause of the Labour Ordinance with wilfully and knowingly harbouring on the 8th March five coolies deserted from Beckington estate.

The facts proved are these. Appellant for more than one year employed on Beckington estate, and knew the coolies in question. Appellant left Beckington in January or February: the evidence is not more precise than this. It is found that the five coolies in question deserted from Beckington. As to one of them it is proved that he deserted about 4th March after the appellant had left Beckington. Three others proved to have deserted between about 20th January and 28th February so that as to these three it is uncertain, on the evidence, whether or not appellant was on Beckington, when they deserted. On the 8th March, the complainant, the superintendent of Beckington estate, found the five coolies working on a native estate, "Gallabodde Ella," "two or three miles from Beckington" under the supervision of appellant. The five coolies were charged with desertion, but returned to complainant's service.

In the case of the cooly who deserted in November 1875, when appellant was still on Beckington, the appellant may fairly be presumed to have known of his desertion. As to the other coolies the evidence is not sufficient to raise the same presumption. Owing to the contiguity of the estates to one another, the case is one of considerable suspicion as against appellant in this respect, but there is not enough to convict him. The coolies themselves were not called as witnesses, nor was the owner of Gallebodde Ella, who according to complainant, had been subpœned, but did not attend.

Under these circumstances the charge fails as to one of the coolies in question, and with regard to the fifth the evidence is not enough to convict appellant of harbouring within the meaning of the ordinance.

If a kangani, knowing a cooly to be a deserter, deliberately brings him on to another estate, and obtains him employment in his own gang, that would I think be harbouring, but if the kangani merely obeyed an employer in receiving into his gang and superintended the labor of the cooly, I do not consider that that would be "harbouring" within the meaning of the ordinance, even though the kangani might know the cooly to be a deserter. The evidence in the present case is quite consistent with the latter alternative.

For these reasons the conviction is set aside and the appellant acquitted. The case is one of considerable suspicion, but the evidence is not enough to sanction a conviction.

P. C. Colombo, No. 32,047. } *Madesamy Assary* v. *Kanen.*

Judgment, revival of—prescription of judgments—Ordinance No. 8 of 1834 and Ordinance No. 22 of 1871—Roman Dutch Law—practice.

Where a judgment was pronounced on 22nd January 1862 and nothing was done till 18th October 1875, when a motion for a *rule* to revive judgment was made and resisted by defendant on the ground of prescription,

Held that the Ordinance of 1834, and not that of 1871, applied to this matter, and that under the former a judgment could not be prescribed.

But *held*, that plaintiff must explain any long delay, and that otherwise the court would presume the judgment to have been satisfied.

Observations on the Roman Dutch practice.

The district court disallowed the motion for a *rule* to revive judgment by the following order :—

"In this case plaintiff seeks to revive a judgment pronounced on 22nd January 1862, with a view to issuing execution thereon against the defendant. The last proceeding in the case was on the same date when writs were moved for and allowed, and nothing has been done since, till the issue of the present rule on 18th October 1875, removed on 11th November 1875. Defendant alleges that the judgment was ratified in March 1862, and contends moreover that it is prescribed. His contention in this respect is based on the 5th section of the Prescription Ordinance 22nd of 1871. Plaintiff's counsel however contends that this Ordinance is not retrospective and that the question of prescription must be governed by Ordinance No. 8 of 1834, and failing any provision therein applicable to the case, that only the *prescriptio longi temporis* of the civil law will apply.

"I think that the rule cannot be resisted on the strength of either the 6th or 11th clause of Ordinance No. 22 of 1871, which has been decided by the Supreme Court, on a very careful and well considered judgment in *Matara D. C.* 27,430, not to be retrospective, and as that ordinance, in re-

pealing 8 of 1834, saved from such repeal "all rights which have accrued, liabilities which have been incurred, and all proceedings and matters which shall have taken place before this ordinance shall (have) come into force," it follows that the present question is to be decided according to the law as it stood prior to 1871.

"We next turn to the Ordinance No. 8 of 1834. We there, however, find no provision for prescription of judgments, and the questions remain whether we are to have recourse to the Dutch law upon the subject, and if so, what that law is. But it has been decided by the Supreme Court in the Kurunegala case C. R. 21,698 (Vanderstraten's Reports for 1871, p. 183) that the effect of the Ordinance No. 8 of 1834, taken in connection with the Regulation 13 of 1822 is that the whole of the common law, that is to say the Roman Dutch law, with regard to prescription and the limitations of actions and suits, had been abrogated, and that there were consequently "many forms of actions liable to no statutory period of limitation whatever;" consequently under this decision there was between 1822 and 1871 no period of prescription whatever for judgments, or for execution of a judgment, (a process which went in the Roman Dutch law under the designation of the *actio judicati*.) This is a conclusion most unwillingly forced upon me, and I can only repeat the words of the Supreme Court in the judgment referred to, and say that I "think this a matter demanding the attention of the legislature" with a view to an amendment of the last prescription ordinance, as this is by no means the only case "which was been left unprovided for" by the ordinance of 1871, which in pursuance of that suggestion was intended to correct the evil pointed out in the Kurunegala case, but which it appears from the recent decision in the Matara case omitted to provide for any case prior to 1871, though an ordinance "which professes to deal with the whole subject of prescription and to supply a complete chapter to the code on the subject." It must be held there that the judgment in question was liable to no prescription.

"It will be convenient however to see what the Dutch law would have been, but by any possible latitude or limitation of the judgment of the Supreme Court, the case can or might be considered as not wholly left unprovided for. It will be seen however, that the Dutch law would not have availed the defendant in this particular case, the term provided by it not having yet run out. The general rule of the Roman law was that all rights and claims whatever for which no shorter period was expressly provided were extinguished by the lapse of forty years, which (as well as the thirty years prescription)was called the *prescriptio longissimi temporis*, and thus term of 40 years required neither good faith nor just cause on the part of the person claiming the benefit of it (See Cod. 7. 39. 4; Voet ad Pand. 41. 3. 21 and 44. 3. 6. Compare *Warnkœnig's Institutes*, sec. 352.) Under the Roman Dutch law this *prescriptio longissimi temporis* was reduced to a third of a century, Voet 44. 3. 8. The "actio judicati" however, had, under the Roman law, the term of thirty years, at the expiry of which it lost its force entirely. This was modified under the Dutch law to this extent that that action became so far "antiquated" (that is to say

unavoidable) though not "prescribed" in a much shorter space of time, and that after the lapse of a certain limited period, which varied in different cases, execution could not issue without a new decree or a revival of the judgment, after citation of the opposite party. This period was one year in the case of judgments of the inferior or minor courts, five years in those of the provincial court, and ten for those of the Supreme Court. See Voet 42. 1. 47 at the place *denique quamvis actio &c.* It seems to me however that the words "antiquated" "and prescribed" imply this distinction in the Dutch law, that the judgment could not be revived or execution issue after ten lapse of a third of a century. There is a matter discussed in Voet b. v. tit. 1 sec. 53 to 56, which is apt to be confounded with, though different from, the present one, viz., within what time a suit prescribes in case of its protraction *before judgment is pronounced, ne autem lites immortales essent dum litigantes mortales sunt.* After some discussion as to whether that term of prescription (which in civil cases was three years under the Justinian law) operated only as a non-suit or as an entire destruction of the cause of action, under the Roman law, and Voet having expressed his opinion in favor of the latter view, he goes on in section 56 to say that by the Dutch law no special time is observed for the termination of suits, though the expiry of the year from the last proceedings operates as an absolution from the instance, but (he adds) that the court readily gives restitution against this on petition, as he had also stated in sec. 20 that is to say readily allow a suit in which no proceedings have been taken for a year (which we call becoming dormant) to be wakened. I believe that in our practice we have confounded the subject of this *wakening of a dormant suit* in which no proceedings have been taken for a year, and in which *no judgment has been pronounced,* with the *revival of a judgment* which had become "antiquated" by the lapse of one, five, or ten years, as the case might be and execution there on or the *actio judicati.*

"To apply all this to the present case, the plaintiff would be entitled under the Dutch law to have his judgment revived on showing good cause at any time within the third of a century. Whether, therefore, we consider the Dutch law as still existing, or that now we have no law at all upon the subject outside of our Ordinance No. 8 of 1834 (in which however no provision exists for the case in point), in either view the plaintiff is entitled to revive the judgment and re-issue writs *on showing good cause*; which cause ought to show a satisfactory reason for his long delay of 13 years; a delay from which otherwise, and if not satisfactorily explained, the court will presume the judgment to have been satisfied, and will not be exigent in demanding from the defendant evidence of payment which may have become difficult or impossible through the lapse of time.

"The plaintiff must give this proof within fourteen days from the delivery of this judgment or the rule *nisi* will be discharged with costs."

Layard for appellant.
Grenier for respondent.

6th October, 1876.—CLARENCE, J.—The order of 9th February allowing the plaintiff to revive judgment on showing cause within 14 days' is not in question, no appeal having been taken from it. Plaintiff did not show cause within 14 days, for it was only the 14th day viz., 23rd February, that he moved *ex parte* for a notice on defendant to attend on a day to be fixed for receiving proof. The defendant, however, has condoned this failure of plaintiff to show cause within the original 14 days and cannot now be heard to found any objection upon it. On the 20th March he moved to file his own list of witnesses in opposition to plaintiff's list. On 15th May he moved to add to his list of witnesses, and on 18th May the district court heard witnesses on both sides and decided two questions in favour of plaintiff. The first question was, whether the plaintiff's delay in realising his judgment had been accounted for. The district judge held that the defendant's absence from the Island, as admitted by himself, was sufficient, and the Supreme Court sees no reason to interfere with the district judge's decision on this point. The question then opened,—whether defendant could prove satisfaction. Defendant adduced evidence on that point, which the district judge expressly disbelieved.

Affirmed.

C. R. Panwilla, No. 5,621. } *Punchiappuhami* v. *Punchiappuhami.*

Court of Requests—jurisdiction—forfeiture of lease.

A Court of Requests has no jurisdiction to declare the forfeiture of a lease, of which the value of the unexpired term exceeds Rs. 100.

Ondatjie for appellant.

The facts of the case are set out in the following judgment of the Supreme Court :—

The plaintiff by his plaint sought, first, to recover the sum of rupees forty as rents in arrears due on a lease, and, secondly, to have the lease cancelled on the ground that a forfeiture had accrued under one of the conditions of the lease in consequence of the non-payment of the rent when due. No proper answer appears to have been filed by the defendant, but on the day appointed for hearing, a tender of the Rs. 40 was made which the plaintiff refused to accept in satisfaction of the action, which, accordingly, went to a hearing, when the court decreed that the plaintiff should recover the sum of Rs. 40, admitted in answer with costs, and that the lease as regarded unexpired term should be cancelled.

To this judgment it has been objected in appeal that as the amount of rent was Rs. 40, and there were four years of the lease held unexpired, the commissioner by the latter part of his decree had in fact dealt with

a value of Rs. 160, and that the case was consequently beyond his jurisdiction.

This view of the case the Supreme Court considers a sound one, and the judgmeut of the court below, so far as it deals with the cancellation of the lease is, therefore, set aside with costs of appeal.

D. C. Testy. Colombo, No. 3,938.

In the matter of the estate and effects of *Sir John Cheape*, deceased.
Ex parte J. L. Bell, applicant for letters of administration.

Administration—application for, by attorney of executors in England—security, amount of—security of a limited company—R. & O. section 4, rules 4 and 6.

Where the attorney of the executors of a will, proved in England, applied for administration to the estate in Ceylon, the Supreme Court did not insist on the same rigorous scrutiny, as in ordinary cases, of the sufficiency of the security, and saw no objection to accepting the security of a limited company whose business included "the transaction of mercantile and other business as agents, on commission or otherwise, in Ceylon."

The facts of the case appear sufficiently in the judgment of the Supreme Court in appeal.

Cayley, Q. A. for appellant.

24th October, 1876.—STEWART, J.—Mr. Bell, the appellant in this case, is the applicant under a power of attorney from the executors of the late Sir John Cheape for letters of administration to the estate in Ceylon of the testator, who died in England on the 30th March, 1875, leaving large sums of money due to him in this island.

The will of the deceased was duly proved in Her Majesty's High Court of Justice in England and probate granted to the executors, who for the purpose of carrying out the provisions of the will, nominated and appointed the applicant to obtain letters of administration in Ceylon.

The application for administration was allowed by the district court contingent on the applicant giving security.

Accordingly on the 15th September, 1876 Mr. Proctor Joseph filed affidavit of Mr. J. H. Starey, attorney of the Ceylon Company Limited, and of Mr. Henry Bois, and moved that they be accepted as securities.

This motion was disallowed, and the present appeal is from the order rejecting these securities.

It appears to us, in view of the circumstances, that the tendered securities ought to have been received.

The appellant is the special nominee of the executors, consequently, in a very different position from applicants for letters of administration whose authority is not traceable to the deceased and whose appointment depends on the nomination of the court.

The rules and orders, testamentary jurisdiction sec. 4 and 6, which make provision for security, being taken from administrators in ordinary cases, do not apparently contemplate such a case as the one now before us. But it is remarkable that even in the cases provided for, no absolute rule is laid down as to the amount of security, the administrator being required to give "bond with two good and sufficient securities for the due execution of the will, (or due administration, if no will) reference being had in refusing such security to the amount of property returned by the appraisers" &c.

To illustrate how the above rules have been applied, we may refer to a case from the district court of Negombo, in which property to a large amount was in dispute. The widow of the intestate was not able to give security in the sum of which half share of the joint estate was appraised; still, notwithstanding the opposition of her husband's heirs, the Supreme Court, regard being had to special circumstances, directed letters of administration to issue to the widow, on her giving security in a sum much less than the appraised value of the deceased's moiety of the common property.

In the present case, if the executors had themselves appeared before the district court, doubtless no security of any kind would have been required; and they might having obtained probate, have returned to England, leaving the actual administration in the hands of the appellant, if necessary only returning to Colombo to file their final account.

Under these circumstances, we are of opinion that in dealing with the applicant, who is the representative and nominee of the executors, the same rigorous scrutiny of the sufficiency of the securities, in respect of the appraised value of the estate, is not essential as in ordinary cases.

The surety for £5,000 is admitted to be inexceptionable. The value of the property to be administered is no doubt far larger. It should, however, be remembered that finding security in this Island for £5,000 is furnishing security for a very lerge sum, and it may also fairly be presumed that a gentleman of the standing of this security, independently of his not needlessly jeopardizing £5,000, would not consent to become security at all, unless he had full confidence in the administrator duly discharging his duties.

Further, there is the security of "the Ceylon Company Limited."

According to the affidavit of Mr. Starey, theCeylon Company is possessed of unencumbered landed estate in Ceylon valued at rupees one million two hundred thousand and upwards. The appreciated value of the property to be administered is Rs. 41,000.

But it is objected to by the learned district judge that the Ceylon Company is one trading with limited liability, the shareholders of which are scattered over the world; and secondly, the learned judge doubts the validity of the proposed obligation in point of law.

As respects the first difficulty, it is enough to state that the company is represented, so far as we are able to form an opinion, from the papers before us, and as we have been informed at the ,bar by duly constituted agents in Ceylon. If there is any doubt on this point, it will be open to the district judge to make further enquiry.

As regards the 2nd objection, on reference to the memorandum of association of the company, (which has been produced before this court), we find in one of the articles, among the objects for which the company was established, as follows:—"The transaction of mercantile and other business as agents on commission or otherwise, in connection with Ceylon and the East."

It is well known that it forms no inconsiderable part of the business of merchants in Ceylon to take out letters of administration to estates of deceased persons on behalf of constituents abroad. Nor can we see any sufficient reason, in the fact that Mr. Bell is an agent of the company, for rejecting the tendered security of the company for the due fulfilment by the applicant and appellant of his duties as administrator.

D. C. Testy. Tangalla, No. 188.

In the matter of the last will and testament of *Don Constantine de Silva Winniga Chintamani Mohotti*, deceased.

Don Andris Samarekora Appuhami, executor, since deceased, now represented by *G. E. Kenneman* and others applicant and appellants.

Don Alvis Wanniga Chintamani Mohotti opponent and respondent.

Execution of will—subscribing witnesses—Ordinance No. 7 of 1840.

It is not sufficient for the valid execution of a notarial will that the testator signed in the presence of the witness, but it is also necessary that the witnesses should subscribe the document in the presence of the testator.

Cayley Q. A. (with *Ferdinands D. Q. A.)* for appellant.
Dias (with *Grenier*) for respondent.

The facts of the case are fully set out in the following judgment of the Supreme Court.

14*th November* 1876.—CLARENCE, J.—This is an appeal from a decision of the District Judge pronoucing against a document propounded as the will of one Don Constantine de Silva Wanniga Chintamani. The alleged testators was an old and wealthy man who had no legitimate children. The document in question propounded by the son of a brother of Don Constantine's deceased's wife; and the only next of kin are nephews and neices of Don Constantine, who, or some of them, are the opponents.

The decision of the District Judge pronouncing against the will, is affirmed, upon the short ground that the evidence proves that the attesting witnesses did not subscribe the will in the testator's presence.

It appears, from the evidence that the alleged testator was of sound and disposing mind at the time when he executed the will in question;

and it further appears that he had it in his mind at that time to make some final disposition of his wordly affairs. Further considering the position of of the parties, it cannot be said that the will in question is an improbable will for the testator to make. The document purports to have been attested by a notary and two witnesses, and the attestation clause recites that the witnesses and the testator all signed in each other's presence.

There is however, evidence, both pro and con, as to the manner in which the will was made. In support of the will there was called the notary, the two attesting witnesses, one Andree a by-stander, and a fever-doctor who was in attendance on the deceased and deposed that he was of sound mind. The evidence proves that the will and several deeds of gifts which Don Constantine appears to have executed at the same time, were all read over to the testator by the notary and that they were then put by in charge of the notary, the testator being too tired to sign at that moment, and that after an interval of some 3 peyahs the deed and will in triplicate, making no less than 27 papers in all for signature, were presented to the testator for signature, and signed by him one after another, before the notary and witnesses proceeded to complete any. At this point in the transaction there is a divergence between the evidence in support of the will and that called by the opponents, as to whether or not the witnesses signed the will in presence of the testator, before the documents were removed from the room by the notary. The evidence of all the witnesses who were called in support of the will is not thoroughly clear on this point. These witnesses all agree in alleging that the testator signed the will in their presence, and that the attesting witnesses subsequently appended their own signatures, but it is not quite clear, in the case of some of the witnesses, whether or not they mean that the witnesses proceeded to sign before the notary took the documents into another room. Thus where a witness deposes :—"we all signed together," it is doubtful whether or not his "we" includes the testator. One witness for the will, however, named Andree, distinctly asserts that the attesting witnesses signed the will before the documents were removed from the room in which the testator lay, and in the presence of the Pattu Mudaliyar, who is a witness for the opponents. As the attestation clause recites that the witnesses signed in presence of the testator, as well as of each other, it is for the opponents to prove the contrary. To the contrary there is the evidence of the Mudalyar, who asserts in most distinct terms, that the attesting witnesses did not sign before the notary removed the documents. The district judge believes the Mudaliyar and disbelieves Andree and we see no reason why we should reverse the disrict judge's decision on that point. And indeed the perusal of the evidence in support of the will leaves us with a decided belief that the attesting witnesses did not sign in the testator's presence, but after the notary had removed the papers from the room in which the testator lay, and that the witnesses for the will having, before the trial, arrived at a belief that the will should have been attested in testator's presence, were embarrassed by a desire to modify their evidence accordingly. We find, therefore, that the attesting witnesses did not,

as the attestation clause recites to have them done, sign in the testator's presence.

Was it necessary that the attesting witness should do so? We understand the Roman Dutch common law to have been, that the witnesses should remain throughout, and append their attestation in the testator's presence. (Voet xxviii. 1. 6.) but the attestation of wills is now governed by the ordinance No. 7 of 1840, clause 8. That clause has been adopted from the 9th section of the Act 1st Vict. c. 26, by altering the number of witnesses from two to five and inserting an alternative providing for attestation by a notary and two witnesses. It was contended for the appellants, that the words at the conclusion of the clause, "and such witnesses shall subscribe the will in the presence of the testator" are to be understood as applying only to the attestation without a notary mentioned immediately before, and that the intention of the clause is that where a notary is employed the witnesses need not sign in testator's presence. We are unable to adopt this view. The clause undoubtedly is far from being as clear as it might have been, but we cannot bring ourselves to believe that the legislature in passing this clause, intended to exempt notarial wills from the requirement that the witnesses should subscribe in testator's presence. The legislature has dovetailed into the clause, as it stood in the English Act—immediately before the two concluding lines, which provide that "such witnesses shall subscribe in the testator's presence," and that no form of attestation shall be necessary—this alternative of notarial execution; and in the case of notarially executed wills has dispensed with three out of the five witnesses required for non-notarial wills. But we see no reason to suppose that the legislature intended to exempt those notarial wills from the requirement standing at the foot of the clause. We think that the phrase "such witnesses" and the *proviso* dispensing with a particular form of attestation both apply to notarial as well as non-notarial wills. We arrive at this conclusion by an examination of the clause and a comparison of it with the corresponding section of the English Act. The Ordinance No. 16 of 1852 to which we were referred in argument, has no bearing on the matter.

We therefore hold that under the Ordinance No. 7 of 1840 it was necessary that the attesting witnesses should subscribe the will in the testator's presence; and since by the evidence we find it proved that they did not do so, we affirm the decision of the district judge on the above short ground.

We were referred in argument in support of the will to *Lloyd* v. *Roberts*, 12 Moo., P. C. 158. That undoubtedly is a very strong case, but the present case is distinguishable. In that case, as in this, the will, *in facie*, appeared to have been properly made, and although the only surviving witness deposed, eight years afterwards, that he wrote his attestation on a blank sheet of paper, the Privy Council upheld the will on the ground that the evidence of that witness was insufficient to rebut the presumption arising from the appearance of the will, strengthened as it was by the improbability that the testator, a solicitor in large practice, and the other witness, a person of respectability, would have acted as the

surviving witness's evidence implied them to have done. In the present case there is no similar antecedent improbability, while the recital in the attestation clause is contradicted by a witness whom the district judge, thoroughly believes, giving his evidence within a few months of the transaction of which he speaks.

The order of the district court is affirmed with costs.

D. C. Matara, No. 27,781. } *Abegunewardana* v. *Don Louis* et. al.

Cause of action—excessive levy under writ in previous case—ex parte motion—practice.

In a previous case instituted in September 1871, the 1st defendant sued plaintiff in ejectment, claiming Rs 200 per annum as damages, and an injunction was obtained restraining plaintiff from plucking fruits, &c. In July 1873, 1st defendant obtained final judgment for damage and costs as prayed. In April 1874, on an *ex parte* motion, writ was issued to recover judgment and costs Rs 520·50, and Rs. 200 yearly damage from September 1871 to February 1874. In June 1874 the fiscal by the 2nd defendant, fiscal's arachchi, carried out the writ and recovered the whole amount. In July 1874 plaintiff raised the present action against 1st defendants for the amount of excess, averring that he had not been in possession since the injunction and that damages had been recovered for the time he had been out of possession.

Held that there was no cause of action against the 2nd defendant.

Held that, in the absence of laches, plaintiff could maintain this action against 1st defendant, the fact of his not proceeding in the original suit, as he should have done, going only to the question of costs.

Held also, that neither the judgment in the previous case, which did not specify the period for which damages were awarded, nor the order issuing writ, which did specify that period but was made *ex parte*, was a bar to the present action.

To the plaintiff's libel, the 1st defendant *inter alia* pleaded that plaintiff has no cause of action and that he was estopped by the judgment in the previous case and by his own act in not opposing the writ. The 2nd defendant also pleaded no cause of action. The district judge, without going into evidence on the issues of fact, non-suited the plaintiff on the legal objections raised, and the plaintiff appealed.

Ferdinands for plaintiff appellant.
Layard for defendants respondents.

14*th November* 1876.—The judgment of the Supreme Court was delivered by CLARENCE, J.,—

In September 1671 plaintiff was sued in district court 26,006 by present 1st defendant who claimed damages at the rate of Rs. 200 per

annum for an ouster, and an injunction was granted restraining plainitff from plucking fruits or committing any waste or spoil on the land in question. In July 1873, the case was tried and judgment given for the then plaintiff present 1st defendant, for damages and costs as prayed. Against the date 24th April 1874 is an entry in the record of district court 26,006, that on the motion of the plaintiff's proctor, writ against the property of the defendant is issued to recover judgment and costs Rs. 520·50 and Rs. 200 yearly damage from September 1871 to February 1874. This entry is signed by a hieroglyphic, which we assume to be the signature of the then D. J., the original motion paper, we have not been able to find in the record, but it was not disputed that the order was made *ex parte*. Now in ordinary cases, when judgment was passed for plaintiff, a motion for writ against defendant for the amount of the judgment is properly made *ex parte*, except, of course, where from lapse of time, the judgment may stand in need of revival. But in the present case, the motion was something more than the ordinary motion to issue writ for the amount of judgment, it was a motion to supply a deficiency in the judgment. The judgment had awarded damages at the rate of Rs. 200 a year, without specifying for what period of time the damages were to be reckoned. Of course the judgment is by implication to be understood as intending the damages to be payable, as long as plaintiff was kept out of possession by defendants ; but it left that period of time unascertained ; and the present motion being a motion to add something to the terms of the judgment by assigning a particular date as the date up to which the damages were to be reckoned was not a proper motion to be made *ex parte*

In June 1874, the fiscal under the writ recovered from defendant the amount specified therein, and in July following the defendant raised the following action, against the plaintiff, whom he made first defendant and the headman who served the notice, whom he made 2nd defendant alleging that after the issue of the injunction present plaintiff had in fact, ceased to possess the land in question, and that the possession had been taken up by 1st defendant, the plaintiff in district court 26,006 and consequently that plaintiff in district court 26,006 had wrongfully recovered damages for the time during which present plaintiff had been out of possession.

The judgment in district court 26006 is no bar to the present claim, because, that judgment merely award to present 1st defendant, as against present plaintiff damages at the rate of Rs 200, a year, being to be ascertained the period over which the damages were to run.

Nor does the order of 24th April 1874 bar the claim, having been made *ex parte* behind present plaintiff's back.

It has been urged by respondent and it was held by the district judge, that present plaintiff has forfeited his right to make his claim in consequence of his not having opposed the sale of his property on the writ, which if his contention was right issued for an excessive amount. But we are of opinion that the plaintiff has not been fixed with such laches as disentitles him to make his claim. The respondent was in fault in the first instance for making *ex parte* a motion which should have been made

on notice, and the whole time from the issue of the writ on the *ex parte* motion of the constitution of the suit, is barely three months.

There was no need, however, for plaintiff to have instituted this fresh suit. His proper course was to have moved in the original suit, and if his motion had been disallowed, he could have appealed to this court. This, however, goes only to the question of costs. The district judge, when deciding plaintiff's claim on its merits, may take this circumstance into consideration in awarding costs.

Plaintiff's libel discloses no ground of action whatever, as against 2nd defendant. As against 2nd defendant, the libel is dismissed with costs.

As against 1st defendant the order of the district court is set aside, and the case sent back for trial. The costs in appeal to abide the event.

D. C. Kandy, No. 63,034. } *George Wall & Co.* v. *Fernando.*

Cause of action—action to recover value of stolen property against purchaser—mala fides—*Roman Dutch Law.*

For the maintenance of an action for the value of stolen property against a purchaser who has already dispossessed himself of it, there must be *mala fides* on his part.

Cayley Q. A. (*Grenier* with him) for appellant.
Ferdinands D. Q. A. (*Vanlangenberg* with him) for respondent.

The facts of the case are sufficiently set out in the following judgment of the Supreme Court.

16*th November*, 1876.—ANDERSON A. C. J.—In December 1873 the plaintiffs had a quantity of coffee stolen from them, while in transit to their stores, by the carters to whom it had been entrusted, and from it was purchased by the defendant, a coffee dealer at Kandy. The carters were subsequently tried and convicted, the defendant giving evidence against them, but as the coffee was not forthcoming at the time, the defendant having dispossessed himself of it immediately after the purchase, restitution could not be made to the plaintiffs who therefore brought the present action against the defendant to recover the value of the stolen property.

The District Judge held that the case was governed by the Roman Dutch Law and that it is now consequently essential for the maintenance of the action that the plaintiff should show *mala fides* on the part of the defendant, and being of opinion that the case had failed in that particular he gave judgment for the defendant from which the plaintiff has appealed.

The district judge was undoubtedly right in holding that the case must be governed by the Roman Dutch law, but on a careful review of the evidence adduced in the case, the Supreme Court is of opinion that there were facts established from which *mala fides* on the part of the defendant might fairly be inferred.

D. C. Badulla, No. 20,149.

Seyyado Mohammado v. *Assen Alliyar.*
Ex parte *Aboobakker Lebbe* and *Anamalai Chetty*, claimants.

Right of preference—arrangement of mortgage—interest in land—Ord. No. 7 of 1840.

In a contest between a person who paid off a primary and secondary mortgage but obtained no deed of assignment from the mortgagee, and an assignee of a tertiary mortgagee,

Held that in the absence of an assignment of the prior mortgage, and cession of action in favour of the person who paid off the debt, the assignee of the tertiary mortgagee was entitled to preference.

One Peria Karuppen Chetty had a primary and a secondary mortgage over certain lands of defendants, and plaintiff in agreement with defendant paid off Peria Karuppen's claim with a view of purchasing the lands. But the defendant having failed to execute a conveyance, plaintiff brought this action to recover the money paid by him and prayed *inter alia* that the land mortgaged to Peria Karuppen be especially bound for the plaintiff's claim. Judgment was entered by defendant in terms of the prayer of the libel, and the said lands were seized and sold under writ. Now, the claimants, the first as tertiary mortgagee of the same land and the second as assignee of the first, claimed preference to the proceeds sale. The district judge, holding that the assignee was aware of the above circumstances before his assignment, gave preference to plaintiff, and the claimants appealed.

Ferdinands D. Q. A. for appellant.
Ondatjie for respondent.

17*th November*, 1876.—Stewart J.—To entitle the plaintiff to stand in place of Peria Karuppen Chetty, it was essential that he should have obtained a transfer of the mortgage to Peria Karuppen Chetty or a legal cession of Peria Karuppen Chetty's right of action, neither of which plaintiff possesses. See judgment of Supreme Court in D. C. Matara 26,949, June 24th 1875.

Set aside, and claimants allowed preference.

D. C. Matala, No. 12,959. } *MohammadoKasim* v. *David Appuhami* et. al.

Plaint defective—possession of green coffee—Ordinance No. 8 of 1874, section 5.

Section 5 of Ordinance No. 8 of 1874 enacts—"Where green gathered coffee shall be found in the possession of any person, such person may be presumed to have stolen such coffee, or unlawfully received it, knowing it to have been stolen, unless such person shall satisfactorily account for his possession thereof."

The defendants were charged under the above section with having green coffee in their possession without being able to give a satisfactory account of the same. They were convicted and appealed.

Held that the plaint disclosed no offence.

VanLangenberg for appellants.
Dornhorst for respondent.

21*st November*, 1876.—The judgment of the Supreme Court was delivered by CLARENCE, J.,—

Defendants are charged under clause 5 of Ordinance No. 8 1874 with having green coffee in their possession, without being able to give a satisfactory account of the same.

The conviction is set aside and the plaint quashed, since it does not disclose any offence. The 5th clause of the Ordinance No. 8 of 1874 does not create any substantive offence, but simply makes an alteration in the law of evidence with regard to prosecutions.

On the evidence adduced in this case the clause would have enabled the police magistrate to convict the defendant of stealing the coffee, had the plaint charged him with stealing it either from a person known or unknown. There is however no charge of theft made; consequently the whole proceedings must be quashed.

D. C. Matale, No. 12,946. } *Boss* v. *Allagan Kangani.*

Master and servant—seducing a servant—evidence—Ordinance No. 11 of 1865 sec. 19.

Where defendant, a kangani, took a cooly away from his work for part of a day and made him do certain work in a garden of his own, but had no intention of permanently withdrawing the cooly from the employer's service,—

Held that this did not amount to seducing or attempting to seduce the cooly from the employer's service within the meaning of the Ordinance.

Upon a verdict of acquittal the complainant appealed.

VanLangenberg for appellant.
Grenier for respondent.

24th November 1876.—The judgment of the Supreme Court was delivered by CLARENCE, J.,—

Defendant, a kangani in complainant's service, is charged with seducing and attempting to seduce a cooly from complainant's service. The evidence in support of the charge, if true, amounts to this, that the defendant took the cooly away from work which the cooly was doing in complainant's employ on the estate, and sent him to dig some holing in defendants garden. There was no intention of permanently withdrawing the cooly from complainant's service, on the contary the cooly was only taken away for the remainder of a day. No doubt such an act on the part of a kangani, would be quite unjustifiable, but we cannot think it can be deemed seducing or attempting to seduce the cooly from complainant's service within the meaning of the Ordinance.

The above charge is not the whole of the plaint, but the remainder is so obscure that we lay it out of consideration.

We observe that evidence is recorded for the defence, which if true, goes to contradict the truth of the evidence for the prosecution, but with the view we have taken of the construction of the ordinance, it is unnecessary to discuss the evidence.

The magistrate should have stated his reasons for acquitting the defendant and not contented himself with merely recording that the accused was acquitted.

Affirmed.

D. C. Galle, No. 38,570. } *Supramanian Chetty* v. *Delmege Reid & Co.*

Contract to supply paddi—"good Chittagong paddi"—tender—principal and agent—action by agent—pleading.

Ferdinands for appellants.
Edgecombe for respondents.

24th November 1876.—CLARENCE, J.—This was an action for non-acceptance of 1,000 bags of paddy; the contract sued on being as follows :—

"Galle, 17th February 1875, A. L. S. Supramanian Chetty agrees to purchase, and Messrs. Delmege Reid and Co., as agents for H. H. Martin Esq., agree to sell (5000 bags) five thousand bags of good Chittagong paddy on the following terms :—To be paid for at the rate of four rupees and eight annas per bag of 164 lbs. nett, in cash, duty paid and landed. Purchaser to pay all rent. Delivery to be taken at the Galle Custom House, as soon as landed. All bags to be taken as full, unless manifestly slack."

In pursuance of this contract 2,696 bags were tendered and accepted. Afterwards Delmege Reid and Co., the plaintiffs, under instructions from Martin, who is a merchant at Chittagong, bought a cargo of 1000 bags Chittagong paddy which had just arrived at Galle consigned to another

firm, and tendered them to defendant under the contract. Defendant refused to accept. Defendant has pleaded in his answer, justifying the refusal to accept, on the ground that the paddy was not of the description agreed upon, and that it did not come from shippers named in the contract. As to the description of paddy we agree with the district judge that defendant has quite failed to show that the 1,000 bags tendered were not "good Chittagong paddy." And the plea that the paddy tendered had not been shipped by Martin is no defence to the action. There was no contract that the paddy should have been actually shipped by Martin. The contract was simply a contract by plaintiffs as the agents of Martin that good Chittagong paddy should be delivered at the Galle custom house. It is quite plain that the paddy tendered was paddy which under the contract defendant was bound to accept, and that defendant endeavoured to evade his obligation, because, as proved in the case, the market had fallen in the interim.

It was pressed upon us in appeal that upon the authority of the recent decision in *Gadd* v. *Haughton*, 24 W. R., 975, Messrs. Delmege Reid & Co. were not entitled to sue upon this contract, but that their principal, Martin, alone could sue. It is not necessary for us to consider what would have been the result if the defendant had pleaded to the libel that plaintiffs were not entitled to sue on the contract, because any such objection as this should have been expressly pleaded, and it has not been pleaded. This point was not raised by defendant in his pleadings or been in any way mooted in the court below.

Plaintiffs are entitled to recover the difference of market price or 37½ cents per bag which the district judge has awarded them, but have no right whatever to the sum which has been given them for commission. With this modification, the judgment of the district court is affirmed with costs.

D. C. Colombo, No. 68,363. } *The Chartered Mercantile Bank* v. *O'Halloran.*

Cause of action—action on bills of exchange covered by hypothecation of bills of lading—concurrent remedy—construction of agreement.

Defendant negotiated certain bills with plaintiff and covered them by hypothecation of bills of lading for certain goods shipped by defendant to England. It was agreed that the delivery of the goods should not prejudice the rights on the bills in case of dishonour, nor recourse taken thereon affect plaintiff's title to the security to the extent of defendant's liability. The bills were dishonoured and were put in suit in this case. The plaintiff, however, after the institution of the case, began to realize the goods in London, which fact the defendant pleaded. The district court held that plaintiff could not pursue both remedies concurrently, and stayed proceedings until the goods should be fully realized.

Held, that plaintiff was entitled to maintain the action for the amount which for the time represented "the extent of defendant's liability."

And the Supreme Court directed an account to be rendered of the

receipts, and judgment to be given for the balance, future sums realized before levy to go in satisfaction of judgment.

Grenier (Dornhorst with him*)* for appellant.
Browne for respondent.

24*th November* 1876.—The following judgment of the Supreme Court was delivered by CLARENCE, J.,—

This appeal was argued before us at the end of July, and our judgment was reserved in the hope that a settlement might be arrived at between the parties, which would render our decision unnecessary. That hope, however, has not been fulfilled, and we now have to decide the question as it was presented to us.

Defendant drew on certain parties in London and negotiated with plaintiffs, the Chartered Mercantile Bank of India, London, and China, four bills of exchange, and "covered" these bills by the hypothecation of bills of lading for certain goods shipped by defendants to England. The letter of hypothecation contained this clause,—

"It is mutuallv agreed that the delivery of the said collateral securities shall not prejudice your rights in said bills in case of dishonour nor shall any recourse taken thereon affect the title of the Bank to said securities to the extent of my liability to your Bank as above."

The bills of exchange were not accepted when presented for acceptance in London, and plaintiffs then put them in suit in this action. Defendant pleaded that plaintiffs were, since the institution of the suit, realizing the goods in London, and objected in effect to plaintiffs maintaining this action and retaining the goods or proceeds of their sale concurrently. The district judge held that plaintiffs could not pursue both remedies concurrently and made a decree, directing plaintiffs to file an account of the proceeds realized from the bills of lading, as soon as the goods should have been fully realized, and in the meantime stayed proceedings in this case. Plaintiffs appeal.

We see no reason why plaintiffs should not, according to what appears to have been the intention of the contract, resort to their two remedies concurrently. But as soon as plaintiffs have realized any thing from one remedy, the extent of defendants' liability to them is *pro tanto* reduced. Plaintiffs are entitled to maintain this action for the amount which for the time being represents what the contract styles "the extent of defendant's liability to them." From the pleadings and evidence in this case, so far as it has gone, we learn that plaintiffs have realized a portion at least of the goods. They are therefore only entitled to judgment for the balance sum due to them. They must render an account of their receipts, and will then be entitled to judgment for the balance (if any) due to them. But if after judgment and before levy plaintiffs realize anything further from the goods, they must account for the sum so realized in part satisfaction of their judgment.

The decree of the district court is provisionally set aside and in lieu thereof it is decreed that plaintiffs do forthwith file an account, showing the

amounts realized by disposal of the goods to the date of account: in default of plaintiffs so accounting within such time as the district judge shall consider reasonable, the decree of the district judge to stand affirmed with costs. If plaintiffs shall so account as aforesaid, the case to stand as remitted for hearing with respect to plaintiff's claim for any balance over and above the sum realized. We do not think there should be any costs in appeal.

D. C. Ratnapura, No. 10,678. } *Francina* v. *Madduma Banda* et. al.

Title to land—ejectment—Nindagama—proceedings of Service Tenures Commissioners—part transfer—Ordinance No. 7 of 1840—estoppel—evidence.

Plaintiff was tenant of a certain *pangu* of a *nindagama*. At an inquiry of the Service Tenures Commissioners, an entry was made in the proceedings that plaintiff assigned his interest to his three sons. Subsequently, defendant purchased one-third of the pangu on a writ against one of the sons. Plaintiff now sued defendant in ejectment and obtained judgment, and defendant appealed.

Held that the entry in the proceedings of the Commissioners conveyed no valid title to the sons.

Held further, that the mere entry, in the absence of other evidence, did not amount to proof that plaintiff held himself out as having assigned his interest to his sons, and therefore did not operate as an estoppel so as to prevent him from claiming the one-third share as against defendant.

Grenier for appellant.

The judgment of the Supreme Court was as follows :—

30*th November* CLARENCE J.—Plaintiff sues in ejectment of certain pieces of land in Godwilipitipanguwa or Udagame. It is admitted that at the time when the Service Tenures Commissioners held their enquiry for the village, plaintiff was the owner of the lands in question in *paraveni* subject to service to defendant, who is the landlord of the *pangu*. Defendant pleads that plaintiff before the Service Tenures Commissioners formally resigned his interest in these pangus in favor of his three sons; and defendant claims a right to one-third as the share of one of these sons purchased under the writ on a judgment obtained by defendants against that son. A certified copy has been pressed in evidence of an extract from the proceedings of the Service Tenures Commissioners as regards Udagama, in which there is the entry under the column "name and holder of each paraveni pangu" for Godawalpita pangu, after plaintiff's name, "this man assigned all rights to the pangu in favor of his sons, Kiri Batta, Balaya, Nanduwa." Certainly such a proceeding as that suggested to have taken place would not operate as a conveyance from plaintiff to his sons, for the entry amounts to no more than a recital of a parol

transfer of land which would be inoperative by virtue of the Ordinance 7 of 1840. Moreover it was no part of the object of the Service Tenures Commissioners to effect transfers ; their inquiry was merely for the purpose of ascertaining and fixing the terms of tenure ; the 10th clause makes the Commissioner's determination final as to the nature of the tenure only, and the 12th clause concludes with a further declaration to the same effect. It remains however to be considered, whether plaintiff by solemnly and publicly holding himself out as having parted with his interest to his sons, and having stood by and allowed defendant to become a purchaser of one-third the land in question as Kiri Batta's share, he estopped himself from claiming such one-third as against Kiri Batta, defendant representing Kiri Batta. For though such a matter cannot operate, of course, as a conveyance, it is quite another question whether it may not operate as an estoppel in pais to prevent plaintiff from now setting up his title as against defendant. Before we can conclude plaintiff as so estopped, we must be satisfied by proof that he did, as alleged by defendant, hold himself out as having resigned his interest to his sons. The burden of proving this is on defendant who alleges the affirmative. Plaintiff, on the other hand, says in his evidence that when he went before the commissioner, his name and his son's names were taken down, but that he did not understand anything about relinquishing his interest. The extract from the commissioner's proceedings is no evidence of what took place, and defendant has not called any witness to prove what did take place. Under these circumstances, the only conclusion we can come to is, that defendant has failed to prove the fact of plaintiff having held himself out as divested of his interest in favour of his sons. We, therefore, think that the district judge's decision in favour of plaintiff is right. According to defendant's evidence, he disputes plaintiff's right to any land whatever in the pangu, but upon what grounds does not appear. His pleadings claim only one-third through Kiri Batta.

The decree adjudging the six lands claimed to plaintiff with damages Rs. 5 is therefore affirmed, but as defendant in his pleadings disputes the correctness of the extent and boundaries given by plaintiff, the case is remitted to the district judge to determine these details. The costs of the enquiry we leave to the discretion of the district judge ; all other costs, including appeal costs, must be paid by defendant.

P. C. Badulla, No. 19,423. } *Punchi ralla Aratchy* v. *Ramasami.*

Salt, removal of—Ordinance No. 3 *of* 1836 *secs.* 3 *and* 12—*plaint defective.*

The provisions of sec. 12 of Ordinance No. 3 of 1836 extend to other districts than those specified in sec. 3.

But *held* that the plaint was defective, in that it stated the quantity of salt by weight, instead of by measure.

Section 12 of Ordinance No. 3 of 1836 enacts that "the removal of salt in any quantity exceeding three quarts in the districts in which the

possession of three quarts is hereinbefore allowed, and two pecks in any other district," without a permit, shall be unlawful.

Section 3 specifies the districts in which it is declared unlawful to possess, without a licence, salt in any greater quantity than two pecks, and certain other districts in which it is declared unlawful to possess salt in any greater quantity than three quarts. The district is not included in either of these categories.

The defendant in this case was charged with having removed "5 cwts. 3 qrs. and 1 lb." of salt without a permit at Palliahandi in the district of Badulla, in breach of section 12 of the Ordinance.

The police magistrate acquitted the defendant on the ground that the Ordinance applied only to the maritime districts specified in sec. 3. The complainant appealed.

Grenier for respondent.

The judgment of the Supreme Court was as follows :—

30*th November* 1876.—ANDERSON, A. C. J.—After the hearing the police magistrate acquitted the accused, basing their acquittal upon the ground "that the Ordinance simply contemplated the maritime districts named specially." Such a construction is however manifestly incorrect, as although some of the clauses may be restricted in their operation to certain designated localities, yet others (and among the number, the clauses referred to in the plaint,) have an extended and general application to the other districts than those specially designated. In this state of circumstances, the Supreme Court would have set aside the acquittal and sent the case back for a hearing and decision on the merits, but the plaint is evidently defective, as instead of stating the quantity of salt possessed and removed by measurement so as to correspond with the provisions of the Ordinance, it is stated by weight.

This we hold to be a fatal defect, and we shall therefore quash the plaint and all the proceedings therein, leaving it to the prosecutor to re-institute his charge if he shall be so advised.

It is decreed therefore that the plaint and all proceedings had thereon be quashed.

D. C. Colombo, No. 67,906. } *Saibu Dorey* v. *Ahamado Lebbe Markar* et. al.

Husband and wife—Muhammadan parties—action by husband—plea of non-joinder—practice.

In an action by a Muhammadan husband for the specific performance of an ante-nuptial contract, by which certain property was promised as dowry to the wife by her parents,

Held that the husband could not maintain the action without joining the wife as plaintiff, or obtaining special authority from her, even though the wife was no party to the anti-nuptial contract.

Cayley, Q. A. (Layard with him) for appellants.

Ferdinands, D. Q. A. (*Grenier* with him) for respondent.

8th December 1876.—The facts of the case are fully set out in the following judgment of the Supreme Court, which was delivered by CLARENCE, J.,—

This is a suit for specific performance of an ante-nuptial agreement made in contemplation of a Moorish marriage. The agreement, which is notarial, was made between Casie Lebbe Markar Saibo Dorey, the intended husband, and the parents of the intended wife, Alima Amma; and by it the parents agreed that after the due solemnization of the marriage they would transfer some house property to Alima Amma, on the joint demand of Alima Amma and Saibo Dorey. The libel is filed by Saibo Dorey, for himself and on behalf of his wife Alima Amma, against the parents; it alleges that the marriage has taken place, that he and Alima Amma have made a joint demand by their proctor, that the parents have neglected to transfer and prays that they may be decreed to do so. The defendants by their answer allege that plaintiff has not been legally authorized to represent his wife in this suit and take the objection that plaintiff has no right to sue as he has done. Plaintiff in his replication has not traversed defendant's allegations of want of authority to sue, or joined issue on that question of fact.

This is a contract by parents to give a dowry to their daughter in marriage and according to the Muhammadan Law in force in Ceylon. A Moorish wife's dowry is distinctly separate property, to which she is entitled independently of her husband. It is as much "separate property" under what is termed a wife's "separate property" under the English law. It is property which has been settled to a wife's separate use independently of the control of her husband. There is no ground on which it could be contended that a Moorish husband could in general sue third parties alone in respect of his wife's dowry. We do not lose sight of the fact that in the present case Alima Amma was not made a party to the deed of settlement,—the stipulation being by the parents with her then intended husband,—but we do not consider that this circumstance would entitle him to sue alone respecting the dowry which the parents thus stipulated to give. The agreement is to sue for her benefit, and it concerns her dowry; and although we think that in a suit on such a settlement, the husband, as the covenantee is a necessary party, we still consider the wife a necessary party also.

But the husband, in the present case claims that he is in fact representing the wife, as a "next friend" might represent her were the suit pending in an English court of equity respecting property settled to the wife's separate use. Now we apprehend that in every case in which a defendant is sued by a person who claims to sue on behalf of another person and in that person's right, the defendant has a right to require that the court shall be satisfied of the plaintiff's personal authority to represent the person on whose behalf he claims to sue. The property in question in this case is separate property, respecting which the wife, as this court has noted in its judgment in D. C. Colombo 3,693, might sue her husband, and the husband cannot be entitled to sue on her behalf, at any rate unless he has the permission to do so. Defendant in his pleadings

has traversed the fact of such permission or authority, and his traverse has not been met. Consequently as the pleadings stand, plaintiff cannot maintain the suit. Defendant has supplied matter which rendered the libel demurrable and is in the position of a defendant who has succeeded on a demurrer.

We were referred in argument to the analogy of a Kandyan married woman's rights to property independently of her husband, and the case, reported in Austin p. 117, supports the view which we have adopted. In that case, a Kandyan wife sued for some land which she claimed in her own right ; the defendant pleaded the decrees in certain suits in which she and her husband had been parties, and under the circumstances it was held that she was estopped by her own acquiesence in those pleadings from afterwards proffering her own separate claim. This shews that she might have consisted on becoming a party if she had chosen, and consequently that she was a proper person to have been a party to the suit respecting the land. This case, therefore, so far as it goes, and so far as the analogy holds, supports the view that this Moorish wife ought to be a party to any suit concerning the dowry.

The order of the district court will therefore be set aside, and in lieu thereof it is decreed that the defendant's demurrer be allowed, with leave to plaintiff to pay all costs of the demurrer.

D. C. Galle, No. 2,530.

In the matter of the estate of *Dadallege Rolintina*, deceased.
Don Louis, applicant respondent.
Don Juan de Silva, opponent appellant.

Administration—right of husband to administration of wife's estate—discretionary power of court—"next of kin."

The courts in Ceylon would not necessarily grant to the husband administration to his wife's estate, but has the right to exercise a discretionary power.

Where the husband had previously propounded a will the genuineness of which he was unable to prove, the next of kin were preferred to the husband.

Observations on the law of administration in Ceylon.

Ferdinands Q. A. for appellant.
Grenier for respondent.

12*th December* 1876.—CLARENCE, J.—The facts of the case appear in the following judgment of the Supreme Court,—

Respondent, brother of the intestate, applied to the district court for administration to her property. The application was opposed by appellant, the husband of the intestate. Appellant had previously propounded a will, as the will of this deceased woman, which will was impeached as a forgery and rejected by the district court, and the decision of the district court was upheld by this court. Under these circumstances, the district

judge in the present case has refused to grant to the appellant administration to his deceased wife's property, considering him not to be a fit and proper person to be entrusted with the administration. Appellant has not been convicted either of forgery or guilty uttering, he has simply propounded a will, which has been rejected, and it was contended for him that the district judge has no discretion in the matter, but was bound to grant him letters of administration.

The English institution of administration to the effects of intestates, which was unknown to the Roman Dutch law, was formally introduced into Ceylon by the charter of 1801. That charter authorized and required the Supreme Court to grant administration to the "next of kin" of the deceased; but the Supreme Court held in *Holman's case*, (reported in Ram. 1820-33, p. 7) that the employment exclusively of the phrase "next of kin" did not prevent the court from granting administration to the husband or widow. The charter of 1833, which revoked the charter of 1801, simply authorized the district courts in general terms to appoint administrators without laying down any rules as to the persons to whom administration should be committed. This court held in D. C. Galle No. 28,256, (Vanderstraaten, 273) that the charter of 1833 has thoroughly established here the English testamentary law as to the rights and duties of executors and administrators, with the qualifications that the lands of the deceased are here considered to pass to his executors or administrators, as well as what in England is termed his personal property. The question however, which we now have to consider is not as to the rights or powers or duties of an administrator when appointed, but as to the election of an administrator in the first instance. The Ordinance No. 11 of 1868, which is the enactment now in force in the matter, is equally general in its terms with the charter of 1833. The rules and orders, as might have been anticipated, simply prescribe details of practice, and do not touch the question to whom administration is to be committed. In this absence of direction on that question, considering that the institution of administration is one unknown to the Roman Dutch law, and which has been imported from England, the proper course would be to apply the English law governing the matter, with such qualifications, if any, as might be rendered necessary by differences between English institutions and those of this island. The English law gives the husband an absolute right to the administration of his deceased intestate's wife's effects. But in the converse case of the husbands' death, the court has a discretion between the widow and the next of kin, the wife being under ordinary circumstances in practice preferred. But in applying these rules to Ceylon, we must not overlook the wide difference between the position of the English widower, who has an exclusive right to all his wife's property, and the Ceylon widower who merely succeeds to half the property lately the subject of marriage community. The English courts themselves have always recognized, as actuating the English statutes governing the subject, the principle of giving the management of the property to the person who has the beneficial interest in it, and have not scrupled even to refuse administration to the very persons pointed out by the statutes,

where it appeared that such persons had no interest. (See cases cited in Williams on Executors, 6th edition, 420.) Under these circumstances, it is reasonable to consider that our courts have, not only in the case of the widow, but in that of the husband, a discretionary power of preferring the next of kin for good reasons, and this is in accordance with the practice as described by that eminent authority, Sir Charles Marshall, (Marshall's judgments, p. 3.)

In the case before us, the husband, the applicant, had previously before the same district judge, propounded as his deceased wife's a will of which he was unable to establish the genuineness : and under these circumstances we are not prepared to say that the district judge was wrong in preferring to entrust the administration to some other individuals.

Affirmed.

D. C. Kandy,
No. 63,047.

Ord. 6 *of* 1840, *see.* 6—*non-payment of customary taxes or dues—forbearance of crown to collect taxes—tax upon kurukkan—requirements of the Ordinance—ejectment.*

Cayley, Q. A. (with him *Dias*) appeared for appellant.

Van Langenberg for respondent.

19*th December* 1876.—The following is the judgment of the Supreme Court :—

The decision in this case turns on the effect to be given to the Ordinance No. 6 of 1840, clause 6. Under the circumstances, plaintiff claims certain chena land in ejectment, complaining of having been ousted in 1874 by defendant, who in that year purchased the land from the Crown as crown property.

Plaintiff has no sannas and consequently, for the proof of which the ordinance throws the burden on him, has to fall back on services and taxes. Services he proves none, for the reason that, according to the evidence of one of the witnesses, there are none to prove since the abolition of a palanquin service formerly rendered to the Kandyan kings. Thus, under the ordinance plaintiff is relegated to proof of "such customary taxes or dues having been rendered within twenty years for the same as have been rendered within such period for similar lands, being the property of private proprietors in the same districts."

The evidence shows that there has been an intermittent cultivation of the land by plaintiff and those through whom he claims, with kurrakkan. Plaintiff proves no payments of any taxes, or dues whatever, and he accounts for this by adducing evidence to shew that the Crown has never taxed kurrakkan in the district. The district judge has held in effect, that the crown, having by its' own gratuitous forbearance to tax kurrakkan, deprived kurrakan growers of the means of satisfying the requirements of the Ordinance, cannot in equity enforce the strictness of the ordinance against them. But it was argued by the Queen's Advocate, to meet this, that the ordinance is peremptory. Plaintiff can only succeed by proving

payment of tax, and it is plaintiff's own fault if he has deliberately chosen to deprive himself of evidence by always cultivating a crop for which no tax has ever been exacted ; and moreover that the duty lay on the people to pay tax, not on the crown to exact it.

We agree to the latter proposition in general, but cannot apply it to the case of a product, which the Crown has uniformly allowed to go untaxed.

Then how happens it that kurakkan has been taxed? On this question we have not yet before us the materials for a conclusion. The evidence in the case does not explain the matter. The proclamation of 3rd September 1801 provided for a tax on produce, but that proclamation did not apply to the Kandyan districts. The proclamation of 2nd November 1818, which did apply to the Kandyan districts, only fixed the amount of a tax as the produce of paddy lands. The Ordinance No. 14 of 1840 was passed to provide for the due collection of the taxes or dues levied or payable under the above two proclamations and by custom, in respect of paddy and dry grain. So that the taxation of dry grain in the Kandyan district is levied by custom only. The Ordinance No. 12 of 1840 evidently proceeds on the assumption that there have been taxes or dues paid according to custom for the prodnce of chena land in the Kandyan provinces. It might be argued that if it were shown that no taxes or dues at all had been rendered and received for chena lands in the district in question, that is, that in fact there were "customary taxes or dues" to render, the result would be that the case of chena lands in such a district must be considered as a *casus omissus* not within the contemplation or scope of the ordinance. It might also be argued that if it were shown that the Crown deliberately ceased to collect the tax or due, the Crown thereby deprived the chena owners of the means of furnishing the statutory proof, and could not therefore be allowed in equity to take advantage thereby. Neither of these circumstances, however, has been proved to have occurred. At present this case stands in this position. The plaintiff suing in ejectment must succeed, if at all, by the strength of his own title, and the ordinance throws on him the burden of proving payment of such "customary taxes and dues within twenty years to have been rendered within such period for similar lands, being the property of private proprietors in the same districts."

The questions involved in the case are of much importance, and it is desirable that they should be decided on as full materials as possible. We therefore consider it best, without now expressing an opinion on either of the two questions just now mooted, viz—as to the effect of proof that there never were any customary taxes, or that the Crown had forborne to collect any—to send the case back for further investigation, with liberty to both parties to adduce further evidence, merely stating now that as the evidence now stands, we think that plaintiff has not proved his title, because in the absence of proof to the contrary we shall assume that there were some customary taxes and dues which plaintiff might have rendered. Plaintiff has not proved the rendering of any, and we do not consider that the evidence amounts to distinct proof that there were none to render.

Set aside.

P. C. Balapitiya, No. 48,211. } *Edoris de Silva* v. *Shona.*

Arrack, possession of—Ordinance No. 10 *of* 1844, *clause* 32.

Possession of arrack in less quantity than two quarts is not an offence within the meaning of clause 32 of the Ordinance 10 of 1844.

Grenier for appellant.

22nd December 1876.—The judgment of the Supreme Court, which sets out the facts of the case, was delivered by ANDERSON, C. J.,—

The accused was charged with a breach of the 32nd clause of the ordinance No. 10 of 1844, in that he was found in possession of a bottle of arrack, and was convicted and sentenced to the payment of a fine of Rs. 50.

The magistrate in pronouncing his judgment of conviction, expressing an opinion that the possession of the arrack by the accused had been distinctly established, and that he had not been able satisfactorily to account therefor at the same time stated that it was equally clear that had the defendant been charged under the 33rd clause for removal, he must have been discharged; and the learned gentleman then proceeded with some remarks which had better have been omitted from the record of his judgment; but taking the opinion thus enunciated, it is apparent that the magistrate held that a conviction for possessing arrack in less quantities than two quarts would be sustained, while a charge for removal of the same quantity could not.

This is an erroneous construction of the ordinance. It is true that the 32nd clause is general in its wording, and refers to the possession of any spirit distilled from the cocoanut or any other description of palm or from the cane without limitation as to the quantity; but a correct construction of that clause can only be properly arrived at by reading it as a part of the ordinance, the meaning and intent of which must be arrived at by a consideration not alone of its particular wording, but by the language of the entire ordinance: and adopting this mode, it is abundantly clear that the penal consequences of the ordinance do not apply to the possession of spirit of less quantities than two quarts.

In this case the quantity found in the possession of the accused must have been about one quart, and consequently should have been acquitted.

Set aside and defendant acquitted.

D. C. Testy. Kandy, No. 956.

In the matter of the goods and chattels of *Roma Kandu*, deceased.

Pakeer Pulle, 1st applicant and appellant.

Sinna Umma, 2nd applicant.

Isa Umma, 3rd applicant and respondent.

Muhammadan law—divorce, requisites for—Muhammadan Code of 1806, *cls.* 87, 88 *and* 89.

For a valid divorce between Muhammadan parties at the instance of the husband, it is necessary that three written notices or tallock, should have been given, as required by the 89th clause of the Ceylon Muhammadan code of 1806, unless this requisite can be proved to have been dispensed with by a custom having the force of law.

Cayley, Q. A. for appellant.
Van Langenberg for respondent.

22*nd December* 1876.—The facts of the case are sufficiently set out in the following judgment of the Supreme Court, which was delivered by CLARENCE, J.,—

Respondent claims to be entitled to a share under the intestacy of the deceased, claiming as his widow. The question in the case is whether she ever was his wife, and that question is narrowed to this question ;—was she legally divorced from her first husband Pakir Pulle ?

The evidence on this head is that Pakir Pulle took respondent before a Lebbe and witnesses, addressed her by name, and said thrice that he divorced her, and took from her the tali and some bangles as Maboram, and witnesses alleged that this is all that custom requires.

According to the evidence, this was a divorce at the instance of the husband, which would fall under the 87th, 88th, and 89th clauses of the Ceylon Muhammadan code. The 89th clause comes nearest to what took place in this case. It contemplates the giving of the three notices of divorcement all at once, when the husband is determined on the divorce ; but the evidence does not fulfil the requirements even of this, since this clause requires three written letters of divorce or tallocks to be given, and the evidence is that there was no writing whatever. There is no doubt that custom has in some respects sanctioned variations from the strictness of the rules prescribed in the code of 1806, but we should require very clear evidence to convince us that, in lieu of the formalities there required, a Moorish wife can be divorced by mere uttering of a word thrice consecutively before a Lebbe. We are not satisfied by the evidence adduced in this case that the "writing of divorcement", described in clause 89 of the code, has been dispensed with by a custom having the force of law.

Set aside.

D. C. Kurunegala, No. 3,364. *Schokman* v. *Felsinger.*

Appropriation of payment, rules of—Roman Dutch Law.

Where a person, indebted on two accounts to another person, made a payment.—

Held, that to constitute a legal appropriation under the Roman Dutch Law, either by creditor or by debtor, the appropriation must be made at the time of payment and not after.

Where defendant was doubtful as to such appropriation, and where defendant was indebted on two promissory notes, on one as maker and on the other as endorser.—

Held, that the payment should be appropriated to the former, which was the debt most burdensome to the debtor.

Cayley, Q. A. for appellant.
Ferdinands, D. Q. A. for respondent.

22nd December 1875.—The facts of the case appear in the judgment of the Supreme Court, which was delivered by CLARENCE, J.,—

This case and the connected case No. 3365 arise out of a complication of bill transactions between the plaintiff and the three defendants in No. 3365, the 2nd defendant in No. 3365 being the defendant in the present case. Plaintiff sues defendant on a promissory note granted by defendant to plaintiff, claiming Rs. 170, and interest Rs. 47·60, in all Rs. 217·60. Defendant admits the note, but pleads that on 6th November 1874 there was only due Rs. 21·34 for interest, and that on that day he paid plaintiff Rs. 198·89, which satisfied his liability to plaintiff on this note, leaving over Rs. 6·45 which defendant claims in reconvention. Plaintiff pleads appropriation of the Rs. 198·89 to the note sued on in No. 3365. The note sued on in No. 3365, is a note for Rs.400 granted by 1st defendant in that case to plaintiff (who is also plaintiff in this case) endorsed by 3rd defendant. The payment in question in the present case was made by plaintiff receiving on defendant's account an amount realized under a writ obtained by defendant against Coulson. Defendant says that he told plaintiff beforehand to apply whatever he got from Coulson to the note sued on in the present case, and that he did not know of respondents having appropriated it otherwise until the institution of the present suit. Respondent flatly denies this. It is true that appellant did not get back the note sued on in this case, but the effect of the circumstance, as a corroboration of respondent's allegation, is weakened by the consideration that appellant did not even get a receipt for the money which respondent admittedly received, and there is, on the other hand, the *prima facie* appropriation of his payment to a note of which he was only an endorsee, rather than to one on which he was the sole person liable. If the evidence fails to satisfy the Court that either the debtor or the creditor made an appropriation, the Court itself must make the appropriation according to the well understood rule of the Roman Dutch Law; and where on such a point the Court

is unable to decide between two contradictory statements made by the debtor and such creditor, the safest course is to fall back on the law. But in this case there is a further circumstance leading to that result. To constitute a legal appropriation either by debtor or creditor it is necessary that appropriation be made at once—*in re presente, hoc est statim atque solutum est, seu dum solvitur, ut vel creditori liberum sit non accipere vel debitori non dare, si alio nomine exsolutum quis eorum velit: cæterum postea non permittitur, sed tunc potius legum definitioni incipit locus esse.* (Voet ad Pand, xlvi. 3, 16.)

Even assuming that we are to believe respondent and disbelieve appellant, respondent's evidence amounts to no more than that, at some time or other, after he received the money under the writ against Coulson, he told appellant he carried it to the credit of the note sued on in 3,365.

Under these circumstances it is for the court to make the appropriation to the debt most burdensome to the debtor, which clearly was the debt or the note in which he was the maker and the sole person liable, and not the other note.

Therefore, the decree of the district judge must be set aside, and in lieu thereof plaintiff's libel is dismissed with costs, and defendant entitled to recover from plaintiff in reconvention, the balance (if any) after deducting from the Rs. 198·89, which plaintiff received, the Rs. 170 due on the note in this case, and interest to the date when plaintiff received the money.

D. C. Galle, No. 36,754. } *Sinno Appu* v. *Sitta Umma* et. al.

Prescription—possession precario—*Roman Dutch Law—Ord. No.* 8 *of* 1834 *and Ord. No.* 22 *of* 1871—*acknowledgment of title.*

Where possession had begun *precario*, and the evidence that defendants on being ordered on one occasion to be out had asked for time,—

Held, that although by Roman Dutch Law possession *precario*, however long, gave no prescriptive right, yet, on the local ordinance which wholly governs the matter, such possession would be sufficient for purposes of prescription if there was no acknowledgment of the original owner's title.

Held also, that the circumstance of the defendants asking for time to quit, did not amount to an acknowledgment of title within the meaning of the ordinance.

This was an action by plaintiff to recover possession of the ground, upon which the defendants had built a house, the plaintiff praying that the defendant might be compelled to remove the materials of the house or receive compensation for the same. The defendants pleaded prescription. The district judge upheld the plea of prescription and dismissed plaintiffs action, and plaintiff appealed.

Grenier for the appellant.

Ferdinands, D. Q. A. for the respondents.

22*nd December* 1876.—The judgment of the Supreme Court was delivered by CLARENCE, J.,—

Plaintiffs have been in possession of the sites in question for far more than ten years. They came in as mere tenants *at sufferance de precario*—having been out of charity allowed to come in and squat upon the land. As to acknowledgment in bar of prescription, the evidence at most proves that when told to turn out on the occasion of the Fiscal selling the main garden, they asked for time. We do not think under the circumstances of the case that we ought to construe this request strictly against these people as an acknowledgment of plaintiff's right, within the meaning of the 3rd clause of the Prescription Ordinance 1871.

There is no doubt that a common law possession *precario*, did not bar the right of the original *dominus* to recover—"*ne immemorialis quidem temporis prescriptione*," but the matter is now governed by legislation. The case falls under the 3rd clause of the Ordinance 1871, which is copied from the 2nd clause of the Ordinance of 1834. It was decided by this court in C. R. Batticaloa 9653 (Vanderstraaten, 44) that in interpreting this enactment the words in the parenthesis are to be understood as a definition of possession by adverse title, and that being so, and there being no acknowledgment, it follows that defendants in this case are entitled to a decree.

Affirmed.

P. C. Kandy, No. 5,107. } *Marshall* v. *Seyan Uman.*

Finder of property—Proclamation of 26th October 1823—*repeal—the revised edition of the Ordinances.*

The proclamation of 26th October 1823 requires the finder of property to bring the same to the headman of the village on pain of punishment.

This proclamation though not expressly repealed, is not contained in the revised edition of the ordinances, and the Ordinance No. 6 of 1867 declares the revised edition to be *prima facie* evidence that it contains the only lawful proclamations, regulations, &c.

Held, that the proclamation of 26th October 1823 is still in force.

The defendant in this case was charged under the Proclamation of 26th October 1823, and was convicted.

There was no appearance of counsel.

22*nd December* 1876.—The judgment of the Supreme Court was delivered by CLARENCE, J.,—

Appellant has been convicted on a charge under the proclamation of 25th October 1823, which required the finder of property to bring the same to the headman of the village or division, on pain of being punished "by fine or imprisonment either with or without being employed at hard labour, at the discretion and according to the powers of the agent before whom such conviction shall take place."

The proclamation is not in the revised edition of the legislative enactments of Ceylon although it has never been expressly repealed. The reason probably is that it was omitted by mistake from its proper place in the edition of 1853. It appears inserted in the fly-leaf of the second volume of that edition. If the 4th clause of the Ordinance No. 6 of 1867 were still in operation, there could be no question but that no conviction can stand under the proclamation, for that clause provided that the copies of revised edition should in all courts and upon all occasions be taken to be, (*i.e*, we presume, to include) the only lawful enactments in force of the period included; but this clause was repealed by the Ordinance No. 7 of 1872, which enacts that copies of the revised editions are to be taken as *prima facie* evidence that they contain the only lawful proclamations, regulations, ordinances and charters in force." What are we to understand by the copies of the revised edition being *prima facie* evidence of the state of the law of this country? And how are we to apply such a provision to a criminal charge under a proclamation not in the revised edition? We must deal with this expression in the Ordinance of 1872 as best we can. We find that the proclamation has not been repealed, and therefore still law; but we cannot in justice impose more than a nominal penalty for a conviction under it, considering that the revised edition issued under the authority of Government has to be regarded as having encouraged the public to suppose that the proclamation is not in force.

D. C. Colombo, No. 63,533. } *Pedro Fernando* v. *Agustino Silva* et. al.

Prescription—payment by one of several joint debtors—debt incurred by husband in wife's life time—effect of payment of interest by husband after wife's death on prescription in favour of children—Regulation No. 13 of 1822 and Ordinance No. 8 of 1834—Roman Dutch Law.

In 1859 defendant's father mortgaged to plaintiff a certain land belonging to the marriage community. The mother died in 1860. The father made a payment of interest in 1868. The plaintiff sued the defendants, who as their mother's heirs are in possession of a share of the mortgaged land, to recover a balance due on the mortgage. The defendants pleaded prescription.

Held, (following C. R. Kurunegala 21,698 Vand. Rep. p. 188), that the local legislative enactments, while abolishing the old terms or periods of prescription, left untouched the collateral incidents of the Roman Dutch Law.

Held, that by Roman Dutch Law, payment by one joint debtor did not interrupt prescription in favour of the others, except in the case of the joint debtor *in solido*, and that the Ordinance of 1834 did not have the effect of rendering payment by one of several joint debtors, not being joint debtors *in solido*, an interruption to prescription in favour of the rest.

Held, further, that on the death of the mother the surviving father on the one hand and the children on the other, became joint debtors *in solido*, and that the debt was now prescribed as against the defendants.

The district judge overruled the plea of prescription and gave judgment for the plaintiff, and the defendant's appealed.

Grenier for appellants.
Layard for respondents.

28th December 1876.—The judgment of the Supreme Court was delivered by CLARENCE, J.,—

Defendant's appeal against a judgment recorded against them in an action on a mortgage deed.

In 1859 defendants further mortgaged to plaintiff by this deed, a land which was subject to the marriage community of property between himself and defendant's mother. The mother died in 1860. The father made a payment of interest in 1868. Defendants (as their mother's heirs) are in possession of a share of the mortgaged land. The plaintiff now sues defendants, alleging a balance due on the mortgage.

The question submitted to the district court under these circumstances was:—whether or no, the father's payment of interest in 1868, after the mother's death, interrupted prescription in favour of the heirs.

The clause of the Prescription Ordinance 1871, relating to the effect of acknowledgments and payments, is the 13th, which is copied nearly verbatim from an English statute,—not indeed from the latest enactment now in force in England *in pari materia*, which is the 14th section of the Mercantile Law Amendment Act (9 Geo. iv. c. 14), and the district judge assumed that the present case fell under this 13th clause of our Ordinance of 1871. This case in fact falls under the old Ordinance of 1834, but it is immaterial which Ordinance applies since the new Ordinance expressly saves the pre-existing law, as to the effects of payment.

The district judge held that under the old law a payment by one of a set of "joint contractors" interrupted prescription as to all; and further held that the defendants, standing in the place of their deceased mother, must be considered as joint contractors with their father, in the mortgage deed sued on.

Before endeavouring to apply the terms of the Ordinance of 1834 to the case, it is advisable to ascertain what was the previous common law applicable to such a case. It is clear that whatever interrupted prescription as to one of several joint debtors *in solido*, interrupted also as to others and their heirs (Voet xlv. 2, 6; Cod. viii. 40, 5.) But we read this as limited to joint debtors *in solido*, *i. e.* to instances in which each debtor is liable to the creditor, not merely for a share, but for the whole debt. Where the debtors are not joint debtors *in solido*, and each is liable only for a share of the debt, then, under the general civil law, as Pothier points out (Oblig. 663, Evans' trans.), interruption as to one does not prejudice the others. And this in our opinion was the Roman Dutch law on the subject. Such a case, is the case in which a debt has become divisible between the heirs of a debtor. The present case is such a case, so far as respect the mere money debt—(we will speak presently of the hypothecation.) So far as concerns the mere money

debt, the defendants cannot be considered joint debtors *in solido* with their father. While the community lasted, the parents were as one individual *quoad* this property. That individual contracted the debt. On the termination of the marriage, the debt became at once divisible between two parties, the surviving father on the one hand, and the mother's heirs on the other, and those two parties stand in the position of the heirs of a deceased's debtor : they are, so to speak, the heir of the extinct marriage community.

But does it or does it not make any difference that this was not a mere debt, but was secured by hypothecation of the common property ? Here again the case is as though A had mortgaged his land and died, leaving it to devolve by inheritance on B and C ; and we can find no authority for supposing under such circumstance that which could not interrupt it as to security (Voet. xlv. 3, 10) is to the contrary ; and Pothier's opinion is distinctly that any action confined to the share of one heir, whether suit against him, or acknowledgment by him, interrupted prescription as to his share only. If the property in question were not of a divisible nature, different considerations could apply, but that is not the case here.

Thus we find under the old common law, the father's payment made after the mother's death, on account of a mortgage of the common property which he made in her life-time, would not interrupt prescription in favour of her heirs. We have now to consider, whether this law has been repealed, or modified by legislation.

The Ordinance No. 8 of 1834, as the Supreme Court had occasion to point out (C. R. Kurunegala No. 21,698,) while repealing the Regulation No. 13 of 1823, preserved in full force and operation that part of the regulation which repealed previous laws or customs respecting prescription. The Regulation of 1822, entitled, "A regulation for fixing the periods of prescription in civil cases, and repealing all previous laws or customs touching the same," after reciting in the preamble that doubts had been entertained respecting the periods of prescription, which should be considered as barring actions for the recovery of property moveable or immoveable, according to the laws then in force, repealed, all laws heretofore enacted, or customs existing with respect to the acquiring of "rights or the barring of civil actions by prescription." The object of this enactment was to do away with all doubt and variance as to the terms or periods of prescription applicable to various rights and actions, by providing that for the future there should be no periods of prescription save those marked out by the regulation. And this, as the Supreme Court pointed out in the Kurunegala case above cited, effectually did, and as the event has shown somewhat too effectively, since it left some actions altogether unaffected by any periods of prescription. But the collateral incidents of the existing common law, distinct from the definition of the prescriptive period, such as that just now pointed out, formed no part of the mischief at which the regulation was aimed. The object of the regulation was, as the preamble says, to ascertain the period of prescription, and we cannot construe the regulation as repealing collateral incidents of the existing common law, such as that before noticed.

We have now to consider the effect of the Ordinance of 1834. Clause 3 enacts that no action shall be maintainable upon any mortgage unless "brought &c. within ten years from the date of such instrument, *or of the last payment thereupon.*" If the last six words are to be understood in their bare literal meaning, the old common law distinction between the effects of payment by one of several joint debtors *in solido*, and the effect of payment by one of several joint debtors not *in solido*, has been swept away. Is that the correct interpretation of the enactment? In clause 7, which imposes a qualification on the effect of the 3rd and other clauses, the expression used is "promise acknowledgment, or admission made, or act done by the alleged debtor;" and in clause 10, which provides a saving in cases of disability, the expression used is,—"if at the time of the right of such action or such claim acruing the plaintiff or defendant, shall not be resident within, this Island,"—which is narrower still. The truth seems to be that we have here to solve a difficulty arising from the circumstance that the framers of the Ordinance had in their minds only the single case of a sole obligor, and that the case of a bond with several obligors, or of a deceased obligor, did not occur to them. A similar question was raised upon the 5th section of the English Act 4 and 5, Wm. IV. c. 42, and its difficulty has been demonstrated by the circumstance that the common law judges, consulted by the Vice Chancellor in *Rodham* v. *Morley*, and Lord Chelmsford in *Coope* v. *Cresswell*, L. R. 2 ch. 112, arrived at opposite conclusions.

The conclusion at which we have arrived upon the construction of the Ordinance of 1834, is that we feel unable to attribute to the ordinance the effect of rendering a payment by one of several joint debtors *in solido* an interruption to prescription in favour of the remainder. The intention of this ordinance, like that of the preceding regulation seems rather to have been confined to ordaining the number of years which should prescribe actions of various kinds, and if it had been intended to repeal the old law, as to heirs or other debtors owing money to the same creditor on the same contract, but not owing it jointly and severally we should have expected to find a definite enactment in terms to that effect.

Our opinion consequently being that the husband's payment in 1868 did interrupt prescription, as in favour of the wife's heirs, the order of district court will therefore, be set aside, and the plaintiff's libel dismissed with costs.