THE

Supreme Court Reports

BEING

Reports of Cases Decided

BY

THE SUPREME COURT OF CEYLON,

WITH A DIGEST,

EDITED BY

WALTER PEREIRA,

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ACCEPTING GRATIFICATION TO STAY LEGAL PROCEEDINGS.

Accepting Gratification to stay legal proceedings—Ceylon Penal Code, Sects. 102 and 210.

The conviction of an accused, under Sects. 102 and 210 of the Ceylon Penal Code, on a charge of abetting one in the offence of accepting a gratification in consideration of his not proceeding against a person for the purpose of bringing the latter to legal punishment on a charge of a non-compoundable offence is good, although the latter charge has been found by the Magistrate to be completely false.

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ADMINISTRATION.

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ADMINISTRATION, APPLICATION FOR LETTERS OF.

Application for letters of administration—Inquiry into claim—Issue of fact as to ownership of property claimed to be administered.

A applied for letters of administration to the estate of B, his wife, who had died intestate and leaving property, and the application was opposed by parties interested in the estate of a previous husband deceased of B. The District Judge refused A's application having found, in the course of the inquiry into A's claim, that the property which A claimed to administer belonged, not to B, but to her former husband—

Held, that such an issue could not be summarily determined in the present proceedings, and that A had a *prima facie* claim to letters of administration.

D. C., Badulla, No. B 25. RATU RALA *v.* KUMA APPU and others 253

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APPEAL.

1—Appeal—Ex parte judgment.

Where in a Court of Requests judgment is entered up behind the defendant's back in consequence of the summons having been made returnable on a *dies non*, the defendant's proper course is not to appeal from such judgment, but to apply in the first instance to the Court below to open it up.

C. R., Colombo, No. 57,574. GUNAWARDENE *v.* PERERA 85

2—Petition of Appeal—Criminal Procedure Code, Sects. 406 and 407.

Under Sections 406 and 407 of the Criminal Procedure Code, all persons comprised in one judgment, sentence or order, may join in one petition of appeal bearing stamps as for a single petition.

P. C., Galle, No. 5,238. DE SILVA *v.* ANDRIS and others 97

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APPEALABLE ORDER.

Appealable Order—Dismissal of Petition of Intervention—Costs.

Where a District Judge dismissed a Petition of intervention with costs, reserving his final decision on the question at issue between the plaintiffs and the defendants, the intervenients had no right of appeal until such final decision.

D. C., Tangalle, No. 4,665. DISSANAIKE *v.* EKENAIKE and others 39

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ARRACK.

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ARREST, WARRANT OF.

Warrant of arrest—Signature by stamp or die—Handcuffing road tax defaulters.

A warrant of arrest, good on the face of it, and which has not been

illegally issued on the contrivance of the party arresting under it, is sufficient to justify such party in making the arrest.

Although there is no objection to the authentication of a warrant of arrest by the name of the official issuing it being impressed on it with a stamp or die, and not being signed in writing yet, where the genuineness of such authentication is challenged, it is necessary to shew that the impression was made by such official himself, or in his presence and by his authority, as a distinct act of signing.

Courts of justice should scrutinize carefully the acts of those entrusted with the administration of a harsh and oppressive law, where they enforce it with undue harshness and severity, and should make them responsible for every departure from the strict line of their duty.

Observations on the impropriety of handcuffing, and otherwise treating as malefactors, those arrested for default of payment of the road tax, and on the necessity, in the event of such proceedings, of courts of justice being watchful to protect the liberty of the subject.

D. C., Galle, No. 833. BABAPPU *v.* DE SILVA ... 166

AWARD, TIME FOR.

See CIVIL PROCEDURE, 13.

BILL OF LADING.

Bill of Lading—Breach of contract as to shipping rice.

Plaintiffs contracted with the defendant to ship one thousand bags of rice per B. I. Steamer sailing "direct or otherwise" to the Port of Galle. Plaintiffs supplied the rice within the time stipulated, but on board a B. I. Steamer not sailing "direct or otherwise" to the Port of Galle. The rice was carried from Calcutta beyond the Port of destination, *i.e.*, to Colombo where it was landed, and "re-shipped in another ship, and forwarded to Galle"—

Held, that, in the circumstances, the defendant was justified in not accepting delivery of the rice. The defendant was not bound to receive rice which had been shipped on board a ship not sailing "direct or otherwise" to the Port of Galle, but to another Port, and over-carried in her to the other Port, there landed, and re-shipped on board another ship, and then carried to the Port of Galle.

D. C., Galle, No. 52,974. DELMEGE REID & Co. *v.* SUPPRAMANIAN 80

BROTHEL.

Ordinance No. 5 of 1889, Sec. 1, Sub-Sec. 3—Letting house to be used as a brothel.

Accused leased a house which subsequently to the date of the lease was converted into a brothel. *Held*, that he could not be convicted under Sub-Sect. 3, Sect. 1 of Ordinance No. 5 of 1889, unless he knew at the date of the lease that the house was intended to be used as a brothel.

P. C., Colombo, No. 18,400. DEUTROM *v.* FERNANDO... 122

BUILDING, DEMOLITION OF.

Obstructing Public Officer—Demolition of Building—Chairman of Municipal Council—Ordinance No. 7 of 1887, Sect. 198.

The power vested in the Chairman of a Municipal Council by section 200 of Ordinance No. 7 of 1887 to demolish a building, where the

same has been erected without notice to him as required by section 198, is to be exercised only where such demolition is really necessary, and after notice to the builder that he had omitted to obey the requirements of the Ordinance, and opportunity given to him to correct his error.

Court of the Municipal Magistrate, Galle, 2,113.
AMARASAKERE *v.* KADIRAWEL... 347

BURDEN OF PROOF.

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See CIVIL PROCEDURE, 32.
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—— DONATION.
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CHAIRMAN OF MUNICIPAL COUNCIL.

See BUILDING, DEMOLITION OF.

CHEATING.

1—Cheating—Ceylon Penal Code, Sect. 398.

If the evidence in a case discloses an offence under a section of the Penal Code, the accused is liable to conviction and punishment under the Code, although he might also have been prosecuted under another enactment.

Although under the old law, in order to establish the offence of fraudulently obtaining anything by a false pretence, it was necessary to prove a false pretence as to some existing fact, and not a mere promise as to future conduct, section 398 of the Penal Code rendered even such promise sufficient.

But before a defendant can be convicted under Sect. 398 of the Penal Code of fraudulently deceiving the complainant by falsely pretending that he intended to do a certain thing, there must be evidence to shew that, at the time when he made the representation, he had not that intention.

P. C., Hatton, No. 1,222. FRASER *v.* MUTTUKANKANI 90

2—Cheating—Sale—Misrepresentation in regard to article sold.

A asked B if he had Blackstone tea, and on his saying that he had, A purchased a quantity of it, and at the time of purchase A knew it was not Blackstone tea.

Held, that as A was not deceived by B's description of the tea as Blackstone, B could not be convicted of cheating.

P. C., Colombo, No. 22,357. PASCOE *v.* WEERASINGHE 305

CIVIL PROCEDURE.

1—Appealable order—Civil Procedure Code, Sections 604 and 598—Costs in Divorce Suits.

A decree *nisi* for dissolution of marriage in terms of Section 604 of the Civil Procedure Code is a decree from which an appeal lies.

Section 508 of the Code requires that upon a plaint for a divorce *a vinculo matrimonii* being presented by a husband, in which the adultery of the wife is the cause or part of the cause of action, the plaintiff shall make the alleged adulterer a co-defendent to the action, unless he is excused from so doing on certain grounds specified in the action.

Held, that such excuse can only be obtained by regular prayer to the Court upon an affidavit or other sufficient evidence, and it shall be embodied in the plaint.

Merely inserting in the plaint the name of the alleged adulterer as a co-defendant—no process being served upon him, and no steps being taken to bring him into the action—is not a sufficient complaince with the requirements of section 598.

D. C., Colombo, c, 678. ZIEGAN *v.* ZIEGAN *et al* ... 3

2—Civil Procedure Code, Chapter XL and Sections 591 and 373—"The Stamp Ordinance, 1890"—Guardianship proceedings.

A petition under Sec. 591 of the Civil Procedure Code for the recall of a certificate granted under Chap. XL. of the Code and proceedings generally under that chapter, with the exception of those for which duties are specially prescribed by "The Stamp Ordinance, 1890," are not liable to stamp duty.

Although Sect. 373 of the Code requires that the written petition upon which an application by way of summary procedure is made should be duly stamped, it does not imply that if the law does not require a stamp in a particular proceeding by way of summary procedure, a petition in such matter should be stamped.

D. C., Kurunegala, No. 12. (Guardianship). *In re* the guardianship of Richard and James Henry, minors ... 15

3—Writ against Person for costs—Civil Procedure Code, Sections 298 and 299.

Under the Civil Procedure Code—

A writ against person can only issue in any case after a writ against property has been issued.

It can only be issued by a plaintiff in an action for money, when he recovers a sum which, inclusive of interest, if any, up to the date of decree, but exclusive of any further interest and of costs, amounts to or exceeds Rs. 200.

A defendant having a decree for costs only may issue execution against person on a judgment when those costs amount to or exceed Rs. 200.

A plaintiff obtaining a specific decree in respect of movable or immovable property with costs cannot issue execution against the person, whatever the costs may be.

D. C., Kandy, No. 2,510, SOYSA *v.* SOYSA ... ...

4—Appeal—Time for notice of the tendering of, and for perfecting, security—Sections 754 and 756 of the Civil Procedure Code.

Under Section 756 of the Civil Procedure Code, when a petition of appeal has been received by a District Court, "the petitioner shall forth-

with give notice to the respondent that he will on a day to be specified in such notice and within a period of twenty days from the date when the decree or order appealed against was pronounced, tender security for the respondent's costs of appeal."

Held, that under this section it is not sufficient that the appellant should, within twenty days, give notice of his intention to tender security: he must do so forthwith on the filing of the appeal, and he must actually tender the security within the twenty days, and within sufficient time to enable the Court to accept or reject it. He cannot perfect his security after the lapse of twenty days; and if the security tendered should turn out insufficient or does not satisfy the requirements of the Section, and the Court reject it, the appellant cannot tender fresh security after twenty days, but the proceedings abate.

D. C., Batticaloa, No. 327, KANDAPPAN *v* ELLIOT ... 37

5—Jurisdiction—Civil Procedure Code, Sect. 9—The Courts Ordinance, Sect. 77.

Under Ordinance 1 and 2 of 1889, a Court has no jurisdiction to hear and determine an action by reason only of a part of the cause of action having arisen within its jurisdiction.

Where a cause of action has arisen within the jurisdiction of more than one Court, the Court having jurisdiction to try the case must depend upon where the defendant resides, or where the land in respect of which the action is brought is situate, or where the contract sought to be enforced is made.

C. R., Kandy, No. 889, RANATTE *v.* SIRIMAL and another 57

6—Civil Procedure Code, Sect. 85—Judgment by default.

Where the defendant was absent on the day fixed for the trial of a case, but his proctor on the record aspeared for him, and on the evidence adduced by the plaintiff the Commissioner entered up final judgment—

Held, that the appearance of the proctor took the case out of the operation of Sec. 85 of the Civil Procedure Code, and that final judgment was rightly entered, and the Commissioner had no power to set aside such final judgment on application by the defendant.

C. R., Colombo, No. 2,558, PIERIS *v.* FERNANDO ... 67

7—Civil Procedure Code, Sect. 585—Curatorship.

Section 585 of the Civil Procedure Code does not require the Court to commit the curatorship of the property of the children of a deceased testator to his executor. It only requires the Court to grant the certificate of curatorship to any person entitled under a will or deed to have charge of the minor's property. In failure of a person absolutely entitled to the curatorship, and willing to undertake it, the Court may appoint any person whom it considers fit for the purpose.

D. C., (Testamentary) Galle, No. 2,948, In the matter of the Last Will and Testament of Abeyewardene deceased 68

8—Civil Procedure Code, Sects. 85 and 823—"Ex parte" hearing and decree "nisi" in Courts of Requests.

Under Sect. 823 of the Civil Procedure Code, where default in appearing or pleading is made by the parties, plaintiff or defendant, in an action in a Court of Requests, the provisions of Chapter 12 shall apply,

so far as the same are not inconsistent with the procedure prescribed for Courts of Requests in Chapter 66—

Held, that when on the day appointed for the trial of a case the defendant is absent, the Commissioner is bound to follow the procedure in Chapter 12, and hear the case *ex parte*, and pass a decree *nisi* under Sect. 85.

C. R., Colombo, No. 2,135. BANDA *v.* GUNERATNE. ... 75

9—Non-joinder of parties—Civil Procedure Code, Sect. 17.

Where a debt is payable by defendants to plaintiffs and others as joint creditors, the defendants have, notwithstanding the provisions of Sect. 17 of the Civil Procedure Code, a right to object to being sued by the plaintiffs only for the share of the debt due to them, and they have a right to claim to have all the creditors joined, and to be sued, in one action.

Section 17 of the Civil Procedure Code enacts—"No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it"—

Held, that the meaning of this section is that where a non-joinder is apparent, in the face of which the court cannot proceed, the court, instead of dismissing the plaintiff's action, should allow plaintiff to add parties.

C. R. Kegalle, No. 94. BANDA and another *v.* LAPAYA and others. 98

10—Discovery of Documents—Civil Procedure Code, Sect. 102.

Under Section 102 of the Civil Procedure Code, "the Court may, at any time during the pendency therein of an action, order any party to the action to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the action"—

Held, that under this section, an order for discovery may issue to the plaintiffs in an action, although they are not able to make the required affidavit personally. The order for discovery in such case should go to the plaintiffs, leaving it to them, in the first instance, to chose the channel through which the discovery should come.

D. C., Colombo, No. 1,188. The Commissioners for executing the office of Lord High Admiral of the United Kingdom *v.* VANDERSPAR 105

11—Civil Procedure Code, Sect., 247—Action to set aside order on claim to property seized in execution.

Under Sect. 247 of the Civil Procedure Code, "The party against whom an order under Section 244, 245 or 246 is passed may institute an action within fourteen days from the date of such order to establish the right which he claims to the property in dispute, or to have the said property declared liable to be sold in execution of the decree in his favour, and, subject to the result of such action, if any, the order shall be conclusive."

Held, that the judgment debtor on a writ comes within the expression, "the party against whom an order under section 244, 245, or 246 is passed," as used in section 247.

C. R., Panadure, No. 559. SILVA *v.* SILVA ... 124

12—Calculation of "14 days" under Section 247 of the Civil Procedure Code—Sundays and Public Holidays—Ordinance No. 4 of 1886, Sections 4 and 8.

In calculating the fourteen days within which, under Section 247 of the Civil Procedure Code, an action to set aside an order on a claim in execution may be brought, Sundays and public holidays are not excluded; and where the last of such fourteen days falls on a Sunday or public holiday, it is not open to a party entitled to bring such action to institute the same on the next working day.

D. C., Galle, No. 611, DE SILVA and others *v.* HENDRICK and others 131

13—Arbitration—Time for award—Civil Procedure Code, Sect., 683.

Under Section. 683 of the Civil Procedure Code, the Court can enlarge the time for the delivery of an arbitrator's award without the consent, of or even notice to, the parties to the action.

D. C., Kalutara, No. 345. MOHAMADO and others *v.* PERERA, ... 134

14—Practice—Application by executor of sole plaintiff, deceased, to be substituted plaintiff—Reviving judgment—Civil Procedure Code, Sects. 91, 395 and 405,

Plaintiff having died after judgment, his executor applied by motion, on rule served on defendant to shew cause to the contrary, that he (the executor) be made a party on the record in the room of the deceased plaintiff, and that the judgment be revived, and writs issued—*Held*, that the District Judge's order allowing this motion was wrong, 1st, because there is no provision in the Civil Procedure Code for reviving judgments, 2ndly, because, before an application to issue execution on a decree could be maintained, there must be a plaintiff on the record, and here there was no plaintiff at the time of the application, and 3rdly, because the motion did not set out the particulars that under the Code shou'd be embodied in an application for execution.

Per Withers J.—Petition by way of Summary Procedure is not the proper way for the legal representative to apply to the Court under Sect. 395 of the Code to have his name entered on the record in place of a sole plaintiff, deceased.

Sect. 405 of the Code applies to cases in chap. xxv where the Court has a judicial discretion to exercise in the matter of the particular application, and it does not therefore apply to an application under Sect. 395. Such an application should be made in the manner indicated in Sect. 91.

D. C., Galle, No. 49,861, ABEYAWARDENE *v.* MARIKAR and another- 192

15—Proctor—Petition of Appeal—Civil Procedure Code Sect. 754—Mortgagee—Execution Creditor—Restriction of sale of mortgaged property—Civil Procedure Code Sects. 224, 225, 226.

A petition of appeal to the Supreme Court may be signed by a Proctor of the District Court.

An execution creditor is entitled to a writ in conformity with his decree. A mortgagee in execution cannot be restricted to discuss any particular part of the mortgage property before the other.

D. C., Colombo, No. 98,571, GOONESEKARA, *v.* DE SILVA and others. 195

16—Civil Procedure Code, Sect. 189—Error in decree —Alteration of judgment—Amendment of Decree.

Under Sect. 189 of the Civil Procedure Code "if the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion, or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error."—

Held, that under this section, a District Judge may amend his decree so as to bring it in conformity with his judgment, but he has no authority to vary or to re-open his judgment, and correct what he may consider to be a mistake he has made on the facts.

D. C., Colombo, No, 27,299. DABERA *v.* MARIKAR ... 210

17—Civil Procedure Code, Sect 402—*Res judicata— Conveyance by Infant—Repudiation—Execution of second deed.*

Previous to bringing the present action, the plaintiff had brought another action to the same effect in the same Court, which, not having been proceeded with, the District Judge ordered to be struck off the roll. The defendant having pleaded "res judicata"—

Held, that the plea was not maintainable, as the Code gives no power to a District Judge in default of proceedings for a year to order a case to be "struck off." What the Civil Procedure Code (see sect 402.) directs being that an order may pass that the action shall "abate."

A conveyance by an infant being only voidable, and not void, the mere execution by him of a second deed after attaining majority expressing the disposal of property already conveyed by him during infancy, does not avoid the latter conveyance.

D. C., KEGALLA. No. 120. SIRIWARDANE and another *v.* LOKU BANDA. 218

18—Civil Procedure Code, Sect. 755—Petition of Appeal—Signature of Proctor—Signature of Advocate.

Under section 755of the Civil Procedure Code "all petitions of appeal shall be drawn and signed by some Advocate or Proctor, or else the same shall not be received."

Held, that (1) the words "drawn by" do not mean that the original conception, ss well as manual draft of the petition, should be that of the Advocate or Proctor. It is sufficient if the petition itself bears the proper signature of the Advocate or Proctor. (2). The Proctor who signs the petition must be the Proctor on the record, (3) another Proctor may not sign the petition on behalf of the Proctor on the record (4) as the Ordinance is satisfied if the authentication is by Advocate or Proctor, no

a case where the authentication by one of them is bad, the Ordinance is satisfied, if that of the other is good.

D. C., Colomdo, No. 2,273. ASSAUW *v.* PESTONJEE ... 221.

19—Civil Procedure Code, Sect. 245 and 247—Claim in execution—Previous claim by same party—Estoppel—Costs.

Plaintiff claimed certain lands seized by the 1st defendant under writ of execution against the 2nd defendant. Plaintiff had claimed the same lands when seized in execution by another judgment creditor in a previous case as against the same judgment debtor, the 2nd defendant, and his claim had been disallowed.—

Held, that the order disallowing the plaintiff's claim in the previous case was no bar to the present action, and was not conclusive as against another judgment creditor, not privy to the one against whom the plaintiff lodged an unsuccessful claim.

D. C., Negombo, No. 443. GUNEWARDENE & another *v.* NATCHAPPA CHETTY and others. 227

20—Sect. 402, Civil Procedure Code—Case "struck off"—Effect of such order.

Although an order that the case be struck off the Roll is not the proper order under Sect. 402 of the Civil Procedure Code, when no steps have been taken in the case for over a year, yet such an order would operate in fact, till the case is restored to the Roll; and the proper course is to move for a summons to issue on the other party to shew cause, if any, against an application to have the case restored to the Roll.

D. C., Kalutara, No. 39,967. MARIKAR *v.* BAWA LEBBE and another. 240

21—Splitting of action—Sect. 34, Civil Procedure Code—Sect. 91, Courts Ordinance—Omission of part of claim.

The plaintiff instituted two actions against the same defendant on the same promissory note, one for interest, and the other for the principal sum due on the note. The action for interest having come on for hearing, the plaintiff abandoned it, and elected to proceed on with the action for the principal sum only—

Held, that this action can be sustained under the exception mentioned in Sect. 34, Civil Procedure Code, and the words in that section "except with leave of the Court obtained before the hearing" mean that if a plaintiff has omitted a part of his claim, he may, before that claim is heard, ask the leave of the Court to sue for the omitted remedy.

D. C., Avisawella, No. 852. RAMEN CHETTY *v.* CARPEN KANGANY. 242

22—Writ against person—Ex parte application—Release of debtor—Section 347 and 224, Civil Procedure Code—Discretionary power to release.

The District Judge released the 2nd defendant, who was arrested under writ of execution and brought before the Court, on the ground that the writ ought not to have been allowed, as it had been, on the *ex parte* application of the plaintiff—

Held, that the proper course was for the plaintiff, not to appeal against the order of release, but to move the District Court for a re-issue of the writ against person after due service of the application on the said defendant.

The law reposes in Courts large discretionary powers to release debtors arrested and brought before them.

Per WITHERS, J.—The "petition" referred to in section 347 of the Civil Procedure Code obviously embraces the written application required by Sec. 224.

D. C., Colombo, No. 607. MUTTIAH CHETTY *v.* MEERA LEBBE MARIKAR and another 244

23—Sect. 325 and 326, Civil Procedure Code—Hindering judgment creditor—Thirty days imprisonment.

The penal provision of Sect. 326 of the Civil Procedure Code applies only to one of the offences mentioned in Sect. 325, viz. that of resisting or obstructing the officer charged with a writ of possession, and does not apply to the offence of hindering a judgment creditor from taking complete and effectual possession after the officer has delivered possession.

C. R., Kegalle, No. 325. DISSANAYAKE *v.* TAMBY CHETTY and others 257

24—Trial—Judgment—Further evidence after case closed.

Plaintiff and his witnesses and defendant and his witnesses having been heard in due course, and the case closed, the District Judge reserved judgment. On the day fixed for delivery of judgment, the District Judge made order to the effect that he was unable on the evidence on the record to decide the issue framed, and re-fixed the case for the reception of such further evidence as the parties might choose to adduce—

Held, that the case having being closed, the District Judge had no right to call for further evidence, but was bound to give judgment on the materials on the record.

D. C., Kalutara, No. 364. FERNANDO *v.* JOHANES APPU and others 262

25—Sect. 194, Civil Procedure Code—Payment by instalments—Decree.

Under Sect. 194 of the Civil Procedure Code "In all decrees for the payment of money, except money due on mortgage of movable or immovable property, the Court may order that the amount decreed to be due shall be paid by instalments," &c.—*Held*, that where judgment has been pronounced and the judgment creditor holds a decree for the whole sum, the Court has no power under this section to limit, by a subsequent order to pay by instalments, the right of the creditor to enforce the decree.

C. R., Colombo, No. 3,282. PIRIES *v.* RANESINGHE ... 265

26—Civil Procedure Code, Sect. 86 and 87—Decree Nisi—Decree absolute—Right of appeal.

Where a defendant appears, and contests a decree *nisi*, and it is made absolute, no appeal lies against the order making it absolute. The only appeal against an order making a decree absolute is on the ground that the defendant had no information of the proceedings, or was prevented, by accident or misfortune, from appearing.

D. C., Badulla, No. 370. NATCHIAPPA CHETTY *v.* MUTTU KANGANY ... ... 270.

27—Receiver—Co-owners—Civil Procedure Code, Sect. 671.

Per LAWRIE, J.—In an application under Section 671 of the Civil Procedure Code for the appointment of a receiver in respect of any property, the Court is not authorised to appoint one to protect the pecuniary interests of one of two joint owners, but only to protect the property itself. And when there is no reason to think that the property is in danger, or that the receiver could deal with it otherwise or better than the co-owner in possession, then the Court ought to refuse to interfere.

Per WITHERS, J.—At the time when an order for a receiver is asked for under Sect. 671 of the Civil Procedure Code, the applicant must have a right to the immediate possession of the particular property in respect of which the application is made, or a vested interest in it sufficient to entitle him to have it protected in circumstances which appear to the Court to necessitate its protection by an independent and competent person.

D. C., Galle, No. 1,020. SYADORIS *v.* HENDRICK ... 358.

28—Sects. 725 and 726 and Chapter LV and XXXVIII, Civil Procedure Code—Judicial Settelement—Estates of persons dying before the Procedure Code came into operation.

Chapter LV of the Civil Procedure Code is ancillary to Chapter XXXVIII, and the provisions of the former in respect of the judicial settlement of the account of an executor or administrator do not apply to the estates of persons who died before the Code came into operation.

Muttupillai v. Selamma, 9. S. C. C. p. 179 referred to, and followed.

D. C., Testamentary, Colombo, No. 5,001. In the matter of the estate and effects of Andris Perera Dharmagoonawardena. ... ... 296.

29—Sect. 481, Civil Procedure Code—Minor—Appointment of Next Friend—Plaint.

The plaint in an action intended to be brought on behalf of a minor must accompany the application under Sect. 481 of the Civil Procedure Code for the appointment of a next friend, and where such application has been allowed on insufficient materials, the defendent should not file answer, but move the Court to strike the libel off the file.

D. C., Chilaw, No. 401. MOHAMADO UMMA *v.* MOHIDEEN 302.

30—*Sect.* 337, *Civil Procedure Code—Decree obtained before the Code—Prescription—Sect.* 5 *of Ordinance No.* 22 *of* 1871—*How far repealed—*

Sect. 337 of the Civil Procedure Code does not apply, on the question of prescription, to decrees obtained before the passing of the Code. Such decrees are still governed in regard to prescription by the provisions of Sect. 5 of Ordinance No. 22 of 1871.

D. C., Kalutara, No. 36,247. WIJESEKARA *v* JAYASURIYA 307

31—*Civil Procedure Code, Sec's.* 779 *and* 780—*Courts Ordinance Sect.* 42, *Sub Sect.* 2—*Appeal to Privy Council—Hearing in review—Final judgment—Civil right of value of Rs.* 5000—*Ordinance No.* 6 *of* 1859.

The Supreme Court held, setting aside the judgment of the Court below, that the defendants had infringed the plaintiff's patent and remitted the case to the District Court in order that the District Judge may deal with the plaintiff's prayer for an assessment of all gains and profits derived by defendants from importing into use and sale of infringement of plaintiff's patent. On an application by defendants, praying for a certificate under Section 781 of the Civil Procedure Code for hearing in review previous to appeal to Her Majesty in Council—

Held, that the application could not be allowed; in that there was no final judgment, decree, or sentence or any rule or order made in the action having the effect of a final, or definitive judgment, decree or sentence in terms of Section 779 of the Civil Procedure Code, and in that the judgment given and pronounced on the bare question of fact of infringement or no infringement involves directly or indirectly the title to property or to a civil right exceeding the value of Rs. 5,000 (see section 42, sub-section 2 of the Courts Ordinance.)

The right of appeal given by the Inventions Ordinance is now governed by Section 42 of the Courts Ordinance.

D. C., Colombo, No. 1,251. JACKSON *v.* BROWN ... 313

32—*Civil Procedure Code, Sects.* 244 *to* 247—*Slander of title—Execution debtor—Action to set aside claim—Common Law.*

Per BURNSIDE, C. J.—The allowance by a Court of a claim to the property of one man by another gives no cause of action to the owner.

Per LAWRIE, J.—A party whose lands have been successfully claimed by another has an action at common law to have their respective rights determined. An execution-debtor is not "a party against whom an order, &c., is passed" within the meaning of Sect. 247 of the Civil Procedure Code.

Per WITHERS, J.—The only parties against whom an order under Sect. 244, 245, and 246 can be said to pass is the execution-creditor, the third party claiming or objecting, and a mortgage or lien holder. (Silva *v.* Silva, II, C. L. R, p. 51 considered)

D. C., MATARA, No. 246. SILVA & Another *v.* GOONEWARDENA 321

33-- Civil Procedure Code, Sects. 79 and 813—Replication when necessary—Settlement of issues.

Under the Civil Procedure Code, when there is new matter pleaded in the answer by way of defence, and there is no replication, every material allegation shall be deemed to have been denied, and the burthen of proof of such new matter shall be on the party asserting it.

Per WITHERS, J.—There is no necessity for a replication to an ordinary answer containing a plea in bar by way of confession and avoidance.

D. C., Kandy, No. 5,619. LOKUHAMY *v.* SIRIMALA ... 326.

34—Civil Procedure Code, Sects. 325 and 326,—Hindering judgment-creditor from taking possession.

More than three months after an execution-creditor was put in possession of land under a writ in execution of the decree, the judgment debtor and others at his instance hindered the execution-creditor in the exercise of his right over the land—

Held, that the procedure by petition prescribed by Sect. 326 of the Civil Procedure Code did not apply—

Per WITHERS, J.—Because the hindrance contemplated by this Sect. must occur at the time of the delivery of possession to the judgment-creditor, and not at any time after the delivery.

Per LAWRIE, J.—Because the penal Provision of Sect 326 only applies to resisting or obstructing the officer charged with a writ of possession, and not to that of hindering a judgment-creditor from taking complete and effectual possession after the officer has delivered possession (See 1, Supreme Court Reports p, 257.)

D. C. KANDY, No. 4,084/249 MENIK and others *v.* HAMY and others. 332

35—Practice—Right of claimant in execution, whose claim is disallowed by reason of his having called no evidence in support of it, to institute action under Sect. 247 of the Civil Procedure Code—Costs.

A claimant of property seized in execution who abandons his claim, and leaves the Court without any evidence in support of it may still, if the Court make order disallowing his claim, institute an action under Sect. 247 of the Civil Procedure Code to have such order set aside. But in such case, the plaintiff, even if successful, should be condemned to pay the defendant's costs.

D. C., GALLE, No, 1,172. SILVA and another *v.* WIJAYESINHE 337

36—Practice—Decree in Partition Suit—Time to appoint Commissioneers to effect partition—Civil Procedure Code, Sect., 18.

In a partition suit, a direction to take special notice of claims of third persons to the land decreed to be partitioned is not one that should

be given by the Court, by the partition decree, to the Commissioners to be appointed to effect the partition. The Court itself must adjudicate on the rights of all persons to be parties to the partition.

An order appointing Commissioners can only be made after the decree for partition has been given, and an application for that purpose made by a party to the suit.

Semble per WITHERS, J.—Where, in a partition suit, a Co-owner names certain persons as proper parties to the suit on account of their having interests in the land entitling them to actual possession, the Court may call in aid the provisions of section 18 of the Civil Procedure Code in order to give such persons an opportunity to establish their claims.

D. C., KANDY, No. $\frac{2\ 288\ C}{5,241}$, RATWATTE *v.* BANDA ... 345

See ROMAN-DUTCH LAW, 2.

CLAIMANT IN EXECUTION, RIGHT OF, TO INSTITUTE ACTION UNDER SECT. 247 OF THE C. P. C.

See CIVIL PROCEDURE, 35.

CLAIM IN EXECUTION.

See CIVIL PROCEDURE, 11.

——— CIVIL PROCEDURE, 19.

——— CIVIL PROCEDURE, 32.

CO-HEIR.

See PRESCRIPTION, 1

COLLISION.

Action on tort—Negligent Driving—Liability of defendant.

Where the defendant's horse shied at a donkey cart, and thus brought the defendant's dogcart into violent collision with the plaintiff's phaeton—*Held* that the defendant was not guilty of negligence.

C. R., Colombo, No. 3,116. DAVIES *v.* MITCHELL ... 206

COMMITMENT.

Irregular Commitment—District Court.

Where an indictment appears good on the face of it, and is supported by a commitment, and the Attorney-General's fiat, the District Judge has no jurisdiction to inquire into the validity of the commitment. The remedy against an irregular commitment is by application to the Supreme Court.

D. C., (CRIMINAL) BADULLA, No. 4,165. The QUEEN *v.* KOLENDAVAIL. 198

COMMUNITY OF PROPERTY.

See ROMAN-DUTCH LAW, 1.

COMPENSATION.

See CRIMINAL PROCEDURE, 1.

——— CRIMINAL PROCEDURE, 6.

——— CRIMINAL PROCEDURE, 8.

COMPENSATION FOR IMPROVEMENTS TO LAND.

1—Compensation for improvements to land—Right to retain possession until compensation is paid.

The right to retain possession of land until compensation is paid for improvements effected to it is a right known to our law, and there are independent traces of it to be found in the authorities on Kandyan customary law.

This right may be asserted by the party who has effected the improvements not only as against the owner under whom he got into the land as a tenant, but as against those claiming title to the land on conveyances from such owner.

D. C., Kandy, No. 3,553. APPUHAMY *v.* SILVA and another 71

2—Tenant—Compensation for improvements—Land—Jus retentionis.

Neither by Kandyan law nor Roman-Dutch law can a tenant retain leasehold premises against all the world, till compensated for the benefit, to the owner of the soil, from improvements made by the tenant.

D. C., Kandy, No. 3,553. APPUHAMY *v.* de SILVA ... 243

CONCURRENCE.

1—Practice—Concurrence—Claim to property seized under three different writs, but sold under one of them.

Three plaintiffs in three different cases had judgments against the same defendant, and the same property of the defendant was seized under all three writs, but the Fiscal purported to sell under only one of them.

Held, that the three creditors were entitled to share *pro rata* in the proceeds of the Fiscal's sale.

D. C., Colombo, No. 3,448. WARREN *v.* McMILLAN & Co. 86

2—Concurrence—Roman Dutch Law—Practice—Ordinance No. 7 of 1853.

Claims in concurrence under the old Roman Dutch Law procedure have always been entertained by the courts of this colony, notwithstanding that an Insolvency procedure was provided by Ordinance No. 7 of 1853; and such claims must, until legislative interference on the subject, continue to be disposed of according to the old practice.

Under the old practice, when a creditor has made a levy, a second creditor may claim concurrence in the proceeds, at all events, unless and until those proceeds have got home to the hands of the execution creditor.

When the execution purchaser is not the plaintiff, claims of concurrence are not usually entertainable after the proceeds of the levy have been paid over to the execution creditor.

When the plaintiff is the purchaser, and the price falls short of the amount due to the plaintiff, he, as a matter of convenience, is allowed credit for his purchase money. But *quære*, at what point in such a case is a plaintiff's purchase money to be deemed to have got home?

D. C., Colombo, No. 3,642. HADJIAR and another *v.* HADJIE and another 159

See JUDGMENT,

CONTEMPT OF COURT.

See CRIMINAL PROCEDURE, 2.

CONVEYANCE BY HUSBAND TO WIFE.

See EJECTMENT, 2.

COOLY.

16—Cooly—Entry of name in check-roll—Monthly servant—Contract in writing—Infancy—Ordinance No. 13 of 1889, sects. 5 and 8.

The 5th Section of Ordinance No. 13 of 1889 provides that "every labourer who shall enter into a verbal contract with the employer for the performance of work not usually done by the day or by the job or by the journey, or whose name shall be entered in the check-roll of an estate, and who shall have received an advance of rice or money from the employer, shall, unless he has otherwise expressly stipulated, and notwithstanding that his wages shall be payable at a daily rate, be deemed and taken in law to have entered into a contract of hire and service for a period of one month"—

Held, that a labourer who enters into a contract for a year's service, but which contract is invalidated for want of writing as required by Sect. 8 of the Ordinance, cannot be convicted of acts made penal in respect of monthly servants, merely because his name is on the check-roll, and he works as any other monthly labourer.

Observations on the capacity of an infant to contract himself within the penal provisions of a statute.

P. C., Gampola, No. 10,348. ALLAGAN *v.* ALLAGEY. ... 42

CO-OWNERS.

See CIVIL PROCEDURE, 27.

——— POSSESSORY ACTION, 2.

——— PRESCRIPTION, 3.

COPIES, CERTIFIED.

Ejectment—Loss of original title deeds—Certified copies of duplicates from the Registrar of Lands—Admissibility in evidence—Ordinances 7 of 1840, 16 of 1852, 8 of 1863 and 12 of 1864—Lost document.

Plaintiffs set up title under two deeds, one of 1845 and one of 1854, and the originals having been lost while in possession of their mother who was the widow of the purchaser under the deed of 1854, they produced certified copies of the duplicate in possession of the Registrar of Lands.

Held, that the certified copies were admissible in evidence, and that the law as to the admissibility of lost documents was not applicable, because the copies tendered in evidence were copies of deeds existing in the custody of a public officer.

D. C., Kegalla, No. 117. RANG MENIKA and another *v.* PUNCHI MENIKA and others 266

COSTS.

61—Order for costs—Amendment of decree.

Where a Commissioner has entered a decree omitting an order as to costs, he may subsequently amend it by adding such order. But such amendment should not be made on an *ex parte* application.

C. R., Colombo, No. 58,250. SINNAPPU *v.* PUNCHAPPU ... 121

See APPEALABLE ORDER, 1.

———CIVIL PROCEDURE, 1.

———CIVIL PROCEDURE, 3.

———CIVIL PROCEDURE, 35.

COUNCIL OF LEGAL EDUCATION.

See MANDAMUS.

COURTS OF REQUESTS.

See CIVIL PROCEDURE, 8.

———RENT.

COURTS ORDINANCE, 1889.

Section 18, *Sch. III, Rules* 24 *and* 31.

See MANDAMUS.

Section 42.

See POSSESSORY ACTION, 1.

Section 77.

See CIVIL PROCEDURE, 5.

Section 91.

See CIVIL PROCEDURE, 21.

CRIMINAL BREACH OF TRUST.

Criminal Breach of Trust—General deficiency in accounts kept by a clerk.

On a charge against a clerk by his employer for Criminal Breach of Trust under Section 389 of the Ceylon Penal Code, it is not sufficient at the trial to prove a general deficiency in account. Some specific sum must be proved to have been embezzled by the accused or dishonestly converted by him to his own use.

P. C., Colombo, No, 22,645, BUCHANAN *v.* CONRAD ... 338

CRIMINAL INTIMIDATION.

114—Criminal Intimidation—Sections 483 and 486, Penal Code—Threat of procuring imprisonment—Injury.

In a prosecution for criminal intimidation, the nature of the threat and of the intent should be specified in the charge.

The threat of procuring a person's imprisonment is not a threat with an injury, such as is contemplated by the Penal Code.

Imprisonment by a competent Court is not harm illegally caused to the person undergoing it.

P. C., Manaar, No. 424. CASIM *v.* MUHAMADU ... 254

CRIMINAL LAW.

26—Criminal Law—"Res Gestæ"—Evidence of Statement by deceased as to how injury was caused.

The deceased lay on the road with his skull fractured which, according to the medical evidence, was the result of a blow or a fall. A Police constable, on coming up to the spot, found the deceased on the ground seemingly recovering consciousness, and on his asking him what was the matter, he said, "Appuhamy assaulted me." The Town-Arachchi arrived at the spot shortly afterwards, when the deceased man laid a formal charge of assault against "Appuhamy"—

Held, that these statements of the deceased are, as part of the *res gestæ*, admissible in evidence in support of the contention that the injury he had received was the result of an assault and not of a fall.

1st. Sessions, Kandy, No. 15, The QUEEN *v.* APPUHAMY ... 59

CRIMINAL PROCEDURE.

18—Criminal Procedure—Appeal—Compensation.

Where under Section 236 of the Criminal Procedure Code a Police Magistrate acquits an accused, and being of opinion that the complaint was frivolous or vexatious, directs the complainant to pay the accused or each of the accused, as the case may be, a certain sum as compensation, no appeal lies from such order, unless the total amount of compensation awarded exceeds Rs. 25.

P. C., Matara, No. 594, HENDRICK *v.* BABUWA and others 46

2—Criminal Trespass—Criminal Procedure Code, Sects. 445 and 446—Contempt of Court.

An entry upon premises which a man believes to be his own will not be a criminal trespass, though the land is in possession of another, if the object really is to assert a right over it, and not to intimidate insult or annoy another.

Sect. 445 of the Criminal Procedure Code provides that "whenever any such offence as is described in Secs. 173, 176, 177, 178, or 223 of the Ceylon Penal Code is committed in view or presence of any Court, criminal or civil, such court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may, if it thinks fit, take cognizance of the offence, and sentence the offender—

Held, that under this section the magistrate had no jurisdiction to "convict" an offender forthwith, and sentence him afterwards, and that in proceeding under it, he should carefully observe the requirements of Sect. 446 as to recording the facts constituting the offence, the statement, if any, of the offender, and the finding and sentence.

Held, further, that it is not competent to a magistrate to proceed under Sect. 445 against a witness who, the magistrate thinks, is guilty of contempt of court by reason of his having "evaded and shuffled" whilst giving evidence.

P. C., MATARA, No. 1,590. PULLE *v.* GUNESEKERA .. 76

3—Criminal Procedure—Ordinance No. 1 of 1888, Sect. 1—Criminal Procedure Code, Sect. 352.

It is the duty of a Police Magistrate to ascertain what is the defence of an accused party either by means of Sect. 352 of the

Criminal Procedure Code or Sect. 16 of Ordinance No. 1 of 1888.

There being no record that the Magistrate had complied with the requirements of Sect. 352 of the Code, the conviction was set aside, and the case sent back for further proceedings.

P. C., KURUNEGALLA, No. 8,722. PERERA *v.* APPUHAMY and others. ... 79.

4—Criminal Procedure Code, Sect. 67—Offence made up of parts which are in themselves offences.

Where an accused was charged with and convicted of two offences—house-breaking by night with intent to commit theft under Sect. 443 of the Penal Code and theft from a dwelling house under Sect. 369, and the District Judge sentenced him to two years' rigorous imprisonment on each count—

Held, that as the two charges were only parts which made up the one offence, Sect. 67 of the Penal Code applied, and the District Judge could only punish to the limit of his jurisdiction, *i. e.*, two years as for one offence.

D. C., (Crim.) NEGOMBO, No. 980. ANTHONY *v.* ABILINO and others. ... 88.

5—Security for good behaviour—Criminal Procedure Code, Sects. 91 and 92.

Under Sect. 91 of the Criminal Procedure Code, whenever a Police Magistrate receives information that any person within the local limits of the jurisdiction of such Magistrate is an habitual robber, &c., he may require such person to shew cause why he should not execute a bond for his good behaviour—

Held, that information under this section must be supported by oath or affirmation, and that the non-observance by the Police Magistrate of the requirements of Sect. 92 as to setting forth in his order the substance of the information received, the amount of the bond to be executed, &c., is a material irregularity.

And it appearing in the present case that the information was not supported by oath or affirmation, and that the Police Magistrate had not followed the procedure in Sect. 92 of the Code, the Supreme Court set aside the proceedings and sent the case back to be proceeded with in due course.

P. C., PANVILA, No. 1,033. BANDA *v.* KALUBANDA and others. ... 93.

6—Criminal Procedure Code, Sect. 236—Ordinance No. 22 of 1890 Compensation to accused payable by complainant.

Under section 236, as re-enacted by Ordinance No. 22 of 1890, of the Criminal Procedure Code, the aggregate amount of compensation which a Police Magistrate may direct a complainant to pay the defendants may exceed Rs 10.

Ad. P. C., COLOMBO, No. 3,101. JOHANNES *v.* CAROLIS and others. ... 95.

7—Criminal Procedure—Evidence.

No consent on the part of an accused in a case or his proctor can make depositions of witnesses taken in another case legal evidence in the former.

P. C., KALUTARA, No. 155. HAMIAPPU *v.* BABAPPU ... 102.

8— Criminal Procedure—Compensation—Crown Costs.

A Police Magistrate cannot legally order a complainant to pay compensation and Crown costs, unless and until all the evidence which the complainant is ready to adduce has been heard.

P. C., Chilaw, No. 3,205. GUNESEKERE *v.* BABASINGHO and others 165

9—Criminal Procedure Code, Ch. X—Public Nuisance—Wire shoot over a public highway.

Appellant, who was the manager and owner of an estate traversed by the high road with, at a particular spot, steep embankments on each side, passed a wire rope over the high road, from one side of his estate to the other, at an altitude of from eighty to one hundred feet, by which from time to time, he shot packages of goods across the road. It appeared that if the system of working the wire shoot was carried out without mistake or neglect, there would be no danger to passengers along the road. *Held*, that inasmuch as section 115 of the Criminal Procedure Code conferred on Police Magistrates the power only to order the removal of existing, continuing and public nuisances, and those specially mentioned in that section, the Police Magistrate having held that it was the way in which the wire shoot was worked, and not the wire shoot itself that was a nuisance, it was not competent to him to issue an order under Sect. 115 to remove the wire shoot.

Semble, *per* BURNSIDE, C. J.—It was not the intention of the legislature to give magistrates power to restrain altogether a party from using his property in a particular way on the mere anticipation that a nuisance might result from his using it in an improper way.

An order by a Police Magistrate purporting to be issued under chapter X of the Civil Procedure Code requiring a party to abate a "nuisance" is *ultra vires*, Police Magistrates being by the Code empowered to deal with public nuisances only.

P. C., Panwila, No. 4,049. RATWATTE *v.* OWEN ... 172

10—Sects. 69 and 71, Criminal Procedure Code—Search Warrant.

Under Sects. 69 and 71 of the Criminal Procedure Code, a search warrant may be issued to search for arrack. The expression "other thing" in line 2 of Sect. 69 is not to be construed as referring to a thing *ejusdem generis* with "document" as used in the same section.

Ad. P. C., Colombo, No. 1,988 JONKLAAS *v* SILVA ... 199

11—Criminal Procedure Code, Sects. 207, 209, 210, 113—Joinder of charges—Indictment—General verdict and sentence.

In the case of distinct offences being properly joined in one charge or indictment, an accused should be separately sentenced for each separate offence of which he is found guilty.

When there are several counts in a charge or indictment framed to meet a doubtful case (*e. g.*, illustration to Sect. 210, Criminal Procedure Code) a general verdict and sentence would not be inappropriate.

D. C., Criminal, Galle, No. 11,959. The QUEEN *v* SAMARANAYAKA and others. 335

12—Criminal Procedure Code—Sections 405 and 414.

In a case in which some of the accused have received a sentence, from which an appeal lies, and some a sentence from which there is no appeal, on appeal by the former, the whole of the proceedings may be reviewed under section 414 of the Criminal Procedure Code.

P. C., Kandy, No. 143, SOYSA *v.* PUNCHIRALA and others. 199

13—Attorney-General—Lodging of appeal petition—Forwarding appeal petition by post—Sect. 754, Criminal Procedure Code.—

All criminal prosecutions are at the instance of the Sovereign, and the Attorney-General represents the Sovereign in her executive capacity in all Her Majesty's Courts.

In cases where the Attorney-General appeals, there should be the manual act of lodging the appeal in the Court by the Attorney-General or some one, whom he may authorize to act for him.

D. C., Criminal, Kurunegala. No. 2,450. The QUEEN *v.* HERAS APPU and others. 293

See APPEAL, 2.

——— INDICTMENT, 1.

——— INDICTMENT, 2.

——— MAINTENANCE, 3.

——— PUBLIC NUISANCE.

——— SEARCH WARRANT.

——— WEAPON LIKELY TO CAUSE DEATH.

CRIMINAL TRESPASS.

See CRIMINAL PROCEDURE, 2.

CROWN COSTS.

See CRIMINAL PROCEDURE, 8.

CURATORSHIP.

See CIVIL PROCEDURE, 7.

DECREE.

Decree—writ of execution—Judgment—Payment of an annual sum as alimony—Application for issue of writ.

Decree had been entered "that the defendant do pay plaintiff the sum of Rs. 10,000 per annum on 3rd April, 1891, as alimony and as reasonable provision for the support of plaintiff."

Held, that this was a bad decree, and must be reformed to express on the face of it the sums which and the periods at which the defendant is required to pay the annual rate fixed in the decree as alimony for the plaintiff and the children in her custody.

D. C., Kandy. No. 4,417. LE MESURIER *v.* LE MESURIER 287

See CIVIL PROCEDURE. 25.

DECREE, AMENDMENT OF.

See CIVIL PROCEDURE, 16.

——— COST.

DECREE NISI.

See CIVIL PROCEDURE, 26.

DEMURRER.

See DONATION.

DESERTION

Ordinance 11 of 1865—Wilful desertion—Minority—Liability of minor.

The liability of a minor to punishment for desertion under the Ordinance No. 11 of 1865 depends on the age and mental and bodily capacity of the minor. The mere fact that the minor is under 21 years of age will not relieve him from responsibility.

Allagan *v.* Allagie 1. S, C. R., p. 42 referred to.

P. C., Gampola, No, 12,685. DORA SAMY *v.* MEENATCHY 246

See INDIAN COOLIES,

DETENTION OF TITLE DEEDS.

Solicitors' lien—Detention of title deeds for fees for attesting deeds.

Plaintiffs agreed to sell an estate to F., and the title deeds of the estate were delivered by plaintiffs' proctors to defendants as proctors of F. for the purpose of preparing for execution a conveyance from plaintiffs to F. and a mortgage from F. to plaintiffs. The conveyance and the mortgage were drawn by defendants and duly executed. *Held*, that defendants were not entitled to a lien over the title deeds, and to detain the same, as against plaintiffs for fees due to them for preparing and attesting the conveyance and the mortgage.

D. C., Colombo, No. 1,142. ANDERSON and another *v.* LOOS & VANCUYLENBURG 162

DIGE MARRIAGE.

See KANDYAN LAW, 2,

DISCOVERY OF DOCUMENTS.

See CIVIL PROCEDURE, 10.

DISTRICT COURTS.

See COMMITMENT.

——— INDICTMENT, 2.

DISTRICT COURTS, POWERS OF.

See ROMAN DUTCH LAW, 2.

DONATION.

Donation, Acceptances of—Demurrer—R.D. Law—Right of husband to sue for property which has come to him in community—Cause of action.

Acceptance of a donation is mere matter of proof, and it is not necessary to allege it in a pleading as a link of title.

A husband by the Roman-Dutch Law is not obliged to join his wife in suits respecting land which has come to him in community. He could sue for damage in respect of such land or claim a declaration of title to it in his own name,.

Per BURNSIDE, C. J.—The mere sale by one man of the lands or goods of another gives the latter no cause of action in the absence of some act to disturb the physical possession or title of the owner.

Per DIAS, J.—Although according to the Dutch Law acceptation is an essential ingredient in a deed of donation, the mere acceptance of the instrument itself is a sufficient compliance with the requirements of the law

Per LAWRIE, J.—Where it is admitted that a defendant claimed to be the sole owner of land to which he was entitled jointly with the plaintiff, and that he executed a notarial deed of sale purporting to sell the whole land, and delivered the instrument to the vendees who registered it, there is a sufficient cause of action against him by the plaintiff for a declaration of the plaintiff's title and damages.

D. C., Galle, No. 54,307. DE SILVA *v.* ONDAATJEE and others 16

See EJECTMENT, 3.

DRIVING, NEGLIGENT. ...

See COLLISION.

EJECTMENT.

1—Title to and interest in the fabric of a church and its grounds—Ejectment.

No Foreign prince, power, state or potentate can, as an act of state, by any instrument, by whatever name it may be called, except by deed duly authenticated as required by law, convey or transmit to any person any right, title or interest in or to land or give to any person any civil rights, except in accordance with the law of the land, nor could any person so appointed assume to exercise any delegated authority, whether spiritual or civil, over others, except with their free consent and subject to the laws which govern the relations, not only between Her Majesty's subjects, but between all persons living under her rule and protection. And, hence, a Papal Bull establishing a hierarchy in the East and dividing the Island of Ceylon into three vicariates and other documents whereby 1st plaintiff was appointed Bishop of one of the vicariates with ecclesiastical jurisdiction in succession to the ecclesiastical dignitaries of that vicariate, were held insufficient to vest in him any title to or interest in the fabric of a church within such vicariate.

Where defendants were and had been for some time in possession of a church and its grounds, and plaintiffs sought to disturb that possession—*Held*, that they could only do so by superior title, and on the plaintiffs lay the burthen of proving such title.

1st plaintiff, as Bishop of Jaffna and chief local dignitary of the Roman Catholic Church exercising spiritual jurisdiction over the Mannar and Mantai Districts, claimed to be entitled to appoint priests to the said church, in whom, as he contended, were vested, by such appointment, the fabric of the church and the land on which it stood, and who were entitled to the charge of the church, and to officiate and manage its affairs, subject to his control and to the rights and usages of the Roman Catholic Church—*Held*, that the right so set up by 1st plaintiff was an interest in land, and that he was bound to prove title to such interest by the same means and subject to the same law as would apply to any other person.

D. C., Mannar, No. 8,061. MELIZAN and another *v.* SAVERY and others 107

2—Lease—Action by lessee for ejectment and damages, without possession by him under lease.—Kandyan wife.—Voluntary Conveyance by husband in fraud of creditors, Effect of.

A lessee can maintain an action to eject from the land leased a party claiming adversely to his lessor, even though he himself has never had any possession under his lease, and also for damages by reason of his having been kept out of possession.

Per CLARENCE, J.—Granted that a Kandyan wife can take a conveyance on sale from her husband, such a transaction may not unreasonably be viewed with some jealousy.

D. C., Kurunegala, No. 21,925. PINHAMI *v.* PURAN APPOO and another 144

3—Ejectment—Title—Right to immediate possession—Kandyan Law—Donation—Revocation of gift.

In an action in ejectment the plaintiff has not only to prove that his title is superior to that of the defendant, but also that at the time of action brought, he was entitled to the immediate possession of the land he seeks to recover.

D. C. Kegalle. No. c 88. SIDDARTE UNANSE *v.* SUMANA UNANSE and another. 256

See PRESCRIPTION, 3.

ESTOPPEL.

Estoppel—Judgment in ejectment against husband, how far binding on wife's heirs—Right of surviving husband to alienate or encumber property of deceased spouse.

A Libel in an action against five defendants averred that the plaintiffs had bought a certain land from the first four defendants, and had been in possession, and that the vendor-defendants in collusion with the fifth defendant took unlawful possession of a portion of the land, and retained possession of it; and it prayed for a declaration of title in the plaintiffs' favour and for a judgment in ejectment against the defendants generally. The fifth defendant (married in community of property) appeared to the action before his wife's death, and was barred from answering after her death; and a decree passed in favour of one of the plaintiffs "for the land as claimed in the Libel."

Held, that the Libel disclosed no right in the plaintiffs to eject the fifth defendant, or even for a declaration of title as against him; and that the judgment entered up against the fifth defendant did not estop the heirs of his wife from setting up title to the land.

Per Clarence, J.—Under the Roman Dutch Law, the surviving husband, when there has been no administration, has a right to alienate or encumber the share of his deceased spouse, only so far as a necessity of paying debts renders it beneficial to the heirs of the deceased spouse that that should be done.

D. C., Chilaw, No. 24,485. ROWEL and others *v.* FERNANDO 113

See CIVIL PROCEDURE, 19.

EVIDENCE.

See CIVIL PROCEDURE, 24.

——— COPIES, CERTIFIED.

——— CRIMINAL LAW.

——— CRIMINAL PROCEDURE, 7.

EXECUTOR, ASSENT OF, TO DEVISES.

See TITLE.

EX PARTE JUDGMENT.

See APPEAL, 1.

FINAL JUDGMENT.

See CIVIL PROCEDURE, 31.

FISCAL'S CONVEYANCE.

1—Fiscal's Conveyance—Its effect when obtained by purchaser at the Fiscal's sale after sale by him to a third party—Conveyance by an infant.

K purchased certain land at a Fiscal's sale in April, 1887, and thereafter, but before he obtained a Conveyance for it from the Fiscal, sold the land to M who, on 7th July, 1887, sold it to the plaintiff. K obtained the Fiscal's Conveyance on 9th July, 1887—

Held, that the Fiscal's Conveyance obtained by K after his sale to M enured to the benefit of M so as to complete the chain of title between K and the plaintiff.

A Conveyance by an infant is not *ipso facto* void, but only voidable by the infant himself.

D. C., Kurunegalle, No. 21,776, SELOHAMY *v.* RAPHIEL and another ... ... 73.

2—Fiscal's Conveyance.—Rights of heirs of purchaser at a Fiscal's sale—Practice.

Where a plaintiff, since deceased, bought land sold in execution of the judgment in his favour, but omitted to obtain the formal Fiscal's Conveyance, and after the lapse of some years his heirs applied to be substituted plaintiffs to enable them to obtain such conveyance—*Held*, per LAWRIE, J, that the heirs had mistaken their remedy; that the right of the heirs to get a conveyance did not depend on their being substituted plaintiffs, but that the court might on summary petition by them authorise or order the Fiscal to grant such conveyance.

D. C, Colombo, No. 56,886. JALDIN *v.* NURMA ... 187

FORESHORE.

The Foreshore—Rights of the Crown and Privileges of the Public with respect to it—Action for Rent.

Assuming that the foreshore is the property of the Crown, the right of the Crown to it is not in general for any beneficial interest to the Crown itself, but for securing to the public its privileges on the spot between high and the low water mark, and the Crown itself could do no act to interrupt those privileges; and hence it could not empower others by any means whatever, whether it be by grant or lease or license, to do so.

The use of the seashore is as common to all as that of the sea ; and hence the Crown cannot lease or grant the foreshore to any one for acts that would impede the common user, much less claim rent or remuneration for occupation for such acts, rent being claimable on a contract, express or implied, to pay it.

D. C., Colombo, No. 2,097. The Attorney-General *v.* Pitche 11

FOREST SETTLEMENT.

1—Ordinance No. 10 of 1885—Claim by Government Agent on behalf of the Crown—Adjudication by Forest Settlement Officer—Appeal to Government Agent.

The constitution of the Government Agent, as the Appellate Court to which an appeal lies in the first instance from adjudications made by the Forest Settlement Officer on claims under the Ordinance No. 10 of 1885, virtually deprives the Government Agent of all executive functions in reference to such claims.

In the matter of the Forest Settlement of the Village Gilimale, Ratnapura, Claim No. 182. The Queen *v.* Punchi Bandara 230

2—Ordinance 10 of 1885, Chapter IV—Rules prescribed by Government Agent—Evidence.

In a prosecution for breach of any of the rules prescribed by the Government Agent under Chapter IV of Ordinance 10 of 1885, a copy of the rules must be put in evidence, and the Court cannot take judicial cognizance of such rules, until they are proved.

P. C., Manaar, No. 865. Peachy *v.* Mastankamy ... 247

FURTHER EVIDENCE.

See Civil Procedure, 24.

GENERAL VERDICT.

See Criminal Procedure, 11.

Grenier, Sir Samuel, A.-G., Minute on the death of. 300

GRIEVOUS HURT.

Ordinance 6 of 1891 Section, 1, Sub Sect. 1—Release on probation—Grievous hurt.

Under Sect. 1, Sub. Sect. 1 of Ord. 6 of 1891 "in any case in which a person is convicted of any offence punishable with not more than three years' imprisonment before any Court, and no previous conviction is proved against him, the Court may release him upon probation of good conduct instead of sentencing him to imprisonment."

Held, that this section does not apply to the offence of voluntarily causing grievous hurt and that it could only apply to comparatively lenient offences, which are not punishable in any Court with more than three years' rigorous imprisonment.

D. C., Criminal, Trincomalie, No. 2,353. The Queen *v.* Kirisnen. 281

GUARDIANSHIP.

See CIVIL PROCEDURE, 2.

HABEAS CORPUS.

Writ of Habeas Corpus.—Commencement of execution of sentence—Infliction of punishment under a sentence by instalments.

E. was on the 30th November, 1881, sentenced by the Supreme Court to imprisonment at hard labour for ten years. On the 30th January, 1882, he was again sentenced by the Supreme Court, for a separate offence, to imprisonment at hard labour for ten years, and to receive twenty-five lashes on his bare back. Under the latter sentence the prisioner was lashed on the 3rd February, 1882.

Held, that as the punishment of a prisoner on a sentence passed on him cannot be inflicted by instalments, the prisoner's second sentence must be taken to have commenced from the moment he was lashed, and the two sentences of imprisonment ran concurrently, and the prisoner was entitled to be discharged at the expiration of ten years from the date on which he was lashed.

In re ELLIAS, a prisoner in the Wellicade Jail. ... 40

HANDCUFFING.

See ARREST, WARRANT OF.

HINDERING JUDGMENT CREDITOR.

See CIVIL PROCEDURE, 23.

See CIVIL PROCEDURE, 34.

HINDOO TEMPLE.

Hindoo Temple—Officiating Priest—Prescription—Jurisdiction of District Courts over Ecclesiastical matters.

Plaintiff alleged that he was a Brahmin and a Priest of *Iswara* gods; that for upwards of thirty years he officiated as priest of a certain Temple, the officiating priests of which were the heirs of its donors; that during that time, as such officiating priest, he had enjoyment, use, and possession of the offerings and income of the Temple; and that defendant invaded his right, and deprived him of his share of the revenue. He prayed for a declaration that he was priest of the Temple, and as such entitled to the receipt and appropriation of one half of its revenue, and that he be quieted in the exercise of his right, as priest, to have and receive such share of the revenue.

Held, that the above allegations did not entitle plaintiff to the relief sought.

Semble, *per* WITHERS, J.—A District Court has no jurisdiction over purely ecclesiastical matters, and cannot interfere in the concerns of a religious community, unless in the rules which it has made for its members in relation to the religious object which it has combined to maintain and support, a civil element enters, which brings it within the sphere of the Court's civil jurisdiction.

D. C., Trincomalie, No. 154. KURUKEL *v.* KURUKEL. ... 354

HIRE, CONTRACT OF.

See ROMAN DUTCH LAW, 3.

IMPLIED PROMISE.

Payment of debt due by another—Implied promise—Mortgagor and Mortgagee—Sale for non-payment of Commutation Tax.

A was the holder of a mortgage over a land, of which B was owner, and A had obtained a mortgage decree, declaring the land bound and executable for the debt. B having failed to pay the commutation tax due on the land, which had accrued subsequent to the mortgage, the Government seized and sold the land, but on A coming forward and paying the tax, the sale was cancelled, and B released from his liability to pay the tax.

Held, that A could claim from B the sum so paid by A as commutation tax, on the promise implied by law, that, when one person is compelled to pay money which another is legally compellable to pay, the latter will repay it.

Such implied promise is independent entirely of any express contract of the parties by way of guarantee, indemnity, contribution, or otherwise.

C. R., Batticaloa, No. 977, VELAUTHEN *v.* NALLATAMBY. ... 290

INDIAN COOLIES.

Indian Coolies—Desertion — Non-payment of wages—Burden of proof—Ordinance No. 11 of 1865, section 21—Ordinance No. 13 of 1889, section 6, sub. Sect. 1—Ordinance No. 7 of 1890, section 1.

Where a labourer charged with desertion seeks to justify the act on the ground that his wages have not been paid within the prescribed period, the burden of proving such non-payment is on the accused; but as in the case of an estate cooly and his master the accounts are usually with the latter, the court will call on him to produce them, and so place it in a position to strike the balance between the parties.

Per CLARENCE, J.—The 21st section of Ordinance No. 11 of 1865 provides in effect that no cooly shall be punishable for desertion, if his wages have at the time of leaving been unpaid for any period longer than a month, and if forty-eight hours before leaving he shall have unsuccessfully demanded his wages. This section is neither expressly nor impliedly repealed by Ordinance No. 13. of 1889 or Ordinance No. 7 of 1890, but subsists in force side by side with the 6th and 7th sections of Ordinance No. 13 of 1889 as amended by Ordinance No. 7 of 1890.

Hence, when a cooly falling under the category of "Indian coolies" is charged with desertion, he has two defences open to him founded on non-payment of wages viz., the old defence under Ordinance No. 11 of 1865 that wages for more than a month remain unpaid, and the new defence under Sub. Sect. 1 of Sect. 6 of Ordinance 13 of 1889 as amended by Sect. 1 of Ordinance No. 7 of 1890 that wages have not been paid within sixty days from the expiration of the month during which the same have been earned; but to avail himself of the former defence he must have made demand forty-eight hours before leaving.

P. C., Kalutara No. 11,631. HENLY *v.* WELLAYAN. and others... 136

INDICTMENT.

1—Indictment signed and presented by Advocate specially authorised by the Attorney-General to conduct prosecution—Criminal Procedure Code, Sects. 277 and 280.

An Advocate specially authorised by the Attorney-General, under Sect. 277 of the Criminal Procedure Code, to conduct prosecutions before the Supreme Court may sign and present to the Court the indictments in such prosecutions.

No. 19 of the 1st Criminal Sessions of the S. C. for the Southern Circuit for 1892, holden at Galle. The QUEEN *v.* SOMANASEKERA and others 102

2—District Court—Indictment—Sect. 263, Criminal Procedure Code—Charge framed by Attorney-General.

In the trial of an accused in the District Court an indictment was presented which embodied the charge framed by the Attorney-General in terms of Sect. 263 of the Criminal Procedure Code.

Held that the District Judge had no right to ask the Secretary of his court to present a new indictment charging the accused with an offence under another section.

D. C., Criminal, Ratnapura. No. 397. THE QUEEN *v.* MENDIS 249

See CRIMINAL PROCEDURE, 11.

——— WEAPON LIKELY TO CAUSE DEATH.

INFANCY.

See COOLY.

INFANT, CONVEYANCE BY.

See CIVIL PROCEDURE, 17.

INSOLVENCY.

1—Insolvency—Ordinance No. 7 of 1853, Section 36—Discharge of Insolvent from custody.

Under section 36 of Ordinance No. 7 of 1853 when a person who has been adjudged an insolvent, and has surrendered and obtained his protection from arrest is in prison or in custody for debt, the Court may, except in the cases mentioned in the 1st proviso to the Section, order his immediate release. The cases mentioned in the proviso are those of persons in prison or in custody for debts contracted by fraud, &c., or on judgments in actions for breach of promise of marriage, Libel, Slander, &.

Held, that an insolvent who is in custody at the date of adjudication is not entitled to be discharged merely because his case does not fall within any of the exceptions in the above proviso, but that the discharge of the Insolvent under the above Section is a matter discretionary with the Judge.

Held also, that the proper time for the application for the release of an insolvent from custody is after the choice of assignees has been, made.

D. C., Colombo, (Int.)No. 1763. *In re the* Insolvency of SARAYE LEBBE 53

2—Insolvency—21 days' imprisonment on mesne process—Ordinance No. 7 of 1853, Sect., 9.

Suffering twenty-one days' imprisonment on mesne process for failure to give security to abide by the judgment of the Court "in a certain action to pay all such sum or sums of money as should be decreed" is not an act of insolvency within the meaning of the Insolvency Ordinance.

D. C., Kandy, No. 1,292. *In re* the Insolvency of PITCHE MUTTU 87

INSTALMENTS, PAYMENT BY.

See CIVIL PROCEDURE, 25.

INTERPRETATION OF ORDINANCE.

Interpretation of Ordinance—Removal of spirit without permit—Ordinance No. 10 of 1844.

Section 37 of Ordinance No. 10 of 1844 enacts that the "owner" of spirit removed without a "permit and every person concerned in the removal thereof shall be guilty of an offence, and be liable, on conviction, to a fine at the rate of thirty shillings per gallon, whether more or less, upon the quantity so removed."

Held, that the words of the section do not imply that no more than a fine of thirty shillings a gallon can be imposed on the accused, whatever their number, but that the full fine of thirty shillings a gallon is exigible from every person concerned in the removal.

Semble per curiam, that when an ordinance enacts that an offender shall be liable on conviction to a fine of a stated amount, or to imprisonment for a stated period, the meaning is that he is liable to fine or imprisonment, as the case may be, not exceeding the amount or period mentioned in the ordinance, and not that the whole punishment must be inflicted.

P. C., Colombo, No. 3,233. The QUEEN *v.* PERUMAL and another 48

INTERVENTION.

See APPEALABLE ORDER.

ISSUES, SETTLEMENT OF.

See CIVIL PROCEDURE, 33.

JOINDER OF CHARGES.

See CRIMINAL PROCEDURE, 11.

JUDGMENT.

Concurrence—Judgment not conclusive evidence of debt.

The right of a creditor to claim concurrence in the proceeds of a levy made on the debtor's goods by another creditor, which subsisted under the Roman-Dutch Law, has not been put an end to either by legislation or by decision. But the creditor claiming concurrence, before he can be admitted to share in the proceeds, is bound to prove the existence of the debt: a judgment is not necessarily conclusive as to the existence of the debt.

C. R. Kandy, No. 62. CHELLAIYA *v.* ALWIS ... 56

JUDGMENT BY DEFAULT.

See CIVIL PROCEDURE, 6.

JUDGMENT CREDITOR.

See CIVIL PROCEDURE, 34.

JUDICIAL SETTLEMENT.

See CIVIL PROCEDURE, 28.

JURISDICTION.

District Court—Administrator—Action to set aside judgment obtained in a Court of Requests—Fraud—Minor.

Plaintiff, as administrator, brought an action in the District Court of Jaffna to set aside a judgment fraudulently obtained by defendants in the Court of Requests of Point Pedro against a minor, as representative of plaintiff's intestate's estate.

Held, that the District Court of Jaffna had no power to enforce a decree against another Court, although of inferior jurisdiction, and that the Court itself, in which the fraud has occurred should be called on to deal with it.

D. C. Jaffna, No. 22,683. KURUKAL *v.* MURUGAN and others 259

See CIVIL PROCEDURE, 5.

——— HINDOO TEMPLE.

——— MAINTENANCE, 2.

——— MISCHIEF.

——— RENT.

JUS RETENTIONIS.

See COMPENSATION FOR IMPROVEMENTS TO LAND, 2.

———, LANDLORD AND TENANT, 2.

KANDYAN LAW.

1—Kandyan Law—Unregistered Marriage before Ordinance of 1859—Repudiation—Registered Marriage after Ordinance of 1870—Effect of Repudiation and subsequent Marriage—Issue of which Marriage entitled to preference.

K., a Kandyan, married M. a Kandyan according to Kandyan custom before the Ordinance of 1859 was passed. The marriage was not registered. K. repudiated M. and married the defendant after the passing of Ordinance No 3 of 1870. This marriage was registered. The plaintiffs as the grand children of K. by his daughter D. begotten of M claimed his estate; the defendant contested their right, and set up a title in herself as the lawful widow of K.

Held, that the union of K. with M. was a lawful one under the Ordinance of 1859 and 1870, and though K. repudiated M., such repudiation not having been effected under any of these enactments, did not amount to a valid dissolution of marriage; that the marriage of K. with the defendant though registered was invalid under the circumstances, and that the plaintiffs as the issue of the first union were entitled to K's estate in preference to the defendant.

D. C. Kegalla, No. 5,954. APPUHAMI and another *v.* RAMMENIKA. 125

2—Kandyan Law—Dige marriage—Inheritance—Ordinance No. 3 of 1870.

A woman who now lives in *dige*, but whose marriage has not been registered under "The Amended Kandyan Marriage Ordinance, 1870," is in very much the same position as a *dige* married woman was before the Ordinance came into operation. Hence, a woman who so lives is not entitled to a share of her father's estate.

C. R. Kandy, No. 1,114. KALU and another *v.* HOWWA and another. 140

3—Kandyan law—Right of childless widow to possess husband's paraveni lands for maintenance—Small Estate—Maintenance of widow and possession of estate by heir-at-law.

Where a Kandyan childless widow has no other means of subsistence, *Held* that she was entitled to possess her husband's paraveni lands, and to support herself out of them, but her right to do so ceased as soon as the deceased's heir-at-law came forward and undertook to provide for her maintenance. There could be no reason in making an exception where the lands were small, and she had no other means of subsistence.

D. C., Kurunegala, No. 21,919. DINGIRI AMMA *v.* MUDIANSE and another. 207

See EJECTMENT, 3.

KANDYAN WIDOW.

See KANDYAN LAW, 3.

KANDYAN WIFE.

See EJECTMENT, 2.

LAND ACQUISITION.

"The Land Acquisition Ordinance, 1876," Sections 13, 34 and 35—Libel of reference under Sect. 11.

The first step preliminary to a reference by a Government Agent to the District Court under "The Land Acquisition Ordinance, 1876," after he has determined the amount of compensation, is to tender the amount to the persons interested, who appear; and until he has done so, he has no right to make such reference; and the fact of such tender should be stated as a condition precedent in the libel of reference.

It is only after the sufficiency of the amount of compensation awarded by the Government Agent is admitted by the claimants that he can refer to the District Court the question as to the apportionment of the amount among the respective claimants: and if the sufficiency of such amount is not admitted, the question of such sufficiency must first be referred and decided. On a reference on the question as to the apportionment of the amount the District Court has no power to adjudicate on the question as to its sufficiency.

D. C., Galle. No. 1,038. ELLIOTT *v.* PODIHAMY and others 349

LANDLORD AND TENANT.

1—Landlord and Tenant—Proviso of re-entry—Claim for Rent—Damages—Penalty.

Where by an indenture of lease it is agreed that the landlord should have the right of re-entry on failure of the tenant to pay rent due in advance, and the landlord re-enters upon such failure, he can have no further claim for rent not in arrear; but can recover damages actually sustained by the breach of the covenant to pay rent.

Per WITHERS, J.—Where it is stipulated to pay damages on a breach of contract, and the stipulation is made in respect of a sum certain, and the amount fixed on as damages is greater than that sum, it is generally to be treated as a penalty and not as liquidated damages.

D. C. Colombo, No. 3,905. BAWA SAIBO *v.* JACOB COORAY ... ... 233.

2—Landlord and Tenant—Re-entry—Tacit hypothec—Jus retentionis—Roman Dutch Law—English Law—Landlord's lien.

Per BURNSIDE, C. J.—A landlord has no right to lock up the house of his tenant and exclude him from the beneficial enjoyment of the leased premises, either to enforce his lien, or to prevent the tenant from removing the goods from the premises, nor can he, if he makes a distress for rent, exclude the lessee from any part of the demised premises.

Per WITHERS, J.—A substantial interruption by the landlord of the enjoyment of demised premises discharges a lessee from liability to pay rent, except what has accrued due, and entitles him to claim annulment of the contract of lease, and damages, if any, for the interruption.

D. C. Colombo, No. 1,944. MARIKAR *v* BELL. ... 237

3—Landlord and tenant—Notice to quit—Monthly Tenant.

In the case of monthly tenancies, either party must have a complete calendar month to find a new house or engage a new tenant as the case may be. To ensure this, a notice to quit must be given before the commencement of the month at the expiry of which the tenancy is to determine, so that the party noticed shall have from midnight of the last day of the month immediately preceding the month, at the end of which the tenancy is determined by the notice, to midnight of the last day of the expiring month of the tenancy as thus determined, for the purpose of making fresh arrangements.

D. C., Kalutara, No. 840. DE FONSEKA *v* JAYEWICKREME 352

See COMPENSATION FOR IMPROVEMENTS TO LAND, 2.

——— RENT.

LAND, PURCHASER OF.

See WARRANTY.

LEASE.

1—Lease, Breaches of Convenants of—Lessor's right to sue—When it accrues—Cause of action.

The plaintiff leased a cinnamon estate to the defendants for four years, and by the terms of the lease the defendants were to clear and weed the estate, bury weeds, &c., before the 30th April of each of the said four years. The

defendants also covenanted by the said lease not to cut green cinnamon from bushes unfit to be peeled, nor to pluck tender coconuts from the coconut trees on the estate, and to possess the land "so that no damage might be caused thereto."

Held, that the plaintiff was not entitled to recover damage from the defendant, until after the expiration of the lease, for breaches of the above convenants, save and except that for clearing and weeding the estate before the 30th April, of each of the four years of the lease.

D. C., Kalutara, No. 43,396. De Fonseka *v.* Fernando and another. 35

2—Lease—Informal agreement—Failure to execute deed—Action for repayment of rent.

A, on an informal agreement that B would execute a notarial lease of land, paid the consideration for the lease and entered into possession of the land. Some months after, A sued B alleging that he had refused to execute the deed of lease, and prayed for repayment of the rent paid.

Held, that A's action was misconceived, and that B's alleged refusal to execute the deed of lease gave A no cause of action.

Per Withers, J.—An agreement for a demise, unless it is expressly contemplated that a more formal instrument shall be executed, operates as a demise.

D. C., Kegalla, No. 101. Gomes *v.* Tikiribanda ... 260

LIEN, SOLICITOR'S

See Detention of Title Deeds.

MAINTENANCE.

1—Maintenance—Ordinance No. 19 of 1889—Evidence as to non-access between husband and wife.

In a prosecution under "The Maintenance Ordinanee, 1889," by the mother of an illegitimate child against its putative father, the complainant, if a married woman, may give evidence as to the person by whom the child was begotten provided non-access to her by her husband has first been proved by other evidence.

Neither the husband nor the wife can give evidence as to non-access.

P. C. Matara, No. 10,164. Babatcho *v.* Daniel ... 25

2—Maintenance—Child two years old—Jurisdiction—Ordinance No. 19 of 1889, Sect. 3.

A Police Magistrate has no jurisdiction to entertain an application under Ordinance No. 19 of 1889 where the child sought to be affiliated is more than twelve months old, unless the case falls within the exceptions stated in section 7.

It is not competent to a Police Magistrate to enter an order directing that the payments to be made by the accused do commence from a date antecedent to the date of the order, and requiring the accused to pay a lump sum.

P. C., Galle, No. 972. Podihamy *v.* Subehamy ... 81

3—Maintenance—Ordinance No. 19 of 1889, Sects. 3, 14 & 17—Appealable order—Ordinance No. 1 of 1889, Sect. 39—Dismissal of application for maintenance—Criminal Procedure Code Sect. 404—Appeal by Attorney-General.

In proceedings under the Maintenance Ordinance No. 19 of 1889 the only appealable orders are those under section 3 requiring a husband to make his wife or a father his child, a monthly allowance, and those under Sect. 14 refusing to issue summons after examination of a person who applies for an order, or a warrant to enforce an order of maintenance (See Sect. 17.)

An order dismissing the application for an order of maintenance is not appealable by the applicant, and (per BURNSIDE, C. J.,) as the order amounts to an acquittal, the appeal must be by the Attorney-General.

Per LAWRIE, J. (*dissentiente*) The right to appeal against a dismissal is expressly conferred by section 17 of the Maintenance Ordinance. Even if it does not, the Supreme Court has appellate jurisdiction under section 39 of Ordinance No. 1 of 1889.

P. C., Colombo, No. 165. SALESTINA HAMY *v.* SIMON PERERA 224

MALICIOUS PROSECUTION.

Malicious prosecution—Reasonable and probable cause—Malice.

In actions for malicious prosecution the questions to be considered are (1) Did the defendant take reasonable care to inform himself of the true state of the case, and (2) did he himself believe the case which he had laid before the Magistrate?

Where the defendant allowed himself to be entirely guided by an Inspector of Police, and instituted proceedings without satisfying himself of their *bona fides*.

Held, There was absence of reasonable and probable cause. Judgment of Justice Cave in Brown *v* Hawkes, 60 L. J. Q., B. 335, followed.

D. C., Colombo, No. 1,697. ORR *v.* MARTIN. ... 204

MANDAMUS,

Mandamus—Council of Legal Education—The Courts Ordinance 1889, Sect. 18, and Sch. III, Rules 24 and 31.

There is no express law whereby the Supreme Court is compellable to admit and enrol proctors or the Council of Legal Education is compellable to permit any one to submit himself for examination with a view of obtaining a certificate of qualification to enable him to apply to the Supreme Court to be enrolled as a proctor.

The Council of Legal Education have vested in them a discretion to control the education of candidates, and the Supreme Court will not interfere with that discretion, unless it is most unreasonably exercised.

It is not unreasonable for the Council of Legal Education to pass a general resolution restricting the number of examinations for which a candidate may enter.

In re the application of Salgado, a law student, for a rule on the Council of Legal Education. 189

MARRIAGE.

See KANDYAN LAW, 1.

MASTER AND SERVANT.

Master and servant—Transfer of Contract of service.

A Master has no right to transfer to another his servant's contract of ervice with him, without the servant's consent.

P. C., Kalutara, No. 2,776. BOWEN *v.* PANNUM. ... 94

MINOR.

See CIVIL PROCEDURE, 29.

——— DESERTION.

MINOR, CONVEYANCE BY.

See CIVIL PROCEDURE, 17.

MISCHIEF.

Mischief—Jurisdiction—Rule of Construction.

Mischief by killing a buffalo of the value of Rs. 30 is an offence for which a prosecution may be entered under either the 411th or the 412th section of the Penal Code.

Ad. P. C., Kegalle, No. 348. BANDA *v.* SOMALIA. ... 26

MONTHLY SERVANT.

See COOLY.

MORTGAGE.

1—Sale of mortgaged property—Proceeds under morgage decree—Balance in Court—Claim by mortgagor's vendee.

The defendant mortgaged a land in 1882 to A, and sold it in 1887 to B for Rs. 300 of which B paid down Rs. 100, and by agreement retained the Balance Rs. 200 to pay it to the mortgagee A. B entered into possession of the land, but never paid the mortgagee. The mortgage bond was put in suit as against the defendant only, and after satisfaction of the mortgagee's claim out of money recovered by sale of the land mortgaged, a sum of Rs. 90 remained in Court. B by petition claimed this sum.

Held, by CLARENCE and DIAS, J. J (BURNSIDE, C. J. *dissentiente*) that whatever may be B's rights as against the defendant, B could not on such application be allowed to draw the money.

D. C., Kandy, No. 3,055. SAIBO *v.* RAHIMAN. ... 62

2—Mortgage of movable property—Sale and delivery to a third party—Title of purchaser—Mortgagee's seizure of such property in the hands of a third party.

The sale and delivery of movable property to a third party confers valid title on the purchaser, and such property is not executable on the mortgagee's writ.

Casy Lebbe Marikar *v.* Abdul Rahman (IX, S. C. C., P. 10) considered.

D. C., Jaffna, No. 22,914, SIMEON and others *v.* THAMPIMUTTU and another 213

3—Marriage in Community—Mortgage by husband—Action against mortgagee by children for mother's share—Claim in reconvention by mortgagee.

A, while married in community to B, mortgaged certain land to C. B having died, the executrix of C. assigned the mortgage to X who sued upon the mortgage, and had the mortgaged land seized and sold under his writ. The plaintiffs, who are children of A and B, having instituted an action against A and X for a declaration of title to an undivided half of the said land by right of inheritance from B—

Held, that X had a right to claim in reconvention a decree declaring the plaintiff's share of the land bound and executable under the mortgage to his assignors by their father A

D. C., Colombo, No. c. 1,875 FERNANDO and others *v.* FERNANDO and others 250

See IMPLIED PROMISE.

MORTGAGE BY EXECUTRIX.

Mortgage by executrix—Seizure of property of a deceased Testator by a Creditor.

A creditor of a deceased testator may not follow, under writ of execution, property of the estate, in the hands of a bonâ fide purchaser or mortgagee from the executor of the testator's estate.

D. C., Colombo, No. c. 1,162. SMITH *v.* WIJERATNE. ... 13

MORTGAGE DECREE, SALE UNDER.

See ROMAN DUTCH LAW.

MORTGAGEE.

See CIVIL PROCEDURE, 15.

MOVABLE PROPERTY.

See MORTGAGE, 2.

MUNICIPAL COUNCIL.

"The Municipal Councils Ordinance, 1887," Sec. 73—Right of a Municipal Council to sue one of the Public for damages for a trespass on a street—Prescription.

Semble per BURNSIDE, C. J.—"The Municipal Councils Ordinance, 1887" which vests all streets, &c., in the Municipality only vests them for the purposes of the Ordinance, and although it gives the Municipality every necessary power in order to protect and conserve the streets for public purposes, it does not give to the Municipality any right to bring a civil action for damages for a trespass on a street by one of the public themselves. The Municipal Council could not in itself and by its personal action prescribe for any particular street.

D. C., Kandy, No. 4,627. The MUNICIPAL COUNCIL of Kandy *v.* PHILIP. 50

NEXT FRIEND.

See CIVIL PROCEDURE, 29.

NON-JOINDER OF PARTIES.

See CIVIL PROCEDURE, 9.

NOTARY.

Signature of Notary—Attesting witness—Section 2 of Ordinance No. 7 of 1840—Attestation—Ordinance 16 of 1852.

In an instrument under Sect. 2 of Ordinance No. 7 of 1840 a notary is an attesting witness in precisely the same sense as are the two witnesses who with him are required to attest the execution thereof.

The mere failure of the notary to attach a formal attestation does not invalidate such an instrument, though it would penalize the notary.

D. C. KANDY, No. $\frac{3,768}{146}$ KIRIBANDA *v.* UKKUWA ... 216

NOTICE TO QUIT.

See SMALL TENEMENTS ORDINANCE.

——— LANDLORD AND TENANT, 3.

ORDINANCES.

No. 8 of 1834.

See PRESCRIPTION, 5.

No. 7 of 1840.

See COPIES, CERTIFIED.

No. 7 of 1840, section 2.

See NOTARY.

No. 10 of 1844, section 37.

See INTERPRETATION OF ORDINANCE.

No. 16 of 1852.

See COPIES, CERTIFIED.

—— NOTARY.

No. 7 of 1853.

See CONCURRENCE, 2.

No. 7 of 1853, section 9.

See INSOLVENCY, 2.

No. 7 of 1853, section 36.

See INSOLVENCY, 1.

No. 8 of 1863.

See COPIES, CERTIFIED.

No. 10 of 1863, sections, 5 and 9.

See PARTITION DECREE.

No. 12 of 1864.

See COPIES, CERTIFIED.

No. 11 of 1865.

See DESERTION.

No. 11 of 1865, section 21.
See INDIAN COOLIES.
No. 14 of 1867, section 17.
See TOLL.
No. 3 of 1870.
See KANDYAN LAW, 2.
No. 22 of 1871.
See PRESCRIPTION, 5.
No. 22 of 1871, section 5.
See CIVIL PROCEDURE, 30.
No. 22 of 1871, section, 7.
See PRESCRIPTON, 4.
No. 3 of 1876, sections 11, 13, 34 and 35.
See LAND ACQUISITION.
No. 10 of 1885.
See FOREST SETTLEMENT, 1.
—— FOREST SETTLEMENT, 2.
No. 10 of 1885, sections 45 and 46.
See TIMBER, REMOVAL OF.
No. 4 of 1885, sections 4 and 8.
See CIVIL PROCEDURE, 12.
No. 7 of 1887, section 198.
See BUILDING, DEMOLITION OF.
No. 1 of 1888, section 1.
See CRIMINAL PROCEDURE, 3.
No. 1 of 1889, section 39.
See MAINTENANCE, 3.
No. 5 of 1889, section 1, Sub.-Sect. 3.
See BROTHEL.
No. 13 of 1889.
See WAGES, ARREARS OF.
No. 13 of 1889, Sections 5 and 8.
See COOLY.
No. 13 of 1889, Section 6, Sub.-Sect. 1.
See INDIAN COOLIES.
No. 19 of 1889.
See MAINTENANCE, 1.
No. 19 of 1889, section 2.
See MAINTENANCE, 2.
No. 19 of 1889, sections 3, 14 and 17
See MAINTENANCE, 3.
No. 3 1890, section 32.
See STAMP, 2.
No. 7 of 1890, section 1.

See INDIAN COOLIES.

—— WAGES, ARREARS OF.

No. 6 of 1891, Sect. 1, Sub-Sect. 1.

See GRIEVOUS HURT.

PARTITION DECREE.

Ordinance No. 10 of 1863, Sects. 5 and 6 —Partition Decree—Stranger to Partition suit—Title—Remedy—Damages.

A partition decree is good against all the world, and by Ordinance No 10 of 1863, a stranger to the action, damnified by the decree, has no remedy left him, save an action for damages. (9, S. C. C., p. 198 followed.)

Per LAWRIE, J. (*dissentiente.*)—If in the final scheme of division in a partitoin suit, the parties to it include land, which did not belong to them in common, the decree has no strength or effect against a stranger to the suit.

It is the decree for partition which, under Sect. 5 of Ordinance No. 10 of 1863, precedes the issue of the commission for partition, which is conclusive under Sect. 9 (1, S. C. C., p. 19.)

D. C., Galle, No. 1,023. CAROLIS APPU *v.* RATNAIKE and another 274

PARTITION SUIT.

Partition suit—Ouster by a trespasser without title—Misjoinder of Defendants.

A trespasser without title cannot be joined as a defendant in a partition suit.

The plaintiff in a partition suit ought not only to state the extent of plaintiff's claim, but also disclose facts which warrant his claim to the extent of his share.

D. C. MATARA, No. 3,600, DEPARIS and another *v.* CHRISTIAN and others 218

See CIVIL PROCEDURE, 36.

PENAL CODE.

Sections 102 and 210.

See ACCEPTING GRATIFICATION TO STAY LEGAL PROCEEDINGS.

Section 138.

See WEAPON LIKELY TO CAUSE DEATH.

Section 208.

See PREFERRING FALSE CHARGE.

Section 261.

See PUBLIC NUISANCE.

Section 310.

See ROBBERY.

Section 389.

See CRIMINAL BREACH OF TRUST.

Section 398.

See CHEATING, 1.

Sections 411 *and* 412.

See MISCHIEF.

Sections 483 *and* 486.

See CRIMINAL INTIMIDATION.

Section 488.

See PUBLIC PLACE.

PETITION OF APPEAL.

See CIVIL PROCEDURE, 15.

——— CIVIL PROCEDURE, 18.

——— CIVIL PROCEDURE, 27.

POLICE STATION.

See PUBLIC PLACE.

POSSESSION, RIGHT TO BE REPLACED IN.

See PRACTICE, 2.

POSSESSORY ACTION.

1—Possessory Action—Appeal to Privy Council—Title, meaning of—Courts Ord. 1889, Sec. 42, Sub-Sec. 2.

Where, in a Possessory action, the value of the land regarding which the action is brought is above Rs. 5,000, a judgment, decree, sentence or order in such action comes within the provisions of Sec. 42, Sub-Sec. 2 of the Courts Ordinance, 1889, and an appeal from such judgment, decree, sentence or order lies to Her Majesty in her Privy Council, and the party desiring to appeal is entitled to a certificate under Sec. 781 of the Civil Procedure Code.

Per BURNSIDE, C. J.—The word "Title" as used in the said sub-section refers generally to any right to any property, whether movable or immovable, and not simply the absolute right to immovable property.

D. C, Kandy, No. 4,558, The O. B. C. ESTATES Co. *v.* BROOKS & Co. 1

2—Ordinance No. 22 of 1871 Sect. 4—Possessory action—Co-owner—Roman Dutch Law.—

The possession of a co-owner is not such an exclusive possession as entitles him to a possessory action in the event of his being dispossessed.

D. C., Chilaw, No. 261, PERERA *v.* FERNANDO and another ... ... 329.

PRACTICE.

1—Practice—Right of proctor to draw Money deposited to the credit of his client—Proxy.

On a motion by a proctor to draw money deposited to the credit of his client, the latter's consent to the motion must be proved apart from the general authority given to the proctor in his proxy.

C. R., Colombo, No. 407, GUNEWARDENE *v.* PERERA ... 78.

2—Practice—Right of successful party in appeal to be placed in possession of property of which he had been deprived by process of Court pending appeal.

Plaintiff recovered judgment for a house alleged to be in defendant's possession and for certain movables alleged to be detained by defendant. In appeal by defendant this judgment was set aside, and plaintiff's claim dismissed. Pending appeal Plaintiff had been placed in possession of the house and movables. On application by defendant, the District Judge made order (conditional on defendant's filing a list of the movables) that he be placed in possession of the house and movables. *Held*, that defendant was entitled to such order.

D. C., Kandy, No. 31,135, PATUMA *v.* MOHAMADO ... 343

See CONCURRENCE, 1 and 2.

——— FISCAL'S CONVEYANCE, 2.

——— SUBSTITUTION OF DEFENDANT.

PREFERRING FALSE CHARGE.

Preferring false charge—Ceylon Penal Code, Sect. 208.

Where a Police Magistrate entertains a charge, makes inquiries of both the complainant and the accused, and refers the complainant to a civil action, a prosecution under Sect. 208 of the Ceylon Penal Code for preferring a false charge may still be instituted against the complainant.

D. C., (Crim.) Kandy, No. 152, The QUEEN *v.* KIRIBANDA 104

PRESCRIPTION.

1—Prescription by tenant in common—Co-heirs—Effect of interruption of possession by one co-heir.

A tenant in common cannot by mere occupation prescribe against a co-tenant; and hence a step-mother by merely continuing to occupy the family home, after her husband's death, could not, in the absence of some direct act going to shew that such occupation was adverse, prescribe against her husband's children.

Per DIAS, J.—The interruption of the possession of a party pleading prescription by one co-owner enures to the benefit of all the co-owners.

In re the claims of GUNESEKERE and others, to the property of the estate of DE SILVA, deceased 64

2—Prescription—Goods sold and delivered—Account stated.

Plaintiff claimed for goods sold and delivered and on an account stated. The defendant raised the plea of prescription: the claim for goods sold and delivered was clearly prescribed. *Held*, following the law as laid down in Ashley v. James, 11, M. & W., 542 and Clarke v. Alexander, 12, L. J. Ch., 133 that such evidence as would not have availed to take the original debt out of the prescription ordinance could not be accepted as evidence on the claim on account stated.

C. R., Kandy, No. 425, FERNANDO *v.* PUNCHA and another 123

3—Action in ejectment—Prescription—Co-owners—Adverse Possession.

Plaintiffs as owners of a divided and defined portion of a land sued in ejectment, pleading title under a deed and by prescription. It appeared on the face of the deed that the plaintiffs were entitled only to an undivided portion in common with others. *Held* that plaintiffs were thereupon out of Court, and that even if title by prescription were correctly pleaded, it could apply to no other estate than that given the plaintiff by the deed.

D. C., Kurunegala, No. 21,874, MEERA LEBBE and another *v.* IBRAHIM LEBBE and others 128

4—Prescription—Written Promise—Ordinance No. 22 of 1871, Section 7—Procedure.

A deed containing a simple promise to deliver certain movable property within a given time falls within what, in the 7th section of Ordinance No. 22, of 1871, is called a "written promise," and a claim thereon is prescribed in six years.

Where several defendants are sued on an instrument, and only one of them successfully pleads prescription, such plea will enure to the benefit of those in default, but will not affect those who have consented to judgment.

D. C. Batticaloa, No. 271. KANDAPERUMAL and another *v.* KANDAPERUMAL and others 142

5—Prescription—Adverse Possession—Ordinances No. 8 of 1834 and No. 22 of 1871—Tenant by sufferance—Occupation ut dominus—Burden of proof.

A obtained possession of a parcel of land from the owner B., who was her brother, with his leave and consent, and retained such possession for over the prescriptive period without disturbance, by the tacit acquiescence of B.

Held that such possession was "adverse" within the meaning of the Prescription Ordinances, in that it was not accompanied by payment of rent, or performance of service, or some act from which an acknowledgment of title in another may be inferred.

D. C., Colombo, No. 98,202. JAIN CORIM *v.* PAKEER and another 282

See CIVIL PROCEDURE, 30.

——— HINDOO TEMPLE.

——— MUNICIPAL COUNCIL.

PROCTOR.

See CIVIL PROCEDURE, 15.

——— PRACTICE, 1.

PROMISSORY NOTE.

Promissory notes granted on agreement to convey land to maker—Consideration.

The plaintiffs agreed to sell to the defendant a coffee garden, and the defendant granted to the plaintiff three Promissory Notes for the price. The defendant was put in possession, and continued in possession for about a year when he lost possession.

Held, by BURNSIDE, C. J. and CLARENCE, J. (DIAS, J., *dissentiente*) that inasmuch as the defendant had the right to retain possession, and obtain a conveyance on payment of the notes, the plaintiffs had the corresponding right to recover on the notes.

D. C., Kandy, No. 2,800, RAMASAMY and others *v.* WEERAPPA 91

See STAMP, 2.

PUBLIC NUISANCE.

Public nuisance—Ceylon Penal Code, Sect. 261—Criminal Procedure Code, Chap. X.

A person who refuses to allow or obstructs the drawing of water from a public well commits a public nuisance within the meaning of Sect. 261 of the Ceylon Penal Code, and proceedings may be taken under Chapter X. of the Criminal Procedure Code to abate such nuisance.

D. C., Mannar, No. 219, MUTTAIAH *v.* MEERAMEYEDIN ... 85

See CRIMINAL PROCEDURE, 9.

PUBLIC OFFICER, OBSTRUCTING.

See BUILDING, DEMOLITION OF.

PUBLIC PLACE.

Section 488, Penal Code—Public Place—Police Station—Misconduct.

A public place within the meaning of Sect. 488 of the Penal Code is a place to which and from which the public have ingress and egress and regress as of right, and without reference to any particular purpose, and a police station is not such a public place.

P. C., Gampola, No. 12,946. PIETERSZ *v.* WIGGIN ... 320

RECEIVER.

See CIVIL PROCEDURE, 27.

RECONVENTION.

See MORTGAGE, 3.

REGULATION No. 18 of 1806.

See WEAPON LIKELY TO CAUSE DEATH.

RELEASE OF DEBTOR.

See CIVIL PROCEDURE, 22.

RELEASE ON PROBATION.

See GRIEVOUS HURT.

REMOVAL OF SPIRIT WITHOUT PERMIT.

See INTERPRETATION OF ORDINANCE.

RENT.

Landlord and Tenant—Jurisdiction of Courts of Requests—Agreement to pay Rent.

Plaintiff averred that defendant was his tenant under an agreement. Defendant denied that he entered into any such agreement, and pleaded an independent title to the house alleged to have been let to him by the plaintiff. *Held* that the Court of Requests had jurisdiction to try the case, and decide whether there was an agreement or not, although the value of the house was Rs. 100.

C. R., Colombo, No. 53 494, KAMY UMMAH *v.* JUNOOS LEBBE 200

See FORESHORE.

——— LANDLORD AND TENANT, 1.

REPLICATION.

See CIVIL PROCEDURE, 33.

RES GESTAE.

See CRIMINAL LAW, 1.

RES JUDICATA.

See CIVIL PROCEDURE, 17.

REVIEW.

See CRIMINAL PROCEDURE, 10.

——— CRIMINAL PROCEDURE 12.

REVIVING JUDGMENT.

See CIVIL PROCEDURE, 14.

ROBBERY.

Robbery—Section 310 of the Penal Code—Theftuous taking—Intention in Cases of Theft.

The 1st accused's dog rushed out at A who struck it with a bill-hook which he had in his hand. The accused got angry, rushed at A, and snatched the billhook from him, and took it away. *Held*, that the accused was not guilty either of robbery or of theft.

The Penal Code did not depart from the principle of the Civil Law and of the Common Law, that in a case of theft the intention of the party charged should have been to cause permanent and not temporary deprivation.

D. C., (Criminal) KURUNEGALA, No. 2,446, THE QUEEN *v.* KANACASABBY and others. 31

ROMAN DUTCH LAW.

1—The Roman Dutch Law, how far adopted in Ceylon—The Dutch Law of continuing community between a surviving parent and the children—Tacit Hypothec—Sale under Mortgage decree.

The whole of the Dutch Law, as it prevailed in Holland more than a century ago, was never bodily imported into this country. We have adopted and acted upon only so much of it as suited our circumstances, such as the law of inheritance in the maritime provinces, community of property, law of mortgage, &c. The Dutch Law of continuing community, after the death of a parent, between the surviving parent and the children, assuming there was such a Law, which is doubtful, was never adopted by us.

A and B were husband and wife, married in community of property. B. died leaving a son (the plaintiff) by A. A remained in possession of the whole of the common estate, and after "The Matrimonial Rights and Inheritance Ordinance, 1876" came into operation, married 2nd defendant. *Held*, that plaintiff had no legal hypothec over the property of the 2nd defendant or, under so much of the Dutch Law as has been adopted in this colony, over the property of his father, A, for his (the plaintiff's) moiety of the common estate of his parents.

Assuming that plaintiff had a legal hypothec over A's moiety of the common estate, he could not prevent a sale, under a mortgage decree, of property forming part of such moiety. All that he might do is to set up a preferent claim to the proceeds.

D. C., Colombo, No. 422, WIJEYEKOON *v.* GUNEWARDENE & and others 147

2—Roman Dutch Law—Sequestration—Powers of District Courts—Civil Procedure Code, Sect. 4.

Held, by BURNSIDE, C. J. and LAWRIE, J. (DIAS, J. *dissentiente*) that, to the Civil Procedure Code and to it alone, must reference be had for whatever jurisdiction in respect of sequestration may be claimed for District Courts.

Semble per BURNSIDE, C. J.—There is no authority for the position that District Courts had any jurisdiction to issue writs of sequestration as a remedial measure for the protection of property, the subject of litigation, *pendente lite*; and admitting that, by the Dutch Law, goods concerning which there was dispute might by a decree of the judge be kept in the hands of a third person, until the dispute had terminated, and then be given over to the party who should be adjudged entitled to them, there is no authority for the position that jurisdiction to enforce that law was granted to District Courts.

The District Courts are the creatures of the Charter and the Ordinances succeeding it; and there is nothing which gives them authority generally to administer the Dutch Law; nor had any general right to grant sequestration which existed under the Dutch Law ever been exercised by them.

Per DIAS, J.—A power to issue any order, either in the nature of a mandatory injunction or sequestration, to prevent either of the parties to a suit from improperly interfering with the subject matter in litigation is inherent in the court having jurisdiction over the parties to the subject in litigation.

In view, particularly, of Sect. 4 of the Civil Procedure Code, which enacts that, in every case in which no provision is made by the Code, the procedure and practice theretofore in force should be followed, it cannot be inferred from the fact that the Code provides for injunctions and sequestrations in certain cases only, that all the powers of the court to issue sequestration orders, except in the cases specified in the Code, are abrogated.

D. C., GALLE, No. 1,020, SEYADORIS *v.* HENDRICK ... 152

3—Contract of hire of movables—Claim for return of movables—Destruction by fire—Roman Dutch Law.

Plaintiff sought to recover arrears of rent for the use of a jar, and also claimed the return of the jar, or its value, the contract being determined, and it was alleged by way of defence that the jar was destroyed by fire through no fault of the defendant.

Held, that the defence was a good one under the Roman Dutch Law, but the *onus* was on the defendant to prove that the fire, which destroyed the jar, was caused by unavoidable accident.

C. R., Batticalao, No. 903, BASTIAN PILLAI *v.* GABRIEL 264

See CONCURRENCE, 2.

——— DONATION.

——— POSSESSORY ACTION, 2.

SALE BY ADMINISTRATRIX.

See SALE UNDER ORDER OF COURT.

SALE UNDER ORDER OF COURT.

Grant of administration to widow—Sale by auction by administratrix of immovable property under authority of the Court.

Per CLARENCE, J.—

1. When a sale by auction is being carried out under order of Court, the Court has always power up to the time of completion of the sale to open the matter up, or, as it is styled in English practice, "to open the biddings.' This, however, is not done, unless there has been fraud or improper conduct in the management of the sale.

2. Where an administratrix has an absolute and unfettered grant of administration, she can sell immovable property on her own responsibility. If she is, however, selling improperly or unnecessarily, she may be responsible to those concerned for loss thereby occasioned, and, moreover, any one concerned may apply to have the estate administered under the direction of the Court.

D. C., Colombo, No. 4,917, (Testamentary), In the matter of the goods and chattels of JAYEWARDENE, deceased 83

SEARCH WARRANT.

Search warrant to search for arrack—Criminal Procedure Code, sects. 69 and 71.

Under Sect. 69 of the Criminal Procedure Code, whenever any court considers that the production of any document or thing is necessary or desirable for the purposes of any investigation, &c., it may issue a summons for the production of such document or thing, and under Sect. 71, when the Court has reason to believe that a person to whom a summons under Sect. 69 might be addressed is not likely to produce the required document or thing, it may issue a search warrant for the search of the same.—

Held, that under these sections it was competent to a Police Magistrate to issue a search warrant for the search for arrack in the house of a person charged with illicit sale of arrack.

Where an accused charged with obstructing the execution of a warrant was a Tamil man speaking the Sinhalese language, and without asking for a Tamil translation of the warrant, he resisted its execution, the Supreme Court held that the objection that no Tamil copy of the warrant was served on him prior to its attempted execution was bad.

P. C., Kalutara, No. 2,383, DE SOYSA *v.* KARAGAN. ... 101

See CRIMINAL PROCEDURE, 10.

SECURITY FOR GOOD BEHAVIOUR.

See CRIMINAL PROCEDURE, 5.

SECURITY IN APPEAL.

See CIVIL PROCEDURE, 12.

SENTENCE, EXECUTION OF.

See *Habeas Corpus.*

SEQUESTRATION.

See ROMAN DUTCH LAW, 2.

SIGNATURE BY STAMP OR DIE.

See ARREST, WARRANT OF.

SLANDER OF TITLE.

See CIVIL PROCEDURE, 2.

SMALL TENEMENTS ORDINANCE.

"The Small Tenements Ordinance, 1832,"—Notice to quit.

A notice to a monthly tenant given on the 31st July requiring him to quit on or before the 1st September is not a sufficient notice.

C. R., Colombo, No. 36,729, MARICAR *v.* PACKEER ... 61

SOLICITOR'S LIEN.

See DETENTION OF TITLE DEEDS.

SPECIALLY DEVISED PROPERTY.

See TITLE.

SPLITTING OF ACTION.

See CIVIL PROCEDURE, 21.

STAMP.

1—Promissory Note—Stamp—Objection to insufficiently stamped document tendered with plaint.

The burden of proof of the sufficiency of a stamp affixed to an instrument alleged to be invalid by reason of its not being the kind of stamp required by law to be affixed to the particular kind of instrument is on the party who alleges its sufficiency.

Semble *Per* WITHERS, J.—When an insufficiently stamped document tendered with a plaint is objected to by the defendant or the officer of the court brings to the notice of the court the impropriety of the stamp, the document ought to be rejected.

D. C. Kandy, No. $\frac{4,967}{145}$ WATSON *v.* ALAGAN ... 231

2—Ordinance No. 3 of 1890, Sects. 19 and 32—Stamp—Promissory Note—Powers of Commissioner.

The Commissioner of Stamps can properly exercise the powers conferred on him by Sect. 32 of Ordinance No. 3 of 1890, to stamp a promissory note which had been executed without being duly stamped, if brought to him within a year after it had been executed, and a promissory note is not such an instrument as is affected, by either of the two concluding provisoes to the section.

D. C., Kandy, No. $\frac{5,183}{173}$ ROSLING *v.* SAVERIMUTTU ... 311

STAMP ORDINANCE, 1890.

See CIVIL PROCEDURE, 2.

STRIKING CASE OFF THE ROLL.

See CIVIL PROCEDURE, 20.

SUBSTITUTION OF DEFENDANT.

Revival of Dormant Judgment—Substitution—Decree.

Held, that the mere substitution of a defendant does not make him liable to the extent of a judgment obtained before he was on the record. If a plaintiff wishes to bind substituted defendants to the extent of the property of their ancestor which may have come to their hands, he should proceed regularly against them, and obtain a decree for that purpose.

D. C. Kalutara, No. 34,171, MARICAR *v.* PERERA ... 17

SUBSTITUTION OF PARTY.

See CIVIL PROCEDURE, 14.

——— FISCAL'S CONVEYANCE, 2.

SUNDAYS AND PUBLIC HOLIDAYS.

See CIVIL PROCEDURE, 12.

SURVIVING HUSBAND, RIGHT OF, TO ALIENATE PROPERTY OF DECEASED WIFE.

See ESTOPPEL, 1.

TACIT HYPOTHEC.

See ROMAN DUTCH LAW, 1.

TAX, COMMUTION.

See IMPLIED PROMISE.

TENANT IN COMMON.

See PRESCRIPTON, 1.

THEFT.

See ROBBERY.

TIMBER, REMOVAL OF.

Removal of Timber without a Pass—Ordinance No. 10 of 1885, Sects. 45 and 46.

To support a conviction, under the 46th section of the Forest Ordinance of 1885, for the removal of timber without a pass, it must be established that the timber was removed from a land, and the land must be that on which the trees grew, and were felled.

P. C., Batticaloa, No. 4,556, SPENCE *v.* ANTHONY ... 55

TITLE.

Title of devisee to property specially devised—Sale of specially devised property under writ against executor—Assent of executor to devises under the will.

In Ceylon, a special devise by will of immovable property passes the estate in such property to the devisee to the extent of the devise, and no formal conveyance by the executor under the will to the devisee is necessary to perfect the title of the latter to such property.

Per BURNSIDE, C. J.—If property specially devised is not required for the purposes of administration, the special devisee takes a clean title unburdened by any right of executor or creditor, and it is always open to him to call on an executor within a reasonable time to make his election as to such property, and an executor not electing within such time would be estopped from doing so.

The mere fact that specially devised property was seized and sold on a judgment against the executor is not sufficient to shew that such property was liable to be sold, in due course of administration, for the testator's debts.

Per WITHERS, J.—No assent of the Ceylon executor or administrator is necessary to pass title to the heir appointed in the will or the heirs at law; for they have this title on the death of the testator or intestate, subject to suspension of enjoyment pending administration, and subject to the estate or title which by probate and letters of administration passes to the Ceylon executor and administrator respectively for purposes of administration and limited thereto.

D. C., Colombo, No. 1,187, CASSIM *v.* MARIKAR and others 180

See EJECTMENT, 3.

TITLE TO THE FABRIC OF A CHURCH.

See EJECTMENT, 1.

TOLL.

Toll, Evasion of—Ordinance No. 14 of 1867, Section 17.

To drive up to a Toll Station, get out of the Carriage, and walk across to the other side, and then get into another Vehicle, and drive off, is evasion of Toll in breach of Sect. 17 of "The Toll Ordinance, 1857."

P. C., Galle, No. 5,561, BASTIAN *v.* ABEYSEKERE ... 46

TRANSFER OF CONTRACT OF SERVICE.

See MASTER AND SERVANT.

UNLAWFUL ASSEMBLY.

See WEAPON LIKELY TO CAUSE DEATH.

USUFRUCTUARY MORTGAGE.

Usufructuary Mortgage—Redemption by mortgagor as mortgagee is about to realise produce which he is entitled to recieve in lieu of interest.

In the case of a usufructuary mortgage the mortgagor cannot claim redemption as the mortgagee is about to realise the produce of the mortgaged land which he was entitled to receive in lieu of interest. The mortgagee having expended money in preparing the land to yield his interest, the mortgagor could only redeem by paying that amount as well as all interest due.

C. R., Badulla, No. 19,464, BANDAR *v.* BANDAR ... 54

WAGES, ARREARS OF.

Labour Ordinances, No. 13 of 1889, and No. 7 of 1890—Arrears of Wages—Desertion—Termination of contract of service.

By Sect. 1 of Ordinance 7 of 1890 the wages of a labourer shall be payable within sixty days from the expiration of the month during which such wages shall have been earned.

Quære (per BURNSIDE, C. J.) whether the non-payment of wages within the term prescribed in the above section does not in itself terminate the original contract of hiring

P. C., Haldumulla No. 5,541, BARKLY *v.* KATTAN and others 309

WARRANTY.

Sale of Land—Ouster by third party—Express Warranty—Implied Warranty.

Where a purchaser of land sues the vendor on a breach of express warranty of title, and fails to establish such express warranty, he cannot avail himself of the implied warranty of title under the Roman Dutch Law.

D. C., Badulla, No. 28,689 De SILVA *v.* OSSEN SAIBO... 201

WEAPON LIKELY TO CAUSE DEATH.

Weapon likely to cause death—Sticks and cudjels—Unlawful assembly—Indictment—Omission to state particulars—Sect. 138, Penal Code, and 210, Criminal Procedure Code—Special privileges claimed by a particular caste—Regulation No. 18 of 1806.

The question whether a particular weapon is likely to cause death is not one of law, but depends on the fact of how it was intended to use the weapon.

In a prosecution for unlawful assembly, where the indictment omits to mention the particular or particulars under Sect. 138 of the Ceylon Penal Code which made it unlawful, such omission is cured by Sect. 210 of the Criminal Procedure Code, unless the accused was misled by such omission.

Observations on some special privileges claimed by the Vellalas of the Northern Province under Regulation 18 of 1806, and on their right to enforce them.

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See CIVIL PROCEDURE, 15.

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ERRATA.

Page xv of the Digest—Line 26 from top, between "involves" and "directly," *insert* "no definite sum or matter at issue of any definite value, nor does it involve."

„ lii of the Diges'—Line 18 from top, for "Commution" *read* "Commutation."

„ 28—Line 16 from bottom, for "Criminal" *read* "Civil."

„ 99—Between lines 8 and 9 from bottom *insert* "9,662, P. C. Gampola."

„ 124—Line 6 from top, for "or" *read* "on."

„ 136—For line 13 from bottom substitute the following:—"Canekeratne (Peiris with him) for accused-'

„ 166—Line 4, between "event" and "such" *insert* "of."

„ 177—Lines 27 and 28 from top, for "he may be altogether restrained" *read* "to restrain him altogether."

„ 184—Line 8 from top, for "considered" *read* "conceded."

„ 184—Line 13 from top, for "different" *read* "difficult."

„ 185—Line 8 from top, for "Gawin" *read* "Gavin" and for "Harder" *read* "Hadden."

„ 213—In head note, between "and" and "is" *insert* "such property so sold and delivered."

„ 240—Line 9 from bottom, for "1862" *read* "1892."

„ 246—Line 13 from bottom, for "Manyarjie" *read* "Meenatchi."

„ 247—In margin, for "Manyarjie" *read* "Meenatchi.'

„ 253.—Line 1 in head note, between "letters" and "administration" *insert* "of."

„ 281—Line 4 of head note, between "release" and "upon" *insert* "him."

„ 293—Line 17 from bottom, for "Civil" *read* "Criminal."

„ 301—Line 7 from bottom, for "yourself" *read* "yourselves."

N. B.—The case of Hendrick v. Babuwa at Page 46 was reported by an oversight. The judgment in that case will be found over-ruled by the judgment in Kanapathipillai v. Vellayan at p. 200, Vol. VII of the S. C. C.

THE

Supreme Court Reports

BEING

Reports of Cases decided

BY THE

SUPREME COURT OF CEYLON.

Edited by WALTER PERERA *and* CHARLES M. FERNANDO, (*Advocates.*)

BEFORE *Burnside*, C. J., AND *Dias*, J.

February 19 and 26, 1892.

THE O. B. C. ESTATES Co. *v.* BROOKS & Co.

[*The "St. Coombs" Case*]

[No. 4558, D. C., KANDY.]

Possessory Action—Appeal to Privy Council—Title, meaning of—Courts Ord. 1889, Sec., 42, Sub-Sec. 2.

Where, in a possessory action, the value of the land regarding which the action is brought is above Rs. 5,000, a judgment, decree, sentence or order in such action comes within the provisions of Sec. 42, Sub-Sec. 2 of the Courts Ordinance, 1889, and an appeal from such judgment, decree, sentence or order lies to Her Majesty in her Privy Council, and the party desiring to appeal is entitled to a certificate under Sec 781 of the Civil Procedure Code.

Per BURNSIDE, C. J.—The word "Title" as used in the said sub-section refers generally to any right to any property, whether movable or immovable, and not simply the absolute right to immoveable property.

This was an application by the plaintiff-Company for a certificate under Sec. 781 of the Civil Procedure Code with a view to an appeal to the Privy Council from the Judgment of the Supreme Court.

Layard, A. A. G. for Defendants—A possessory action does not involve title to property directly or indirectly Voet., B. 2, Tit. 2. It is merely a personal action. The plaintiffs merely claim a right to possession, the value of which is not stated,

The O. B. C. Estates Co. v. Brooks & Co. [The "St. Coombs" case.]

Dornhorst for Plaintiff.—A possessory action involves title to property indirectly, and bare possession is sufficient title. Possession considered in a possessory suit is not mere occupation, but occupation *ut dominus*, and as such implies title. The value of the right to possess a certain land is the value of the land.

Cur. adv. vult.

On February 26, the following judgments were delivered.

BURNSIDE, C. J.—This was an application under Sec. 781 of the Code on the part of the plaintiff for a certificate that as regards value the case fulfils Section 42 of the Courts Ordinance 1889, and is a fit one for appeal to Her Majesty in Council.

The 2nd sub-section of the 42nd section ordains that every Judgment, etc., from which an appeal shall be submitted to Her Majesty shall be given or pronounced for or in respect of a sum or matter at issue above the amount or value of Rs. 5,000, or shall involve directly or indirectly the title to property or to some civil right exceeding the value of five thousand rupees.

The action was a possessory action in respect of an estate valued at Sixty-four thousand rupees. The learned Attorney-General contended that the judgment in a possessory action did not involve a question of title within the meaning of the section, as the right in such cases essentially and particularly depended upon a mere *de facto* possession, altogether independent of and even adverse to the rights of the real owners in whom the title lay.

In my opinion this is putting too limited a construction on the word "title" as used in the Ordinance.

I construe the word "title" as referring generally to any right to any property, whether movable or immovable, and not simply the absolute right to immoveable property.

The words used are "title to property," and in my opinion the word "title" as used in its primary meaning as synonymous with right. *Titulus*, says an old writer, *est justa causa possidendi quod nostrum est*, and this *justa causa possidendi*, this right, is particularly the title which is the subject of enquiry and decision in a possessory action. In this action the property in respect of which the possessory judgment was passed

The O. B. C. Estates Co. v. Brooks & Co.

[THE "ST. COOMBS" CASE.]

was over the value of Rs. 5,000, and in my opinion it comes within the provisions of the Statute, and an appeal lies. And a certificate should be given.

DIAS, J.—This is an application for a certificate under section 42 of the Courts Ordinance (1 of 1889) with a view to an appeal to the Privy Council. The learned Attorney-General for the respondent objected that the order appealed from is not such an order as is contemplated by section 42. The question turns on the two last lines of sub-section 2 to section 42. The action is a possessory action in which the plaintiffs sought to regain possession of an estate, of which they have been unlawfully dispossessed by the defendants. In this form of action it is not open to the defendants to deny the plaintiffs' title, and in that sense no doubt the title to the property in question is not in dispute; but what the plaintiffs seek to recover is the immediate possession of the estate, which is an appreciable right, and in my opinion it is within the meaning of sub-section 2 to section 42. Let a certificate issue.

BEFORE *Burnside*, C. J., *Clarence* AND *Dias*, J. J.

October 6 and 9 and November 3, 1891.

ZIEGAN *v.* ZIEGAN *et al.*

C, 678, D. C., COLOMBO.

Appealable order—Civil Procedure Code, Sections 604 and 598—Costs in Divorce Suits.

A decree *nisi* for dissolution of marriage in terms of Section 604 of the Civil Procedure Code is a decree from which an appeal lies.

Section 598 of the Code requires that upon a plaint for a divorce *a vinculo matrimonii* being presented by a husband, in which the adultery of the wife is the cause or part of the cause of action, the plaintiff shall make the alleged adulterer a co-defendant to the action, unless he is excused from so doing on certain grounds specified in the section.

Held, that such excuse can only be obtained by regular prayer to the Court upon an affidavit or other sufficient evidence, and it shall be embodied in the plaint.

Merely inserting in the plaint the name of the alleged adulterer as a co-defendant—no process being served upon him and no steps being taken to bring him into the action—is not a sufficient compliance with the requirements of section 598.

This was an action by the plaintiff praying for a decree of separation *a vinculo matrimonii* as against his wife, the 1st defendant, on grounds of adultery and malicious desertion, the

ZIEGAN v. ZIEGAN, *et al.*

adultery complained of being with the 2nd and 3rd defendants, and for a decree for damages against the second and third defendants.

At the trial the plaintiff and the first and third defendants were represented by counsel, but the second defendant was absent, and no summons appeared to have been served on him.

The District Judge admitted evidence on the charges against the first defendant of adultery with both the second and third defendants, and holding that the first defendant was guilty of adultery with the other two defendants and of malicious desertion, after her adultery with the second defendant, entered up a decree *nisi* with the costs as against the first defendant in terms of section 604 of the Code.

The first defendant appealed.

The case first came on before *Burnside*, C. J. and Dias, J. on October 6, 1891, when *Dornhorst* for plaintiff, respondent, took the preliminary objection that no appeal lay from a decree *nisi* under section 604 of the Code.

Layard, A. A. G.—Contra.

Their Lordships were of opinion that an appeal lay, and overruled the objection.

October 9.—The case was now argued before *Burnside*, C. J., and *Dias*, J., parties being represented by the same counsel as before, and judgment reserved.

Their Lordships having subsequently intimated that they were not able to agree upon a judgment, counsel consented that *Clarence*, J. should take part in the decision without further argument.

On *November 3*, the following judgments were delivered :—

BURNSIDE, C. J.—I do not think it is competent to us on this appeal to enter upon the facts of the case, in order to decide whether, on the merits, the respondent can keep the decree *nisi* dissolving *a vinculo* his marriage with the appellant. However much we may regret that, after the vigorous contest between the appellant and respondent in the court below to obtain a judicial decision touching upon respondent's right to obtain a dissolution of marriage, we should be compelled to nullify their efforts on a question of procedure, yet we cannot do otherwise, in face of the distinct law which we must obey. The 598th sec. of our recent

Civil Procedure Code, to which the proceedings in this suit are subject, requires that upon a plaint for divorce *a vinculo matrimonii* being presented by a husband, in which adultery of the wife is the cause or part of the cause of action, the plaintiff shall make the alleged adulterer a co-defendant to the said action, unless he is excused from so doing on certain grounds specified in the section. Now, such excuse can only be obtained by regular prayer to the court, upon an allegation of the necessary facts, and supported by affidavit or other sufficient evidence, and it shall be embodied in the plaint. We need not stop to enquire why such a stringent provision as this should exist, beyond saying that it follows the practice which is prescribed in divorce suits in the mother-country. In this case the name of an alleged adulterer was inserted as a co-defendant on the plaint, and this was all that was done with respect to him—no process was served on him, nor were any steps taken to bring him in to the action, but at the trial the appellant's adultery with him was keenly contested between the appellant and respondent, neither side having interested himself or herself with the absence of the co-defendant from the action. And this, perhaps the most important issue on the record, has been decided against the appellant, and a decree *nisi* was passed against which the appellant appeals, and she has taken objection to the decree on the ground that the alleged adulterer was not made a party to the action as required by the Code.

The question for us to decide is whether the provision is satisfied by the mere insertion of the name of an alleged adulterer in the plaint as a co defendant. I think not. Had that been the intention, it would have been easy to say so. The section requires that an adulterer shall be made a co-defendant to the action. Had his name not been inserted in the plaint as a co-defendant, it is clear that the plaint must have been rejected, and it does not seem reasonable to suppose that by merely inserting it the object of the law had been fulfilled. Till the alleged co-defendant had been served with process, it can scarcely be said that he was a co-defendant to the action, and I do not think it was competent to either party by waiver, or laches, or consent to avoid the stringent requirements of the law.

Divorce suits cannot be regarded in the same light as ordinary litigation between individuals, affecting them and them

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alone. The policy of the law has always been to regard them in the light of suits affecting the social status of the community, and has been careful to hedge them round with precautions so that the marriage tie may not be loosened by the mere consent, or laches, or indifference of the parties to it.

I think all the proceedings from setting the case down for hearing are nullities, and the appeal must succeed.

Having come to this conclusion we should not discuss the other questions which were raised for our decision, but which must be decided only on the true facts of the case, which can only be regularly before us after a regular procedure has been observed.

On the question of costs, the appellant must have the costs of the appeal. No proposition is more clealy established than that the wife is a privi'eged suitor in divorce proceedings, and her husband is bound to provide the necessary funds to enable her to carry on a contest with him when she shall dispute his claim for divorce.

CLARENCE, J.—This appeal was argued before the Chief Justice and my brother Dias, and my learned brethren not agreeing, counsel desired that I should deliver a judgment after perusal of the opinion of my brethren and without any further argument.

The plaintiff claims to be divorced from his wife, 1st defendant, by reason of her having, as he alleges, committed adultery with the 2nd and 3rd defendants, Messrs. Bone and Brown. Bone is said to be out of the jurisdiction, in Australia. He has not appeared in the action, and no process was issued to him. Brown appeared and answered, denying the adultery. The learned District Judge received evidence in support of both charges of adultery, after which the 1st defendant was called by her counsel and denied both charges. The District Judge then found upon the evidence that the 1st defendant had committed adultery with both Bone and Brown, and made a *decree nisi* for a divorce by reason of such adultery, and ordered the 1st defendant to pay the costs. From this decree the 1st defendant appeals.

We could not in any case support the order directing the 1st defendant to pay the plaintiff's costs. There is no suggestion that she has any separate porperty of her own. We have

further to consider whether a decree *nisi* for a divorce can itself be supported. The 598th sec. of the Civil Procedure Code, following the example of the English Act of 1857, requires that when a husband sues for a divorce on the ground of his wife's adultery, the alleged adulterer shall be made a co-defendant, unless upon a special application for that purpose the Court excuses the plaintiff from making him a party. The English Act (§ 28) merely says a husband must make the alleged adulterer a party, "unless on special grounds to be allowed by the Court he shall be excused from so doing." Our Procedure Code goes further and defines the grounds on which the alleged adulterer may be dispensed with. The prayer to be excused from making the alleged adulterer a co-defendant and the allegations on which it is based must be embodied in the plaint and supported by evidence.

In the present case the alleged adulterer Bone is named in the plaint as a co-defendant, but no attempt was made to serve him with process. Beyond inserting his name in the plaint charging him with adultery, no attempt whatever appears to have been made to bring the suit to bear upon him or give him notice of the proceedings. The plaint refers to him as resident in Australia, but no application was made under section 69 to serve him out of the jurisdiction. The mere including Mr. Bone's name in the plaint without taking steps to bring him before the Court, was clearly no sufficient compliance with the requirement that he be made a party, and it was not competent to the District Court in this condition of the matter to entertain the issue—whether the 1st defendant had committed adultery with Mr. Bone. I cannot assent to the proposition that we may still separate this charge from the other charge of adultery with Mr. Brown and uphold the verdict of the Court below upon that charge. The District Judge purported to try the two charges jointly, though Mr. Bone had not been properly made a party. This was, *in limine*, a proceeding which the District Judge should not have taken, a proceeding *ultra vires*. Added to this, it would be impossible for us to separate the evidence adduced in support of one charge from that adduced in support of another, where the learned District Judge in pronouncing on a direct conflict of testimony appears to have been influenced by the whole mass of evidence,

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As to the order which we should make under these circumstances, I see no alternative but to treat the whole proceeding at the hearing as a nullity, and quash them and the decree. That the 1st defendant raised no objection to the course pursued can make no difference. The policy of the law in divorce proceedings requires us to conserve jealously the safeguards created by the Legislature. Much as we may regret that a trial anxiously contested should be thrown away, we have no alternative open to us. The plain requirements of the law appear to have been ignored on plaintiff's behalf, and the result is that the time and expense bestowed on the trial have been spent in vain. We must set aside the decree, and quash all the proceedings of the trial.

The decree being set aside on first defendant's appeal, I agree that she should have her costs of the appeal. As to any other costs, it will be better that we should make no order now.

DIAS, J.—This is an action by the husband against the wife for a dissolution of the marriage on the ground of adultery and malicious desertion. The 1st defendant is the wife, and the 2nd and 3rd defendans are the alleged adulterers. The 2nd defendant is out of the country, and no process was served on him, so that defendant must be looked upon as no party to the action, and the evidence so far as it regards the adultery between the 1st and 2nd defendants was inadmissible and should have been objected to. No such objection, however, was taken and the evidence was received, and if the District Judge had based his judgment on that evidence alone, I do not think the judgment can be sustained.

Under Sec. 598 of the Civil Procedure Code the alleged adulterer is a necessary party to the action. The mere insertion of his name in the plaint will not make him a party to the action, and that was all that was done with regard to him. He should have had due notice of the action and charge preferred against him, and should have had the opportunity to appear and defend himself if he liked. The object of the rule of law is plain, and it cannot be waived even by the consent of the parties. There are two co-defendants in the case, and there are two distinct acts of adultery charged against them

As the 2nd defendant had no notice of the action, the charge of adultery between him and the 1st defendant, as it is set forth in the 5th paragraph of the libel, falls to the ground. But the charge against the 3rd defendant remains. He appeared and filed an answer, and was represented by counsel at the hearing, and as regards him the only question for decision was, did he or did he not commit adultery with the 1st defendant at the British India Hotel on or about the days specified in the 6th paragraph of the libel? This is a question of fact depending on the credibility of witnesses called on both sides.

On the day of hearing, all the parties, except the 2nd defendant, were represented by counsel, and the District Judge notes: "the 2nd defendant is absent away from the Island, no summons was served on the 2nd defendant." No objection was taken to the case going on without the 2nd defendant, who was ignored by the parties and the court, and the case went to trial between the plaintiff and the 1st and 3rd defendants; and I am of opinion that under the circumstances the non-service of process on the 2nd defendant did not vitiate the rest of the proceedings, which of themselves were enough to pass a decree one way or the other.

In dealing with this case I put the 2nd defendant out of consideration altogether, and take the case as one in which the plaintiff sues for a divorce from his wife, the 1st defendant, on the ground of her adultery with the 3rd defendant, and on the further ground of malicious desertion. Adultery and malicious desertion, or any one of them, is a good ground for a divorce *a vinculo matrimonii* (Van Der Linden, p. 88.)

I have carefully read the evidence, and for obvious reasons abstain from going into the painful details spoken to by the witnesses on both sides. The District Judge's conclusions of fact are fully borne out by the evidence, and I accept them as correct.

According to her own admission, the antecedents of the 1st defendant are not much in her favour, but I will not allow my mind to be prejudiced against her on that account. The plaintiff with his eyes open took the 1st defendant to wife, and her conduct after the marriage must be dealt with

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on its own merits, quite independently of her character before the marriage.

On the matter of the adultery with the 3rd defendant in the British India Hotel, the evidence is conclusive. The District Judge seems to have taken the trouble of going to the Hotel for the purpose of testing the credibility of the witnesses who spoke to the doings of the 1st and 3rd defendants there, and the conclusion arrived at by the District Judge is that the charge has been proved, and I need hardly add that the evidence bears out that conclusion.

With regard to the matter of malicious desertion, that is also very satisfactorily established by the evidence. It appears that about the latter end of 1883 the plaintiff had reason to be dissatisfied with the conduct of his wife. Frequent quarrels between the parties took place, and about the 25th of September 1883 the 1st defendant left the plaintiff's house, and on the 30th of September embarked for England, and the passage money was paid by the very man who seems to have been the cause of the disagreements between the plaintiff and the 1st defendant; and the conclusion I arrive at is that both the adultery with the 3rd defendant and the malicious desertion of the 1st defendant have been proved. It was urged for the appellant that the plaintiff is not entitled to the relief he prayed for (1) because he allowed some 8 years to pass after he discovered his wife's infidelity before he appealed to a Court of Justice, and (2) because the plaintiff himself had committed adultery with one Miss Krickenbeek.

With regard to the 1st objection, it was explained away by the plaintiff, and under the circumstances I am not prepared to say that that explanation is not satisfactory; and as to the 2nd objection the evidence does not sustain it. On the whole, my opinion is that the judgment should be affirmed, except as to costs. The plaintiff is clearly not entitled to costs as against his wife the 1st defendant, so the order as to costs will have to be set aside. I give no appeal costs to either party.

BEFORE *Burnside*, C. J. AND *Dias*, J.

February 26 and March 4, 1892.

The ATTORNEY-GENERAL *v.* PITCHE.

[No. 2,097, D. C., COLOMBO.]

The Fore-shore—Rights of the Crown and Privileges of the Public with respect to it—Action for Rent.

Assuming that the fore-shore is the property of the Crown, the right of the Crown to it is not in general for any beneficial interest to the Crown itself, but for securing to the public its privileges on the spot between high and low water mark, and the Crown itself could do no act to interrupt those privileges; and hence it could not empower others by any means whatever, whether it be by grant or lease or license, to do so.

The use of the seashore is as common to all as that of the sea; and hence the Crown cannot lease or grant the fore-shore to any one for acts that would impede the common user, much less claim rent or remuneration for occupation for such acts, rent being claimable on a contract, express or implied, to pay it.

The defendant stacked and stored a quantity of timber on the fore-shore in Colombo for the purpose of building cargo boats. The Attorney-General on behalf of the Crown sued the defendant in ejectment, and for rent for the use and occupation of the fore-shore. The defendant pleaded in demurrer (1) that the plaintiff had no cause of action, (2) that rent was not due in the absence of an agreement to pay rent. The District Judge held that the fore-shore was vested in the Crown, and gave judgment for the plaintiff. The defendant appealed.

J. Grenier for defendant-appellant. There is no averment of a contract between plaintiff and defendant to pay rent. In the absence of such contract plaintiff cannot sue. The fore-shore is not the property of the Crown, and the Crown has no right to lease it. The plaintiff has mistaken his remedy in bringing a civil action.

Dumbleton, C.C., for plaintiff-respondent. The fore-shore belongs to the Crown—Blundell *v.* Catterall, 5 B. and Ald., p. 26; Mace *v.* Philcox, 15 Com. Bench, N. S., p. 600). There are cases in English Law where the fore-shore is the absolute property of the Lord of the Manor under gift from the Crown. Even conceding that the fore-shore is public property, the Crown is and has always acted as trustee for the public, and can therefore rightly sue for rent.

J. Grenier in reply.

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Cur. adv. vult.

On March 4, the following judgments were delivered:—

BURNSIDE, C. J.—I do not find it necessary to enquire, in this action, what are the rights of the Crown to the fore-shore of this Colony, whether the claim put forward on behalf of the Crown rests on local legislation or on the principles of Roman-Dutch law which prevailed when the Crown acquired the Island from the Dutch.

It is clearly not a prerogative right even in England, but rests there on the assumption that all the land in England once belonged to the Crown, and that the fore-shore, which was a part of the manor to which it was attached, had never been granted away by the Crown. But be this as it may, and assuming for the purpose of this case that the fore-shore, by whatever title it may be claimed, is the property of the Crown, it is assuredly a right not in general for any beneficial interest to the Crown itself, but for securing to the public its privileges on the spot between high and low water mark, and the Crown itself could do no act to interrupt those privileges, any more than the Crown, in whom the fee of public highways is vested, could interrupt or abate the rights of the public in respect of it. And if the Crown itself is incapable of so doing, it could not empower others, by any means whatever, whether it be by grant or lease or license, to do so. The use of the seashore is as common to all as that of the sea is for all the purposes of egress and regress, and what is necessary for fishing, navigation, bathing, &c. and the Crown, presumably interested in the public good, will protect the claims of the public to the utmost verge of the law.

Now in this case, what the Crown alleges the defendant has done without leave from Government was to stack and store a quantity of timber for the purpose of building cargo boats on the fore-shore in Colombo.

These acts, being of necessity such as would impede the common user, it would not be possible for the Crown to lease or grant the fore-shore to the defendant for that purpose, and *a fortiori* it could not claim rent or remuneration for such occupation: rent can only be claimed on a contract, express or implied, to pay it.

There is no express contract here, and the occupation itself repels the inference that the defendant considered himself liable to pay rent.

If the object is to rid the land of any trespass or consequent nuisance committed by the defendant, there is ample remedy, provided both by statute and common Law, available to the Crown, without resorting to this fictitious action for rent.

The defendant will have judgment with costs.

DIAS, J.—This is an action by the Attorney-General on behalf of the Crown against the defendant on an alleged lease of a portion of the sea-shore. It appears to me that the plaintiff has mistaken his remedy. The sea-shore is public property, as a public highway or any other property of the like kind, which the Crown is interested in protecting. If the defendant had interfered with that public property in a manner to interfere with the rights of the public, he has committed a nuisance for which he is criminally liable. I agree with the C. J. that the defendant is not liable to be sued as he has been sued in this case. Set aside and judgment for defendant with costs.

BEFORE *Clarence* AND *Dias*, J. J.

December 18, 1891 and January 19, 1892.

SMITH *v.* WIJERATNE.

[No. c, 1,162, D. C., COLOMBO.]

Mortgage by executrix—Seizure of property of a deceased Testator by a Creditor.

A creditor of a deceased testator may not follow, under writ of execution, property of the estate, in the hands of a bonâ fide purchaser or mortgagee from the executor of the testator's estate.

B was a secured creditor of the testator. He had realized on his security, and had a money judgment for a balance sum, which he assigned to the plaintiff. The executrix of the testator's estate had mortgaged the property now in question to defendant, and under his own writ defendant purchased the same at Fiscal's sale, and the plaintiff sought to have it declared liable to be seized and sold in satisfaction of the judgment

The ATTORNEY-GENERAL, v. PITCHE.

Cur. adv. vult.

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BEFORE *Clarence* AND *Dias*, J. J.

December 18, 1891 and January 19, 1892.

SMITH *v.* WIJERATNE.

[No. c, 1,162, D. C., COLOMBO.]

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assigned to plaintiff by B. The District Judge dismissed the plaintiff's action with costs, and the plaintiff appealed.

Grenier (*Dornhorst* with him) for the appellant. Testator's estate is primarily liable to the debts contracted by testator himself. His creditors must therefore be preferred to the creditors of the executrix.

Fernando for respondent. It is well-established law that an executor has absolute power of disposal over the estate of the testator (William on Executors, Vol. II., p. 874), and the executor is presumed to be dealing with the estate for the purposes of the administration of the estate. A purchaser or mortgagee from the executor is not bound to look to the application of the money, and his title cannot be postponed in favour of the creditors of the testator (Corser *v.* Cartwright, 7 L. R. Eng. and Irish Appeal Cases, p. 731. Hall *v.* Andrews, 27 L. J. 195.)

Cur. adv. vult.

The following judgments were delivered on January 19, 1892.

CLARENCE J.—This judgment is right, and must be affirmed. The question for decision is whether plaintiff, as an unsatisfied creditor of Wirakoon, can follow the land in the possession of defendant, whose title arises under Fiscals' Sale in execution of a mortgagee's decree, based on a mortgage made by Wirakoon's widow. Wirakoon and his wife made a joint will under which the wife surviving him took everything, and became sole executrix. She afterwards mortgaged the land which was part of the estate to defendant, who got judgment on his mortgage, and purchased under his judgment. The only issue which appears to be raised in this suit is whether the widow, in making that mortgage, did so as executrix or in her own personal character as sole beneficiary under the will. If she mortgaged in her own personal character, then in a properly constituted suit this land can be reached by an unsatisfied creditor of the husband's. Upon examining the mortgage itself, all that can be said is that she did purport to mortgage as executrix. This is all the material we have before us, and therefore the learned District Judge was right in treating the mortgage as a mortgage made by the executrix. This being so, the defendant's title is good against the plaintiff's claim.

DIAS J.—This is a point of law, the facts being admitted. The plaintiff is the holder of a decree against the executrix of the last will of herself and her husband Wirakoon founded on a mortgage executed by Weerakoon. Under the decree the property specially mortgaged was sold, but it did not satisfy the amount of the decree. The decree was afterwards assigned by the representative of the creditor to the plaintiff, who seized a land of the estate not especially mortgaged, and the defendant claimed it under a title derived from the executrix of Weerakoon. It appears that, by a bond of 28th November 1881, the executrix mortgaged the lands in dispute to the Defendant who obtained a decree on his bond, and at the Fiscal's Sale which followed became the purchaser, and the question is whether the mortgage by the executrix to the Defendant is good as against the other creditors of the testator. The matter seems to admit of no doubt, and the authority cited by the District Judge is in point. I would dismiss the appeal with costs.

BEFORE *Burnside*, C. J., AND *Dias*, J.

February 19 and 26, 1892.

In re the guardianship of Richard and James Henry, minors.

[No. 12 (Guardianship), D. C., Kurunégala.]

Civil Procedure Code, Chapter XL and Sections 591 and 373—"The Stamp Ordinance, 1890"—Guardianship proceedings.

A Petition under Sec. 591 of the Civil Procedure Code for the recall of a certificate granted under Chap. XL of the Code and proceedings generally under that chapter, with the exception of those for which duties are specially prescribed * by "The Stamp Ordinance, 1890", are not liable to stamp duty.

Although Sect. 373 of the Code requires that the written petition upon which an application by way of summary procedure is made should be duly stamped, is does not imply that if the law does not require a stamp in a particular proceeding by way of summary procedure, a petition in such matter should be stamped.

This was a case brought up by way of revision from the D. C. of Kurunégala, to have it decided whether a petition for the removal of a guardian should bear stamps.

Hay, A. S.-G. for the Crown. Application for appointment or removal of a guardian must be by way of summary procedure (Sec.

* Duties are specially prescribed for the following :—(1) Appointment of guardian or next friend, (2) every certificate of curatorship and (3) every account filed thereunder.—Eds., S. C. R.

In re The GUARDIANSHIP OF RICHARD AND JAMES HENRY, MINORS.

583, Civil Procedure Code) and every petition by way of summary procedure must be stamped (Sec. 373, Civil Procedure Code).

Dornhorst for Petitioner. Part II of Sch. B of the Stamp Ordinance imposes duties only on certain documents, specified in the Ordinance, coming under Chap. XL of the Code. That implies that all other proceedings under that Chap. need not be stamped. The value involved in a guardianship Petition cannot be ascertained, and a difficulty hence arises as to the amount of stamp duty.

Cur. adv. vult.

On *February* 26, the following judgments were delivered.

BURNSIDE, C. J.—After very mature consideration I am of opinion that the ruling in this case by the District Judge is right, and should be affirmed. The Judges of this Court had issued instructions to the Registrar, on the question being submitted to them, that guardianship proceedings were subject to the stamp duties imposed by the Stamp Act on Civil Proceedings as contradistinguished from Testamentary Proceedings; and the question having arisen before the District Judge, as to whether such proceedings were liable to stamp duties at all, he has decided that they are not, and the Crown has brought the matter before us to be dealt with on revision of the District Judge's judgment.

The reasons advanced by the District Judge for his judgment seem to be conclusive.

It is not denied that previous to the passing of the Civil Procedure Code applications for guardianship proceedings were not subject to stamp duties under the old Stamp Acts. No express reference is made to such proceedings either in the old Acts or in the recent Act of 1890, and if the recent Act applied, it can only be by reason of that part of it which contains the duties on law proceedings.

Now, it is in the first place to be observed that all the duties on law proceedings are graduated with respect to the value of the property to which they refer or the claim in money, and considering that guardianship cases in their primary initiation do not necessarily involve any question of a money value, it is not illogical to conclude that such a mode of adjustment of stamp duties was not intended to apply to them.

Then again, a special and one duty is prescribed for every certificate of curatorship under chapter XL of the Code, and another duty on accounts filed thereunder. This would seem to exclude the position that any other duties were chargeable in respect of proceedings of the same nature, more especially if such contention involved the conclusion that these very specially taxed proceedings were also liable to taxation under the general imposts on all law proceedings.

Section 591 of the Code does certainly require that an application such as that under consideration shall be by petition by way of summary procedure, and Sect. 373 directs that it should be upon a "duly" stamped written petition, or it may be made orally upon the "requisite" stamp being furnished; but I see nothing in these words to preclude the conclusion that, if the law does not require a stamp in a particular proceeding by way of summary procedure, a petition in such a matter could be presented unstamped.

Then again, as the learned District Judge has put it, statutes which impose a pecuniary burden on the people must be strictly construed, and charges upon the subject must be imposed by clear and unambiguous language. The subject is not to be taxed, unless the language by which the tax is imposed is perfectly clear and free from doubt. In case of doubt, the construction most beneficial to the people must be adopted.

There are great doubts in this case, and we must uphold the District Judge's ruling against the tax.

DIAS, J.—I see no reason to disturb the order.

BEFORE *Burnside*, C. J. AND *Dias*, J.

August 7 and 18, 1891.

MARICAR *v.* PERERA.

[34,171, D. C., KALUTARA.]

Revival of Dormant Judgment—Substitution—Decree.

Held, that the mere substitution of a defendant does not make him liable to the extent of a judgment obtained before he was on the record. If a plaintiff wishes to bind substituted defendants to the extent of the property of their ancestor which may have come to their hands, he should proceed regularly against them, and obtain a decree for that purpose.

The facts of the case sufficiently appear in the judgment of

MARICAR v. PERERA.

BURNSIDE, C. J.—The defendant died as far back as 1870. In the year 1884, the widow of the deceased defendant and his minor children were made defendants, and the judgment was revived. The judgment became dormant again, and on 9th March, 1891, the plaintiff sought to have it revived again, but the District Judge refused to make an order; but two days afterwards, on fresh material, the plaintiff again moved to revive judgment and to issue writ. The District Judge again refused to make an order on the ground that the application did not follow the procedure prescribed by the Code. The plaintiff then filed a petition supported by an affidavit praying that the action do proceed at the instance of the plaintiff, and he moved that an order be made appointing a day for the determination of the petition, and on the day named the District Judge made an order "that writ do issue in the case, and that the defendants, who shewed cause, do pay plaintiff's costs." The 1st and 2nd substituted defendants shewed cause, and they have appealed.

Many grounds of appeal were urged against this order which were fatal to it. One, however, is sufficiently fatal to render any reference to others unnecessary. There was no decree against the substituted defendants which could be put in force by execution. The defendants were merely substituted defendants on the record. That did not make them liable to the decree against their ancestor. If the plaintiff wished to bind them to the extent of the property of their ancestor which may have come to their hands, he should have proceeded regularly against them, and obtained a decree for that purpose. Merely substituting a defendant does not make him liable to the extent of a judgment obtained before he was on the record. The judge's order must be set aside with costs in both Courts.

DIAS, J.—The order is clearly wrong. There is no judgment against the substituted defendants to be enforced against them.

BEFORE *Burnside*, C. J, AND *Dias* AND *Lawrie*, J. J.

February 14, and May 2, and 8, 1890.

DE SILVA *v.* ONDAATJEE and others.

[No. 54,307, D. C., GALLE.]

Donation, Acceptance of—Demurrer—R.-D. Law—Right of husband to sue for property which has come to him in community—Cause of action.

Acceptance of a donation is mere matter of proof, and it is not necessary to allege it in a pleading as a link of title.

A husband by the Roman-Dutch Law is not obliged to join his wife in suits respecting land which has come to him in community. He could sue for damage in respect of such land or claim a declaration of title to it in his own name.

Per BURNSIDE, C. J.—The mere sale by one man of the lands or goods of another gives the latter no cause of action in the absence of some act to disturb the physical possession or title of the owner.

Per DIAS, J.—Although according to the Dutch Law acceptation is an essential ingredient in a deed of donation, the mere acceptance of the instrument itself is a sufficient compliance with the requirements of the law.

Per LAWRIE, J.—Where it is admitted that a defendant claimed to be the sole owner of land to which he was entitled jointly with the plaintiff, and that he executed a notarial deed of sale purporting to sell the whole land, and delivered the instrument to the vendees who registered it, there is a sufficient cause of action against him by the plaintiff for a declaration of the plaintiff's title and damages.

The facts of this case material to this report appear in the respective judgments delivered by their Lordships on May 8, 1890.

Berwick (*Browne* with him) for defendants-appellants.

Dornhorst for plaintiff-respondent.

BURNSIDE, C. J.—This is an action by the plaintiff against several defendants claiming to be declared owner of 49/160 shares of certain land, and to be put and placed in possession of those shares, and for damages and costs.

The defendants are, as alleged, co-owners of undivided shares of the whole land. The libel was demurred to by all the defendants who answered on the merits as well. The learned District Judge ruled against the demurrer, and on the trial on the merits found for the plaintiff, and decreed him owner of the shares he claimed, and awarded him damages and costs. Against this judgment the defendants appeal, and on the argument before us, counsel again urged the objections set up by the demurrer. First, it was objected that it was not stated that the deeds of gift from the original owners, Don Simon de Silva and Dona Johanna,

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had ever been accepted. In my opinion, the acceptance of a donation is mere matter of proof, and it is not necessary to allege it as a link of title any more than in alleging title by deed it is necessary to say that the deed was sealed and delivered. If the pleading allege that by donation a person became entitled to certain land, it is, in my opinion, sufficient statement that everything occurred to complete the title by donation of which acceptance is only one ingredient. I do not think that ground of demurrer good.

Again, it is alleged as ground of demurrer that it nowhere appears that the plaintiff has any interest in the subject matter of this action. This objection, to my mind, also fails. In setting out title the libel alleges that the plaintiff's wife became entitled to particular shares of the land in question, and the libel goes on to say that the plaintiff is, "in right of his wife entitled" to the shares. This is an allegation of fact, and not a deduction of law, and it was an issue of fact which might have been denied, and would have then required proof as any other issue. It was said that even assuming that the libel did allege that the plaintiff was entitled in right of his wife, that gave him no right to sue alone in this action, to which it might be a sufficient answer to say, the non-joinder has not been pleaded in abatement; but I think I am justified in saying that a husband by the Roman-Dutch Law is not obliged to join his wife in suits respecting the land which came to him in the community. His right during his life is to treat the property absolutely as his own; he may sell, mortgage, or do whatever he likes with it, in his own name; and I think it would be going too far to say that he could not sue for injury to it or claim a declaration of title to it in his own name. The declaration of title would not touch the source from which he became entitled, but simply declare that he was entitled.

I now come to the last ground of demurrer. The plaintiff's alleged cause of action is, that the 1st defendant sold the whole land to the 2nd, 3rd, 4th, 5th, 6th and 7th defendants for a particular sum, which he appropriated, that they purchased, and have since been and still are in the possession of the whole land. It is objected that no cause of action is here disclosed, and I am of that opinion. It is beyond contention

that the mere sale by one man of the lands or goods of another, without doing any act to disturb the physical possession or title of the owner, gives the latter no cause of action.

Something was said at the bar about "scandal" or slander of title, to which it is sufficient to reply that this is not an action for defamation. As against the first and selling defendant, therefore, nothing whatever is alleged which is a cause of action. The purchasing defendants are admitted to be the joint owners of the land in common with the plaintiff, and as such being seized *per my et per tout* were entitled to the entire possession. It is nowhere alleged that the defendants had ejected the plaintiff or ousted him, and their entire possession is quite consistent with the plaintiff's possession in common with them. For these reasons, I am of opinion that the plaintiff's libel is bad on demurrer, and that the defendant must have judgment with costs.

The judgment of the District Judge would be set aside, and the plaintiff's suit dismissed with costs, unless the plaintiff elect to amend, in which case he will have leave to do so on the lines of this judgment, and a new trial will be had. All further costs reserved.

DIAS, J.—The plaintiff alleges that by right of his wife he is entitled to 49/160ths of the garden Thanayanwatte; and admitting the right of the defendants, or some of them to the remainder, complains of a trespass by the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th defendants on the plaintiff's undivided share.

The foundation of the plaintiff's title is to be found in two deeds of conveyance, by way of gift, bearing date respectively the 6th and 19th of April, 1858, executed by the admitted owners of the garden in question. The first mentioned deed conveyed half of the garden to the donors' daughter, Dona Martha de Silva, and the 2nd deed conveyed the other half to their son, Andreas Juanis de Silva, subject nevertheless, with regard to both the donations, to a life-interest in favour of the donors. The donor and donee are dead, and the present litigation is between the heirs of the donees. The plaintiff's wife, Isabella, is a sister of the above mentioned Dona Martha de Silva, and the plaintiff's title to the shares which he claims is fully set out in the libel. All the defendants, except the 1st and 8th,

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claim the entirety of the garden, and deny the plaintiff's right to any part of it.

The defendants have filed three answers. The 1st defendant is the seller to the 2nd, 3rd, 4th, 5th, 6th and 7th defendants, and in his answer he admits the sale of the whole garden to the other defendents, which he says he had a right to do. He also pleaded not guilty, and the plaintiff having failed to prove any trespass by him, the 1st defendant is clearly entitled to be absolved; but the 1st defendant made common cause with his vendee-defendants in denying the plaintiff's title, and I do not think he is entitled to his costs. All the defendants admit the two deeds of 1858, but they deny their legal effect, and say that the deeds are not deeds *inter vivos* but mere testamentary acts. If that be so, of course, the plaintiff is not entitled to the share which he claims, as some of the donees have predeceased the donors. The deeds must speak for themselves, and there can be no doubt as to their legal effect. They are deeds *inter vivos*, duly executed according to law, and irrevocable. At the hearing of this appeal, it was not seriously contended that they were testamentary acts, but several other points were urged against the deeds to shew that they were void *ab initio*, and the only one which calls for remark is that the deeds were not duly accepted. Undoubtedly, according to Dutch Law, acceptation is an essential ingredient in a deed of donation, but the fact of acceptance is matter of proof. The mere acceptance of the instrument itself is a sufficient compliance with the requirements of the law. This objection has been dealt with by the learned Chief Justice, and I need not add anything more to what I have already said. Another objection, which is equally untenable, was that as the property came to the plaintiff through his wife, he had not such an interest as would give him the right to sue alone without joining his wife. This objection is founded on a total misapprehension of the Dutch Law of community of property. When two persons marry in community of goods, the husband is absolute owner of the common property pending the marriage. He may alienate or encumber it at his will and pleasure, but in the event of an abuse of the marital power by him, the wife's only remedy is to obtain the order of a competent Court prohibiting him

from interfering with the wife's half of the common property.

The only remaining question is, whether or not the plaintiff has established a good cause of action against the defendants or any of them. I have already pointed out that the 1st defendant is entitled to succeed on this point, but the case of the other defendants stands on a different footing. No doubt the vendee-defendants and the plaintiff are tenants in common in the English acceptation of the term, but I do not think we are bound to adopt the nice distinctions of the English Law with regard to joint tenants and tenants in common. The Dutch Law, however, does not recognize these distinctions. The elementary principle—that every man has a right to the free enjoyment of what is his—is what should govern this case. In the latter case, one of the common owners cannot abridge the right of his co-owners without their free will and consent, either by keeping them out of the common property, or by taking the whole of the common property to himself to the exclusion of all or any of his co-owners. In the case under consideration the 2nd, 3rd, 4th, 5th, 6th and 7th defendants, who are co-owners or tenants in common with the plaintiff, keep the plaintiff out altogether from his share of the common property, which, I take it, is a clear invasion of the plaintiff's right, and would give the plaintiff a good cause of action. The defendants are in actual possession of the whole including the plaintiff's share, and they deny the plaintiff's right to any share on the ground that the plaintiff took nothing under the deed of 1850. The above stated material facts are admitted by the defendants, and the only question submitted for the consideration of the Court below was—whether the deeds were deeds of gift or testamentary acts.

I am, therefore, of opinion that the plaintiff is entitled to keep the judgment which he has obtained, and the appeal of the appealing defendants must be dismissed with costs.

LAWRIE, J.—All the objections stated to the title of the plaintiff to the share of the land he claims have been repelled or withdrawn, and the only question on which a difference of opinion exists between My Lord the Chief Justice and Justice Dias is, as to the relevancy of the plaintiff's averments as against each and all of the ten defendants.

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The plaintiff has called as defendants everyone who has, or who pretends to have, a right as co-owner. Three of these co-owners, the 8th, 9th and 10th defendants, did not appear, and have not filed answer.

The other defendants, besides demurring to the libel, answered on the merits, and denied the plaintiff's right to any share of the land.

My Lord the Chief Justice and Mr. Justice Dias are agreed that the plaintiff has a right to the shares he claims. In my opinion he is entitled to a judgment declaratory of his right.

I am not able to agree that no cause of action is stated as against the first defendant. It is admitted that he claimed to be sole owner, that he denied the plaintiff's right, and that he sold the whole land, and by that I understand it is meant that he executed a notarial deed of sale, and delivered it to the purchasers, who were thereby enabled to register the deed. The existence of such a deed on the register would necessarily prejudice the plaintiff. It would render his share in the land unsaleable and valueless, because no one would purchase from him or would lend money to him on that security, until his title on the register was cleared.

The plaintiff has erred in not stating his cause of action against the 1st defendant with sufficient clearness, but as it is alleged that the 1st defendant denied the plaintiff's right, and sold to the other defendants, and that the purchasers under the 1st defendant wrongfully possessed the whole land since their purchase, I am of opinion that the allegations are sufficient.

It is true that the plaintiff does not allege that he was ejected from the land. We must assume that he was not ejected; that at the time when the 1st defendant sold, and when the other defendants entered into possession, the plaintiff was absent; and that the entry of the defendants was peaceful and unaccompanied by violence; but that will not, in my opinion, prevent the plaintiff from successfully vindicating his undoubted right.

I only regret that, in the judgment about to be pronounced, the question between the plaintiff and the 1st defendant is not adjudicated on, and finally determined.

I agree with my brother, Dias, that the plaintiff is entitled to judgment.

BEFORE *Lawrie*, J.

June 12 and 19, 1890.

BABATCHO *v.* DANIEL.

[No. 10,164, P. C., MATARA.]

Maintenance—Ordinance No. 19 of 1889—Evidence as to non-access between husband and wife.

In a prosecution under "The Maintenance Ordinance, 1889," by the mother of an illegitimate child against its putative father, the complainant, if a married woman, may give evidence as to the person by whom the child was begotten, provided non-access to her by her husband has first been proved by other evidence.

Neither the husband nor the wife can give evidence as to non-access.

The complainant, a married woman, applied for an order in terms of Ordinance No. 19 of 1889, Sect. 3, as against the defendant whom she charged with having neglected to maintain his illegitimate children by her. Apart from the complainant's own evidence, the non-access between her and her husband was not sufficiently proved. The Police Magistrate made order against the defendant who appealed.

Pieris for appellant.

There was no appearance of counsel for the respondent.

Cur. adv. vult.

On June 19, 1890, the following judgment was delivered.

LAWRIE, J.—The conviction is set aside and the accused acquitted.

A prosecution under the Vagrant Ordinance of a man for neglecting to maintain his illegitimate children so much resembles an application for an affiliation order in England that evidence which would be admitted or rejected in such a case in England must be admitted or rejected here. The law is clear that when the complainant, the mother of the children, is a married woman, she may give evidence as to the person by whom the children were begotten, provided it has first been proved by other evidence that it was impossible that the husband could be the father by reason of the fact that he and his wife lived so far apart that access was impossible at the time when the children were begotten. Neither the husband nor the wife can give evidence as to the non-access: that must be proved by other witnesses. Here, apart from the evidence given by the

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wife, there is not sufficient evidence that the complainant and her husband were not living together at the time when their children were begotten; still less, that the husband did not live within such distance as to make access easy.

BEFORE *Burnside*, C. J.

February 25 and March 1, 1892.

BANDA *v.* SOMALIA.

[No. 348, Ad. P. C., KEGALLE.]

Mischief—Jurisdiction—Rule of Construction.

Mischief by killing a buffalo of the value of Rs. 30 is an offence for which a prosecution may be entered under either the 411th or the 412th section of the Penal Code.

Revision.

The facts of the case sufficiently appear in the judgment.

Hay, A. S.-G., for the Crown.

Cur. adv. vult.

The following judgment was delivered on March 1, 1892:—

BURNSIDE, C. J.—This case comes before us in revision from the Police Court of Kegalla on motion of the Attorney-General.

The Magistrate tried and convicted an accused of mischief in killing a buffalo of the value of Rs. 30 under the 411th section of the Penal Code.

The Crown contends that killing a buffalo is a special offence under the 412th section of the Code—one triable by the District Court only and not by the Police Court. The 411th section enacts that "whoever commits mischief by killing, etc., any animal or animals of the value of Rs. 10 or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both"; and over this offence the Police Magistrate is given jurisdiction.

The 412th section enacts that "whoever commits mischief by killing, etc., any elephant, camel, horse, ass, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of Rs. 50 or upwards, shall be punished with imprisonment of either description, for a term which may extend to five years, or with fine, or with both"; and over this offence the District Court only has jurisdiction.

There can be no doubt that under the general wording of the 411th section a buffalo could be included, if the section stood alone. The question is, does the 412th section giving jurisdiction to the District Court alone with regard to particular animals, limit the general jurisdiction given by the 411th section in respect of such animals?

The question is not free from doubt, and I have come to the conclusion that it does not, and for this reason:—The latter part of the 412th section refers generally "to any other animal of the value of Rs. 50 or upwards." Now, in the case of mischief by killing, say, a dog of the value of Rs. 50 or upwards, the Police Court might try the offence, because a dog would come within the general description "animal" in the 411th section, and it would as well come within the general description "any other animal" in the 412th section, and the District Court would also have jurisdiction; so that the two sections would confer undoubtedly concurrent jurisdiction in respect of mischief to the same animal, the Police Court being empowered to give punishment to the extent of its power, *i. e.*, six months, and the District Court to the extent of its power, *i. e.*, two years, while the Supreme Court might inflict punishment to the extent of two years and five years respectively; and it would be for the prosecuting department to elect the court, with reference to the amount of punishment which it conceives the offence merited.

The rule of construction must, therefore, prevail, that where a statute by clear words confers jurisdiction in any particular matter, the fact that further and other jurisdiction is also afterwards conferred cannot be construed to oust the other.

The conviction must be affirmed.

BEFORE *Burnside*, C. J. AND *Dias*, J.

March 8 and 18, 1892.

SOYSA *v.* SOYSA.

(No. 2,510, D. C., KANDY.)

Writ against Person for costs—Civil Procedure Code, Sections 298 and 299.

Under the Civil Procedure Code—

A writ against person can only issue in any case after a writ against property has been issued.

It can only be issued by a plaintiff in an action for money, when he recovers a sum which, inclusive of interest, if any, up to the date of decree, but exclusive of any further interest and of costs, amounts to or exceeds Rs. 200.

A defendant having a decree for costs only may issue execution against person on a judgment when those costs amount to or exceed Rs. 200.

A plaintiff obtaining a specific decree in respect of movable or immovable property with costs cannot issue execution against the person, whatever the costs may be.

In this case the plaintiff obtained a decree against the defendant for certain land with costs. His costs were taxed at over Rs. 200, and the plaintiff, having failed to recover these costs on a writ against the defendant's property, moved under sect. 298 of the Criminal Procedure Code for a writ against the defendant's person. The District Judge having disallowed this motion on the ground that execution against person could not be issued for costs, the plaintiff appealed.

Dornhorst for plaintiff-appellant.

Browne for defendant-respondent.

The following cases and sections of ordinances and the Civil Procedure Code were cited or referred to in the course of the argument:—

Habibu Lebbe v. Sego Lebbe, S. C. C. VI—50; *Annamaley Chetty v. Lee*, S. C. C. VII—164; Sect. 164 of Ord. No. 7 of 1853; Sect. 5 of Ord. No. 24 of 1884; Sects 209, 298 and 299 of the Civil Procedure Code.

Cur. adv. vult.

On March 18, the following judgments were delivered:—

BURNSIDE, C. J.—I have come to the following conclusion

after carefully reading the several clauses of the Civil Procedure Code.

The person of a judgment debtor is only liable to be taken in execution after execution against property has been returned in one of the returns (a) (b) (c) (d) prescribed in the 298th section.

Under the 299th section the words "the sum awarded" refer as well to a decree in favour of the defendant as of the plaintiff. A decree in favour of a defendant for a sum by way of costs alone is a decree "for a sum awarded."

I have had some difficulty in coming to the latter conclusion in consequence of the form No. 60 which is provided in the schedule to the Ordinance, and which suggests that the writ against person can issue only at the suit of the plaintiff. But I do not think the form can be allowed to restrict a meaning which is clearly within the words of the Section. Then arises the question, is a decree for the plaintiff embracing a substantive matter together with costs such a decree as may be said to be a decree wherein "the sum awarded" is exclusive of interest and costs. I am afraid that, to whatever result it may lead, I must hold that it certainly is not. It is a decree which is specific in one respect, and includes costs which the explicit wording of the 299th section of the Code excludes.

I am fortified in this opinion by several Sections of the Code. Section 209 says, an order for the payment of costs "only," mark the word, "only," is a decree for money. Section 224 (g) provides for execution, only when the claim is for a *debt* due upon the decree. Then in section 320 (b) and 323 (c) and the forms 62 and 63, given for executing decrees against property, that part of the decree which refers to costs is omitted. There is no form of execution for costs upon a substantive decree with costs; and it is only under the circumstances and in the manner which are specified in section 321, with regard to movable property, and section 324, with regard to immovable property, that the substantive decree may be enforced, and no notice is taken of costs; and sections 334 and 335 seem to conclude the matter. What the remedy is for costs upon such decrees (and there must be some remedy) I am not called on to decide in this case. Practically then I arrive at these conclusions

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as the result of the Ordinance:— A writ against person can only issue in any case after a writ against property has been issued (section 298).

It can only be issued by a plaintiff in an action for money, when he recovers a sum with interest, not including costs, amounting to Rs. 200 or over (Sec. 299).

A defendant having a decree for costs only may issue execution against person on a judgment, when the sum awarded for costs amounts to Rs. 200 in any action.

A plaintiff obtaining a specific decree in respect of movable or immovable property with costs can never issue execution against the person whatever the costs may be, because the decree is not one for money, but for some subtantive relief together with costs, and execution could not go for costs alone, because there is no sum awarded exclusive of costs.

The learned counsel for the appellants suggested a way out of the difficulty by reading the clause in question as applying only to money decrees and not touching the old law as to execution on decrees for substantive relief or specific remedy. I am afraid we cannot do this without openly defying the entire provisions of the Code which in many cases, and notably the sections which I have quoted, unmistakeably provide for execution upon such decrees. And we ought not to apply one law to one set of cases and one to another.

I do not doubt that the correct reading of the Civil Code is as I have stated, but I do not pretend to understand, much less explain, the reasons, if there are any, for the distinctions which have been made. The judgment must be affirmed.

DIAS, J.—The plaintiff in this case obtained a decree in ejectment with costs, and moved for a writ against the person of the 2nd defendant for the costs which amounted to some Rs. 800. The District Judge refused the application on the ground that execution against person cannot be issued for costs. According to section 299 of the Civil Procedure Code, no execution against person can issue when the sum awarded, inclusive of interest, if any, up to date of decree shall not amount to Rs. 200 or more. In calculating the amount, the interest after the date of the decree and the costs of the suit are expressly excluded. This section evidently had in

view a decree for a sum of money, whether in favour of the plaintiff or the defendant; but what is important in the consideration of the question in hand is that it excludes costs in the computation when their is a substantive decree with costs, and the costs are merely an incident of the decree, and the effect of the section in my opinion is, that where, as in this case, the plaintiff obtained a substantive decree, he cannot issue execution against the person of the defendant for costs, though the amount of such costs be Rs. 200 or more. On the other hand, if the defendant obtained a decree for costs only, it is a decree for a sum awarded as costs within the meaning of the section, and if such costs amounted to Rs. 200 or more, the defendant can have a writ against the person. The point is one of some nicety, but on the whole I think the District Judge took a correct view of the matter, and his order must be affirmed.

BEFORE *Burnside*, C. J.

January 28 and February 11, 1892.

THE QUEEN *v.* KANACASABAY and others.

[No. 2,446, D. C. (Criminal) KURUNEGALA].

Robbery—Sect. 310 of the Penal Code—Theftuous taking—Intention in cases of Theft.

The 1st accused's dog rushed out at A who struck it with a bill-hook which he had in his hand. The accused got angry, rushed at A and snatched the bill-hook from him, and took it away. *Held*, that the accused was not guilty either of robbery or of theft.

The Penal Code did not depart from the principle of the Civil Law and of the Common Law, that in a case of theft the intention of the party charged should have been to cause permanent and not temporary deprivation.

The facts of the case sufficiently appear in the judgment.

Dornhorst for the defendants-appellants.

Hay, *A.A.-G.*, for the Crown.

Cur. adv. vult.

The following judgment was delivered on February 11, 1892, by

BURNSIDE, C. J.—The appellant in this case was charged with robbery under the 380th section of the Code.

I take it for the purpose of the legal question that was raised in appeal on behalf of the 1st accused appellant that

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the case for the Crown is that the accused's dog rushed out at the complainant who struck it with a bill-hook which he had in his hand. The accused got angry, rushed at the complainant, and snatched the bill-hook from him, and took it away, and is charged with and convicted of the robbery of it.

It is contended for the 1st accused that what he did was not robbery but only a civil trespass.

For the Crown the Solicitor-General urged that this was robbery within the Code; that even if the accused may not have intended to cause wrongful gain to himself, he intended to cause wrongful loss to the complainant, and so the taking was dishonest.

By the 22nd section of the Code it is ordained that, whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person is said to do that thing "dishonestly," and theft by the 365th section of the Code is defined as follows:—"Whoever intending to take dishonestly any movable property out of the possession of any person without the consent of that person, moves that property in order to such taking"; and by the 379th section "Theft" is robbery if, in order to the committing of the theft, the offender uses force of a particular description.

The contention of the Solicitor-General no doubt seems most logical, and yet it does not seem to coincide with our preconceived ideas of a theftuous taking, *i. e.*, such a taking as is done secretly, or, if forcibly, with an intention of causing loss to the party from whom the property is taken, with some corresponding gain to the taker.

I say "some" because it will be remembered that although in Howarth's case six Judges against five held that it was not necessary that the taker should act *lucri causa*, yet two of that majority were of opinion that in the case before them evidence of *lucrum* might be discerned. And indeed if Mr. Solicitor's contention goes to the extent that the mere taking in such a case as that before us would be sufficient evidence of a wrongful taking to satisfy the requirements of the Code, then I think the proposition goes too far. For it may well be that the accused before he moved the property had not any preconceived dishonest intention at all. The taking

may have been simply an inpulsive act in which the only motive was retaliation, and without any intention of causing permanent loss or gain. As for instance, where after keeping the article for a moment, the taker returned it or offered to return it to the person from whom it was taken.

The Code especially requires that the intent should exist at the time of the act, and I venture to submit my humble opinion that it did not depart from the principles of the Civil Law and of the Common Law that the intention must be to cause permanent and not temporary deprivation.

Now, if there were no more evidence in a prosecution of this kind than that an accused had forcibly taken away an article with which he considered an injury had been done, which he resented, it might be fairly contended for him that there was no evidence of a dishonest taking, and if there was evidence that soon after he had taken the article he had offered to return it or done something negativing an intention to deprive the owner permanently of it, there would be stronger evidence to negative any presumption of a dishonest taking; but if there were evidence that after the taking the accused dealt with the property as his own by taking it away with him or the like, then it would be a question of fact whether the original taking had not been with the dishonest intent which the Code prescribes. And yet even such evidence might not preclude the conclusion that the subsequent dealing with the property was the result of an intent which supervened after the taking, and did not precede it, in which event the requirements of the Code would still be unsatisfied to constitute the offence of robbery. Having thus dealt as I was bound to do with this general and important question of law, I turn to the facts of this particular case. The case for the prosecution rests on the evidence of native witnesses who, I admit, tell a very direct story of what took place, and materially corroborate each other.

The defence for the most part also rests on the testimony of native witnesses who also tell an equally direct story, and are equally corroborated, and the District Judge has undertaken to believe the story of the complainant and not that of the defence; but it seems to me that he has overlooked the

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crucial tests of the truth of the two directly contradictory stories. The complainant in this case and his witnesses say that it was in consequence of the complainant having struck the accused's dog that the 1st accused set on him and with some of his coolies not only severely beat him but robbed him on the road opposite the 1st accused's bungalow: he does not pretend to say that in this assault upon him the 1st accused was in any way beaten. The complainant himself was armed with a katty which he never pretended to use in defence, and at the most the only injury that the 1st accused could have received, if the complainant's story were true, would have resulted from falling on the grass on the roadside as he tripped over his sandals.

In the very same case and on the very same evidence, the complainant charged a third accused against whom the case was dismissed.

The 1st accused supported his case, as I have said, by equally strong evidence as that given by the complainant. It was the accused who laid the 1st charge: it was the complainant who laid a counter case. Now, had matters only stood in this way, it would seem to strike an unprejudiced mind that the man who had first sought legal redress against another who then made a counter charge against him, and falsely included a third party in it, should at least have been allowed the privilege of a first hearing; but for some inscrutable reason or other I find that the case brought by the accused against the complainant was dismissed, whilst that brought by the complainant against the 1st and 2nd accused was committed for trial. But this is not all. Both complainants alleged that they had been severely beaten, and both were subjected to an examination as to their injuries.

The 1st accused went immediately to a qualified Surgeon who testifies that he examined him at 8 A.M. on the morning of the alleged robbery and found—I use his own words.—"He had two contusions, one severe, on the lower third of the left fore-arm with considerable swelling, the other was on the right wrist which was also swollen, both from blows by a blunt instrument." The complainant went to the Peace Officer, his countryman, and complained of the beating, and the

Peace Officer testifies that—I use his own words—"he had examined him, and he had no marks of beating." At the trial before the District Judge he never attempted to prove any injuries, whilst the 1st accused again produced evidence of the injuries he had sustained. There can be no longer any doubt where the weight of evidence lay, and I do not hesitate to add that the appellants had good cause for complaint, that they have been put on their trial, whilst the complainant has been supported in his charge against them, and he succeeded in securing the imprisonment of two of them till now. Conviction set aside against all the accused.

BEFORE *Clarence* AND *Dias*, J. J.

February 20 and March 10, 1891.

DE FONSEKA *v.* FERNANDO and another.

[No. 40,396, D. C., KALUTARA.]

Lease, Breaches of Convenants of—Lessor's right to sue—When it accrues—Cause of action.

The plaintiff leased a cinnamon estate to the defendants for four years, and by the terms of the lease the defendants were to clear and weed the estate, bury weeds, &c., before the 30th April of each of the said four years. The defendants also covenanted by the said lease not to cut green cinnamon from bushes unfit to be peeled, nor to pluck tender coconuts from the coconut trees on the estate, and to possess the land "so that no damage might be caused thereto."

Held, that the plaintiff was not entitled to recover damage from the defendant, until after the expiration of the lease, for breaches of the above covenants, save and except that for clearing and weeding the estate before the 30th April, of each of the four years of the lease.

The facts of the case sufficiently appear in the judgment of CLARENCE, J.

Dornhorst for defendants-appellants.

Withers (*Pereira* with him) for plaintiff-respondent.

Cur. adv. vult.

The following judgments were delivered on March 10, 1891:—

CLARENCE, J.—The action is by lessor against lessees to recover damages for breach of agreements in a lease which, at the date of action brought, was still running. By lease bearing date December 8, 1886, the plaintiff agreed to lease to defendants for a term of four years expiring on December 31, 1890, a cinnamon estate of 229 acres. The lease contains a special

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agreement by the lessees to clear and weed the land four times during the term, viz., before the end of April in each year, and there are also stipulations as to the burying of weeds, clearing drains, &c. There is also a prohibition against cutting immature cinnamon and plucking tender coconuts at the end of the term.

The plaint avers that defendants "in breach of the terms of the said lease" made a default of weeding, burying weeds, and clearing drains in the current year 1890, for which plaintiff claimed damages Rs. 730, and also "in breach of the terms of the said lease" cut immature cinnamon, for which plaintiff claims damages Rs. 35. The plaint further avers that defendants "in breach of the terms of the said lease," allowed the buildings to be damaged by fall of coconuts and coconut branches, for which plaintiff claims damages Rs. 175, and allowed damage to be done by cattle trespass to young cocoanut plants and cinnamon shoots, for which plaintiff claimed damages Rs. 372·50.

The action was instituted in May, 1890. Defendants in their answer took, by way of demurrer, objection to plaintiff's suing on the above counts while the lease was still running; and in my opinion that objection should have been upheld, as to all plaintiff's claim, except the claim in the 4th paragraph of the plaint for omission to weed, clear drains, and bury weeds.

The plaintiff's claim for damages to buildings is based on no special agreement, but can only be grounded on an implied agreement to deliver up the premises at the end of the term in good condition. Plaintiff was premature in suing on this matter in May, six months before the end of the term. Similar considerations apply to plaintiff's claim for cutting of immature cinnamon, and for allowing trespassing cattle to do damage. Plaintiff may have a right to recover something from defendants on these heads at the expiry of the term, but there are no circumstances entitling him to maintain his present action, while the lease is still running, and it remains to be seen what damages 'if any' the condition of the premises at the end of the term will entitle plaintiff to recover.

With regard, however, to the omission to weed and bury weeds and clear drains under the terms of the lease, plaintiff had a right to sue for damages as soon as the breach was committed, viz., April 30th, 1890. The breach of the agreement in

this behalf is admitted in defendants' answer, and the evidence distinctly proves that the estate has suffered materially from defendants' neglect. It is impossible, however, upon the materials, to assess any damages under this head, because the witnesses called as to the assessment of damages have mixed up this and other matters, such as the cutting of immature cinnamon.

I think the order in appeal should be as follows:—

Set aside the judgment appealed against.

Uphold defendants' demurrer so far as concerns the relief prayed for under paragraphs 5, 6 and 7 of the plaint.

Send the case back for further hearing, and assessment of damages upon plaintiff's claim under paragraph 4 of the plaint.

No costs of this appeal. All other costs left as costs in the cause.

DIAS, J.—I agree to the above order.

BEFORE *Burnside*, C. J. AND *Dias*, J.

March 15 and 18, 1892.

KANDAPPAN *v.* ELLIOT.

[No. 327, D. C., BATTICALOA.]

Appeal—Time for notice of the tendering of, and for perfecting, security—Sections 754 and 756 of the Civil Procedure Code.

Under Sections 756 of the Civil Procedure Code, when a petition of appeal has been received by a District Court, "the petitioner shall forthwith give notice to the respondent that he will on a day to be specified in such notice and within a period of twenty days from the date when the decree or order appealed against was pronounced, tender security for the respondent's costs of appeal.

Held, that under this section it is not sufficient that the appellant should, within twenty days, give notice of his intention to tender security: he must do so forthwith on the filing of the appeal, and he must actually tender the security within the twenty days, and within sufficient time to enable the Court to accept or reject it. He cannot perfect his security after the lapse of twenty days; and if the security tendered should turn out insufficient or does not satisfy the requirements of the Section, and the Court reject it, the appellant cannot tender fresh security after twenty days, but the proceedings abate.

In this case the petition of appeal was received by the District Court on the 11th November, 1891, and notice of the tendering of security was given by the appellant to the respondent on the 21st November, and the security bond was signed after the lapse of twenty days from the date of judgment, calculated as provided in Section 754 of the Code.

In appeal,

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Hay, A. S.-G. for defendant-respondent submitted that the appeal should be rejected, as notice of the tendering of security was not given forthwith on the filing of the appeal, and the security itself was not perfected in time.

Sampayo for plaintiff-appellant, *contra.*

On March 18, 1892, order was made rejecting the appeal.

BURNSIDE, C. J.—There can be no question that the proceedings in this appeal abated in the Court below, and we must reject the appeal.

By the 754th section of the Code the petition of appeal must be presented within ten days from the day when the decree was pronounced, and by the 756th section, after a petition of appeal has been presented, the appellant must *forthwith* give notice to the respondent that he will on a particular day, within twenty days from the date of the pronouncing of the decree, tender security for the respondent's costs of appeal. Now, under this provision, it is not sufficient that the appellant, within twenty days of the pronouncing of the judgment to be appealed from, should give notice of his intention to tender security: he must do so forthwith on the filing of the appeal; and he must actually tender the security within the 20 days and within sufficient time to enable the Court to accept or reject it, and the security must be either by a bond with one or more sufficient securities, or by way of mortgage of immovable property, or by deposit and hypothecation by bond of a sum of money sufficient to cover costs of appeal, and to no greater amount. He cannot perfect his security after the lapse of twenty days, whatever he may have done before; and it should be borne in mind that if the security tendered should turn out insufficient, or does not satisfy the requirements of the clause, and the Court reject it, the appellant cannot tender fresh security after 20 days, but the proceedings abate. That is what happened here. The appellant put in his appeal, gave notice, and then put in his security; but he did not give the notice forthwith as required by the section, and consequently he could not perfect his security.

The proceedings on the appeal abated, and we must reject the appeal.

DIAS, J.—This appeal must be rejected, the appellant not having given the necessary security within time. The mere tendering of security within time is not sufficient. It must be perfected within the time allowed by law.

BEFORE *Burnside*, C. J. AND *Dias*, J.

February 19, 1892.

DISSANAIKE and others *v.* EKENAIKE and others.

(No. 4,665, D. C., TANGALLE.]

Appealable Order—Dismissal of Petition of Intervention—Costs.

Where a District Judge dismissed a Petition of intervention with costs reserving his final decision on the questions at issue between the plaintiffs and the defendants, the intervenients had no right of appeal until such final decision.

The plaintiffs as the descendants of one Constantyne de Silva claimed certain shares of certain lands allotting in the plaint to the defendants, also as descendants of Constantyne de Silva, the remaining shares. Don Hendrick and others intervened, also claiming to be descendants of Constantyne de Silva, and as such to be entitled to certain shares of the same lands. On the date of trial the plaintiff's proctor applied for a postponement as some of the plaintiffs had died since the case was set down for trial, and their legal representatives had not been made parties to the action. The District Judge refused the application, and heard evidence in the case and on 31st July, 1891, entered of record the following minute:—"I dismiss the intervenient's claim, and order that they do jointly and severally pay to the plaintiffs all costs incurred by them since the filing of the answer of the first defendant. As regards the shares claimed by the several plaintiffs and those allotted to the several defendants I will definitely decide when all these parties are before the Court on a certain day to be fixed hereafter. In the meantime I adjudge that the plaintiffs and defendants (save the first named) and they alone, as the descendants of the paternal uncles and aunts of the deceased Don Constantyne de Silva, are the persons at present entitled to the estate of the said deceased as administered by the first defendant in Testamentary case No. 188. I make no order

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as to any costs incurred by the plaintiffs prior to the filing of the answer of the first defendant, as those costs must lie over, pending the decision of the second issue in the suit, namely, the administration of the estate by the said first defendant."

From the above order the intervenients appealed.

Layard A. A.-G. for plaintiffs-respondents took the preliminary objection that in the District Judge's minute of the 31st July, 1891, there was no judgment, decree, sentence or order in terms of Sect. 42, Sub. Sect: 2 of the Courts Ordinance, 1889, to appeal from. The District Judge expressly reserved his final decision in the case.

Dornhorst for Intervenients *contra.*

Their Lordships intimated that they thought that the appeal was premature, and should not be entertained, and subsequently entered up the following judgment:—

At the hearring of this appeal the learned Attorney-General objected to the appeal being entertained as there was no final judgment on all the issues raised on the pleadings. There were several issues in the case, and the learned District Judge gave judgment on one only, and we agree with the Attorney-General that the appeal is premature, and we reject it; but we give no costs, as it was perhaps a cautious step to take considering that, if the appeal had not been taken, and we had held that the order was an appealable one, the appellant might have lost his right.

BEFORE *Burnside*, C. J. and *Lawrie*, J.

June 10 and 13, 1890.

In re ELLIAS, a prisoner in the Wellicade Jail.

Writ of Habeas Corpus.—Commencement of execution of sentence —Infliction of punishment under a sentence by instalments.

E. was on the 30th November, 1881, sentenced by the Supreme Court to imprisonment at hard labour for ten years. On the 20th January, 1882, he was again sentenced by the Supreme Court, for a separate offence, to imprisonment at hard labour for ten years, and to receive twenty five lashes on his bare back. Under the latter sentence the prisoner was lashed on the 3rd February, 1882.

Held, that as the punishment of a prisoner on a sentence passed on him cannot be inflicted by instalments, the prisoner's second sentence must be taken to have commenced from the moment he was lashed, and the two sentences of

imprisonment ran concurrently, and the prisoner was entitled to be discharged at the expiration of ten years from the date on which he was lashed.

The facts material to this report appear in the judgment. *Dumbleton, C.C.*, for the Crown.

On June 13, 1890, the following judgment was delivered by

BURNSIDE, C. J.—When my brother Lawrie visited the Wellicadde Jail, complaint was made to him by Prisoner No. T, 302, Ellias, that he had been twice convicted before the Supreme Court, and sentenced by it on each occasion to undergo rigorous imprisonment for a period of ten years; and on the second sentence to receive, in addition, 25 lashes on his bare back. He stated, and it was not contested, that the lashes had already been inflicted on him, and that he had already been in Jail for ten years—that, therefore, he had undergone the punishment imposed on him by the second sentence of the Court. He therefore claimed to be discharged without being subjected to any further term of imprisonment. On this complaint this Court issued a Writ of *Habeas Corpus*, and caused the body of the prisoner to be produced before it, and the question for determination now is, whether his ground of complaint is good, and whether he is entitled to be discharged or not.

On looking into the Committals under which he is detained, I find that on the 30th day of November, 1881, he was tried at a Criminal Sessions of this Court, was convicted of Highway Robbery, and was sentenced to imprisonment at hard labour for a term of ten years. The Prisoner was again, on the 20th day of January, 1882, tried before the Supreme Court, was convicted of breaking into a dwelling house with intent to steal, and stealing therefrom, and was sentenced to receive 25 lashes on the bare back, and to be imprisoned at hard labour for a term of ten years, such sentence of imprisonment to commence after the expiration of the period or periods of imprisonment to which he had already been sentenced by this court.

Instead, however, of the prisoner being subjected to imprisonment under the 1st sentence, it appears that he was lashed on the 3rd of February 1882; and as the punishment on a prisoner on a sentence passed on him cannot be inflicted by

In re ELLIAS, A PRISONER.

instalments, the prisoner's second sentence must be taken to have commenced from the moment he was lashed; and so the two sentences of imprisonment, notwithstanding the proviso in the second commitment, ran concurrently. And as the prisoner has fulfilled the period of ten years' service together with his marks, he must be discharged.

BEFORE *Burnside*, C. J.

June 25, 1891.

ALLAGAN *v.* ALLAGEY.

[No. 10,348, P. C., GAMPOLA.]

Cooly—Entry of name in check-roll—Monthly servant—Contract in writing—Infancy—Ordinance No. 13 of 1889, sect. 5 and 8.

The 5th Section of Ordinance No. 13 of 1889 provides that "every labourer who shall enter into a verbal contract with the employer for the performance of work not usually done by the day or by the job or by the journey, or whose name shall be entered in the check-roll of an estate, and who shall have received an advance of rice or money from the employer, shall, unless he has otherwise expressly stipulated, and notwithstanding that his wages shall be payable at a daily rate, be deemed and taken in law to have entered into a contract of hire and service for a period of one month."

Held, that a labourer who enters into a contract for a year's service, but which contract is invalidated for want of writing as required by Sect. 8 of the Ordinance, cannot be convicted of acts made penal in respect of monthly servants, merely because his name is on the check-roll, and he works as any other monthly labourer.

Observations on the capacity of an infant to contract himself within the penal provisions of a statute.

The accused, a cooly girl, and an infant in law, was prosecuted by her father, a kangany, for desertion from the estate of Mr. Northway. Mr. Northway, the only witness for the prosecution, stated that accused was a cooly under him, and worked in his estate as a monthly labourer, and produced check-roll shewing entries of her name and of rice advances. But after the case for the prosecution was closed, the kangany himself was called, and stated "I agreed to work on the estate for one year—so did the accused through me," and it appeared that the agreement was not in writing. On these facts the accused was acquitted, and the Attorney-General appealed.

Browne for appellant.

Dornhorst for accused-respondent.

Cur. adv. vult.

The following judgment was delivered by

BURNSIDE, C. J.—This is an appeal by the Attorney-General against the acquittal by the Police Magistrate of Gampola of a cooly girl who had been charged with desertion.

Mr. Browne appeared for the apellant, and *Mr. Dornhorst* for the respondent.

Mr. Dornhorst relied on the second ground on which the magistrate had acquitted the accused as sufficient for his purpose to support the judgment appealed from, and while not waiving it, he expressed no desire to obtain a ruling on the first point, unless it was necessary. The respondent, a cooly girl, an infant in law, had been prosecuted by her father, a kangany on the estate of Mr. Northway, for desertion from that estate. Mr. Northway was the only witness for the prosecution. He says "she (defendant) was a cooly under me, and worked on my estate as a monthly labourer. I produce the check-roll in which her name is entered." This is every word of the evidence as to service.

The Ordinance No. 13 of 1889, expressly provides that every labourer who shall enter into a verbal contract for the performance of work not usually done by the day or by the job or by the journey, or whose name shall be entered in the check-roll of an estate, and who shall have obtained an advance of rice or money from the employer shall, unless he has otherwise expressly stipulated, be deemed and taken in law to have entered into a contract of hire and service for the period of one month.

Mr. Northway's evidence was sufficient to establish *prima facie* that the accused was a monthly servant; but, the case for the prosecution being closed, the prosecutor himself was called who says, "I took her, the defendant, to Galapola estate, and contracted on her behalf to serve Mr. Northway. I agreed to work on his estate one year"; so did the accused through me. The agreement was not in writing. In cross-examination he said, "we are looked upon as monthly paid servants," and in his re-examination he said "if we choose, we can leave after the expiry of the year without notice. Our wages are paid once in two or three months." Now Mr. Northway did not go in to the witness box and contradict the statement, nor does it on any way conflict with his own evidence; for it is quite possible that

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the contract with the servant was for a year, and the mere facts that her name was on the check-roll and that she drew rice, would not make her a monthly servant. Nor did Mr. Northway say that she was a monthly servant. The Magistrate has believed the evidence of the prosecutor, and in fact that there was no room to reject it, because it stood uncontradicted, and Mr. Northway would undoubtedly have contradicted it, had it not been true. This then raises the question which I am to decide; and that is, can a servant who enters into a contract for a year's service, but which contract is invalidated for want of writing, be convicted of acts made penal in respect of monthly servants, merely because his name is on the check-roll, and he works as any other monthly laborer?

The 8th section of the Labor Ordinance 13 of 1889 invalidates all contracts of service for longer than one month entered into with laborers, which are not in writing and executed with particular formalities; and it was contended that the contract which the parties in this case intended to make having been invalidated for want of writing and the due formalities, it must be presumed that another contract, *i. e.*, one of monthly service under the Ordinance, was created. I cannot assent to that proposition: it is not tenable, and I do not think it would be seriously urged; in fact a distinguished predecessor of mine, Sir Richard Cayley, had already decided the point in the case cited by the Magistrate in 4., S. C. C. Once admit that there is sufficient proof of an intention to contract for a year, and no presumption can rise that another contract for a shorter period was created contrary to the intention of the contractors. The law is expressly careful to guard against the fact of a cooly's name appearing on the check-roll being conclusive evidence that he is a monthly servant by inserting the words, "unless he has otherwise expressly stipulated"; and in this case the evidence is that the appellant had expressly stipulated for a yearly hiring; consequently, by the express provisions of the 7th section of the Labor Ordinance 11 of 1865, she was not subject to the penal provisions of the Ordinance.

The first point raised was, that the respondent being an infant, could not contract herself within the penal provisions of the

Ordinance. Sir Edward Creasy, in the case cited at the bar, and reported in 2, Grenier, guarded himself against holding in favor of this proposition; but the point was not decided nor is the dictum binding on us, although it must have much weight, because of the eminence of the learned judge. My learned brother, Clarence, in a joint judgment of my brother Dias and himself, is reported to have said in the case cited from Ramanathan "undoubtedly a minor may enter into a contract of service so as to render himself liable to statutory punishment for desertion, but this assumes that the minor is old enough fairly to comprehend the situation and its consequences." The decision itself however acquitted the accused, because he was a minor and sickly. Taking the dictum and decision together, it would seem that my learned brothers held that the question in each case would be one of fact and not of law. If it is to be a question of fact, then I must point out that there is no evidence as to the mental or bodily condition and capacity of the young girl in this case, and it seems to me that it would involve a very minute and critical enquiry to determine when a cooly girl could "comprehend her situation and its consequences," unsatisfactory and perplexing at the most, and involving embarrassing diversity of even judicial opinion. Sir Richard Cayley, when Queen's Advocate, thought that a boy of eleven years of age "could not have sufficient capacity to enter into a binding contract of service"; but gives expression to no opinion as to the age when and the test by which the law would presume that he had, and I must not forget the judgment under appeal in which the learned Police Magistrate, after seemingly careful reflection, has stated an opinion not wanting in force and cogency that upon principle an infant cannot contract himself within the penal provisions of a statute. There is therefore opinion and dicta and judgment of more or less weight to which I need not add my humble opinion, of whatever weight; and however decided it may be, it would only be dictum not necessary for the decision of the case; and neither party wished any more authority or doubt to be thrown on the point than already exist.

BEFORE *Clarence*, J.

December, 10 and 17, 1891.

BASTIAN *v.* ABEYSEKERE.

[No. 5,561, P. C., GALLE.]

Toll, Evasion of—Ordinance No. 14 of 1867, Section 17.

To drive up to a Toll Station, get out of the Carriage, and walk across to the other side, and then get into another Vehicle, and drive off, is evasion of Toll in breach of Sect. 17 of "The Toll Ordinance, 1867."

The facts of the case appear in the judgment.

Dornhorst for accused-appellant.

There was no appearance of counsel for the respondent.

On December 17, 1891, the following judgment was delivered :—

CLARENCE, J.—Appellant drove in a hackery up to the complainant's Toll Station, got out, and walked accross to the other side, and there got into another hackery and drove off. The question is whether on those facts defendant is rightly convicted, under section 17 of the Toll Ordinance, of doing an act with intent to evade payment of Toll. Doubtless, there are many things that people may do in order to avoid paying a toll, which will not subject them to convictions of toll evasion under this section; but I think the meaning of the ordinance was that such an act as this should be punishable. If we are to take the words "any other act" as restricted to acts *equsdem generis* with those previously enumerated, then I think it is *equsdem generis* with the act, already penalised, of crossing adjoining land in order to evade the toll payment. Apart from the authority of any reported decision, I think this must have been the intention of the Ordinance, and the Judges who decided the case reported Grenier (1873) p. 22, seem to have placed a similar construction on the Ordinance.

BEFORE *Fleming*, A. C. J. AND *Laurie*, J.

July 15 and 24, 1891.

HENDRICK *v.* BABUWA and others.

[No. 594, P. C., MATARA.]

Where under Section 236 * of the Criminal Procedure Code a Police Magis-

* Repealed, but re-enacted, by Ordinance No. 22 of 1890.

trate acquits an accused, and being of opinion that the complaint was frivolous or vexatious, directs the complainant to pay the accused or each of the accused, as the case may be, a certain sum as compensation, no appeal lies from such order, unless the total amount of Compensation awarded exceeds Rs 25.

The facts of the case material to this report appear in the judgment of LAWRIE, J.

There was no appearance of counsel in appeal.

On July 24 the following judgments were delivered:—

FLEMING, A. C. J.—In my opinion no appeal lies in such a case as this unless the amount of compensation awarded under section 236 of the Criminal Procedure Code exceeds Rs 25.

Section 405 provides that there shall be no appeal from a Police Court in cases in which the Court passes a sentence of imprisonment not exceeding one month or fine not exceeding twenty five Rupees.

"Fine" under section 3 of the Code, includes any pecuniary forfeiture or compensation adjudged upon any coviction of any crime or offence, or for the breach of any ordinance. It may possibly he doubtful how far compensation awarded under section 236 of the Code can be considered compensation adjudged upon a convictiou of some crime or offence, but I think the fact of having brought a complaint which has been declared frivolous or vexatious may be regarded as an offence for the purpose of considering the question involved.

LAWRIE, J.—This appeal raises a small point which it is desirable should be authoritatively settled.

In dealing with a Police Court case the Magistrate of Matara discharged the accused, and found that the complaint was a vexatious one, and he directed the complainant to pay to each Defendant a sum of Rs 2·50 each as compensation for such vexatious complaint.

There were eight Defendants, and the total amount payable was Rs 20. Against this order the Complainant appealed.

The question for decision is whether an appeal is competent. In P. C. Cases, Nos. 73 and 84 of this year's list, I held that an appeal did not lie against an order awarding compensation, if the sum did not exceed Rs 25. In another case DIAS, J, expressed a doubt whether an appeal lay, but he did not think it necessary to decide the question because he thought the Police Magistrate was right. The 236th section of

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the Procedure Code provides that when a Magistrate acquits an accused, and is of opinion that the complaint was frivolous or vexatious, he may, in his discretion, by his order of acquittal, direct the complainant to pay to the accused or to each of the accused, when there are more than one, such compensation, not exceeding ten Rupees, as the Police Magistrate shall think fit.

By the 405 section of the Code it is provided that there shall be no appeal from a Police Court in a case in which the Court passes a sentence of fine not exceeding Rs 25.

By the interpretation clause (See Sub-Sect. 3) it is provided "fine" includes "any fine, pecuniary forfeiture, or compensation adjudged upon any conviction of any crime or offence, or for the breach of any Ordinance, by any Court of the Colony."

From these clauses it seems to me that—

No fine under Rs 25 can be appealed from;

Compensation is a fine, *ergo*, no compensation under Rs 25 can be appealed from.

I am allowed to say that Mr. Justice Dias takes the same view.

BEFORE *Lawrie*, J.

September 2 and 29, 1885.

The QUEEN *v.* PERUMAL and another.

[No. 3,233, P. C., COLOMBO.]

Section 37 of Ordinance No. 10 of 1844 enacts that the "owner" of spirit removed without a "permit and every person concerned in the removal thereof shall be guilty of an offence, and be liable, on conviction, to a fine at the rate of thirty shillings per gallon, whether more or less, upon the quantity so removed.

Held, that the words of the section do not imply that no more than a fine of thirty shillings a gallon can be imposed on the accused, whatever their number, but that the full fine of thirty shillings a gallon is exigible from every person concerned in the removal.

Semble per curiam, that when an ordinance enacts that an offender shall be liable on conviction to a fine of a stated amount, or to imprisonment for a stated period, the meaning is that he is liable to fine or imprisonment, as the case may be, not exceeding the amount or period mentioned in the ordinance, and not that the whole punishment must be inflicted.

Appeal by the 1st accused against a conviction under Sect. 37 of Ordinance No. 10 of 1844.

Dornhorst for 1st accused-appellant.

Browne for complainant-respondent.

On September 29, 1885, the following judgment was delivered:—

LAWRIE, J.—The 37th clause of the Ordinance No. 10 of 1844 provides that "the owner" of such spirit (illegally removed) "and every person concerned in the removal thereof shall be "guilty of an offence, and be liable, on conviction, to a fine "at the rate of thirty shillings per gallon, whether more or "less, upon the quantity so removed."

These words are unambiguous. The full fine of thirty shillings a gallon is exigible from every person concerned in the removal.

The words are incapable of the meaning that however large a number of persons join in removing a large quantity of arrack, no more than a fine of thirty shillings can be imposed, and divided equally, on the guilty.

It is unnecessary to enter on the question whether, under the provisions of the Ordinance, the penalty or fine is not a maximum amount, no more than which can be exacted.

The Case of REX, *v.* CLARKE (Cowper's Reports, p. 612), decided by Lord Mansfield in 1777, is the leading authority on the construction of such clauses; and even if it be admitted that it is only in *qui tam* actions that a single penalty can be recovered, actions under several of the clauses of the arrack and other revenue Ordinances are of the nature of *qui tam* actions, as they are for penalties and forfeitures, of which, by section 63 of the Ordinance No. 10 of 1844, one half must be paid to the informer.

It has been decided in many cases that when an Ordinance enacts that an offender shall be liable, on conviction, to a fine of a stated amount, or to imprisonment for so many months, or years, the meaning is—to any amount or period not exceeding that mentioned in the Ordinance, and not that the whole punishment must be inflicted.

The removal of arrack is an offence within the jurisdiction of the Police Court; but the Police Magistrate cannot impose a greater punishment than he, by the Procedure Code, is empowered to give in summary cases.

In cases when the quantity removed is very large, the offenders should be tried before the District Court; but in this case

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the plaint did not disclose the number of gallons, and there was nothing to show that the full penalty exigible would be beyond the jurisdiction of the Police Court.

It was only at the trial that it was proved that the quantity was nine gallons and two gills.

In these circumstances, it is my opinion that no failure of justice was occasioned by the Police Magistrate assuming jurisdiction without a certificate from the Attorney-General.

Affirmed.

BEFORE *Burnside*, C. J. AND *Clarence* AND *Dias*, J. J.

February 23 and March 15, 1892.

THE MUNICIPAL COUNCIL OF KANDY *v.* PHILIP.

[*The "Green Gallop" Case.*]

[No. 4,627, D. C., KANDY.]

"The Municipal Councils Ordinance, 1887," Sec. 73—Right of a Municipal Council to sue one of the Public for damages for a trespass on a street—Prescription.

Semble per BURNSIDE, C. J.—"The Municipal Councils Ordinance, 1887" which vests all streets, &c., in the Municipality only vests them for the purposes of the Ordinance, and although it gives the Municipality every necessary power in order to protect and conserve the streets for public purposes, it does not give to the Municipality any right to bring a civil action for damages for a trespass on a street by one of the public themselves. The Municipal Council could not in itself and by its personal action prescribe for any particular street.

The Plaint averred that under and by virtue of Sec. 73 of Ordinance No. 7 of 1887 the roads and streets of Kandy became vested in the plaintiffs; that on the Northern Boundary of "Bon Accord" estate, owned by the defendant, there was a public road called "Lady Anderson's Road," and also a road-reservation of 25 feet, on each side, from the middle of the said road, which road and road-reservation also vested in the plaintiffs as aforesaid; that in right of a reservation contained in the Grant by the Crown of the Defendant's estate the Government Agent in the year 1858, acting for the Crown, opened, for public purposes, through the said estate, a road, twenty links in width, which at the date of the action went by the name of the "Green Gallop"; and that the two roads,

"Lady Anderson's Road" and the "Green Gallop," had been used as public roads and thoroughfares for many years; and that they had always been maintained by the plaintiffs as public thoroughfares. And for causes of action the Plaint set out that, in respect of "Lady Anderson's Road," the defendant, since October, 1889, had been in the wrongful possession of the road reservation aforesaid, and claimed the same as his own, and that, in respect of the "Green Gallop," the defendant in January and June, 1890, and in March, 1891, wrongfully prevented the plaintiff's workmen from working on it, and wrongfully prevented the public from using it, and claimed it as his private property. The plaintiffs prayed for a declaration of title to the road-reservation and to the "Green Gallop" and damages.

The defendant in his answer admitting that the roads, streets, &c., of Kandy vested in the plaintiffs, averred that they only vested for the trusts and purposes made and provided for by the Municipal Councils Ordinance, and that the plaintiffs had no right to sue as they had done in the present action. He admitted that he was the owner of "Bon Accord" estate; that a road, inaccurately defined in one of the plans, and referred to as "Lady Anderson's Road," was reserved on the Northern boundary of his estate, and that fifty feet of land was reserved for that purpose; but denied that as much as twenty five feet from the middle of the entire road or each side of it was so reserved. He also denied that the Government Agent, at any time, made the "Green Gallop," or that it had been kept up by the plaintiffs, or that the defendant ever trespassed on the reservation of the so-called "Lady Anderson's Road."

After trial the learned District Judge dismissed the plaintiffs' claim with costs. The Plaintiffs appealed.

Dornhorst, [*Layard A. A.-G.*, with him] for plaintiffs-appellants.

Withers for defendant-respondent.

Their Lordships in their judgments delivered on March 15, 1892, reviewed the evidence; and on the facts held that the plaintiffs had failed to prove (1) that the defendant had taken possession of any piece of land that formed a part of the reservation extending twenty-five feet from the centre of "Lady Anderson's Road," as that road existed at the time when the

THE MUNICIPAL COUNCIL OF KANDY v. PHILIP. [THE "GREEN GALLOP" CASE.]

Grant was made, (2) that the Crown had for necessary purposes opened the road referred to as "Green Gallop," or that any such road had been dedicated to the public, and had become a public road, or (3) that the defendant prevented the plaintiffs' workmen from working on any such road or the public from using it.—And on the question as to whether the plaintiffs had any right to bring a Civil action for damages for a trespass on a street by one of the public, and as to whether a Municipal Council could in itself and by its personal action prescribe for any particular street, opinion was expressed as follows by

BURNSIDE, C. J.—The Municipality of Kandy claim damages in this suit for alleged trespass to certain roads said to have vested in them under the Municipal Councils Ordinance, 1887, and the Defendant contests their right to do so.

The Municipality as well claim title by prescription to one of those roads, and the Defendant objects that the corporation could not obtain title by prescription.

Were it necessary to decide these points, I would not hesitate to do so in favour of the Defendant's contention.

The Municipal Councils Ordinance which vests all streets, &c., in the Municipality, only vests them for the purposes of the Ordinance, and no doubt gives the Municipality every necessary power in order to protect and conserve the streets for public purposes. But it never was intended to, and the Ordinance does not in my opinion, give to the Municipality any right to bring a civil action for and recover damages for a trespass on a street by one of the public themselves; for the Ordinance makes no provision for the disposal of such damages, if recovered, and the corporation itself cannot sustain such injury as would justify the council in appropriating the damages awarded to its individual use.

On the second point it is beyond doubt that the corporation could not in itself and by its personal action prescribe for any particular street. If the public had acquired a title by prescription to a particular street, which thereupon vested in the Municipality by virtue of the Ordinance, it would not be possible to say that the title of the Municipality to it was by prescription: it would be a title under the Ordinance,

BEFORE *Clarence* AND *Dias*, J. J.

December 4 and 18, 1891.

In re the Insolvency of Saraye Lebbe.

[No. 1763 (Int.) D. C., Colombo.]

Insolvency—Ordinance No. 7 of 1853, Section 36—Discharge of Insolvent from custody.

Under section 36 of Ordinance No. 7 of 1853 when a person who has been adjudged an insolvent, and has surrendered and obtained his protection from arrest is in prison or in custody for debt, the Court may, except in the cases mentioned in the 1st proviso to the Section, order his immediate release. The cases mentioned in the proviso are those of persons in prison or in custody for debts contracted by fraud, &c., or on judgments in actions for breach of promise of marriage, Libel, Slander, &c.

Held, that an insolvent who is in custody at the date of adjudication is not entitled to be discharged merely because his case does not fall within any of the exceptions in the above proviso, but that the discharge of the insolvent under the above Section is a matter discretionary with the Judge.

Held also, that the proper time for the application for the release of an insolvent from custody is after the choice assignees has been made.

Appeal by a creditor against the discharge from custody of an Insolvent. The facts sufficiently appear in the judgment.

Wendt for the creditor-appellant.

Dornhorst for the insolvent-respondent.

On December 18, 1891, the following judgments were delivered:—

CLARENCE, J.—This is an appeal by a creditor from an order discharging an insolvent from custody.

On the 14th October, the insolvent's Proctor filed petition, affidavit and list of debts, and moved that the party be adjudicated insolvent, and for protection and discharge from custody, the affidavit averring the party to be in prison for debt. The present appellant appeared at the same time, and opposed the application. The District Judge allowed the motion in its entirety, and the appellant appeals from that part of the order only which directs the discharge from custody.

We cannot help observing that the materials for the mere adjudication were not satisfactory. If the application is to be regarded as based on imprisonment for debt beyond 21 days, then, the affidavit is insufficient, since the application was made on October 14th, and the affidavit merely alleged that the party had been in custody "since September 1891." If the application is to be regarded as an application merely on

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the ground of inability to meet debts, then, the list of debts, does not fulfil all the requirements of section 20. Appellant, however, does not complain of the adjudication, but only of the discharge.

I think that the appeal succeeds. The insolvent was at the date of adjudication in custody for debt, and the 36th section provides the means of surrender in such a case, of which however, so far as appears, the insolvent does not seem to have availed himself as yet. An insolvent who is in custody at the date of adjudication is not entitled to discharge from custody *ex debito justitiae* merely because the case does not fall within any of the exceptions contained at the end of section 36. The matter is discretionary, and, as pointed out at page 912 of Messrs. Griffith and Holmes work, Ed. 1867, the appropriate time for an application for release is after the choice of assignees has been made, though the court may in its discretion release the insolvent before then. In the present case, the learned District Judge does not appear to have exercised any discretion in the matter, and so far as materials go, I do not see that they disclose any reason for releasing the insolvent before the usual time. I think that the order must be varied by striking out so much of it as orders the discharge from custody, and that appellant must have the costs of his opposition.

The case to which we were referred in argument reported Lorenz I. 124 is not clearly reported. There is, however, no doubt as to the intention of the Ordinance in the matter following as it does the English Act of 1849.

DIAS. J.—I think the order must be set aside with costs.

BEFORE *Burnside*, C. J. AND *Dias*, J.

February 28 and March 4, 1890.

BANDAR *v.* BANDAR.

(No. 19,464, C. R., BADULLA.)

Usufructuary Mortgage—Redemption by mortgagor as mortgagee is about to realise produce which he is entitled to recieve in lieu of interest.

In the case of a usufructuary mortgage the mortgagor cannot claim redemption as the mortgagee is about to realise the produce of the mortgaged land which

he was entitled to receive in lieu of interest. The mortgagee having expended money in preparing the land to yield his interest, the mortgagor could only redeem by paying that amount as well as all interest due.

The Plaintiff, the mortgagor of certain land to the defendant, which in terms of the mortgage bond the defendant was entitled to possess in lieu of interest, sued the defendant to redeem the mortgage on payment of the principal due on the bond. The defendant pleaded that he had expended money in preparing the land to yield his interest, and that he was about to realise the produce of the land, and that the plaintiff could not redeem without paying, in addition to the principal, the amount so expended and all interest due. Judgment was entered for the defendant in the court below, and the plaintiff appealed.

The appeal first came on before DIAS, J. when

Sampayo, appeared for the defendant-respondent, and there was no appearance of council for the plaintiff-appellant.

Cur. adv. vult.

On February 28, 1891, while the Bench was constituted as above, *Dornhorst*, by leave of Court, was heard for plaintiff-appellant, and on March 4, 1891, the following judgment, which was accepted by DIAS, J. as his judgment, was delivered by

BURNSIDE, C. J.—This judgment must be affirmed. It would be manifestly unjust and contrary to the intent of a usufructuary mortgage, to allow a mortgagor to claim redemption, as the mortgagee was about to realise the produce of land which he was entitled to receive in lieu of interest. In the present case the mortgagee has expended money in preparing the land to yield his interest, and the mortgagor could only redeem by paying that amount as well as all interest due.

BEFORE *Lawrie*, J.

June 5 and 12, 1890.

SPENCE *v.* ANTHONY.

[No. 4,556, P. C., BATTICALOA.]

Removal of Timber without a Pass—Ordinance No. 10 of 1885, Sects. 45 and 46.

To support a conviction, under the 46th section of the Forest Ordinance of 1885, for the removal of timber without a pass, it must be established that the timber was removed from a land, and the land must be that on which the trees grew, and were felled.

SPENCE v. ANTHONY.

Appeal against a conviction for removal of timber in breach of Sect. 46 of "The Forest Ordinance, 1885"—an offence punishable under Sect. 45.

There was no appearance of counsel for either party.

On June 12, the following judgment was delivered:—

LAWRIE, J.—This is a conviction under the 46th section of the Forest Ordinance of 1885. The offence is not a crime at Common Law, nor under the Penal Code: it is created by the Ordinance, and to justify a conviction, there must be proof that the express provisions of the Ordinance have been violated. The offence is the removal of timber from any land without a pass. In this case there is no allegation in the plaint, nor was there evidence, that the timber in question was removed from a land. From where it was removed was neither stated nor proved. This is not a technical objection. The section of the Ordinance does not make it an offence to remove timber from a ship to a shed, or from a timber shed to a work-shop, or from one house to another. It contemplates the removal of timber from a land, and I am inclined from the context to hold that the land must be the land on which the trees grew, and were felled. It is not necessary in this case to do more than to set aside the conviction, because there is no proof from what place the timber was being removed.

BEFORE *Clarence*, J.

December 18, 1890 and January 10, 1891.

CHELLAIYA *v.* ALWIS.

[No. 62, C. R., KANDY.]

Concurrence—Judgment not conclusive evidence of debt.

The right of a creditor to claim concurrence in the proceeds of a levy made on the debtor's goods by another creditor, which subsisted under the Roman-Dutch Law, has not been put an end to either by legislation or by decision But the creditor claiming concurrence, before he can be admitted to share in the proceeds, is bound to prove the existence of the debt: a judgment is not necessarily conclusive as to the existence of the debt.

Appeal by a creditor of the defendant against an order of the Commissioner refusing his claim to concurrence with the plaintiff in the proceeds of a levy under the plaintiff's writ.

Wendt for claimant-appellant.

Dornhorst for plaintiff-respondent.

On January 10, 1891, the following judgment was delivered :—

CLARENCE, J.—The right of a creditor to claim concurrence in the proceeds of a levy made on the debtor's goods by another creditor, which subsisted under the Roman-Dutch Law, has not been put an end to either by legislation or by decision. It appears that before the Court of Requests made the order for payment of the proceeds of the levy in this case to the plaintiff, the appellant, who claims under another judgment, had preferred his claim. Consequently the claim was in time.

But before appellant can be admitted to share in the proceeds of the plaintiff's levy, he must establish to the satisfaction of the court the existence of the debt in respect of which he claims a *pro rata* share. As in insolvency, a judgment is not necessarily conclusive of the existence of the debt. No reason, however, appears for doubting that the judgment under which the appellant claims is a *bona fide* judgment. But appellant has further to shew what debt (if any) remains due under the judgment. This appellant has not done. So far as I can gather from the statement made by the debtor, there seems to have been some dealing between him and the appellant since the appellant's judgment and assignments by the debtor to appellant. In this state of the matter I see no reason to make any order in appellant's favor. The plaintiff, the more diligent creditor, will retain the advantage which he has gained. Appeal dismissed with costs.

BEFORE *Dias*, J.

November 19 and December 3, 1891.

RANATTE *v.* SIRIMAL and another.

[No. 889, C. R., KANDY.]

Jurisdiction—Civil Procedure Code, Sect. 9—The Courts Ordinance, Sect. 77.

Under Ordinances 1 and 2 of 1889, a Court has no jurisdiction to hear and determine an action by reason only of a part of the cause of action having arisen within its jurisdiction.

RANATTE v. SIRIMAL.

Where a cause of action has arisen within the jurisdiction of more than one Court, the Court having jurisdiction to try the case must depend upon where the defendant resides, or where the land in respect of which the action is brought is situate, or where the contract sought to be enforced is made.

In this case it was admitted that the whole cause of action did not arise within the jurisdiction of the Court of Requests of Kandy, and the question was whether that Court had jurisdiction to hear and determine the case.

Wendt [*Dornhorst* with him] for plaintiff-appellant.

Rama Nathan for defendant-respondent.

On December 3, 1891, the following judgment was delivered:—

DIAS, J.—The question in this case is whether the Kandy Court of Requests had jurisdiction to try the case; and that question must be decided by Sect. 9 of the Civil Procedure Code. Sub-section *c* is the only section under which the jurisdiction can be supported, and it is admitted that the whole cause of action did not arise within the Kandy district, but that part of it arose there, and part in the Kegalla district. Sect. 77 of the Courts Ordinance and section 9 of the Civil Procedure Code only speak of the cause of action, *i. e.* the whole cause of action. In this respect the Ordinances 1 and 2 of 1889 are different from the Ordinance 11 of 1868 sections 65 and 81. Under the new law, where the cause of action is divided, and is in several districts, the action cannot be instituted in any of the districts, and the plaintiff is driven to go to the district in which the defendant resides, or where the land is situated, or where the contract is made. This view is emphasised by the latter part of Sect. 9 which provides for a case where doubts are entertained as to whether the land in dispute is situated within the jurisdiction of two or more Courts. I think the objection to the jurisdiction is fatal to the Plaintiff's case.

Affirmed.

BEFORE *Burnside*, C. J. AND *Dias*, J.

April 13, 1892.

[Crown Case Reserved.]

THE QUEEN *v.* APPUHAMY.

[No. 15, 1ST SESSIONS, KANDY.]

Criminal Law—"Res Gestae"—Evidence of Statement by deceased as to how injury was caused.

The deceased lay on the road with his skull fractured which, according to the medical evidence, was the result of a blow or a fall. A Police constable, on coming up to the spot, found the deceased on the ground seemingly recovering consciousness, and on his asking him what was the matter, he said, "Appuhamy assaulted me." The Town-Arachchi arrived at the spot shortly afterwards, when the deceased man laid a formal charge of assault against "Appuhamy."

Held, that these statements of the deceased are, as part of the *res gestae*, admissible in evidence in support of the contention that the injury he had received was the result of an assault and not of a fall.

The Case reserved by BURNSIDE, C. J. for the consideration of the Court was as follows :—

The Post-mortem Examination disclosed that the deceased had received but one injury on the side of the head which had fractured his skull, and the Doctor's evidence was that it had been occasioned by "one blow or one fall."

One witness had sworn to having seen the prisoner in the night time strike the deceased with an instrument like a hammer, whilst upon the high road, which knocked him down on the spot where he lay.

Another witness swore that he had seen the prisoner standing over the deceased as he lay on the ground.

A Police constable, on coming up to the spot, found the deceased on the ground seemingly recovering consciousness, and, on his asking him what was the matter, he said, "Appuhamy assaulted me."

The Town Arachchi arrived on the spot shortly afterwards, when the deceased man laid a formal charge of assault against "Appuhamy."

I admitted the evidence of the charge of assault to the constable, and to the Arachchi, as part of the *res gestæ*, in support of the contention of the Crown that the blow was the result of an assault, and not of a fall. I told the Interpreter that the witness must not disclose the name of any person charged, but

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simply the fact that the deceased did charge some one, and with assault. But, as my learned brothers will readily understand, the name was disclosed in spite of the Interpreter's efforts.

The learned Counsel for the prisoner strenuously opposed my ruling. I told the Jury that the mere statement of a name having been disclosed, similar to that of the prisoner, a very common one, could not in any way be taken as identifying the prisoner, but the fact that the deceased had laid a charge of assault was evidence in corroboration of the contention, on the Doctor's evidence, that the injury was the result of an assault and not of a fall.

The jury convicted the prisoner, and I sentenced him to death. And I have felt it my duty to reserve the question of my ruling for the opinion of the Court. If I was right in admitting the evidence, the conviction and sentence must stand. If I was wrong, the conviction should be set aside, and the accused acquitted.

On April 13, the case was argued before the Court constituted as above.

Van Langenberg, [*Morgan*, with him] for the prisoner.—In order to render the statement made by the deceased to the Constable admissible in evidence as part of the *res gestæ*, it should have been made contemporaneously with the assault. Here, the statement was made some time after the assault was committed. The person to whom the statement was made should have been the first to come up (Reg. *v.* Lunny, 6. Cox, C. C., 477.) The statement was not voluntary: it was made in answer to a question put by the Constable [BURNSIDE, C. J.—The question itself was not suggestive of the answer. The question was, "what is the matter with you," not, "who assaulted you."] If the question was not put, the man would have said nothing [DIAS, J.—If the question was a leading question suggesting the name of a man, the answer would not be admissible.] Then, the statement was not made immediately after the assault (Reg. *v.* Bedingfield, 14 Cox, C. C. 341.) [DIAS, J.—As soon as the blow was given the man fell unconscious, and as soon as he became conscious, he made the statement. That is equal to making it soon after the blow was given.] As

to the charge made to the Arachchi it was no part of the *res gestæ* [BURNSIDE, C. J.—The fact that the deceased had laid a charge of assault is evidence.] The name ought not to have been admitted [BURNSIDE, C. J.—That is right. I told the Interpreter that the witness must not disclose the name of any person charged, but simply the fact that the deceased did charge some one, and with assault. The name was disclosed in spite of the Interpreter's efforts, but I told the jury that the mere fact of a name similar to that of the prisoner—a very common one—having been disclosed could not in any way be taken as identifying the prisoner.]

Hay, A.S.-G., for the Crown—The evidence was admitted only as confirmatory of the evidence of the other witnesses as to the injury having been the consequence of an assault. By the mention of the name "Appuhamy" the prisoner was not identified.

At the close of the argument DIAS, J. agreed with the Chief Justice that the evidence of the statements made by the deceased was admissible in law, and that it was rightly admitted in this case. The question was whether the injury on the deceased was the result of an assault or a fall. The statements made immediately after the deceased recovered consciousness were admissible to prove how the injury was caused.

The conviction was thereupon affirmed.

BEFORE *Burnside*, C. J.

November 8 and 16, 1883.

MARICAR *v.* PACKEER.

[No. 36,729, C. R., COLOMBO.]

"The Small Tenements Ordinance, 1882,"—*Notice to quit.*

A notice to a monthly tenant given on the 31st July requiring him to quit on or before the 1st September is not a sufficient notice.

The plaintiff obtained a rule on the defendant, his monthly tenant, in terms of the 3rd section of Ordinance No. 11 of 1882. The Commissioner made an order for costs against the defendant from which the defendant appealed.

Dornhorst for defendant-appellant.

There was no appearance of Counsel for the plaintiff-respondent.

MARICAR v. PACKEER.

On November 16, the following judgment was delivered:—

BURNSIDE, C. J.—The order of the 9th October 1883 is set aside.

The Commissioner has not made the rule absolute with costs, but simply gives an order for costs, which he is nowhere authorised to do in the Ordinance No. 11 of 1882, under which the proceedings were taken.

The Commissioner could not have made the rule absolute, because, on the complainant's own shewing, he had not given the defendant, his monthly tenant, a proper month's notice to quit. He says he gave notice on the 31st July to quit on or before the 1st September. That was not a proper notice, the Commissioner should have refused to issue the rule.

BEFORE *Burnside*, C. J. AND *Clarence*, AND *Dias* J. J.

February 24 and March 10, 1892.

SAIBO *v.* RAHIMAN.

(No. 3,055, D. C., KANDY.)

Sale of mortgaged property—Proceeds under mortage decree—Balance in Court—Claim by mortgagor's vendee.

The defendant mortgaged a land in 1882 to A, and sold it in 1887 to B for Rs. 300 of which B paid down Rs. 100, and by agreement retained the balance Rs. 200 to pay it to the mortgagee A. B entered into possession of the land, but never paid the mortgagee. The mortgage bond was put in suit as against the defendant only, and after satisfaction of the mortgagee's claim out of money recovered by sale of the land mortgaged, a sum of Rs. 90 remained in Court. B by petition claimed this sum.

Held, by CLARENCE and DIAS, J. J. (BURNSIDE, C. J. *dissentiente*) that whatever may be B's rights as against the defendant, B could not on such application be allowed to draw the money.

The facts of the case appear in the respective judgments.

Morgan for claimant-appellant.

There was no appearance of Counsel for defendant-respondent.

On March 10, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—The admitted facts of this case are that the appellant purchased from the defendant the field in question subject to a mortgage. Afterwards the land was sold by legal process on the mortgage, and realised more than the mortgage debt, and the balance is in court. The ap-

pellant applied to the District Court for an order to pay the amount to him, which was refused, and he appeals. He is clearly entitled to the money. When the defendant sold to the appellant, all his interest in the mortgaged premises passed to the appellant, and in the words of the District Judge the appellant "derived his right" to the balance "from the defendant."

The appellant, whatever may have been his right in consequence of not having been made a party to the mortgage suit had a clear right to waive those rights, and by claiming the balance of the proceeds estopped himself from taking any objection hereafter to the sale. The judgment of the District Court should be set aside, and an order as prayed for made.

CLARENCE, J.—In 1882, the defendant in this suit mortgaged land to secure a debt of Rs. 200. He afterwards, in 1887, sold and conveyed the land to appellant for the price of Rs. 300, of which appellant paid down Rs. 100, and by agreement with the defendant retained the other Rs. 200 in order to pay it to the mortgagee. Appellant never paid the mortgage, and the mortgagee (or rather an assignee of the mortgagee, which comes to the same thing) put the mortgage in suit against the mortgagor, and got judgment for Rs. 251.50 including costs. The plaintiff then sold the land under his mortgage decree, and after satisfying the judgment, a sum of about Rs. 90 remains in Court. Appellant now by petition applies to the District Court for this sum, and appeals against the learned District Judge's refusal of his application.

I take the above facts as not in dispute. They are averred in the appellant's petition, and I understand from the learned District Judge's note that the defendant admits them.

Appellant had possession of the land on his purchase, but he did not think proper to resist the mortgage creditor's seizure of the land, and he may have been well advised not to do so, since the mortgage must eventually have prevailed over his title. He now, admitting the land to be sold over his head, claims the surplus proceeds, and the question is, can he by thus proceeding sustain the claim.

In my opinion the application was rightly rejected by the District Court. The sum in Court is the proceeds of the sale of

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the defendant's interest in the land, as it stood at the date of the mortgage. *Prima facie*, therefore, to say the least, it is the defendant's money. I do not wish on matters of procedure under a new Code to say more than is called for by the circumstances of the case before us; but putting the matter at its lowest, I see no reason to substitute appellant for defendant, as the party entitled to this sum. Defendant is the defendant in the action, and the appellant has no judgment against him. Appellant advisedly and deliberately allowed this mortgage to remain unpaid in contravention of his arrangement with defendant, and whatever may be his right as against the defendant, I do not think that he can be allowed on this summary application to receive this money. I am for dismissing the appeal with costs.

DIAS, J.—The Plaintiff obtained judgment on a mortgage bond, issued execution, and sold the mortgaged property. The proceeds were more than enough to satisfy the judgment, and there is now a balance in Court to the credit of the suit. The appellant is a purchaser of the mortgaged property from the defendant, the execution debtor, and as the property was sold away by the Fiscal, he now claims the balance in Court. The District Judge refused the application and hence this appeal. The matter of the appellants application first came on before the District Court on the 20th October, 1890, and was fixed for 11th November, and it was finally taken up on the 18th November, 1890, when the defendant appeared, and objected to the application. Under these circumstances I am of opinion that the order of the District Judge is right, and it must be affirmed.

BEFORE *Burnside*, C. J. AND *Dias*, J.

February 11 and May 6, 1890.

In re the claims of GUNESEKERE and others, to the property of the estate of De Silva, deceased.

[No. 31, Special Commissioner's Court, Wellewatte.]

Prescription by tenant in common—Co-heirs—Effect of interruption of possession by one co-heir.

A tenant in common cannot by mere occupation prescribe against a co-tenant; and hence a step-mother by merely continuing to occupy the family home, after her husband's death, could not, in the absence of some direct act going to shew that such occupation was adverse, prescribe against her husband's children.

In re THE CLAIMS OF GUNESEKERE AND OTHERS TO THE PROPERTY OF THE ESTATE OF DE SILVA, DECEASED.

Per DIAS, J.—The interruption of the possession of a party pleading prescription by one co-owner enures to the benefit of all the co-owners.

The facts necessary for this report sufficiently appear in the judgment of DIAS J.

Dornhorst for claimants Gunesekere and Ekenaike.

Pereira for claimant Henrietta de Silva.

On May 6, 1890, the following judgments were delivered:—

BURNSIDE, C. J.—There is nothing in the facts of this case which takes it out of the general proposition that one tenant in common cannot by mere occupation prescribe against a co-tenant. It would be fatal to the interest of children, and especially of those of the first bed, and productive of family discord to hold that a step-mother could prescribe against her husband's children by merely continuing to occupy the family home after her husband's death. There must be some direct act going to shew that such occupation was adverse, and in the absence of evidence in that direction, the occupation of the widow must be presumed to be her own occupation only, as she has a legal right to occupy as a tenant in common. The learned Commissioner holds that the appellant, Henrietta de Silva, did not prescribe against three of her step children, but that she did prescribe against two. The reason for holding against prescription being that the co-owners had excercised acts of ownership within the prescribed period, but it is not necessary that a co-owner should exercise acts of ownership in order to bar prescription, unless the possession be adverse to the others. We must therefore repel the appellant Henrietta de Silva's claim to the individual shares in lot No. 21 which were inherited by Anne Elizabeth and Matilda Charlotte from their mother, and vary the Commissioner's order by vesting these shares 2/20ths each in their respective husbands, appellants Gunesekere and Ekenaike.

The appellant Henrietta de Silva will have 5/20ths only, and pay the costs ordered by the Commissioner and of this appeal.

DIAS, J.—The land in dispute in this case consists of two lots, viz., Nos. 21 and 21 A. The Rev. Mr. David de Silva owned both these lots. He was twice married, and during the life time of his first wife he purchased lot No. 21 and the other lot 21 A after her death. The contending parties are the children of the first wife and the administrator of the husband. The 2nd wife claims both

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the lots by adverse possession after her husband's death which took place in 1874.

By his first wife Mr. De Silva left five children, who on their mother's death became entitled to half of lot No. 21, and half of the other half, or one-fourth, went to the second wife, and the remaining one-fourth to the husband's Administrator. With regard to lot No. 21 A, the second wife is entitled to half and the other half passed to the Administrator for the benefit of the children of both the marriages. The principal question which the Commissioner had to decide was, whether or not the second wife had prescribed for the whole as against the children of the first wife. The Commissioner's finding upon this point is not very satisfactory. He held that the second wife had prescribed against two out of the five children of the first wife, and not against the other three and the Administrator of the husband. The land is not divided, and I fail to see how a party can prescribe for some out of several undivided shares. Again, the Commissioner held that three of the children of the first wife interrupted the possession of the second wife, thereby preventing her from acquiring an adverse title. The five children of the first wife were tenants in common, and the interruption of the possession by any one of them will enure to the benefit of the rest. There are two sets of appellants in this case, namely, first, the husbands of the two children of the Rev. David de Silva who were excluded by the Commissioner, viz., O. J. Gunesekere, the husband of Elizabeth, and S. D. Ekenaike, the husband of Matilda Charlotte, and, second, Henrietta de Silva, the 2nd wife of the Rev. David de Silva. The last mentioned appellant appeals against as much of the finding of the Commissioner as disallowed her claim for the whole land, and cast her in the costs of the inquiry. With regard to this appeal, all that I need say is that her claim to the whole land by adverse possession has been entirely dismissed. But the claims of Gunesekere and Ekenaike stand on a different footing. The wives of these two appellants were two of the five children of Mr. David de Silva by his first wife, and if no other rights had intervened, they would on their mother's death be entitled to 2/5 of ½ or 2/10 of lot No. 21. With regard to this lot, the second wife of de Silva sets up a claim by prescription, but the Commissioner repelled this claim with respect to only three of the five children of David de Silva, and upheld it as against two who

now appeal. As I have already pointed out, this ruling of the Commissioner is erroneous, and I am of opinion that the order in this case must be modified accordingly.

In re THE CLAIMS OF GUNESEKERE AND OTHERS TO THE PROPERTY OF THE ESTATE OF DE SILVA, DECEASED.

BEFORE *Dias*, J.

March 9 and 29, 1892.

PIERIS *v.* FERNANDO.

[No. 2,558, C. R., COLOMBO.]

Civil Procedure Code, Sect. 85—Judgment by default.

Where the defendant was absent on the day fixed for the trial of a case, but his proctor on the record appeared for him, and on the evidence adduced by the plaintiff the Commissioner entered up final judgment—

Held, that the appearance of the proctor took the case out of the operation of Sec. 85 of the Civil Procedure Code, and that final judgment was rightly entered, and the Commissioner had no power to set aside such final judgment on application by the defendant.

In this case the defendant had filed answer, and after some postponements the trial was fixed for the 12th January, 1892. On that day, the plaintiff was present, but the defendant absent. The defendant's proctor on the record, however, appeared for him. On the evidence called for the plaintiff the Commissioner entered up final judgment for him. Subsequently, the defendant on an affidavit in which he swore that on the trial date he was ill, and unable to attend Court, and that he forwarded a medical certificate to that effect to his proctor with instructions to move for a postponement, but that the report and instructions were accidentally delayed in transmission, and they reached the proctor after the trial of the case, moved to open up the judgment entered. The Commissioner having disallowed his motion, he instituted the present appeal.

Alwis for defendant-appellant contended that the Commissioner had no power under the circumstances to enter up final judgment. The trial was *ex parte*, and the decree should have been a decree *nisi* under Sec. 85 of the Code. Under the Indian Code of Civil Procedure it has been held that a decree under circumstances similar to those of the present case should be a decree *nisi*. He cited The Ind. Law Reports [Allahabad Series] vol. VIII, p. 140.

Pereira for plaintiff-respondent,

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FERNANDO.

On March 29th, the following judgment was delivered :—

DIAS, J.—In this case a plaint and an answer were duly filed, and a day was fixed for the trial. On that day, 12th January 1892, the plaintiff himself was called, and there being no evidence for the defence, judgment was entered for the plaintiff. Subsequently, on the 28th of January, 1892, the defendant produced an affidavit, and moved to open up the judgment, and the Commissioner having refused the application, the defendant appeals. It was contended for the appellant that the Commissioner had no jurisdiction to enter up a final judgment, and that under section 85 of the Civil Procedure Code the Commissioner could only enter up a decree *nisi*. The answer to this contention is very simple. Section 85 only applies, when the defendant does not appear, meaning appear personally or by proctor. In this case the defendant did appear by his proctor, and the decree of the 12th January is a final decree, and the Court had no power to set it aside. The Commissioner's order is right, and it is affirmed.

BEFORE *Clarence*, AND *Dias* J. J.

October 27 and November 3, 1891.

In the matter of the Last Will and Testament of Abeyewardene, deceased.

[No. 2948, D. C., (TESTAMENTARY) GALLE.]

Civil Procedure Code, Sect. 585—*Curatorship.*

Section 585 of the Civil Procedure Code does not require the Court to commit the curatorship of the property of the children of a deceased testator to his executor. It only requires the Court to grant the certificate of curatorship to any person entitled under a will or deed to have charge of the minor's property. In failure of a person absolutely entitled to the curatorship, and willing to undertake it, the Court may appoint any person whom it considers fit for the purpose.

Two applicants, A. Abeyadeera, an executor under the last will of the above named Testator, and H. Abeyewardene, severally applied for a certificate of curatorship of the property of the minor children of the Testator. The District Judge, apparently being of opinion that Sect. 585 of the Code left him no option but to commit the curatorship to the executor, made order accordingly, but condemned each applicant to bear his own costs, the executor, A. Abeyadeera, paying his own costs out

of his own pocket. From this order both the applicants appealed. The other facts of the case material to this report appear in the judgment of CLARENCE J.

Browne for applicant. H. Abeyewardene.

Dornhorst (*Wendt* with him) for applicant. A. Abevadeera.

On November 3, the following judgments were delivered:—

CLARENCE, J.—These are two several appeals from an order made by the District Court upon two consolidated applications by petitioners for the appointment of a curator of the property of the minor children of Simon Perera Abeyewardene, deceased. Simon and his wife Charlotte made a joint will in 1882, containing dispositions in favour of their children and of the survivor of the spouses, and appointed the surviving spouse executor. Charlotte pre-deceased Simon who afterwards died in December, 1890, leaving four minor children of the marriage, and a will whereby he disposed of all his estate in favor of the four children, and appointed his brother-in-law, Andris, and two of the sons executors, and also appointed Andris guardian of the children. Probate was granted to Andris, the children being all still minors.

Thereafter, in June last, Henry Abeyewardene, a brother of the testator applied by petition to the District Court for the appointment of a curator for the minor children, that is a curator for their property, and asked that one of these things might be done, viz., that the executor Andris might be appointed, or the petitioner himself, or both jointly. After this, the executor Andris petitioned that he himself be appointed curator. These applications were made under Chap. XL of the Procedure Code, and were consolidated, and taken up together.

The two petitioners, the executor and the testator's brother Henry, were both examined, and the District Judge made an order committing the curatorship to the executor, ordering at the same time the petitioners to bear their own costs, the executor to pay his own costs out of his own pocket. From this order both petitioners appeal.

The District Judge appears to have thought that Sect. 585 of the Code left him no option but to commit the curatorship to the executor. To that position we do not assent. Sect. 585 requires the Court to grant the certificate of curatorship to any person

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF ABEYEWARDENE, DECEASED.

entitled under a will or deed to have charge of the minor's property. The executor is not such a person. The testator by appointing him executor entrusted to him the task and charge of distributing his assets generally, but not any special trust to take charge of the minor's shares, or hold them in trust for the minors. In the absence of a person absolutely entitled to the curatorship, and willing to undertake it, the Court may appoint some other fit person. It might well be that the testator, having trusted the executor with the distribution of his assets, and also with the guardianship over his children's person, the Court would consider him a proper person to be also entrusted with the curatorship over their property. But in view of the admissions made by the executor in the witness box, we should hesitate to commit any such charge to him. Should it ever be necessary in the minors' interest for the executor to be called to account, it is the curator on whom would fall the duty of protecting the minor's interests, and if there be any reason to suspect the executor's *bona fides*, that is a reason for appointing some independent person to act for the minors. Now, the executor admitted in the witness box that he had wilfully omitted from his inventory considerable items of the testator's assets. If we had been dealing with the matter as judges of first instance, we most certainly would have considered it improper to commit the curatorship to the executor under those circumstances, and we cannot affirm the order which the District Judge has made in that behalf. It does, however, seem desirable, under such circumstances, that some fitting person be appointed to protect the minors' interests as curator. Whether the petitioner, Henry Perera, is a suitable person, we do not undertake to say. We note that he seems to be disputing with the executor concerning certain items of property which the executor claims for the estate and for which Perera sets up a private claim on his own account. It may be that neither of these petitioners should be appointed curator.

We shall simply set aside the order committing the curatorship to the executor, and send the matter back to the District Judge in order that the District Judge may in his discretion, after due inquiry, appoint some fit person. We see no reason to interfere in the executor's favor with the District Judge's order as to costs. We shall therefore leave him to pay the costs of his

petition including costs of his appeal. The costs of the other petitioner (including appeal costs) may be left to be disposed of hereafter.

DIAS, J.—I quite agree with my learned brother that the order of the District Judge must be set aside. The executor, on his own showing, is quite unfit to be appointed curator over the minors; and the petitioner, Henry Perera, in my opinion is not in a better position. He seems to set up a claim on his own account to some of the estate property; so his interest is adverse to that of the minors. Under the circumstances, the best course to be followed is to send the case down to the District Court for further inquiry and for the appointment of a disinterested person as the curator of the minors.

BEFORE *Clarence* AND *Dias*, J. J.

November 6 and 13, 1891.

APPUHAMY *v.* SILVA and another.

[No. 3,553, D. C., KANDY.]

Compensation for improvements to land—Right to retain possession until compensation is paid.

The right to retain possession of land until compensation is paid for improvements effected to it is a right known to our law, and there are independent traces of it to be found in the authorities on Kandyan customary law.

This right may be asserted by the party who has effected the improvements not only as against the owner under whom he got into the land as a tenant, but as against those claiming title to the land on conveyances from such owner.

The facts of the case appear in the judgment.

Morgan for first defendant-appellant.

Dornhorst for plaintiff-respondent.

On November 13, the following judgment was delivered :—

CLARENCE, J.—The question for decision on this appeal is, whether 1st defendant can support a claim to compensation for improvements.

The plaintiff sues to eject the two defendants from a piece of land, and avers a claim of title beginning with one Kiri Banda and continuing through Tambugalle Vidane by divers conveyances down to plaintiff himself. Tambugalle Vidane bought in 1881, and re-sold in 1888 to a purchaser who in 1890 conveyed to plaintiff. The 1st defendant does not dispute the plaintiff's title,

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but sets up a claim to compensation for improvements. He claims to have greatly improved the land by planting, and sets up a right to retain possession till paid for his improvements. He appears to have got in as a monthly tenant from Tambugalle Vidane, and says that, when he got in, the land had much fallen in value owing to the failure of Coffee with which it had formerly been planted. Defendant says that he planted cocoanuts, jack and other things. The plaintiff in a replication demurred to the 1st defendant's answer as disclosing no defence to the action. The first defendant, however, was allowed to adduce some evidence as to the improvements made by him, and 1st defendant having closed his case, the learned District Judge entered judgment for plaintiff, holding that the answer disclosed no defence to the plaintiff's action.

I think that this judgment cannot be supported. The right of retention for improvements effected to land is one known to our law, and there are independent traces of it to be found in the authorities on Kandyan Customary Law *e.g.*, Armour, 115. We cannot say that 1st defendant has not made out a *prima facie* case for retention till compensated for improvements. If 1st defendant by making improvements acquired a right to retention as against Tambugalle Vidane, the mere conveyances by which the title has passed from Tambugalle Vidane to plaintiff do not imperil his position. He is entitled to hold to his possession till compensated by the owner for the time being. Nor is there any hardship in this, so far as the purchaser is concerned: for a prudent man before buying land makes enquiry as to actual occupiers and the terms on which they hold. As the case seems to have been stopped on the conclusion of the 1st defendant's evidence, the plaintiff must have an opportunity of further hearing, but 1st defendant is entitled to his costs of this appeal.

The principles under which compensation is awarded have been discussed in the case reported, Ram. (1877) 333.

DIAS, J. concurred.

BEFORE *Burnside*, C. J. AND *Clarence* AND *Dias*, J. J.

January 29 and February 8, 1889.

SELOHAMY *v.* RAPHIEL and another.

[No. 21,776, D. C., KURUNEGALLE.]

Fiscal's Conveyance—Its effect when obtained by purchaser at the Fiscal's sale after sale by him to a third party—Conveyance by an infant.

K. purchased certain land at a Fiscal's sale in April, 1887, and thereafter, but before he obtained a Conveyance for it from the Fiscal, sold the land to M. who, on 7th July, 1887, sold it to the plaintiff. K. obtained the Fiscal's Conveyance on 9th July, 1887—

Held, that the Fiscal's Conveyance obtained by K. after his sale to M. enured to the benefit of M. so as to complete the chain of title between K. and the plaintiff.*

A Conveyance by an infant is not *ipso facto* void, but only voidable by the infant himself.

The facts of the case sufficiently appear in the judgment of BURNSIDE, C. J.

Dornhorst for plaintiff-appellant.

Browne for defendants-respondents.

On February 8, the following judgments were delivered:—

BURNSIDE, C. J. The plaintiff seeks to eject the defendants from a piece of land alleging that Alexander Keegel was the owner and in possession under a Fiscal's title bearing date 9th July, 1887, and that on the 16th of April, 1887, he, Keegel, sold to one Maria Perera Hami, who on the 7th July, 1887, sold to the plaintiff; and that defendant, since the plaintiff's purchase, has been in forcible and unlawful possession. The defendant has challenged the plaintiff's title on several grounds to which I shall refer as raised for our decision. As appears by the pleadings already cited, the sale by Keegel to Perera Hami took place in April, 1887; and his own title under the Fiscal's sale was perfected three months afterwards. The District Judge has held that Hami's title was in consequence bad. On this point we are of opinion that the finding of the District Judge is wrong in law, because so soon as Keegal acquired title from the Fiscal, that title enured to the benefit of his vendee Hami, and she was entitled to demand and receive from him a conveyance of the land,

* See. Sect. 289 of the Civil Procedure Code—EDS. S. C. R.

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and consequently upon the principle that equity will concede everything done which ought to be done, Hami must be held to have a good title from Keegel, which passed to the plaintiff. Defendant has also objected, and the District Judge has upheld the objection, that at the time of the conveyance by Hami to the plaintiff, she, Hami, was an infant. It is scarcely necessary to say that such a ruling is untenable. An infant's conveyance is not *ipso facto* void, but only voidable by the infant herself.

Then, it was urged that the original sale in execution had taken place under a judgment against a man other than the real owner of the land. Upon this point there has been no finding by the District Judge, who having ruled on the two previous points in favour of the defendant non-suited the plaintiff. We must, therefore, set aside the non-suit, and send the case back to enable the District Judge to dispose of the remaining question. The plaintiff will have costs.

CLARENCE, J.—The defence to this action cannot succeed upon the objection taken in respect of the alleged minority of the plaintiff's vendor, Maria. Maria herself might or might not be able to avoid her conveyance to plaintiff, but a conveyance by an infant is avoidable merely, and not absolutely void, and the defendants have no *locus standi* to challenge this conveyance as a link in plaintiff's title. It is not necessary for us to express, any opinion on the question, whether in point of fact Maria, when she executed this deed, was of age or just under age. A finding on that issue would have no bearing on the decision of this case.

The next question upon which the District Judge has upheld the defence is—whether the Fiscal's conveyance obtained by Keegel after his sale to Maria enures to the benefit of Maria, so as to complete the chain of title between Keegel and the plaintiff. Upon consideration, I agree with the Chief Justice that this question must be answered in plaintiff's favor. Maria took from Keegel, between the Fiscal's auction and the Fiscal's conveyance, a conveyance by Keegel to herself, in which Keegel covenanted with her to obtain for her a Fiscal's conveyance to herself. In point of fact, however, the

Fiscal's conveyance, when it came, was made out in favor of Keegel. Now, we are not here concerned with any question arising out of any claim to the land made by some third party consequent on some dealing with this Fiscal's conveyance on the part of the vendee therein named. There is no such question. Neither are we concerned to inquire whether an intending purchaser from Maria would have been bound to accept Maria's title in the absence of a conveyance in her favor either from the Fiscal or one from Keegel, made subsequently to the Fiscal's conveyance to him. Probably, the purchaser would not be so bound. But I agree with the Chief Justice that upon the principle, that equity will consider that as done which should have been done, these defendants, who for the purpose of this question are altogether strangers to the title, cannot resist plaintiff's case by relying on the absence of a Fiscal's conveyance direct to Maria or a conveyance made to her by Keegal subsequent to the Fiscal's conveyance to him.

Upon the question, whether Keegel himself has a good title derived from his mortgagor, the District Judge has not found, and the case must go back to the District Court for further adjudication. I think that both parties should be at liberty to adduce further evidence. Plaintiff must have her costs of this appeal.

DIAS, J.—I am of the same opinion.

BEFORE *Dias*, J.

November 19 and December 3, 1891.

BANDA *v.* GUNERATNE.

[No. 2,135, C. R., COLOMBO.]

Civil Procedure Code, Sects. 85 and 823—"Ex parte" hearing and decree "nisi" in Courts of Requests.

Under Sect. 823 of the Civil Procedure Code where default in appearing or pleading is made by the parties, plaintiff or defendant, in an action in a Court of Requests, the provisions of Chapter 12 shall apply, so far as the same are not inconsistent with the procedure prescribed for Courts of Requests in Chapter 66—

Held, that when on the day appointed for the trial of a case the defendant is absent, the Commissioner is bound to follow the procedure in Chapter 12, and hear the case *ex parte*, and pass a decree *nisi* under Sect. 85.

BANDA v. GUNERATNE.

Appeal by defendant from an order of the Commissioner refusing to open up a final judgment entered without *ex parte* trial as required by Sect. 85 of the Code.

Grenier for defendant-appellant.

Dornhorst for plaintiff-respondent.

On December 3, the following judgment was delivered :—

DIAS, J.—On the trial day of this case, 6th October, the defendant was absent and judgment was entered up for plaintiff without any further proceeding. On the 10th of October the defendant made an unsuccessful attempt to open up the judgment, and he now appeals against the order of that date.

Under section 823 of the Code the Commissioner was bound to follow the procedure in Chap. XII, and hear the case *ex parte*, and pass a decree *nisi* under section 85; but the Commissioner neither heard the case *ex parte*, nor passed a decree *nisi*, but proceeded to give final judgment which he had no right to do. Set aside, and the case sent back to be proceeded with in due course; appellant is entitled to his costs in both Courts.

BEFORE *Burnside*, C. J.

July 21 and 23, 1886.

PULLE *v.* GUNESEKERA.

[No. 1,590, P. C. MATARA.]

Criminal Trespass—Criminal Procedure Code, Sects. 445 and 446—Contempt of Court.

An entry upon premises which a man believes to be his own will not be a criminal trespass, though the land is in possession of another, if the object really is to assert a right over it, and not to intimidate, insult or annoy another.

Sect. 445 of the Criminal Procedure Code provides that whenever any such offence as is described in Sects. 173, 176, 177, 178 or 223 of the Ceylon Penal Code is committed in view or presence of any Court, criminal or civil, such court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may, if it thinks fit, take cognizance of the offence, and sentence the offender—

Held, that under this section the magistrate had no jurisdiction to "convict" an offender forthwith, and sentence him afterwards, and that in proceeding under it, he should carefully observe the requirements of Sect. 446 as to recording the facts constituting the offence, the statement, if any, of the offender, and the finding and sentence.

Held, further that it is not competent to a magistrate to proceed under Sect. 445 against a witness who, the magistrate thinks, is guilty of contempt of court by reason of his having "evaded and shuffled" whilst giving evidence.

There were two appeals in this case—one by the 1st accused

against a conviction under Sect. 434 of the Ceylon Penal Code, and the other by a witness who had been fined by the magistrate, on proceedings had under Sect. 445 of the Criminal Procedure Code, for contempt of court by reason of his having, as the magistrate held, "evaded and shuffled" when giving evidence.

Seneviratne for 1st accused-appellant.

Browne for complainant-respondent.

There was no appearance of counsel for the witness.

On July 23, the following judgment was delivered:—

BURNSIDE, C. J.—The evidence in this case has been taken in such a perfunctory manner, that I am unable to decide, whether the defence set up by the appellant, the 1st accused, was or was not established. A mere entry upon a house in the possession of another, is not an offence within the 434th section of the Ceylon Penal Code, and the offence created by that section can only be committed when some criminal intent is present to the mind of the person charged. An entry upon premises, which a man believes to be his own, will not be a criminal trespass, though the land was in possession of another, if the object really was to assert a right over it, and not to intimidate, insult or annoy another. (See Maine on the Indian Criminal Code, page 365.) Upon the materials before the Police Magistrate, I cannot see how he could have satisfactorily decided with what intent the accused did enter upon the land in question. I will, therefore, set aside the conviction, and send the case back for a new trial.

With regard to the appeal by the witness who was committed for contempt, and sentenced to a fine or imprisonment, I may point out that the magistrate has not followed the procedure which the law prescribes. Although under the 445th section of the Procedure Code a Police Magistrate may, when an offence under the 176th section of the Penal Code has been committed in his presence, detain the offender in custody, and at any time before the rising of the Court on the same day, take cognizance of the offence, and punish the offender, the Magistrate has no jurisdiction to "convict" the offender forthwith, as was done in this case, and sentence him afterwards. He should proceed regularly against the offender by the procedure provided in Criminal cases, and he should observe carefully the requirements of the 446th section. He should record the facts constituting the offence, with the statement made by the

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offender as well as the sentence and finding. All this has been, to say the least, most imperfectly done, if done at all. Again, I do not find that the Magistrate has stated, under what law he has fined the witness for contempt of court, because he "evaded and shuffled." The 176th section of the Code refers to the offences by a person, who refuses to bind himself by oath or affirmation to tell the truth, and the 177th section to a person who refuses to answer a question put to him after he has been sworn or affirmed. These are distinctly criminal offences. I can find no law making it penal in a witness to evade or shuffle in giving his evidence, and I know of no authority under which a magistrate may fine or imprison for doing so. If the state of the country requires that more power should be possessed by judicial officers of inferior courts to deal with and punish witnesses who commit perjury before them, we must wait on the legislature for authority. The conviction of the witness-appellant must also be set aside.

BEFORE *Dias*, J.

August 27 and September 4, 1890.

GUNEWARDENE *v.* PERERA.

[No. 407, C. R., COLOMBO.]

Practice—Right of proctor to draw money deposited to the credit of his client—Proxy.

On a motion by a proctor to draw money deposited to the credit of his client, the latter's consent to the motion must be proved apart from the general authority given to the proctor in his proxy.

The facts sufficiently appear in the judgment.

Dornhorst (*Wendt* with him) for plaintiff-appellant.

On September 4, the following judgment was delivered:—

DIAS, J.—This is an appeal against an order of the 16th July whereby the motion of the plaintiff's proctor to draw a sum of money in deposit, presumably to the credit of the plaintiff, was disallowed. In a letter of the 16th August the Commissioner gives his reasons for the order, and he cites certain decisions which support him. The practice of drawing money in the proctor's own name has been more than once noticed by this court, and this court seems to have been of opinion that no money should be so drawn till the court is satisfied that the proctor's client is a con-

senting party to the arrangement (1, s. c. c., p. 4.) The proctor in this case seems to have trusted to the general authority given to him in his proxy; but the Supreme Court required something more than that. The proctor having refused to produce his client's consent by simply referring the Commissioner to his proxy, the Commissioner had great reason to doubt the *bona fides* of the application. It was said at the hearing that the client had expressed his consent by signing the petition of appeal, but I think a more formal consent is necessary to warrant the court in allowing the motion. The order appealed from is affirmed.

BEFORE *Clarence*, J.

March 17 and 29, 1892.

PERERA *v.* APPUHAMY and others.

[No. 8,722, P. C., Kurunegala.]

Criminal Procedure—Ordinance No. 1 of 1888, Sect. 1—Criminal Procedure Code, Sect. 352.

It is the duty of a Police Magistrate to ascertain what is the defence of an accused party either by means of Sect. 352 of the Criminal Procedure Code or Sect. 16 of Ordinance No. 1 of 1888.

There being no record that the Magistrate had complied with the requirements of Sect. 352 of the Code, the conviction was set aside, and the case sent back for further proceedings.

In this case the Police Magistrate had convicted the accused without calling upon him for a statement under Sect. 352 of the Criminal Procedure Code, or questioning him under Sect. 16 of Ordinance No. 1 of 1888 to enable him to explain any circumstances appearing in the evidence against him.

In appeal,

Dornhorst for accused-appellant.

Hay, A. S.-G. for complainant-respondent.

On March 29, the following judgment was delivered:—

CLARENCE, J.—I am obliged to set aside this conviction for the simple reason that there is no record that the Magistrate complied with the requirements of section 352 of the Procedure Code. I may surmise the defence to be that the sticks the defendants are charged with stealing were not Crown property, but property purchased by them from a private owner.

PERERA v. APPUHAMY.

However that may be, it was the Magistrate's duty to ascertain what is the defence intended either by means of section 352, or, failing that, by means of Ordinance 1 of 1888 Sect. 16. I set aside the conviction, and send the case back to the Police Court for further proceedings in due course.

BEFORE *Burnside*, C. J. AND *Dias*, J.

February 15 and 22, 1887.

DELMEGE REID & Co. *v.* SUPPRAMANIAN.

[No. 52,974, D. C., GALLE.]

Bill of Lading—Breach of contract as to shipping rice.

Plaintiffs contracted with the defendant to ship one thousand bags of rice per B. I. Steamer sailing "direct or otherwise" to the Port of Galle. Plaintiffs supplied the rice within the time stipulated, but on board a B. I. Steamer not sailing "direct or otherwise" to the Port of Galle. The rice was carried from Calcutta beyond the Port of destination, *i.e.*, to Colombo where it was landed, and "re-shipped in another ship, and forwarded to Galle"—

Held, that, in the circumstances, the defendant was justified in not accepting delivery of the rice. The defendant was not bound to receive rice which had been shipped on board a ship not sailing "direct or otherwise" to the Port of Galle, but to another Port, and over-carried in her to the other Port, there landed, and re-shipped on board another ship, and then carried to the Port of Galle.

The facts material to this report appear in the judgment of BURNSIDE, C. J.

Grenier, A.-G. for defendant-appellant.

Dornhorst for plaintiff-respondent.

On February 22, the following judgments were delivered:—

BURNSIDE, C. J.—The judgment of the District Court cannot, in my opinion, be supported, and must be set aside, and the defendant must have judgment with costs.

The contract between the parties is contained in the document A. The Bills of lading between the plaintiffs and the ship owners are in no way binding on the defendant, nor can they import anything into the contract which the document describes without any ambiguity.

That contract, on the part of the plaintiffs is to ship on or before the 7th of November, 1,000 bags of good, new cayella rice per B. I. Steamer sailing "direct or otherwise" to the Port of Galle. The plaintiff supplied the rice within the time stipulated by the contract, but on board a B. I. Steamer not sailing "direct or otherwise" to the Port of Galle, but sailing for another Port

In the language of their own libel the ship "carried the rice "from Calcutta, and in so doing carried the same beyond the "port of destination, that is to Colombo," where the rice was landed and "re-shipped in another ship, and forwarded to Galle." The defendant had in the meantime refused to accept it, as he had clearly the legal right to do.

By the terms of his contract he was bound to receive rice which had been shipped at Calcutta, and carried "direct" to the Port of Galle in the particular ship in which it had been placed, or which had been carried "otherwise," *i. e.*, indirectly in that ship, by stoppage at intermediate ports between the shipping port and the port of destination in the course of the voyage to that port. But he certainly never contracted to receive, and he was consequently not bound to receive, rice which had been shipped on board one ship not sailing directly or otherwise to the Port of Galle but to another Port, and overcarried in her to another Port, there landed, and re-shipped on board another ship, and then carried to the Port of Galle.

The rice had not, within the terms of the contract, been shipped at Calcutta but at Colombo; it had not been carried within the terms of the contract from Calcutta to Galle, but from Calcutta to Colombo, and the plaintiffs, therefore, could not require the defendant to accept it.

DIAS, J.—I agree with the Chief Justice that the plaintiffs had failed to perform their part of the contract, and, consequently, the defendant was not bound to accept the rice.

BEFORE *Clarence*, J.

July 17, 1890.

PODIHAMY *v.* SUBEHAMY.

[No. 972, P. C., GALLE.]

Maintenance—Child two years old—Jurisdiction—Ordinance No. 19 of 1889, Sect. 3.

A Police Magistrate has no jurisdiction to entertain an application under Ordinance No. 19 of 1889 where the child sought to be affiliated is more than twelve months old, unless the case falls within the exceptions stated in section 7.

PODIHAMY v. SUBEHAMY.

It is not competent to a Police Magistrate to enter an order directing that the payments to be made by the accused do commence from a date antecedent to the date of the order, and requiring the accused to pay a lump sum.

The facts of the case sufficiently appear in the judgment.

Canekaratne, for accused-appellant.

There was no appearance of counsel for complainant-respondent.

On July 17, the following judgment was delivered :—

CLARENCE, J.—Defendant appeals against an affiliation and maintenance order made on an application under the new Ordinance, No. 19 of 1889.

The 3rd section of the Ordinance empowers the magistrate to order a monthly payment from date of order, and the 9th section provides a procedure in case of failure to pay any monthly sum. I could not uphold the magistrate's order making the payments commence from a date antecedent to the date of the order, and requiring the defendant to pay a lump sum.

There remains, however, to be considered, a more serious question affecting the jurisdiction of the magistrate to entertain the application at all. The child which the complainant-woman seeks to affiliate, is, admittedly, nearly two years old. The 7th section enacts that no application under section 3 shall be entertained, unless made within 12 month's from the child's birth, or unless the case falls within certain other exceptions stated thereafter, viz., unless it be proved that the putative father has at some time within 12 months next after its birth maintained it or paid money for its maintenance—which is not suggested here—or, unless the application is made "within the 12 months next after the return to this Island" of the putative father, "and on proof that he ceased to reside in the Island within the 12 months next after the birth of such child."

In the present case the defendant left the Island, according to the evidence on both sides, while the complainant was pregnant, and shortly before the child was born, and returned a few weeks only before the complainant made her application to court. Consequently, there is no proof that defendant "ceased to reside in the Island within the 12 months next after the child's birth," since in point of fact, he had left the Island before the child was born. The magistrate, consequently had no juris-

diction to entertain the application. The order appealed from is set aside, and proceedings quashed.

The magistrate before entertaining the application at all should have required the complainant to satisfy the requirements of the Ordinance by the necessary proof. Set aside, and proceedings quashed.

BEFORE *Burnside*, C. J. AND *Clarence* AND *Dias*, J. J.

June 30 and July 22, 1891.

In the matter of the goods and chattels of

JAYEWARDENE, deceased.

[No. 4,917, (Testamentary) D. C., COLOMBO.]

Grant of administration to widow—Sale by auction by administratrix of immovable property under authority of the Court.

Per CLARENCE, J.—

1. When a sale by auction is being carried out under order of Court, the Court has always power up to the time of completion of the sale to open the matter up, or, as it is styled in English practice, "to open the biddings." This, however, is not done, unless there has been fraud or improper conduct in the management of the sale.

2. Where an administratrix has an absolute and unfettered grant of administration, she can sell immovable porperty on her own responsibility. If she is, however, selling improperly or unnecessarily, she may be responsible to those concerned for loss thereby occasioned, and, moreover, any one concerned may apply to have the estate administered under the direction of the Court.

The facts of the case sufficiently appear in the judgment of CLARENCE, J.

Dornhorst, for applicant-appellant.

Browne, for administratrix-respondent.

On July 22, the following judgments were delivered:—

BURNSIDE, C. J.—The order seems to be right, and should be affirmed.

CLARENCE, J.—This is an appeal by a person entitled to a share of the estate of one Jayewardene, deceased, administration of which has been committed by the District Court to the deceased's widow, against an order of the District Court refusing an application made by him in the matter of the administration.

A grant of administration was made to the widow, limited by a prohibition against sales of the deceased's immovable property

IN THE MATTER OF THE GOODS AND CHATTELS OF JAYEWARDENE, DECEASED.

save by permission of the Court. Subsequently the Court authorised the administratrix to sell the immovable property, some being undivided shares of land. The administratrix has had some of these properties put up to auction, and sales have been made to the extent, as I understand, of purchasers being declared, but so far as I understand, no conveyances have as yet been made. Appellant's application is in effect that these sales be not carried out.

I am of opinion the application should be refused on the following grounds:—

When a sale by auction is being carried out under order of Court, the Court has always power, up to the time of completion of the sale, to open the matter up, or, as it is styled in English practice, "to open the biddings." This, however, is not done, unless there has been fraud or improper conduct in the management of the sale. It may be that these sales were not properly managed. I express no opinion on that point, because the learned District Judge did not hear all the evidence which the appellant and respondent had ready to offer. It seems, however, to be admitted that only three days notice of some of the sales was given by public advertisement. But this is not the case of a sale under order of Court, as for instance in an administration suit. The District Court has withdrawn its prohibition against sales of immovable property, and the administratrix has now in effect an absolute and unfettered grant of administration under which she can sell on her own responsibility. If she is selling improperly or unnecessarily, she may be responsible to those concerned for loss thereby occasioned, and, moreover, any one concerned may apply to have the estate administered under the direction of the Court.

In the present case there will probably be considerable care required in administering the estate. If the administratrix is correct in stating that the marriage between her husband and herself was with community of property, for so her statement must be understood, care will be requisite in separating the widow's moiety from her husband's moiety which she is administering under these letters. The appellant's present ap-

plication, however, is mistaken, and this appeal must be dismissed.

DIAS, J. agreed to affirm the order.

IN THE MATTER OF THE GOODS AND CHATTELS OF JAYEWARDENE, DECEASED.

BEFORE *Clarence*, J.

July 3, 1890.

GUNAWARDENE *v.* PERERA.

[No. 57,574, C. R., COLOMBO.]

Appeal—Ex parte judgment.

Where in a Court of Requests judgment is entered up behind the defendant's back in consequence of the summons having been made returnable on a *dies non*, the defendant's proper course is not to appeal from such judgment, but to apply in the first instance to the Court below to open it up.

Appeal by a defendant from an *ex parte* judgment in the plaintiff's favour.

Sampayo, for plaintiff-respondent.

There was no appearance of counsel for defendant-appellant.

On July 3, the following judgment was delivered:—

CLARENCE, J.—This is an appeal against an order of the Court of Requests entering up judgment against the defendant for default of appearance, and the grounds of the appeal, as described in the appeal petition, appear to be that the judgment was improperly entered up behind the defendant's back, in consequence of the summons having been made returnable upon a *dies non*. Defendant's proper course under such circumstances was to have applied in the first instance to the Court of Requests. This appeal is therefore rejected.

BEFORE *Dias*, J.

March 25, 1891.

MUTTAIAH *v.* MEERAMEYEDIN.

[No. 219, P. C., MANNAR.]

Public nuisance—Ceylon Penal Code, Sect., 261, *Criminal Procedure Code, Chap.* X.

A person who refuses to allow or obstructs the drawing of water from a public well commits a public nuisance within the meaning of Sect. 261 of the Ceylon Penal Code, and proceedings may be taken under Chapter X. of the Criminal Procedure Code to abate such nuisance.

MUTTAIAH v. MEERAMEYE-DIN.

Appeal from a refusal of the magistrate to make an order to abate a public nuisance on an application under chapter X of the Civil Procedure Code.

Wendt, for Applicant-appellant.

There was no appearance of counsel for respondent.

The following judgment was delivered by

DIAS, J.—This is an application, under chapter 10 of the Criminal Procedure Code, for an order to abate a public nuisance. The nuisance complained of is the refusal and obstruction by the defendant to allow water to be drawn from a well in the defendant's garden without the payment of a fee. The well is said to be a public well, but on this there is no finding of the Police Magistrate. If the well is a public well, the obstruction complained of is a nuisance within the meaning of section 261, of the Penal Code, as being an act which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use the public right. I set aside the order, and send the case back to the Police Magistrate to find the fact whether the well is a public or private well. Should the magistrate be of opinion that the well is a public well, he will make an order under chapter 10.

BEFORE *Clarence*, A. C. J. AND *Dias*, J.

December 29, 1890 and January 23, 1891.

WARREN *v.* McMILLAN & Co.

[No. 3,448, D. C., COLOMBO.]

Practice—Concurrence—Claim to property seized under three different writs, but sold under one of them.

Three plaintiffs in three different cases had judgments against the same defendant, and the same property of the defendant was seized under all three writs, but the Fiscal purported to sell under only one of them.

Held, that the three creditors were entitled to share *pro rata* in the proceeds of the Fiscal's sale.

The facts sufficiently appear in the judgment.

Morgan, for plaintiff in 3736.

Browne, for plaintiff in 3578.

Wendt, for plaintiff in 3448.

On January 23, the following judgment was delivered:—

CLARENCE, A. C. J.—The facts out of which these appeals arise are not in dispute. The plaintiff in this action, No. 3448, the plaintiff in No. 3736, and the plaintiff in 3578, all have judgments against the same defendant, and all three seized the same property under their writs. Thereafter, the property was sold on July 14, and on July 24 the debtor was adjudged insolvent. The Fiscal purported to sell, the learned District Judge says, under the writ in No. 3448 only, but as pointed out by the Court in the case reported, 7. S. C. C. 173, the sale under such circumstances must be taken to be a sale under all these writs. The assignee under the insolvency, in consequence perhaps of the decision reported, 9, S. C. C. 54, which did not follow the decison reported, 8, S. C. C. 162, as to the effect of Sect. 56 of the Insolvency Ordinance, makes no claim, and we have to deal only with the claims of the three judgment creditors above mentioned. These three creditors are clearly entitled to share *pro rata* in the proceeds of this levy. The property sold must be taken to have been sold under each judgment, and even were that otherwise, they would all be entitled to participate by way of concurrence.

The order appealed from is wrong, and must be set aside, and in lieu thereof the order will be that the judgment creditors in No. 3448, 3736 and 3578 are entitled to share the proceeds between them *pro rata*, and the creditor in No. 3448, who unsuccessfully raised this point by claiming to be paid his debt in full, must pay the costs of this appeal.

DIAS, J. concurred.

BEFORE *Clarence*, J.

June 26 and July 16, 1890.

In re the Insolvency of PITCHE MUTTU.

[No. 1,292, D. C., KANDY.]

Insolvency—21 days' imprisonment on mesne process—Ordinance No. 7 of 1853, Sect., 9.

Suffering twenty one days' imprisonment on mesne process for failure to give security to abide by the judgment of the Court "in a certain action to pay all such sum or sums of money as should be decreed" is not an act of insolvency within the meaning of the Insolvency Ordinance.

In re THE INSOLVENCY OF PITCHE MUTTU.

Appeal by an opposing creditor from an adjudication of his debtor as insolvent.

Browne, for insolvent-respondent.

There was no appearance of counsel for the opposing creditor-appellant.

On July 16, the following judgment was delivered:—

CLARENCE, J.—The question is, has respondent committed an act of insolvency by suffering 21 days' imprisonment within the meaning of the Insolvency Ordinance. I think that he has not. He was imprisoned on mesne process, because he failed to give security to abide by the judgment of the Court "in a certain action to pay all such sum or sums of money as should be decreed" and so on. That was not a commitment for debt, or non-payment of money, or a detention for debt within the meaning of the Insolvency Ordinance. It was then argued that his case may fall within another part of section 9, which declares that a person "having been arrested and committed to prison for any other cause" and lying in prison for 21 days after writ of execution issued against him, and not discharged, shall be deemed to have committed an act of insolvency. As to this it is sufficient, without going further, to say that the requisite number of days had not elapsed. Admittedly, 21 days had not elapsed when he filed his petition. The adjudication is set aside, and the opposing creditor will have his costs in both Courts.

BEFORE *Burnside*, C. J.

February 18 and 23, 1892.

ANTHONY *v.* ABILINO and another.

[No. 980, D. C., (Crim.) NEGOMBO.]

Criminal Procedure Code, Sect. 67—Offence made up of parts which are in themselves offences.

Where an accused was charged with and convicted of two offences—housebreaking by night with intent to commit theft under Sect. 443 of the Penal Code and theft from a dwelling house under Sect. 369, and the District Judge sentenced him to two years' rigorous imprisonment on each count,—

Held, that as the two charges were only parts which made up the one offence, Sect. 67 of the Penal Code applied, and the District Judge could only punish to the limit of his jurisdiction, *i. e.*, two years as for one offence.

This case came before the Supreme Court in revision on

motion of the Attorney-General. The facts sufficiently appear in the judgment.

Hay, A. S.-G. in support of the motion for revision.

Cur. adv. vult.

On February 23, the following judgment was delivered:—

BURNSIDE, C. J.—The accused in this case was by order of the Crown Counsel charged with two offences—house-breaking by night with intent to commit theft under Sect. 443 of the Code, and theft from a dwelling house under Sect. 369 of the Code. The District Judge finds him guilty of both offences, and sentences him to two years' rigorous imprisonment on each count, and now the Solicitor-General has moved to revise this sentence.

If the two convictions were for different offences, the District Judge could have acted as he did, but the two charges are only parts which made up the one offence. The 69th section of the Code applies, and the District Judge could not punish except for one offence, and to the limit of his jurisdiction, *i. e.*, two years. I set aside the second sentence of two years' rigorous imprisonment. I feel bound to say here that the District Judge has been misled by the instructions given to the Magistrate, because the Magistrate was instructed to commit for two offences, when in fact he would, if left alone, have committed for the major offence only, and the District Judge could have tried, and convicted for that alone.

I feel also bound to say that the case should never have been sent to the District Judge for trial. If it be a true case, which I very much doubt, the accused should have received more than two years' rigorous imprisonment. At present his conviction before the District Court is a kind of compromise, based on the doubts of his guilt and the quantity of punishment he deserves if he is guilty.

BEFORE *Burnside*, C. J. AND *Clarence*, J.

December 17 and 22, 1885.

FRASER *v.* MUTTUKANKANI.

[No., 1222, P. C., HATTON.]

Cheating—Ceylon Penal Code, Sect. 398.

If the evidence in a case discloses an offence under a section of the Penal Code, the accused is liable to conviction and punishment under the Code, although he might also have been prosecuted under another enactment.

Although under the old law, in order to establish the offence of fraudulently obtaining anything by a false pretence, it was necessary to prove a false pretence as to some existing fact, and not a mere promise as to future conduct, section 398 of the Penal Code rendered even such promise sufficient.

But before a defendant can be convicted under Sect. 398 of the Penal Code of fraudulently deceiving the complainant by falsely pretending that he intended to do a certain thing, there must be evidence to shew that at the time when he made the representation he had not that intention.

The case first came on before CLARENCE, J. who reserved it for argument before a fuller court, and on December 17, the case was argued before the Court constituted as above.

Dornhorst for accused, appellant.

Wendt, for complainant-respondent.

Cur. adv. vult.

On December 22, the judgment of the Court was delivered as follows by

BURNSIDE, C. J.—This is a charge of cheating falling under section 398 of the Penal Code.

It was argued for the defence that the offence if any, indicated by the facts is one falling within the purview of Section 22 of the Ordinance 11 of 1865. We are, however, clearly of opinion that if the evidence discloses an offence under Section 398 of the Penal Code, the defendant is liable to conviction and punishment under the Code. It may be that he might also have been prosecuted under the Ordinance of 1865; but as to that we are not now concerned to express an opinion. The charge is that defendant by deception induced complainant to give him an order on a Chetty for Rs. 20; but what was the deception by which complainant was induced to part with the order, the charge does not specify. In complainant's own account of the matter, complainant puts it that what induced him to give the order was defendant's promise that he would stay on the estate. Previously to the enactment of the Penal Code, we always held,

following the English authorities, that in order to convict a defendant of the offence of fraudulently obtaining anything by a false pretence, you must prove a false pretence, as to some existing fact, and not a mere promise as to future conduct. But section 398 of the Code, as shown by illustrations f and g, carries the matter further. Still, before a defendant can be convicted under this section of fraudulently deceiving the complainant by falsely pretending that he intended to do a certain thing, there must be evidence to shew that at the time when he made the representation he had not that intention.

Now, if the representation relied on be a representation that defendant would stay on the estate, it is sufficient to say that defendant did stay on the estate, until complainant himself gave him notice to leave. And if the cause for the prosecution be, that defendant said that he would bring coolies in return for the advance, when at the very time of saying so he had no intention of doing anything of the kind, the prosecution must show some material from which we are to infer that such was the state of defendant's mind, when the transaction took place. The mere fact that he has not yet brought the coolies is not enough. Defendant says he tried to get the coolies, and was unsuccessful and was robbed or cheated of the money, and he admits his liability to account for the money to the complainant. There is nothing here from which we are entitled to draw the conclusion that defendant, when he received the order, intended to cheat the complainant, and had no intention of bringing the coolies.

BEFORE *Burnside*, C. J. AND *Clarence* AND *Dias*, J. J.

February 24 and March 4, 1891.

RAMASAMY and others *v.* WEERAPPA.

[No. 2,800, D. C., KANDY.]

Promissory notes granted on agreement to convey land to maker—Consideration.

The plaintiffs agreed to sell to the defendant a coffee garden, and the defendant granted to the plaintiffs three Promissory Notes for the price. The defendant was put in possession, and continued in possession for about a year, when he lost possession,

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Held, by BURNSIDE, C. J. and CLARENCE, J. (DIAS, J. *dissentiente*) that inasmuch as the defendant had the right to retain possession, and obtain a conveyance on payment of the notes, the plaintiffs had the corresponding right to recover on the notes.

The facts of the case sufficiently appear in the respective judgments.

Dornhorst, for plaintiffs-appellants.

Seneviratne, for defendant-respondent.

Cur. adv. vult.

On March 4, the following judgment was delivered :—

DIAS, J.—This is an action on three promissory notes. The notes are admitted, but the defendant sets up a plea of failure of consideration. The parties agree that the notes represent the value of a coffee garden which the plaintiffs agreed to sell to the defendant.

The defendant was put in possession in 1882, and continued in possession for about a year, when he lost possession. The defendant says that the plaintiffs turned him out, but, whether that is so or not, he left the land in 1888, as the plaintiffs admit. This action was instituted in 1889, and according to the admitted facts, the defendant got nothing for his three promissory notes.

I would affirm the judgment.

BURNSIDE, C. J.—I cannot affirm the judgment of the District Court in this case.

The Notes sued on are in evidence, and on the face of them, they are payable on particular dates. It is therefore clear that the contract between the parties contemplated the payment of these notes as a condition precedent to the defendant's obtaining a conveyance of the land. He was duly let into possession, and I am not sure, even from his own evidence that he was really turned out by the plaintiffs. Be that, however, as it may, he had the right to retain possession, and obtain a conveyance on payment of the notes, and I cannot find that anything has occured to disturb that agreement, and, therefore, the plaintiffs have the corresponding right to recover on the note.

I would set aside the judgment of the Court below, and enter judgment for plaintiffs with costs.

CLARENCE, J.—I am of opinion that this judgment should

be set aside, and judgment entered for plaintiffs with costs in both Courts.

Defendant agreed with plaintiffs to buy this land, and gave three notes for the price, payable on a specified date. Defendant then went into possession of the land. So far as the transaction between the parties is disclosed, the intention appears to have been that, on defendant paying the notes, he should be entitled to call for a conveyance in the usual manner.

BEFORE *Dias*, J.

April 6 and May 5, 1887.

BANDA *v.* KALUBANDA and others.

[No. 1,033, P. C., PANVILA.]

Security for good behaviour—Criminal Procedure Code, Sects. 91 and 92.

Under Sect. 91 of the Criminal Procedure Code, whenever a Police Magistrate receives information that any person within the local limits of the jurisdiction of such Magistrate is an habitual robber, &c., he may require such person to shew cause why he should not execute a bond for his good behaviour.

Held, that information under this section must be supported by oath or affirmation, and that the non-observance by the Police Magistrate of the requirements of Sect. 92 as to setting forth in his order the substance of the information received, the amount of the bond to be executed &c., is a material irregularity.

And it appearing in the present case that the information was not supported by oath or affirmation, and that the Police Magistrate had not followed the procedure in Sect. 92 of the Code, the Supreme Court set aside the proceedings, and sent the case back to be proceeded with in due course.

The facts sufficiently appear in the judgment.

Dornhorst for accused-appellant.

There was no appearance of counsel for complainant-respondent.

Cur. adv. vult.

On May 5, the following judgment was delivered.

DIAS, J.—With regard to the facts of this case I am not prepared to say that the conclusion arrived at by the Police Magistrate is wrong, but I am obliged to set aside these proceedings which are irregular in substance. The Police Magistrate seems to have entirely overlooked the procedure laid down in the Code. By the 91st Sect. of the Procedure Code the Magistrate is authorised to deal with a certain class

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of offenders summarily, and the proceedings must be initiated by an information duly received by the Magistrate; and it is hardly necessary to observe that this information should be precise, and supported by oath or affirmation. Sect. 92 provides that on the receipt of such information the Magistrate shall make a written order setting forth the substance of the information, the amount of the bond, the term for which it is to be in force, and the number, character and class of the sureties. This is the first step in the proceedings by the Magistrate; and if the accused is present in Court, the above-mentioned order may be read to him at once, but if he is absent, a summons should issue as directed by section 94. The summary power conferred on Magistrates by section 91 is an extraordinary power, and hence the safeguards with which it is hedged: and Police Magistrates cannot be too careful in following the procedure laid down by the law. It is an essential part of a proceeding like this that the accused person should have ample notice of the character and nature of the charge or charges to be brought forward against him, so that he may have ample opportunity to come prepared to rebut it if he can. The information referred to in section 91 is to be found in the case, but it does not seem to be supported by oath or affirmation, nor does the Magistrate appear to have made the order referred to in section 92. In this case I will simply set aside the proceedings on the ground of irregularity, and send the case back to be proceeded with in due course, as required by the Criminal Procedure Code.

BEFORE *Burnside*, C. J.

November 24 and 26, 1886.

BOWEN *v.* PANNUM.

[No. 2,776, P. C., KALUTARA.]

Master and servant—Transfer of Contract of service.

A Master has no right to transfer to another his servant's contract of service with him, without the servant's consent.

The facts material to this report appear in the judgment.

Browne for, accused-appellant.

On November 26, the following judgment was delivered:—

BURNSIDE, C. J.—I cannot support this conviction. I think upon the evidence it is more than doubtful that the defendant ever intended to enter into the exclusive service of the complainant, or ever considered himself the servant of the complainant at all. I have no doubt the complainant had reason to believe that it was the intention of Mr. Poppenbeek to transfer the contract of service which the defendant had entered into with him to the complainant for a period, but there is nothing in the evidence which leads me to the belief that the defendant himself intended to terminate his contract with Mr. Poppenbeek, and to enter into a new contract for service with the complainant. The whole evidence seems to point to the conclusion that the defendant considered himself Mr. Poppenbeek's servant, and Mr. Poppenbeek had no right whatever to transfer the defendant's contract with him to the complainant, without the defendant's consent. I do not think he did consent. I think from the evidence that he regarded himself simply as lent by his master to another estate to work there for a given time, and to return again, and in such case he would not be the complainant's servant, but Mr. Poppenbeek's servant lent to the complainant.

I think the complainant has much reason to complain of the want of good faith which has been observed towards him, but it is not the alleged servant who is to blame or who should suffer.

BEFORE *Dias*, J.

May 13 and 19, 1892.

JOHANNES *v.* CAROLIS and others.

[No. 3,101, Ad. P. C., COLOMBO.]

Criminal Procedure Code, Sect. 236—Ordinance No. 22 of 1890—Compensation to accused payable by complainant.

Under section 236, as re-enacted by Ordinance No. 22 of 1890, of the Criminal Procedure Code, the aggregate amount of compensation which a Police Magistrate may direct a complainant to pay the defendants may exceed Rs. 10.

In this case the complainant charged six persons with the theft of a cow. The Police Magistrate found the charge to be "false and vexatious," and ordered the complainant to pay

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each of the accused Rs. 10 as compensation. From this order the complainant appealed.

Pereira, for complainant-appellant, submitted that the evidence did not shew that the charge was false, frivolous or vexatious, and moreover, that the question as to whether the Police Magistrate had power under section 236 of the Criminal Procedure Code, as given in Ordinance No. 22 of 1890, to award more than Rs. 10 in the aggregate as compensation deserved consideration in view of the Chief Justice's remarks on the subject in Kanapathipillai *v.* Vellayan. [S. C. C., vol-VII, p. 200.]

There was no appearance of counsel for the accused-respondents.

Cur. adv. vult.

On May 19, DIAS, J. set aside the order on the evidence, and on the question as to the Magistrate's power to award as compensation a sum exceeding Rs. 10 in the aggregate where there were more than one accused, expressed his opinion as follows:—

Another question was raised by the learned counsel for the appellant, and that is, under section 236 of Ordinance 22 of 1890, the Magistrate had no authority to award as compensation any sum exceeding Rs. 10. There are six defendants in the case, and each was awarded Rs. 10, which aggregated the sum of Rs. 60, which exceeded the sum of Rs. 10.

The words of section 236 are very clear, and they are. "he (the Police Magistrate) may by an order of acquittal direct the complainant to pay to the accused or to each of the accused, when there are more than one, such compensation, not exceeding Rs. 10, as the Police Magistrate shall think fit."

A case was cited from 7, S. C. C., p. 200 in which the Chief Justice expressed some doubt as to whether, under section 236 of the Procedure Code, which is the same as the Ordinance 22 of 1890, the Police Magistrate can award more than a round sum of Rs. 10, though there should be more defendants than one. If the section stopped at the words "pay to the accused," the words, "such compensation not exceeding Rs. 10," will no doubt govern the word "accused," whether one or more; but the words, "or to each of the accused when there are more than one," appear

to be advisedly introduced into the section, to enable the Police Magistrate to cast the complainant in a sum not exceeding Rs. 10 as to each and every of the accused persons wrongfully charged.

In my opinion the contention of the learned counsel on this point is untenable; but I set aside the order on the ground first above cited.

BEFORE *Burnside*, C. J.

July 28 and August 2, 1887.

DE SILVA *v.* ANDRIS and others.

[No. 5,238, P. C., Galle.]

Petition of Appeal—Criminal Procedure Code, Sects. 406 and 407.

Under Sections 406 and 407 of the Criminal Procedure Code, all persons comprised in one judgment, sentence or order may join in one petition of appeal bearing stamps as for a single petition.

The accused, four in number, appealed from a conviction of voluntarily causing hurt. They joined in one petition of appeal which was stamped with a stamp of Rs. 5.

Dornhorst for accused-appellants.

There was no appearance of counsel for complainant-respondent.

Cur. adv. vult.

On August 2, BURNSIDE, C. J. in setting aside the conviction on the facts, observed as follows on the subject of the petition of appeal :—

The Police Magistrate has very properly directed the attention of the Court to the fact that he has convicted four persons who appeal in one petition and on one stamp of Rs. 5, and he refers to sections 406 and 407 which give to "any person" the right of appeal. I do not think I am wrong in interpreting those clauses to mean that all the persons comprised in any judgment, sentence or order may join in the same petition of appeal, upon which there should be but one stamp. The word "person" includes a "body of persons."

BEFORE *Clarence*, J.

May 21 and 25, 1891.

BANDA and another *v.* LAPAYA and others.

[No. 94, C. R., KEGALLE.]

Non-joinder of parties—Civil Procedure Code, Sect. 17.

Where a debt is payable by defendants to plaintiffs and others as joint creditors, the defendants have, notwithstanding the provisions of Sect. 17 of the Civil Procedure Code, a right to object to being sued by the plaintiffs only, for the share of the debt due to them, and they have a right to claim to have all the creditors joined, and to be sued, in one action.

Section 17 of the Civil Procedure Code enacts—"No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it—"

Held, that the meaning of this section is that where a non-joinder is apparent, in the face of which the court cannot proceed, the court, instead of dismissing the plaintiff's action, should allow plaintiff to add parties.

The facts sufficiently appear in the judgment.

Browne, (*Dornhorst* with him) for plaintiffs-appellants.

VanLangenberg, for defendants-respondents.

Cur. adv. vult.

On June 25, the following judgment was delivered:—

CLARENCE, J.—Plaintiffs sue the defendants claiming Rs. 5·80 as due by defendants for commuted services for the years 1888 and 1889 in respect of certain service lands of which defendants are admittedly the *paraveni* tenants. The plaintiffs do not aver that they are lords or owners of the *Nindagama*, but merely that they are owners of the "*Nilapanguwa*." A *panguwa* I understand to be merely one part or tract of the *paraveni* lands of a *Nindagama*. Passing this by, however, plaintiffs aver that their father Loku Banda owned the "*Nilapanguwa*" in question, that he died in 1882 leaving him surviving the plaintiffs vendors, his only children and heirs. They aver that the services had been commuted by the Commissioners in 1870 at Rs. 2·90 for the *panguwa*, and that defendants paid this commutation down to 1877. Defendants' answer is evasive as to Loku Banda's ownership of the *Nilapanguwa*. The answer first admits it, and then purports to deny it. A traverse must be explicit. Therefore I regard Loku Banda's ownership as not in issue.

No evidence whatever was adduced by plaintiffs, but certain

documentary evidence was adduced by defendants who proved an averment made in the answer that one of plaintiffs' vendors had conveyed his share to a third person before the conveyance to plaintiffs. The Commissioner dismissed plaintiffs' action on this ground, and plaintiffs appeal.

In my opinion the appeal fails, the 17th section of the Code notwithstanding. I can only read that section as contemplating the continuance of actions when such continuance is possible. There are cases in which the Court cannot deal with the subject matter of the suit piecemeal. Apart from the question mooted by the Commissioner whether the right to the services for a *panguwa* is divisible in the way contended for by plaintiffs, as to which I express no opinion, defendants have a right to object to being sued piecemeal for this debt. If plaintiffs sue to-day for their two-thirds of the debt, the third share-holder may sue to-morrow for his one-third. Defendants have a right to have all the three creditors joined in one action, and to be sued once for all. I think that the Ordinance contemplated this, when at the end of section 17, it declares that "if the consent of any one who ought to be joined as a plaintiff cannot be obtained, he may be made defendant," That section declares that "no action shall be defeated by reason of the * * * non-joinder of parties." I take the meaning of that to be, that when a non-joinder is apparent, in the face of which the court cannot proceed, the court, instead of dismissing the plaintiff's action, should allow plaintiff to add parties. Here plaintiffs make no proposal to add the missing co-share-holder, the vendee of one of their vendors, as a party, and therefore I think that I ought not to interfere on this appeal.

BEFORE *Clarence*, J.

March 25, 1891.

BANDA *v.* PERERA and others.

Accepting Gratification to stay legal proceedings—Ceylon Penal Code, Sects. 102 and 210.

The conviction of an accused, under Sects. 102 and 210 of the Ceylon Penal Code, on a charge of abetting one in the offence of accepting a gratification in consideration of his not proceeding against a person for the purpose of bringing the latter to legal punishment on a charge of a non-compoundable offence is good, although the latter charge has been found by the Magistrate to be completely false.

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v.
PERERA.

The facts of the case sufficiently appear in the Judgment.

Dornhorst for 3rd accused-appellant.

There was no appearence of counsel for complainant-respondent.

Cur. adv. vult.

On March 25, the following judgment was delivered:—

CLARENCE, J.—This is the second appeal in this case. The 3rd defendant now appeals against a conviction on a charge of abetting one Subesaris in the offence of accepting a gratification in consideration of not proceeding against the complainant for the purpose of bringing him to legal punishment on a charge of theft. The Magistrate has found that the charge of theft preferred against the complainant by Subesaris and Jotihamy was completely false. I am of opinion that the circumstance is by no means fatal to the conviction. I conceive the object of this enactment to have been twofold, viz., to prevent genuine prosecutions from being stifled or bought off, and to discourage false prosecutions, undertaken for purposes of extortion or oppression. The offence with which complainant was falsely charged is not among the offences which the Code allows to be compounded, and consequently it would have been an offence under this section to compound it in the manner described by the evidence, even had the charge been true. There is nothing, however, in the evidence to indicate that the Appellant when he, by witnessing to the Promissory Note, assisted Subesaris in compounding this prosecution, had any idea that he was doing anything more than assisting him in compounding a true charge of arecanut stealing on the terms of receiving compensation. In the view which I take of the Ordinance, I think that he was wrong, in the eye of the law, in doing that much; but I cannot view his offence as a heinous one or one for which he should be disgraced by suffering six weeks' rigorous imprisonment. Considering the length of time during which this charge has been hanging over the Appellant's head, I shall impose on him no more than a fine of Rs. 250. and the sentence is altered accordingly.

BEFORE *Dias*, J.

August 11 and 17, 1886.

DE SOYSA *v.* KARAGAN.

[No. 2,383, P. C., KALUTARA.]

Search warrant to search for arrack—Criminal Procedure Code, Sects. 69 and 71.

Under Sect. 69 of the Criminal Procedure Code, whenever any court considers that the production of any document or thing is necessary or desirable for the purposes of any investigation, &c., it may issue a summons for the production of such document or thing, and under Sect. 71, when the Court has reason to believe that a person to whom a summons under Sect. 69 might be addressed is not likely to produce the required document or thing, it may issue a search warrant for the search of the same.—

Held, that under these sections it was competent to a Police Magistrate to issue a search warrant for the search for arrack in the house of a person charged with illicit sale of arrack.

Where an accused charged with obstructing the execution of a warrant was a Tamil man speaking the Sinhalese language, and without asking for a Tamil translation of the warrant, he resisted its execution, the Supreme Court held that the objection that no Tamil copy of the warrant was served on him prior to its attempted execution was bad.

On a charge against the accused of illicit sale of arrack the Police Magistrate issued a search warrant to search the accused's house for arrrack. The accused having obstructed the execution of the warrant, the present prosecution was instituted against him. The Police Magistrate acquitted the accused holding that the search warrant was bad on the face of it. Appeal was taken at the instance of the Attorney-General against the acquittal.

Hay, *C. C.*, in support of the appeal.

There was no appearance of counsel for the accused-respondent.

Cur. adv. vult.

On August 17, the following judgment was delivered:—

DIAS, J.—The accused was charged with voluntarily obstructing the complainant who is a Peace Officer, whilst executing a search warrant directed to him by the Police Magistrate to search the house of the accused for some arrack, and after hearing evidence, the Police Magistrate acquitted the accused, holding that the search warrant was bad on the face of it for the reasons given by the Police Magistrate. He held, first, that the warrant was illegal, inasmuch as it did not on the face of it shew the jurisdiction of the judge who issued it. This, as an abstract question of law, is quite right, but I think the war-

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rant in question is not open to that objection. Now, under section 69 of the Procedure Code, when the court is satisfied that the production of a document or other thing, which latter expression is large enough to include anything, is necessary or desirable for the purpose of the investigation, it is competent to the court to issue a summons to the person in possession of the thing wanted, to produce it, and under section 71, the court has the discretion to issue a search warrant. The Police Magistrate issuing the warrant seems to have acted under this section, and his jurisdiction to issue it is sufficiently shown on the face of the warrant. The first objection is therefore untenable. The second objection is equally bad. The accused is a native Tamil who speaks the Sinhalese language, and though the complainant had not with him a Tamil translation of the warrant, he had a Sinhalese translation. The accused does not seem to have asked to see the warrant. He seems to have been in such a hurry to resist the search that he would not give the complainant an opportunity to produce the warrant.

BEFORE *Burnside*, C. J.

May 23, 1892.

THE QUEEN *v.* SOMANASEKERA and others.

[No. 19 of the 1st Criminal Sessions of the S. C. for the Southern Circuit for 1892, holden at GALLE].

Indictment signed and presented by Advocate specially authorised by the Attorney-General to conduct prosecution—Criminal Procedure Code, Sects. 277 and 280.

An Advocate specially authorised by the Attorney-General, under Sect. 277 of the Criminal Procedure Code, to conduct prosecutions before the Supreme Court may sign and present to the Court the indictments in such prosecutions.

In this case the indictment was in the usual form, but it was signed and presented to the Court by Mr. Drieberg, Advocate of the Supreme Court. Mr. Drieberg had already exhibited to the Court an authority from the Acting Attorney-General, under Sect. 277 of the Criminal Procedure Code, to conduct all prosecutions before the Supreme Court at the sessions mentioned above. The authority was as follows:—

I, Charles Peter Layard, Acting Attorney-General of the Island of Ceylon do hereby specially authorise and empower Mr. Walter Dionysius Drieberg, Advocate, to appear before the Supreme Court during the first Sessions of the Southern Circuit for the year 1892, and to conduct the prosecutions on behalf of the Crown in criminal cases committed for trial at such sessions.

Given under my hand at Colombo, this 7th day of May, 1892.

C. P. LAYARD,
Acting Attorney-General.

Grenier (*de Vos* with him) appeared for the prisoners, and before the pleas were taken, objected to the sufficiency of the indictment on the ground that it was not signed by the Attorney-General, or the Solicitor-General, or any specially authorised Crown Counsel, He argued as follows:—

Sect. 281 of the Criminal Procedure Code provides that the Attorney-General shall embody the charge in an indictment which indictment shall be the foundation of the trial in the Supreme Court, and according to Sect. 3, Sub-Sect. (f) of the Code the "Attorney-General" shall include also the Solicitor-General or any Crown Counsel specially authorised by the Attorney-General to represent him. The indication that a charge has been embodied in an indictment by the Attorney-General is usually his signature at the foot of the indictment. The present indictment is not signed by the Attorney-General or the Solicitor-General or any specially authorised Crown Counsel [The C. J.—It is signed by an Advocate of this Court specially authorised by the Attorney-General to conduct the prosecution] "To conduct the prosecution"—that did not include authority to sign the indictment, and, indeed, the Attorney-General could give no such authority [The C. J.—Presenting the indictment is the first step in a prosecution, and if an Advocate had authority to conduct a prosecution, he had authority to sign and present the necessary indictment] Conducting a prosecution does not extend to initiating a prosecution [The C. J.—I take it that it does] Then, Mr. Drieberg's authority does not appear on the face of the indictment, nor does the indictment shew in what capacity he has signed it. It simply bears the signature, "W. D. Drieberg" [The C.

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J.—That is clearly insufficient, but I shall allow Mr. Drieberg to amend the indictment by adding to his signature the words necessary to indicate his authority. As to the authority produced—*Omnia præsumuntur rite esse acta.* Under it, Mr. Drieberg had a perfect right to present such an indictment as was warranted by the commitment.]

The indictment was amended accordingly by the addition to it, below Mr. Drieberg's signature of the following words:—"Advocate, specially authorised by the Attorney General to prosecute at the first Supreme Court Sessions of the Southern Circuit for the year 1892 on behalf of the Crown." And at the close of the argument, his Lordship held that an Advocate specially authorised by the Attorney-General, under Sect. 277 of the Criminal Procedure Code, to conduct a prosecution before the Supreme Court had power to sign and present the indictment, and over-ruled the objection of counsel for the defence, and allowed the pleas to be taken, and the trial to proceed.

BEFORE *Clarence*, J.

March 10 and 15, 1887.

The QUEEN *v.* KIRIBANDA.

[No. 152, D. C., (Crim.) KANDY.]

Preferring false charge—Ceylon Penal Code, Sect. 208.

Where a Police Magistrate entertains a charge, makes inquiries of both the complainant and the accused, and refers the complainant to a civil action, a prosecution under Sect. 208 of the Ceylon Penal Code for preferring a false charge may still be instituted against the complainant.

Appeal from a conviction under section 208 of the Penal Code for preferring a false charge.

Dornhorst, for accused-appellant.

Hay, C. C., for complainant-respondent.

Cur. adv. vult.

On March 15, the following judgment was delivered:—

CLARENCE, J.—The only point which I find it necessary to notice in deciding this appeal is the objection pressed in both courts, that defendant should have had proper opportunity of establishing his original charge, before being prosecuted for preferring a false charge. In support of that objection reliance

was placed on a case reported, 6 Ind. Law Reports. (Calcutta Series) 497. Apart from the circumstance that this objection seems not to have been raised by defendant when charged before the Police Magistrate, and that, in fact, it was not raised until he had pleaded to the indictment, the objection fails upon its merits. When defendant made his original charge before the Police Magistrate, the Police Magistrate distinctly entertained the charge, made certain inquiries of both defendant and complainant (the latter being the then defendant) and, as the result, referred defendant to his civil action. I do not at all say that the inquiry made by the Police Magistrate was a sufficient one, but he certainly entertained defendant's complaint sufficiently to enable defendant to appeal, if dissatisfied with the order made upon it. Defendant did not appeal, and the falsity of the complaint has been sufficiently established by the evidence at the trial of the present charge.

BEFORE *Clarence* AND *Dias*, J. J.

November 20 and 24, 1891.

The Commisssioners for executing the office of Lord High Admiral of the United Kingdom

v.

VANDERSPAAR.

[No. 1,188, D. C., COLOMBO.]

Discovery of Documents—Civil Procedure Code, Sect. 102.

Under Section 102 of the Civil Procedure Code, "the Court may, at any time during the pendency therein of an action, order any party to the action to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the action"—

Held, that under this section, an order for discovery may issue to the plaintiffs in an action, although they are not able to make the required affidavit personally. The order for discovery in such case should go to the plaintiffs, leaving it to them, in the first instance, to choose the channel through which the discovery should come.

In this case the defendant appealed against an order of the District Judge refusing his application for an order on the plaintiff for discovery of documents under Sect. 102 of the Civil Procedure Code.

Withers (*Dornhorst* with him) for defendant-appellant.

Hay, A. S.-G., for plaintiffs-respondents.

THE COMMISSIONERS FOR EXECUTING THE OFFICE OF LORD HIGH ADMIRAL OF THE UNITED KINGDOM v. VANDERSPAAR.

Cur. adv. vult.

On November 24, the following judgment, in which DIAS, J. concurred, was delivered by

CLARENCE J.—The plaintiffs are the Commissioners executing the office of the High Admiral of the United Kingdom, and they sue the defendant, a merchant and shipping Agent trading in Colombo, on a claim arising out of the shipment of some Naval Stores. The proxy under which the plaint is filed is signed by Lt. Col. Bridgman, as attorney for the plaintiffs. Defendant has answered, and plaintiffs have replied. Meanwhile, a few days before the plaintiffs filed their replication, the defendant made an application for discovery of documents out of which this appeal arises. The defendant's application is in these terms:—"I move for a summons on the plaintiffs to show cause why they should not declare, within seven days of the service thereof, by affidavit of their attorney, Lt. Col. F. H. Bridgman, what shipping documents are or have been within their possession or power relating to the matters in dispute herein or what they know as to the custody they or any of them are in, and whether they object, and, if so, on what grounds, to the production of such as are in their possession or power, and why the costs of, and occasioned by, this application should not be costs in the action." The learned District Judge refused the application considering that as Lt. Col. Bridgman is not the plaintiff, but only the Attorney of the plaintiffs, he had no power to address such an order to him.

Upon the argument of the appeal, Mr. Solicitor sought to support the District Judge's refusal by contending, if I rightly understood his argument, that Section 102 of the Code confers no power to order discovery of documents against a party who cannot make affidavit personally. That is not a contention which we can uphold. There is no substantial difference in this respect between the terms of section 102 of the Code and those of Rule 12 of Order XXXI under the Judicature Act, under which, orders for discovery on oath of documents are constantly made against corporations and other litigants who cannot make affidavits personally. There is no reason why plaintiffs should not be called upon for an affidavit in

discovery of documents, but I think that the order should go to the plaintiffs, leaving it to them in the first instance to choose the channel through which the discovery shall come. No consideration has been pressed on us, arising out of the plaintiffs' delay in making the application. The simple question submitted to us is, whether the Court has power to make an order in this case under section 102. There can be no question but that the Court has this power. The order of the District Judge simply refusing the defendant's application will be set aside, and in lieu thereof the order will go simply directing plaintiffs in terms of section 102 to declare by affidavit what shipping documents are or have been in their possession or power relating to the matter in question in the action. The parties will probably be able to agree upon the time which should be allowed for compliance with the order. I would leave all costs of the application to be costs in the cause.

BEFORE *Burnside*, C. J. AND *Dias*, J.

February 18 and April 10, 1890.

MELIZAN and another *v.* SAVERY and others.

[*The Mannar Church Case.*]

[No. 8,061, D. C., MANNAR.]

Title to and interest in the fabric of a church and its grounds—Ejectment.

No foreign prince, power, state or potentate can, as an act of state, by any instrument, by whatever name it may be called, except by deed duly authenticated as required by law, convey or transmit to any person any right, title or interest in or to land or give to any person any civil rights, except in accordance with the law of the land: nor could any person so appointed assume to exercise any delegated authority, whether spiritual or civil, over others, except with their free consent and subject to the laws which govern the relations, not only between Her Majesty's subjects, but between all persons living under her rule and protection. And, hence, a Papal Bull establishing a hierarchy in the East and dividing the Island of Ceylon into three vicariates and other documents, whereby 1st plaintiff was appointed Bishop of one of the vicariates with ecclesiastical jurisdiction in succession to the ecclesiastical dignitaries of that vicariate, were held insufficient to vest in him any title to or interest in the fabric of a church within such vicariate.

Where defendants were and had been for some time in possession of a church and its grounds, and plaintiffs sought to disturb that possession—*Held*, that they could only do so by superior title, and on the plaintiffs lay the burthen of proving such title.

1st plaintiff, as Bishop of Jaffna and chief local dignitary of the Roman Catholic church exercising spiritual jurisdiction over the Mannar and Mantai Districts, claimed

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to be entitled to appoint priests to the said church, in whom, as he contended, were vested, by such appointment, the fabric of the church and the land on which it stood, and who were entitled to the charge of the church, and to officiate and manage its affairs, subject to his control and to the rights and usages of the Roman Catholic church—*Held*, that the right so set up by 1st plaintiff was an interest in land, and that he was bound to prove title to such interest by the same means and subject to the same law as would apply to any other person.

The facts of the case sufficiently appear in the judgment of BURNSIDE, C. J.

Berwick, (*Weinman* with him) for defendants-appellants.

Wendt, (*Van Langenberg* with him) for plaintiffs-respondents.

Cur. adv. vult.

On April 10, the following judgments were delivered:—

BURNSIDE, C. J.—Our judgments have been delayed, because we desired to give the most careful attention to the body of documents which have been admitted into the case as evidence, but which we find have no bearing whatever on the plain issues raised by the pleadings. The action is by two plaintiffs. The first, Bishop, and the other, a priest, of the Roman Catholic Mission in the Colony. The libel alleges that the 1st plaintiff is Bishop of Jaffna, and the chief local dignitary of the Roman Catholic Church exercising spiritual jurisdiction over the Mannar and Mantai Districts. That within those districts lies the Roman Catholic Church called Koottathu Mathavin Kovil situate at Parappan Kandal within the jurisdiction of the court, and standing on the land which is called Issana Madarpuddy. That, as such dignitary, the 1st plaintiff is entitled to appoint priests to the said Church, and that the fabric of the church and the land on which it stands are vested in the priests so appointed, who are entitled to the charge of the Church and to officiate and manage its affairs, subject to the control of the 1st plaintiff and to the rights and usages of the Roman Catholic Church. That on the 17th February, 1887, the 1st plaintiff appointed 2nd plaintiff to take charge of the said church, and subsequently gave him an assistant. That the 2nd plaintiff went to take charge of the house, but the defendants, five in number, by violence and threats, prevented him, and are unlawfully in the possession of the said church. This is the plaintiffs' cause of action, upon which they pray a declaration by the court, that the 1st plaintiff, as the Bishop of Jaffna, and his successors in office are entitled to appoint priests to the said church in order to perform divine

service according to the rites of the Roman Catholic Religion, and to administer its affairs, and that the 2nd plaintiff, as the parish priest, is entitled to take charge of the said church and to administer its affairs, and they also pray for an injunction, &c. It will be seen at once, and it is noteworthy, that the plaintiffs' libel neither avers nor alleges that the successors of the 1st plaintiff are entitled to appoint priests, &c., and yet the prayer of the libel extends to his successors. And again, there is no allegation that the 1st plaintiff appointed the 2nd plaintiff priest, the allegation being that he appointed him to take charge—a very different thing—and yet the prayer of the libel is that the 2nd plaintiff, as the present parish priest of the church, be declared entitled, &c. There is no prayer for a declaration of title to the fabric of the church and the lands on which it stands, but merely for a declaration that he is entitled to take charge of the church, &c. This libel was clearly bad on demurrer, and had the defendants demurred, the plaintiffs would have been out of court, and I regard the defects in the libel as indicative of the difficulties which presented themselves to the pleader when he came to shape the plaintiffs claims in a legal form.

The defendants however answered on the merits. They admitted that the 1st plaintiff is Bishop of Jaffna, but whilst also admitting that the Roman Catholic church in question is within the district of Mannar and Mantai, they specially deny that the 1st plaintiff has any jurisdiction whatever over it, or that he is entitled to it, or that the fabric of the said church and the land on which it stands are vested in the priests appointed by the 1st plaintiff, or that such priests are entitled to the charge of the said church and its offerings, or entitled to its management. They claim to have been in possession of the church when the 2nd plaintiff came to take possession, and they say they refused him possession, and they retain possession as they lawfully might. The burthen of all these issues was clearly upon the plaintiffs, and they are simple enough. The District Judge has given judgment in favour of the plaintiffs' claim, and the defendants appeal. The defendants, besides their concrete pleading in denial of the plaintiffs' cause of action, have pleaded specially certain facts which however amount to no more than evidence of the issues which the defendants had already raised. They say that

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the church and the inhabitants of the district have been from time immemorial under the jurisdiction of the Archbishop of Goa, and the services of the church were performed by priests appointed by that prelate. That in 1887 the jurisdiction of Goa was withdrawn, and that they, the defendants, have since been in possession of the church; and they placed themselves under the jurisdiction of the Patriarch of Antioch. To which the plaintiffs reply; and deny that the defendants or any other catholics who do not derive their authority from the Pope had any right to the possession or management of the church, and that when the jurisdiction of Goa was withdrawn, the church and its appurtenances vested in the 1st plaintiff who had the right to take possession of it.

Happily for us, we are not called on to give any judgment or express any opinion on the conflict of ecclesiastical authority between Goa and Rome, which for some time disturbed the Union Catholic Church in the Island. The issues which the pleadings raised, when divested of what I may call their ecclesiastical surroundings, are simple enough, and free from legal difficulty. It is admitted that the defendants are, and for some years have been, in possession of the Church and grounds. The plaintiffs seek to disturb that possession, and they can only do so by superior title, and on them rests the burthen of proving such title. The right which the 1st Plaintiff sets up to be entitled to appoint priests to the church, on whom by such appointment the church and its fabric vest, is an interest in land, and he must prove title to such interest by the same means and subject to the same law as would apply to any other person. How has the plaintiff endeavoured to prove this? The Bull of the Pope in 1886 establishing a Hierarchy in the East, and dividing the Island of Ceylon into three vicariates together with a number of other documents were put in to establish that the 1st plaintiff had been appointed Bishop of, and that ecclesiastical jurisdiction had been fully conferred on him in succession to, the ecclesiastical dignitaries of the Northern vicariate, in which it is admitted this church is situate. It is perfectly clear that these documents have no probative effect whatever, and having been objected to, should have been rejected by

the District Judge. They are not duly authenticated to be admitted to proof; and if they were, they do not affect the issues. It would seem unnecessary to say that no foreign prince, power, state or potentate can, as an act of state, by any instrument, by whatever name it may be called, except by deed duly authenticated as required by law, convey or transmit to any person any right title or interest in land, or give to any person whatever any civil rights, except in accordance with the law of the land, nor could any person so appointed assume to exercise any delegated authority over others, whether spiritual or civil, except with free consent, and subject to the laws which govern the relations, not only between her Majesty's subjects, but between all persons living under the rule and protection of our most gracious sovereign. The Right Reverend Prelate who enjoys the title of, and who is admitted by the defendants to be, Bishop of Jaffna has not attempted to prove that by any deed, duly authenticated, the right which he claims has been created. In his evidence he says—"No foundation stone can be laid for a new church without the permission of the Pope. The site must be approved by the Bishop, and the title-deeds of the land must be in the name of the Bishop." The Right Reverend Bishop has clearly stated the means by which title to the land and to the church must only be vested, and there is no vestige of such a title in this case. Nor has a title been created by prescription. The 1st plaintiff never had any predecessor-Bishop of Jaffna, and even assuming that title by prescription to what the Bishop claims had been enjoyed by the chief ecclesiastical dignitary of Jaffna, the 1st plaintiff can by no means be said to be his legal successor for the purposes of inheritance. The rights which the plaintiffs admit had been enjoyed by the ecclesiastical dignitaries and priests of Goa could not be transmitted by the Pope to the 1st plaintiff, so as to affect the civil rights of others, except with their consent. And it is admitted that the defendants, since the withdrawal of Goanese jurisdiction, have retained adverse possession of the church. The 1st plaintiff claims by reason of a direct appointment by the Pope. No appointment by the Pope could confer a right of inheritance to land, unless such land had been legally subjected to such a power, nor could the

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appointment itself have effect, except it operated as a deed duly executed as I have before pointed out. I must correct the learned D. J. who decided this case in the court below by pointing out, that in holding that this church could only be lawfully used for religious worship in accordance with the rites of the Roman Catholic Church, he has attempted to decide an issue not submitted to him, and which does not affect the real issue, "in whom the fabric of the Church vests, and by whom should it be controlled;" and the "laws and usages of the Roman Catholic Church," according to which he has decided that the first Plaintiff as Bishop is the only person who can appoint priests to perform service in the Church, are not sufficient to create a title to real property, and can only be recognised as of consensual authority over those who agree to be bound by them, and the defendants are certainly not such persons. Our attention has been called to a case—D. C. Mannar 6817—in which this court in 1875 held that the vicars apostolic of the Northern Vicariate are entitled to appoint the officiating priest in the Madu Church. We do not know what evidence of such right was before the Court, and we are therefore not concerned with the case, except in saying that the principal plea was that by law and usage (whatever that may mean) the legal title to the church and the sole right to administer its affairs are vested in the vicar apostolic, and the court held that "it had not been proved that by any law or usage having the force of law or even under the customs and discipline of the Roman Catholic Church in the Island, the churches became vested in the Vicar-General as proprietor," and although my Lords had stated that it had not been proved, my Lords went further, and said they should require much stronger evidence before they could acquiesce in such a proposition. We might add that it seems to us that the solemnity of proof to establish an interest in land, such as the power to vest the fabric of a church in a priest on appointment, could be no less than that required to establish title to the land itself. The present case differs materially from those in which the title to the church not being in dispute, this court has held that the beneficiary user of it might be vested in a particular class of persons being a religious body or otherwise

by prescription or consent. In this case the continued and unremitting use by individuals representing the class until disturbed gave a title by prescription to those in the actual enjoyment to have the right continued and protected. In this case title is claimed to the land itself, and there is no evidence that it accrued by conveyance, by inheritance, or by prescription; and the burden was on the plaintiffs, whose action must be dismissed with costs.

DIAS J.—The defect in the plaintiffs' case is that they have no good title to what they claim. The prayer of the libel is "that the 1st plaintiff, as the Bishop of Jaffna, and his successors in office may be declared to be entitled to appoint priests to the church in order to perform divine service, and that the 2nd plaintiff by virtue of such appointment by the 1st be declared entitled to take charge of the church," &c. It is quite plain that the right set up by both the plaintiffs is a real right which can only be acquired according to the law of the land. The Plaintiffs rely on an authority from the Pope, and whatever may be the spiritual authority of the Pope over those who profess the Roman Catholic Faith, and who consent to be subject to the Pope's jurisdiction, the Pope clearly has no jurisdiction to create binding obligations affecting immovable property in the Colony. As the case has been so clearly stated by the learned Chief Justice, I do not think it necessary to add anything else to what I have already stated. The judgment must be set aside, and the plaintiffs' Libel dismissed with costs in both courts.

BEFORE *Burnside*, C. J. AND *Clarence*, J.

January 29 and February 5, 1891.

ROWEL and others *v.* FERNANDO.

[No. 24,485, D. C., Chilaw.]

Estoppel—Judgment in ejectment against husband, how far binding on wife's heirs—Right of surviving husband to alienate or encumber property of deceased spouse.

A Libel in an action against five defendants averred that the plaintiffs had bought a certain land from the first four defendants, and had been in possession, and that the vendor-defendants in collusion with the fifth defendant took unlawful possession of a portion of the land, and retained possession of it;

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and it prayed for a declaration of title in the plaintiffs' favour and for a judgment in ejectment against the defendants generally. The fifth defendant (married in community of property) appeared to the action before his wife's death, and was barred from answering after her death; and a decree passed in favour of one of the plaintiffs "for the land as claimed in the Libel."

Held, that the Libel disclosed no right in the plaintiffs to eject the fifth defendant, or even for a declaration of title as against him; and that the judgment entered up against the fifth defendant did not estop the heirs of his wife from setting up title to the land.

Per Clarence, J.—Under the Roman Dutch Law, the surviving husband, when there has been no administration, has a right to alienate or encumber the share of his deceased spouse, only so far as a necessity of paying debts renders it beneficial to the heirs of the deceased spouse that that should be done.

Two plaintiffs whose interests afterwards became united in the defendant in the present case brought action No. 22,052 of the District Court of Chilaw against five defendants, of whom one Lowe was the fifth. The libel averred that the plaintiffs had bought a certain land from the first four defendants, and had been in possession of it; and, for a cause of action, "that the first four defendants in collusion with the fifth defendant, well knowing the premises, did in or about the month of April, 1886, take unlawful possession of a portion thereof of the value of about £70, and retains possession thereof"; and it prayed for a declaration of title in the plaintiffs' favour and for a judgment in ejectment against the defendants generally. Lowe who had been married in community of property appeared to the action before his wife's death, and he was barred from answering after her death; and a decree was ultimately passed in favour of the present defendant "for the land as claimed in the Libel with costs." In execution of the decree the present defendant was put by the Fiscal in possession of the whole land; and the heirs of Lowe's wife who had died in 1878 instituted the present action claiming one-half of the land through the deceased. The District Judge upheld their claim. and the defendant appealed.

Berwick, (*Grenier* with him) for defendant-appellant.

Dharmaratne, (*Canakeratne* with him) for plaintiffs-respondents.

Cur. adv. vult.

On February 5, the following judgments were delivered.:—

BURNSIDE, C. J.—I have read the judgment of my brother Clarence, and entirely agree with him. I would only say that no reasonable doubt can exist that the judgment in District

Court Chilaw, 22,052, could never have been pleaded as *res judicata* against Lowe himself as to the title of the land; because so far as the title went, there was no issue raised between the plaintiffs and Lowe upon it.

It is not alleged that Lowe claimed title. It is only averred that the first four defendants in collusion with Lowe took possession of the land, and, although the prayer is that the defendants be ejected, &c., yet that prayer is manifestly not applicable to Lowe, because it is nowhere alleged that Lowe was in possession of the land. Upon every principle, therefore, of the law of estoppel, Lowe would not be bound by a judgment obtained in proceedings in which no question of title as against him was raised. It is true that Lowe might have come in, and questioned the plaintiffs' title so as to contest the allegation of collusion, whatever that may have meant, but he clearly was not bound to answer the allegation which rendered him liable to nothing even if judgment did, as it seems to have done, pass against him. The judgment of ejectment and of quiet possession which passed was a judgment affecting only the possession which plaintiffs alleged had been taken adversely to them, and that was by the 1st, 2nd, 3rd and 4th defendants; and even assuming Lowe to have been in possession himself, the possession would not and could not have been disturbed by the judgment. Thus, it is idle to contend that Lowe's wife's children were estopped. It is unnecessary that I should express any opinion upon the general law of estoppel as between husband and wife, as pressed upon us at the bar, beyond saying that my brother Clarence has satisfactorily disposed of it.

On the question of title and possession to maintain the plaintiffs' suit in ejectment, I formed a strong opinion during the argument. The burden of proof was on the plaintiffs, and they have signally failed to establish the one or the other.

The defendant must therefore have judgment with costs.

CLARENCE, J.—This is an action to recover as against the defendant possession of a half share of a piece of land rather more than 20 acres in extent. The parties assign different names to this land, but it appears that the land which the defendant styles Daminagahawatte is identical with the land which plaintiffs

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claim under certain other names. The action was instituted in December, 1883, and the plaintiffs complain of an ouster by defendant in September 1881. The act of which plaintiffs complain as an ouster was, that defendant was put in possession of the land by the Fiscal under writ of possession in execution of a judgment obtained by the defendant in District Court case No. 22,052 Chilaw, against one Robert Lowe. Plaintiffs claim to represent Juliana, wife of Lowe, which Juliana admittedly died in 1878. They admit the defendant's right to one half under his judgment against Lowe, and claim the other half as heirs of Juliana, who died during the pendency of the action 22,052. The parties to the present action do not seem to have been anxious to bring it to a termination. Answer was filed in April 1884, and replication in June, 1884. The case was then entered on the trial roll as for hearing in February, 1885. It did not, however, come to a trial until September, 1888.

Upon the pleadings and the evidence, the first question on which the case turns is—whether the judgment entered against Lowe in the action No. 22,052 D. C. Chilaw, is *res judicata* estopping plaintiffs from showing title to this land. If that question be determined in plaintiffs' favor, and we are so left at liberty to deal, on its merits, with the plaintiffs' evidence as to title, we shall have to consider the value of the plaintiffs' evidence. Plaintiffs, besides putting in evidence certain title deeds, did call some witnesses, whilst defendant contented himself with simply putting title deeds in evidence, without calling any witnesses to prove possession under those deeds.

The action No. 22,052, D. C. Chilaw, was originally brought by two plaintiffs, whose interests afterwards became united in the present defendant, against five defendants, of whom Lowe was the 5th. The libel averred that the plaintiffs were the owners of the land by virtue of a conveyance or sale from the 1st four defendants bearing date February 24th, 1857, and the cause of action was averred in these terms:—"That the first four defendants in collusion with the fifth defendant, well knowing the premises, did in or about the month of April, 1886, take unlawful possession of a portion thereof of the value of about £ 70, and retains possession thereof." And the libel prayed for a declaration of title in plaintiffs' favor and a judgment in ejectment against the defendants

generally. The action was brought in February, 1869, but it seems not to have come to a hearing until 1880. The first four defendants admitted selling to the plaintiffs, but appear to have set up a defence founded on an averment that their purchase money was not fully paid. The 5th defendant, Lowe, was for a long time in default of answering, and was at last barred from answering. The District Court of Chilaw, however, allowed him to appear at the hearing, and finally dismissed the plaintiffs' action with costs. In appeal, that judgment was set aside, and an order was made in appeal in March, 1881, allowing Lowe 14 days time to answer, reckoning from the receipt of the record in the District Court. In default of Lowe answering and paying the plaintiffs' costs within such 14 days, it was directed "that a decree be passed for 2nd plaintiff (the present defendant) for the land claimed in the libel, with costs."

On the 27th May, 1881, Lowe appears to have paid the costs, and applied for leave to file an answer, and the District Court allowed his answer to be filed, but in appeal a judge of this court set aside that order, and, observing that Lowe was out of the time allowed him by the previous order of this court, made an order allowing the application of the 2nd plaintiff (the present defendant) for judgment for the land. It was in execution of the judgment so entered up that the defendant was put in possession by the Fiscal in September, 1881. Had that case come before ourselves, we should probably have hesitated to allow a judgment declaring Plaintiff entitled to this land to be entered against Lowe upon such a libel. The judgment, however, was entered in the present defendant's favor for the land against Lowe, and the question which we now have to consider is, whether that judgment estops the present plaintiffs, they claiming under Lowe's wife, Juliana, who had died in 1878.

The substantial defence which Lowe decided to set up when, after protracted indifference, he showed some desire to make a defence, was a denial of the title of the vendors under whom the present defendant claimed, and an assertion of title in himself. It would appear that both Lowe and the present defendant asserted title derived from members of the same family, and Sir Richard Cayley, Kt., C. J., in stating the

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reasons of the Court for its judgment of March, 1881, observed that Lowe "appeared to have some kind of right."

Then, are the Plaintiffs estopped by the judgment against Lowe from now asserting title to a half of whatever Lowe may originally have owned. For defendant it has been broadly contended that, inasmuch as the action against Lowe was begun in Juliana's life time, the judgment obtained against Lowe after her death is binding on the heirs of Juliana *quoad* the half of the property which, but for the judgment, would have come to them on Juliana's death. In support of this contention we were referred to Voet, XXIV, 3, and counsel also sought to strengthen the contention by reference to the incidents of partnership. I do not think we can derive any assistance, certainly not in favor of defendant's contention, from any analogy to the law of partnership. It is, of course, an elementary principle of law, that after the death of a partner the surving partners are the parties to sue and to be sued in respect of all contracts made before his death. But with regard to partnership the maxim, *jus accrescendi inter mercatores locum non habet*, has no application to real property, and Buckly *v.* Barber, 6. Ex. 182, is authority against unlimited power on the part of surviving partners to sell and make good title to the share in partnership property of a deceased partner's executors, if the partners happened to be tenants in common of the property. The chapter in Voet to which we were referred was considered by Sir E. Creasy in Ederamanasingham's case Vand. 264. I do not think that what is said in Voet concerning a continuation of the *societas* of the shares of the spouses after a wife's death goes the length to which defendant's counsel has contended. The surviving husband, when there has been no administration, had a right to alienate or encumber the share of his deceased spouse only so far as a necessity of paying debts might render it beneficial to the heirs of the deceased spouse that that should be done. And in section 30, Voet expressly says,—"*non tamen continuatur cum liberis hac societas si ipsis damnosa sit cum potissimum favore liberorum videatur recepta.*" The safest course will be to consider the particular circumstances of the litigation to which Lowe was a party. Lowe appeared to the action before his wife's death, and after her death he

was barred from answering. What were the averments in the Libel as affecting him? The Libel averred that plaintiffs had bought the land from the other defendants, and had been in possession, and that the vendors "in collusion with" Lowe had turned them out, and were keeping them out: and the Libel prayed ejectment and a declaration of title. It may be difficult to conjecture what may have been intended by this phrase as to "collusion" on the part of Lowe. But, at most, the Libel charged Lowe with conspiring with the other defendants that the other defendants should commit a tort, and clearly an action against Lowe for that would not have survived as against his representatives had he died *pendente lite*. The Libel disclosed no right to eject Lowe from the land, since it did not aver that he was in possession, nor did it aver, so far as I can understand it, anything as done or contended by Lowe which warranted a declaration of title as against Lowe. If so, then it follows that inasmuch as the action, so far as Lowe was concerned, was one which at most could have supported a verdict for damages, no judgment entered up against Lowe in such an action can estop the heirs of Lowe's wife, she dying *pendente lite*, from setting up title to the land. Different considerations might have applied had the action avowedly been framed so as to attack Lowe's title to the land by an averment of a stronger title in the Plaintiffs. As the action was framed, however, it was no proper foundation for a declaration of title as against Lowe, and although Lowe by his own supineness allowed the plaintiffs to obtain one, that is no reason why the declaration so obtained should bind his wife's heirs.

Plaintiffs then being at liberty to prove their title, if they can, it remains to be seen whether they have done it. If they are to succeed, it must be by the strength of their own title. They have put a quantity of title deeds in evidence, but they have to go further, and prove that those through whom they claim had possession. They have certainly adduced Lowe's evidence directed to that end, but not enough. Rowel, the 1st plaintiff whom the District Judge seems to consider a trustworthy witness, says that, before defendant was put in possession, he and his co-heirs and Lowe were in possession, but for how long he does not say. The other witnesses called scarcely

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carry the case further. The second witness was one of the vendors to defendant. This witness spoke of Lowe (*alias* Raiman Appuhamy) "taking possession." According to this witness, he and some others purported to sell part to defendant, and "other heirs" sold the remainder to Lowe. According to this witness and other witnesses who follow him, the land was owned by a number of co-sharers, who seem to have split up into two camps, each of which purported to make a sale, the one party to defendant, and the other to Lowe. But there is absolutely nothing whatever in all this from which can be gathered anything definite as to what the vendor to Lowe had the right to convey, and what the vendors to defendant. Therefore, although the defendant has adduced no evidence as to his vendor's possession, plaintiffs, inasmuch as they have to succeed, if at all, by the strength of their own title, are entitled to no judgment, because they have utterly failed to shew what their vendors had a right to convey.

Under these circumstances judgment must be entered for defendant. Defendant has been in possession since 1881, and was in possession to 7 years before action brought.

Defendant must have his costs in both courts.

Set aside.

BEFORE *Lawrie*, J.

March 25 and April 1, 1885.

HAMIAPPU *v.* BABAPPU and another.

[No. 155, P. C., KALUTARA.]

Criminal Procedure—Evidence.

No consent on the part of an accused in a case or his proctor can make depositions of witnesses taken in another case legal evidence in the former.

The facts appear sufficiently in the judgment.

Seneviratne, for accused-appellant.

Cur. adv. vult.

On April 1, the following judgment was delivered :—

LAWRIE, J.—The Police Magistrate, after hearing and recording evidence for the complainant, on the motion of the proctor for the accused, and with the consent of the accused and of the proctor for the complainant, read the evidence recorded in another Police Court case, and treated it as the evidence for the

accused in this case, and thereafter convicted the accused. The accused has appealed, on the ground that the verdict is contrary to evidence.

I am of opinion that the conviction is founded on evidence, which was not regularly before the Court. No consent on the part of an accused, or his proctor, can make depositions of witnesses taken in another case legal evidence in a criminal prosecution.

BEFORE *Clarence*, A. C. J.

January 29, 1891.

SINNAPPU *v.* PUNCHAPPU.

[No. 58,250, C. R. COLOMBO.]

Order for costs—Amendment of decree.

Where a Commissioner has entered a decree omitting an order as to costs, he may subsequently amend it by adding such order. But such amendment should not be made on an *ex parte* application.

The facts sufficiently appear in the judgment.

Browne, for plaintiff-appellant.

CLARENCE, A. C. J.—In this case defendant filed answer objecting *inter alia* to the jurisdiction and averring that the subject matter of suit is beyond the jurisdiction of the Court of Requests. At the hearing the plaintiff admitted that to be the case, and consequently the plaintiff's action was dismissed. No order was made, however, as to costs, although under such circumstances as these the defendant party would have some reason for contending that he should receive the costs of successfully resisting the plaintiff's suit. Why no order was made as to costs I do not know. About four weeks after, the defendant's proctor moved *ex parte* for costs. There the defendant was wrong, He should not have moved *ex parte*. The Commissioner, however, upon that motion amended his judgment by allowing the defendant his costs. The plaintiff afterwards moved for a rule *nisi* on the defendant and, strange to say, on the defendant's proctor, to shew cause why that order as to costs should not be set aside, This was refused and the plaintiff now appeals from that refusal. The defendant no doubt, was wrong in moving *ex parte* his application to the Court of Requests to amend its decree in the matter of costs. The application should have been made *inter partes*. Whether

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the plaintiff will gain anything by having the matter discussed *inter partes* may be more than doubtful. I shall however make this order. I quash all the orders made since the judgment, and send the case back to the Court of Requests in order that the parties may there contest the question whether any order as to costs should be made in the decree. I make advisedly no order as to costs in either Court.

BEFORE *Dias*, J.

May 19th and June 9, 1892.

DEUTROM *v.* FERNANDO.

[No. 18,400, P. C., COLOMBO.]

Ordinance No. 5 of 1889, Sec. 1, Sub-Sec. 3—Letting house to be used as a brothel.

Accused leased a house which subsequently to the date of the lease was converted into a brothel. *Held*, that he could not be convicted under Sub-Sect. 3. Sect. 1 of Ordinance No. 5 of 1889, unless he knew at the date of the lease that the house was intended to be used as a brothel.

The facts sufficiently appear in the judgment.

Dornhorst for accused-appellant.

There was no appearance of Counsel for complainant-respondent.

Cur. adv. vult.

On June 9. the following judgment was delivered:—

DIAS, J.—This is a charge under section 1, sub-Section 3 of Ordinance 5 of 1889. The defendant appears to be the owner of the premises, and he seems to have leased it to a third party on the 23rd April 1891. The lease, or a copy of it, was in court, having been proved by one of the attesting witnesses. If at the date of the lease the house was used for honest purposes, but it was subsequently converted into a brothel, the defendant cannot be convicted, as during the pendency of the lease, he had no control over the property. But if at the date of the lease he knew that the house was used as a brothel, or was intended to be used as such, he would be liable under the Ordinance.

The lease is a binding contract, and the lessor has no control over the property leased, till the termination of the lease,

but before deciding the case I should like to see the lease. Call for it.

[His Lordship having seen the lease continued as follows:—]

I have seen the lease since. It is for a term of two years from 1st May, 1891, and is good till 1st May, 1893 the verdict is set aside, and the accused is acquitted.

BEFORE *Clarence*, J.

May, 21 and June 4, 1891.

FERNANDO *v.* PUNCHA and another.

[No. 425, C. R., KANDY.]

Prescription—Goods sold and delivered—Account stated.

Plaintiff claimed for goods sold and delivered and on an account stated. The defendant raised the plea of prescription; the claim for goods sold and delivered was clearly prescribed. *Held*, following the law as laid down in Ashley *v.* James, 11, M. & W., 542 and Clarke *v.* Alexander, 12, L. J. Ch., 133, that such evidence as would not have availed to take the original debt out of the prescription ordinance could not be accepted as evidence on the claim on account stated.

The facts sufficiently appear in the judgment.

Dornhorst for plaintiff-appellant.

Wendt for defendant-respondent.

On June 4, the following judgment was delivered:—

CLARANCE, J.—This appeal fails. The plaintiff claims for goods sold and delivered and on an account stated, and defendants raise the defence of prescription. The claim for goods sold would be barred in one year and that on account stated in three years. According to the evidence the last dealing for goods was in August 1889. This action was not brought till January 1891. A payment on account would take the claim for goods sold out of the ordinance, but the last payment was in September 1889, more than a year before action brought. Then, with regard to the claim on account stated, I follow the law as laid down in Ashley *v.* James 11. M. and W., 542 and Clarke *v.* Alexander 12 L. J. Ch., 133, and cannot accept as evidence for the claim on account stated such evidence as would not have availed to take the original debt out of the ordinance. See the cases reported 5. S. C. C., 169 and 8. S. C. C., 99.

BEFORE *Dias*, J.

May 19 and June 9, 1892.

SILVA *v.* SILVA.

[No. 559 C. R., PANADURE.]

Civil Procedure Code, Sect., 247—Action to set aside order or claim to property seized in execution.

Under Sect. 247 of the Civil Procedure Code, "the party against whom an order under Section 244, 245 and 246 is passed may institute an action within fourteen days from the date of such order to establish the right which he claims to the property in dispute, or to have the said property declared liable to be sold in execution of the decree in his favour, and, subject to the result of such action, if any, the order shall be conclusive.

Held, that the judgment debtor on a writ comes within the expression, "the party against whom an order under section 244, 245, or 246 is passed," as used in section 247.

The facts sufficiently appear in the judgment.

Dornhorst for plaintiff-appellant.

Wendt for defendant-respondent.

Cur adv. vult.

On June 9, the following judgment was delivered:—

DIAS, J.—The case involves a point of law of great importance. Plaintiff being the judgment-debtor on a writ of execution, surrendered the land in dispute to the Fiscal for sale, when the defendant claimed it. The claim was reported to the court, when a summary investigation took place under section 241 of the Civil Procedure Code, and the District Judge upheld the claim on the 27th of November 1891.

Under sections 244 and 245, all that the judge need ascertain is, who was in possession at the time of seizure. If the debtor was not in possession absolutely, the property will be released; but if on the other hand, the debtor was in possession, the claim will be disallowed. In either case the party aggrieved may institute an action in the usual form within 14 days; if not, the finding of the District Judge is conclusive. The question turns upon the words "party aggrieved" &c., in section 247, whether they take in the judgment-debtor, as well as the judgment-creditor and the claimant. If the judgment-debtor is included, he is bound by the 14 days rule, and cannot, after the expiration of that time, try the title to the property by action. The execution debtor and creditor, are parties to the action, and section 241 puts the claimant in the same position

as regards the investigation of the claim, and that section and the subsequent sections, deal with the three parties as parties to the suit; either of whom can institute an action within 14 days; and execution debtor, the plaintiff in this case, having instituted this action within the prescribed time, he is, in my opinion, entitled to maintain it.

The judgment is set aside, and the case sent back for trial on the merits.

The appellant entitled to the costs of this appeal: all other costs to be costs in the cause.

BEFORE *Clarence*, A. C. J. *Dias* AND *Laurie*, J. J.

September 28 and October 5, 1885.

APPUHAMI and another *v.* RAMMENIKA.

[No. 5,954, D. C., KEGALLA.]

Kandyan Law.—Unregistered Marriage before Ordinance of 1859.—Repudiation.—Registered Marriage after Ordinance of 1870.—Effect of Repudiation and subsequent Marriage.—Issue of which Marriage entitled to preference.

K., a Kandyan married M. a Kandyan according to Kandyan custom before the Ordinance of 1859 was passed. The marriage was not registered. K. repudiated M. and married the defendant after the passing of Ordinance No. 3 of 1870. This marriage was registered. The plaintiffs as the grand children of K. by his daughter D. begotten of M. claimed his estate; the defendant contested their right, and set up a title in herself as the lawful widow of K.

Held, that the union of K. with M. was a lawful one under the Ordinance of 1859 and 1870, and though K. repudiated M. such repudiation not having been effected under any of these enactments, did not amount to a valid dissolution of marriage; that the marriage of K. with the defendant though registered was invalid under the circumstances, and that the plaintiffs as the issue of the first union were entitled to Ks,' estate in preference to the Defendant.

The following judgment of the District Judge (*C. Vigors*) set, out the facts of the case:—

Punchirala Kapurala a resident in Ganegama married in May 1883, a woman of Ellangapitiya, a stranger from a distant Village. The marriage was duly registered and there was issue a posthumous child born in 1885. Punchirala Kapurala died in 1884 and the widow Rammenika took letters of administration. She claims the estate on behalf of the minor, as the only lawful wife of the deceased. It appears, however,

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that many years ago Punchirala Kapurala cohabited with a woman named Menikhami who remained in his house for many years and bore two children of whom only one arrived at maturity. The child, Dingiri Menika, was married to a man named, Punchirala, by whom she had several children, of whom, two, the present plaintiffs, survive. At the time of Punchirala's death there were left surviving of those immediately interested, the woman, Menikhami, her two grand children (her daughter Dingiri Menika being dead) and the registered widow, who subsequently bore a child. Menikhami applied for letters of administration, was opposed by the "registered" widow Ram Menika successfully, and then instituted this case for her widow's life interest, jointly with her grand children. She died soon after, and the case has been carried on by her son-in-law, father of the two minors.

The questions which the Court is asked to decide were therefore: (1) was Menikhami lawfully married to Punchirala Kapurala? (2) was Dingiri Menika issue of that marriage? (3) If so are the latter's children entitled to the estate in preference to the child of the wife whose marriage was registered?

There can be no doubt that there was a very long cohabitation between Punchirala Kapurala and Menikhami and the surrounding circumstances are all in favour of that cohabitation having commenced with the ceremonies which constitute a Kandyan marriage. Both Manikhami and Dingiri Menika appear to have been acknowledged by the deceased as his wife and child, and the Aracci's evidence points clearly to this. His evidence is to the effect that in spite of much ill-feeling on the part of the deceased towards the daughter, he never was known to use an expresion which pointed to the woman Dingiri Menika not being his lawful offspring. My opinion on this point is that Manikhami was married according to Kandyan custom, and if so her marriage is legal under the Ordinances of 1854 and 1870. It was admitted by her that she was subsequently repudiated and it is urged that this would justify the 2nd marriage; but as this repudiation can hardly have been anterior to 1870, it could only have been effected under one or other of the Ordinances to be valid as a dissolution of marriage.

The marriage of the daughter of Dingiri Menika is practically admitted and that the two plaintiffs are her children. It would appear to have taken place between 1860 and 1870, as the eldest surviving child is about 12 and there were two or three before. If the opinion I have expressed be correct, and it is but an opinion, though based upon strong grounds, the marriage to Rammenika though registered is absolutely invalid and as Menikhami's marriage, rendered a legal one by enactments, was never dissolved as required by those enactments, the relation between the deceased and Rammenika was one of simple cohabitation. This is a most regrettable position for the latter as she loses her rights as a widow and her child becomes illegitimate. There is no doubt that Punchirala Kapurala wished to secure her position; and his not having done so was due to his ignorance; none the less I am of opinion that he secured her nothing, having a lawful wife alive at the time he registered his marriage with Rammenika. It is a serious matter to overthrow a marriage clearly proved by a decision which may be based on wrong grounds, but I have done so after careful consideration.

I hold that Manikhami was the lawful wife of Punchirala Kapurale; that her marriage was never dissolved lawfully; that Dingiri Menika was their offspring.

The plaintiffs are therefore entitled to succeed in this action against the defendants and they will have judgment declaring them the lawful heirs of the estate.

Browne (*Dornhorst* with him) for defendant-appellant.

Sampayo for plaintiffs-respondents.

The judgment of the Court below was affirmed by the following judgments, which were delivered on October 5th 1885.

CLARENCE, A. C. J.,—There is evidence that Punchirala Kapurala was married to Manikhami according to Kandyan custom before the Ordinance of 1889 was passed. It is true that some of the witnesses called by plaintiffs to prove that fact deny Menikhami's subsequent repudiation by the Kapurala, a fact which admits of no doubt, but upon consideration of the whole materials I see no sufficient reason to dissent from the District Judge's finding that Manikhami was married to the Kapurala. It is clear, however, that in later years

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the Kapurala repudiated Manikhamy and cohabited with the defendant. He purported to register a marriage with her and she lived with him as his wife until his death. It has been contended that the 24th section of Ordinance 3 of 1870 renders this a legal union. On this point also I think the District Judge's finding is right. Without going any further, it is sufficient to say that the union between the Kapurala and the defendant was not registered till long after the passing of that Ordinance.

It thus becomes unnecessary to consider any question, whether the repudiation by the Kapurala of the plaintiff's grandmother and a subsequent legal marriage by him to the defendant would have had the effect of entirely preventing the plaintiffs from sharing in an inheritance *ab intestato*.

In my opinion the decree appealed from should be affirmed.

DIAS, J.—I am of the same opinion.

LAWRIE, J.—In my opinion the judgment under review should be affirmed for the reasons given by the District Judge.

BEFORE *Burnside* C. J. AND *Dias* J.

March 1 and 8, 1892.

MEERA LEBBE and Another *v.* IBRAHIM LEBBE & others.

[No. 21,874, D. C., KURUNEGALA.]

Action in ejectment—Prescription—Co-owners—Adverse Possession.

Plaintiffs as owners of a divided and defined portion of a land sued in ejectment, pleading title under a deed and by prescription. It appeared on the face of the deed that the plaintiffs were entitled only to an undivided portion in common with others. *Held* that plaintiffs were thereupon out of Court, and that even if title by prescription were correctly pleaded, it could apply to no other estate than that given the plaintiff by the deed.

The facts of the case sufficiently appear in the judgments quoted below:—

Dornhorst for plaintiffs-appellants.

Ramanathan for defendants-respondents.

On March 8, the following judgments were delivered:—

BURNSIDE, C. J.—The Plaintiffs sue in ejectment. They claim a declaration of title to and to be returned to the possession of land of which they allege themselves to be the joint owners by

title and possession, from the vendors to them.

There are no less than four defendants. We may at once dismiss the 2nd as the convenient defendant who, in actions like this, is usually introduced in order that he may admit the title sued on, or deny that he ever disturbed it, and then the plaintiff may either take judgment against him, or let him slip out of the suit altogether, whichever will seem to work mostly for the plaintiff's benefit.

The 1st defendant is in default of answer, and is out of court, unless he has been admitted to defend on proper pleadings. The 3rd and 4th are the contesting defendants, and by their very first answer they put the plaintiffs to the proof of this title *i. e.* a joint title to a divided and defined piece of land.

The defendants have also in the same answer, as a matter of law, denied the plaintiffs' right to sue alone, as they were not the sole owners of a divided land; and thus, on the very threshold of the case, the crucial issues of law and of fact were raised, as to the plaintiffs' title upon which they could found the relief prayed for.

The decision of these issues was without difficulty. The plaintiffs' title, as they themselves alleged, was derived from the deed which they pleaded, and within the four corners of that deed it is apparent that the plaintiffs have no sole title to any divided land, but only a title to shares or interest in an undivided land in common with other owners. The Plaintiffs were thereupon out of court, and it was not possible to grant them the relief prayed for, and there was no necessity in fact to move one step further in the action. But instead of thus simply disposing of the action on the title pleaded by the defendant, the District Judge goes on to settle an issue which the plaintiffs have not raised; and even, if raised, the facts alleged in their pleadings at once negative, prescription. If by the 6th paragraph of the libel, title by prescription were correctly pleaded, it could be to no other estate than that given the plaintiff by this deed. In their libel they allege that they entered into possession of the land conveyed them by the deed. How then could they get a larger estate by prescription than that which the 1st defendant possessed himself of under the deed, and of which the plaintiffs' predecessor was in possession, and which he sold to 1st defendant?

The plaintiffs nowhere allege that they entered into pos-

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session and obtained title by prescription to any land or shares in land which their deed did not give them, but they say that they entered into possession of what their deed gave them, and so they could not have thereby obtained a larger estate than they actually had possessed. It is the interest conveyed by the deed which they possessed, and it is to this interest alone that their prescription could run, and even admitting that the plaintiffs did obtain a prescriptive title to the land conveyed to them by their deed, they could not maintain this action of ejectment. There is undoubtedly a tendency in our courts, of which perhaps this court itself is not wholly innocent, to deal with these questions of title upon what is said to be "equitable grounds," or by some fancied intuitive knowledge of what owners and ancestors of owners must be presumed to have done. I think it is mischievous: it does not lead to real justice, and evokes dicta which is of no authority, leads to litigation, and has to be corrected.

The learned District Judge has laid it down that he inclines to the opinion, that where a number of persons are joint and undivided owners of a land, it is not competent for any of them to prescribe against the others by planting and possessing his specific portion exclusively, unless perhaps such portion was held and possessed as the equivalent of the whole of his undivided share, and he has applied that doctrine to the evidence in the case before him, and he holds that the plaintiffs have not established a title by prescription.

Upon this point much argument was directed to us at the bar, and I do not hesitate to say that the ruling of the learned District Judge is right, and that it must equally apply to any other possession in respect of which prescriptive title is claimed. Mere possession of part could not be held to enure to prescription for the whole; and, besides, it is not sufficient, to establish a possession which supports prescription, merely to say "I possessed." The law says you must possess adversely, and the law defines what adversely means, and there must be evidence that the possession, you set up, was within that definition.

The judgment should be affirmed with costs.

DIAS, J.—I affirm this judgment, but not for the reasons given by the District Judge. The two plaintiffs claim a specific portion of a land under a conveyance of sale by the 1st defendant.

The 1st defendant and several other parties, including the 3rd and 4th defendants, were originally entitled in common to an extensive chena land, but the 1st defendant, asserting a right to a specific portion thereof by right of prescription, sold it to the 1st plaintiff who sold half of his purchase to the 2nd plaintiff. The 3rd and 4th, who are the only disputing defendants, denied the plaintiffs' title, and put them to the proof, and in my opinion the plaintiffs have completely failed to establish their vendor, the 1st defendant's right to the specific portion which he sold. The District Judge dismissed the action being of opinion that one owner cannot prescribe against his co-owner. This is an erroneous view of the law. What the plaintiffs failed to establish is that their vendor, the 1st defendant, had obtained a title by adverse possession. The Ordinance defines what adverse possession is, and that is "a possession unaccompanied by payment of rent or produce or performance of service or duty, or by any act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred." The evidence in the case does not meet the requirements of the above definition. All that is proved is that the 1st defendant had planted some cocoanut trees on a specific portion of the chena, and possessed it for a long time. I would affirm the judgment with costs.

BEFORE *Dias* AND *Lawrie*, J. J.

June 10 and 17, 1892.

DE SILVA and others *v.* HENDRICK and others.

[No. 611, D. C., GALLE.]

Calculation of "14 days" under Section 247 of the Civil Procedure Code—Sundays and Public Holidays—Ordinance No. 4 of 1886, Sections 4 and 8.

In calculating the fourteen days within which, under Section 247 of the Civil Procedure Code an action to set aside an order on a claim in execution may be brought, Sundays and Public Holidays are not excluded; and where the last of such fourteen days falls on a Sunday or Public Holiday, it is not open to a party entitled to bring such action to institute the same on the next working day.

The following judgment of the District Judge [J. H. De Saram] sets out the facts of the case:—

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This is an action instituted under the provisions of section 247 of the Civil Procedure Code by the plaintiffs to establish their right to certain shares in the land Hunukotuwewatte, their claim to it, when seized in execution under a writ of execution against the property of third parties, having been disallowed by the Court. The order disallowing the claim was made on the 5th June 1891, and the plaint was filed on the 22nd of that month. That is the date on which the record-keeper received the plaint, being the officer appointed to receive plaints. I have not examined him on this point, because it is admitted that he wrote on the plaint the date on which he received it, and that is 22nd June. That was after the expiration of the 14 days allowed by section 247. The 14th day was the 19th June. That day was by the notification dated 28th April 1891, published in the *Government Gazette* of the 1st May, 1891, appointed to be a public and bank holiday. The 20th June was the accession day of Her Majesty the Queen, and was, under "The Holidays Ordinance, 1886," a Public Holiday. The 21st June was a Sunday. The last day on which the action could have been instituted and the following day having been public holidays, and 21st being a Sunday, the plaintiffs were in time in instituting the action on the 22nd. By the 8th section of the Holidays Ordinance no person shall be compellable to do any act upon a public holiday, which he would not be compellable to do on Sunday, and the obligation to do such act shall apply to the day following such public holiday, and the doing of such act on such following day shall be equivalent to the performance of the act on the holiday. The 19th and 20th June having been public holidays, and the 21st a Sunday, the institution of the action on the 22nd was equivalent to institution on the 19th.

In this view of the case it is not necessary that I should consider that the plaint was as a matter of fact presented to Mr. Eaton the record-keeper *at his house* on the 19th, and whether such presentation was valid. Assuming that the action was instituted in time, Mr. Weeresuriya for the defendants contended that the issuing of the summons which in this case was on the 17th August, 1891, is the institution

of the action, and that therefore the action was not instituted within the prescribed period. There are several reported decisions of the Supreme Court on this point, but I am not aware of any decision affecting actions instituted after the Civil Procedure Code came into operation. Whatever may be the effect of the reported decisions, this matter must be decided under the Procedure Code. By Sect. 39 of the Code "every action of regular procedure (and this is such an action) shall be instituted by presenting a duly stamped written plaint to the court or to such officer as the court shall appoint in this behalf." This is the mode in which an action is to be instituted in a District Court. Then, under Sect. 55, upon the plaint being filed, the Court orders summons to issue. I hold that his action was instituted when the plaint was presented to the record-keeper, and that the issuing of the summons does not constitute any part of the institution of an action. For these reasons I am of opinion that the action was instituted in proper time, and find accordingly.

It is ordered that a commission do issue to Mr. Anthonisz, licensed surveyor, to survey the land in question, and file his plan. The hearing is postponed to the 23rd June.

From the above judgment the defendants appealed.

Pereira for defendants-appellants cited Allapitchai *v.* Sinne Marikar, IX, S. C. C., 182. As to section 8 of "The Holidays Ordinance, 1886," he contended that the section did not apply to the present case. It applied to where a person was under obligation to do an act on some one particular day, and that day happened to be a public holiday, Here, the plaintiffs were under no obligation to institute this action on the 19th June. They might have done so on any working day in the period of fourteen days immediately preceing the 19th June.

There was no appearance of counsel for the plaintiffs-resppondents.

Cur. adv. vult.

On June 17, the following judgments were delivered:—

DIAS, J.—The question here is whether this action, which was instituted under section 247 of the Code, was within time. The order allowing the claim was made on the 5th

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June 1891, and the 14 days will expire on the 19th, but the plaint was filed on the 22nd, that is, three days out of time. The 19th and 20th were public holidays, and 21st was a Sunday; and the question is whether, in the computation of the 14 days, Sundays and public holidays are included or excluded. If they are excluded the plaintiff is in time, if included he is out of time. The District Judge excluded Sundays and public holidays, and held that the plaintiff was in time, and the defendant appeals. In a case, reported in IX, S. C. C., p. 182, this Court held that, in the computation of the 14 days under section 247, Sundays and public holidays are included.

The plaintiff is therefore out of time, and the order must be set aside with costs.

LAWRIE, J.—The decision of the full court, reported in IX, S. C. C., p. 182, rules the question now raised.

It does not appear from the report that the attention of this court was drawn to the provision of the 4th section of the Public and Bank Holidays Ordinance, 4 of 1886.

With diffidence I venture to think that Sundays and Public Holidays must be excluded in reckoning judicial time, because the Ordinance expressly declares that these days are *dies non*. A *dies non* cannot be counted as a *dies*.

I am bound by the unanimous decision of the Full Court. I respectfully record my doubt that it is not in accordance with the law.

BEFORE *Dias*, AND *Lawrie*, J. J.,

June 19 and 17, 1892.

MOHAMADO and others *v.* PERERA.

[No. 345, D. C., KALUTARA.]

Arbitration—Time for award—Civil Procedure Code, Sect., 683.

Under Section. 683 of the Civil Procedure Code, the Court can enlarge the time for the delivery of an arbitrator's award without the consent of or even notice to the parties to the action.

The facts of the case sufficiently appear in the judgment of DIAS, J.

Dornhorst for appellant.

Layard, A. A.-G., for respondent.

On June 17, the following judgments were delivered:—

DIAS, J.—On the 5th of November, 1891, the matter in dispute in this case was referred to the arbitration of John William Gunasekara, the award to be sent in before the 15th of December. On that day, on the application of the arbitrator, the time was extended to 20th January 1892, and on that day a further extention was given to the arbitrator till the 27th, when he filed the award. The first meeting was held on the 19th December, *i. e.*, four days after the first extension, when all the parties were present, and took part in the proceedings. The above remark does not apply to the last extension, and I take it that, under section 683 of the Code, the court has the power to grant extension without consulting the parties.

Another objection to the award is that the arbitrator failed to find on all the issues submitted for his arbitration. I do not see in what respect he has failed to do his duty, and I accept the District Judge's opinion that the arbitrator has given his judgment on all the issues submitted to him. Affirmed.

LAWRIE, J.—I agree.

The only point pressed in appeal depends on the construction of the 683rd section of the Code, which enacts, that if from any cause arbitrators cannot complete an award within the time specified in the order, the Court may, if it think fit, enlarge the period for the delivery of the award. In the Ordinance 15 of 1866, section 22, the power to enlarge the time for making the award was given both to the court and to the parties. By the Code, in voluntary reference, the power is vested in the court only, and that power can be exercised on the application of the arbitrators without notice to the parties and without their consent, even in spite of their opposition.

BEFORE *Burnside*, C. J. AND *Clarence* AND *Dias*, J. J.

July 3 and 16, 1891.

HENLY *v.* WELLAYAN and others.

[No. 11,631, P. C., KALUTARA.]

Indian Coolies—Desertion—Non-payment of wages—Burden of proof—Ordinance No. 11 of 1865, section 21—Ordinance No. 13 of 1889, section 6, sub. Sect. 1—Ordinance No. 7 of 1890, section 1.

Where a labourer charged with desertion seeks to justify the act on the ground that his wages have not been paid within the prescribed period, the burden of proving such non-payment is on the accused; but as in the case of an estate cooly and his master the accounts are usually with the latter, the court will call on him to produce them and so place it in a position to strike the balance between the parties.

Per CLARENCE, J.—The 21st section of Ordinance No. 11 of 1865 provides in effect that no cooly shall be punishable for desertion, if his wages have at the time of leaving been unpaid for any period longer than a month, and if forty-eight hours before leaving he shall have unsuccessfully demanded his wages. This section is neither expressly nor impliedly repealed by Ordinance No. 13 of 1889 or Ordinance No. 7 of 1890, but subsists in force side by side with the 6th and 7th sections of Ordinance No. 13 of 1889 as amended by Ordinance No. 7 of 1890.

Hence, when a cooly falling under the category of "Indian coolies" is charged with desertion, he has two defences open to him founded on non-payment of wages, viz., the old defence under Ordinance No. 11 of 1865 that wages for more than a month remain unpaid, and the new defence under Sub. Sect. 1 of Sect. 6 of Ordinance 13 of 1889 as amended by Sect. 1 of Ordinance No. 7 of 1890 that wages have not been paid within sixty days from the expiration of the month during which the same have been earned; but to avail himself of the former defence he must have made demand forty-eight hours before leaving.

The facts of the case sufficiently appear in the judgment of CLARENCE, J.

Dornhorst (*Canekeratne* and *Peiris* with him) for accused-appellants.

There was no appearance of counsel for complainant-respondent.

On July 16, the following judgments were delivered:—

BURNSIDE, C. J.—The complainant charges some of his coolies with desertion. They plead that under the amended Labour Ordinance their wages remained unpaid, and that they were at liberty to quit the complainant's services forthwith. I take no heed of the defence that one month's notice was given that defence does not arise on the record or on the facts. The Police Magistrate has held that, as it did not appear that at the time of quitting service, a sum of Rs. 10 or one month's wages, was due

to the accused, that defence failed, and he has convicted them, and they have appealed.

It is clear that the Magistrate has not rightly apprehended the effect of the Ordinances of 1889 and 1890, and before I can arrive at any correct conclusion as to what the legal rights of the coolies are, and before I enunciate any legal propositions, I desire to know what are the real facts upon which to apply the law.

It is clear that the burden of proof is on the accused. It is for them to show that their wages are in arrear within the Ordinance. I presume that the accused themselves are but vaguely informed of what was due to them at the end of every month, since the settlement which took place in January last. This is the most important fact to be determined, before we can apply the law; and I must set aside the conviction, and send the case back with instructions to the Magistrate to require from the complainant a detailed statement of what was due to each cooly on the last day of each month since January, detailing the items which led to it, and then to hear the defence, whatever it may be. The appellants who, it appears, are undergoing imprisonment will be discharged in the meantime.

CLARENCE J.—In this matter the complainant charged ten coolies, under Sect. 19 of the Labor Ordinance, 1865, with desertion. It was of course not right thus to include ten defendants in one charge of desertion. The Magistrate after recording some evidence against the defendants collectively, framed separate charges, but the several cases are hampered and confused by being thus dealt with in one paper-book. Eight of the defendants were ultimately convicted. An appeal petition entitled as the appeal of all the defendants including those who were not convicted, and purporting to have been drawn by a proctor, but not signed by him on behalf of the defendants, is sent up to us. The Petition is signed by five of the convicted defendants. There should of course have been a separate appeal by each defendant desirous of appealing. The prosecution of the coolies having, however, been confused by the course adopted by complainant of uniting them all in one complaint, I think that we should entertain this appeal as the appeal of all the convicted defendants, or we may

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treat the matter as before us by way of revision.

It is admitted that defendants were monthly servants within the meaning of the Ordinance, and that they left Ambetenne Estate on May 22nd, not having given a month's notice. It was not contended that any of the defendants gave a month's notice, but it seems to have been suggested that they had made the 48 hours' demand of wages contemplated by section 21 of the Ordinance.

The enactments affecting estate coolies have undergone some patching. First, the Ordinance of 1865 was amended by the Ordinance 16 of 1884. Then the Ordinance of 1884, being found unworkable, was repealed by Ordinance 13 of 1889 which purports to deal with the laborers and kankanies "commonly known as Indian Coolies," and the Ordinance of1889 has again been altered by Ordinance 7 of 1890.

The 21st section of the Ordinance of 1865 provides in effect that no cooly shall be punishable for desertion, if his wages have at the time of leaving been unpaid for any period longer than a month, and if forty-eight hours before leaving, he shall have unsuccessfully demanded his wages. This Section is not expressly repealed by the Ordinances of 1889 and 1890, nor can we suppose that there was any intention to repeal it impliedly, the latter two Ordinances relating only to Indian Coolies, and being not inconsistent with this section. We must take it, therefore, that section 21 of the Ordinance of 1865 subsists in force side by side with the 6th and 7th sections of the Ordinance of 1889, as amended by the Ordinance of 1890. The effect of these latter two sections as so amended is, that no cooly shall be punishable for desertion, if the monthly wages earned by him shall not have been paid in full within 60 days from the expiration of the month during which such wages shall have been earned.

The result is that a cooly falling under the category of "Indian Coolies" has, when charged with desertion, two defences open to him, founded on non-payment of wages: he has the old defence under the Ordinance of 1865 in respect of wages left unpaid for more than a month; but to avail himself of this he must have made the demand 48 hours before leaving, and he has also the new defence under the Ordinances of 1889

and 1890. For the latter defence no "demand" is necessary, but the period during which wages must have been unpaid is 60 days.

When a monthly servant who has left his work without giving a month's notice is seeking to defend himself by one of these pleas of unpaid wages, it lies primarily on him to make ut that defence, and to show that when he left his work, there were wages due and unpaid to an extent entitling him to go. But we must remember that, as between the cooly and his durai, the accounts are usually in the hands of the latter, and I think that little is needed to induce us to call on the durai to produce the accounts, and so place the court in a position to strike the balance between the parties. In the present instance, there is a conflict between the defendants and the complainant as to how much is due to the defendants. The Magistrate has noted that he sees no reason to disbelieve the complainant, and so far as personal veracity is concerned, it may well be that his is the trustworthy voice. But this is a matter of computation, and not a mere matter of truthful assertion or of opinion. The complainant deposed, "I have made up accounts, and I find that when accuseds left"&c.—and then complainant stated, as the result of his computation, the amounts to which these coolies were severally entitled at the end of April, and the amounts due for May. The Magistrate seems to have regarded the matter as depending upon an issue—whether or not wages to the amount of Rs. 10 were due to each defendant, when he or she left. That is not a correct view.

If the 48 hours' demand was given, then the case falls under Sect. 21 of the Ordinance of 1865, which as already interpreted by this Court allows the cooly to go, if something due at the end of a month has been left unpaid after the end of the succeeding month (see IV S. C. C. 44.) If the case falls under the amended 6th and 7th sections of the Ordinance of 1889, then the question will be, whether, when the cooly left, something was still unpaid which had been due to him for 60 days. Monthly cooly wages are due at the month's end, and the computation is usually made from the beginning to the end of the English Calendar months. On this reckoning each cooly's wages for January would be due and payable on February 1st, and if anything earned in January remained unpaid for 60 days after the end of January, *i. e.* until April, the cooly would be entitled to go. In the present instance it is fairly

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doubtful, having regard to the evidence of complainant, whether or no in the case of these several defendants something due to them had been unpaid for 60 days when they left. The evidence is not clear. It is to be inferred from one passage in complainant's evidence than the coolies had received no payments in money since January last, and that being so, it may well be that something accrued due had been 60 days unpaid, when they left in May. It is impossible to form any judgment on this matter without seeing the accounts or a copy of the accounts, and thereby learning what sums have been earned and what *per contra* debits have to be made.

I do not think it has been shown that any of these defendants made the "48 hours'" demand contemplated by section 21 of the Ordinance of 1865, and I view the matter as one to be decided under the "60 days'" provision in the later Ordinance.

I think that we should set aside these convictions, and send each charge back to the Magistrate for further inquiry upon the question of the accounts between complainant and each defendant. Each charge must of course be separately tried.

DIAS, J.—The question in this case is whether the coolies were entitled to leave the estate as their wages were not duly paid as required by the Ordinance. This is a question of fact, and on the recorded evidence I am not able to say whether or not the wages were duly paid. I think the case should go back for further investigation, when the complainant will be able to tell the Magistrate what is due to the coolies on account of wages.

BEFORE *Lawrie*, J.

June 2 and 14, 1892.

KALU and another *v.* HOWWA and another.

[No. 1,114, C. R., KANDY.]

Kandyan Law—Dige marriage—Inheritance.—Ordinance No. 3 of 1870.

A woman who now lives in *dige*, but whose marriage has not been registered under the "The Amended Kandyan Marriage Ordinance, 1870," is in very much

the same position as a *dige* married woman was before the Ordinance came into operation. Hence, a woman who so lives is not entitled to a share of her father's estate.

The first plaintiff who was married in *dige*, but whose marriage was not registered under Ordinance No. 3 of 1870, and the two defendants were children of the same father. The second plaintiff, as purchaser from the first of an undivided one-third of a land belonging to the estate of the first plaintiff's father, sought a declaration of title to the undivided one-third as against the defendants who were in possession of the whole land. The defendants pleaded that the 1st plaintiff was not entitled to any share of the land, inasmuch as she was married in *dige*. The Commissioner upheld the defendants contention, and dismissed the plaintiffs' suit. The plaintiffs appealed.

Sampayo, for plaintiffs-appellants. The deprivation consequent upon a *dige* marriage depended upon the validity of such marriage. Since the passing of the Ordinance No. 3 of 1870, registration was necessary for the validity of any marriage—*dige* or *bina*. Here, there was no registration, and, hence, the 1st plaintiff's *dige* marriage did not disentitle her to share in her father's property.

Wendt, for defendants-respondents. The forfeiture attached not on account of the marriage itself, but on account of the *dige* wife's leaving the parental roof.

On June 14, the following judgment was delivered:—

LAWRIE, J.—The exclusion by Kandyan law of a *dige* married daughter from a share in her father's property did not rest on any theory of the indissolubility of her marriage.

In olden times, a Kandyan woman, married in *dige*, could leave her husband's house when she chose, and was liable to be turned out whenever her husband got tired of her, but though she thus gained only a precarious position by being conducted from her father's house, the legal consequences of such conducting were fixed. By the conducting she ceased to be a member of her father's family, and she did not regain her full rights even though she returned, or was sent back in a few days. A woman who now lives in *dige*, but whose marriage is not registered is in very much the same legal position as a *dige* married woman was before the Kandyan marriage Ordinance passed. Her position is equally free and equally precarious.

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The Ordinance now gives privileges to those who register their marriages, and especially to their children; but the law as to the rights of daughters married in *binâ* and in *dige* has not been changed, and the old disability still attaches to the act of being conducted from a father's house by a man, or the going with him to live as his wife in his house.

BEFORE *Dias* AND *Lawrie*, J. J.

June 10 and 12, 1892.

KANDAPERUMAL and another *v.* KANDAPERUMAL and others.

[No. 271, D. C, BATTICALOA.]

Prescription—Written Promise—Ordinance No. 22 of 1871, Section 7—Procedure.

A deed containing a simple promise to deliver certain moveable property within a given time falls within what, in the 7th section of Ordinance No. 22, of 1871, is called a "written promise," and a claim thereon is prescribed in six years.

Where several defendants are sued on an instrument, and only one of them successfully pleads prescription, such plea will enure to the benefit of those in default, but will not affect those who have consented to judgment.

The facts of the case sufficiently appear in the judgment of DIAS, J.

Dornhorst, for plaintiffs-appellants.

Van Langenberg, for the 25th defendant-respondent.

There was no appearance of counsel for the other defendants-respondents.

On June 21, the following judgments were delivered:—

DIAS, J.—This is an action by two Plaintiffs against 28 defendants on a writing obligatory of 6th May, 1884. The 1st and 2nd defendants and one Candamma executed the deed in question in favor of the 1st plaintiff, promising to give her, within two months, certain movable property by way of dowry. The 1st plaintiff is the daughter of Candamma and wife of the 2nd plaintiff, and the 1st and 2nd defendants are the sons of Candamma and brothers of the 1st plaintiff. Candamma is dead, and the rest of the defendants are some of the children and grand-children of Candamma. The plaintiffs bring this suit to recover some of the goods specified in the deed, the rest having been already delivered. One of the defendants,

the 25th, answered by pleading prescription, and the question is, whether the deed is or is not prescribed. The District Judge decided this question in the affirmative on the authority of a Puttalam D. C. case, 260. The Ordinance which governs the case is No. 22 of 1871, and the question is whether the plaintiffs' claim falls under section 6 or section 7. If under section 7, it is prescribed; but if under 6, it is not prescribed. Strictly speaking, section 6 applies to what are technically called bonds, either mortgage bonds or bonds conditioned for the paymant of money or the performance of an agreement. The deed in question does not fall under either of these heads. It is a simple promise to deliver certain movable property within a given time. That being so, it more properly falls within what, in the 7th section, is called a "written promise," and is prescribed. See case Reported in 1 C. L. R. p. 40.

Since writing the above judgment, I had the advantage of reading my brother Lawrie's opinion. Out of the 28 defendants, one only, the 25th, has pleaded: the rest are in default. The 25th defendant pleaded prescription, and on that plea he has succeeded. If the defendants in default had done nothing in the case, the plea of prescription pleaded by the 25th defendant will enure to the benefit of the rest of the defendants. The foundation of the action is a prescribed written obligation, and under section 44 of the Civil Procedure Code the plaint must shew the ground on which the plaintiff may recover upon a prescribed claim. In this plaint, there are no averments, which will take the case out of prescription. But it appears that on the 3rd of September, 1891, the 1st, 2nd and 3rd defendants appeared before the District Judge, and consented to judgment being entered against them. This I think will disentitle them to the benefit of the plea pleaded by the 25th defendant. Probably, these three consenting defendants are acting with the plaintiffs, and judgment must be recorded for plaintiffs against them. Order—Affirmed as regards the 25th defendant, and set aside as regards the 1st, 2nd and 3rd defendants, and the case sent back for further proceedings with regard to them. The 1st, 2nd and 3rd defendants must pay the plaintiffs' costs of this appeal. The rest of the costs to be costs in the cause. Plaintiffs must pay the costs of the

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25th defendant in both courts.

LAWRIE, J.—I agree.

BEFORE *Clarence*, AND *Dias*, J. J.

July 3 and 22, 1891

PINHAMI *v.* PURAN APPOO and another.

[No. 21,925, D. C. KURUNEGALA.]

Lease.—Action by lessee for ejectment and damages, without possession by him under lease.—Kandyan wife.—Voluntary Conveyance by husband in fraud of creditors, effects of.

A lessee can maintain an action to eject from the land leased a party claiming adversely to his lessor, even though he himself has never had any possession under his lease, and also for damages by reason of his having been kept out of possession.

Per CLARENCE, J.—Granted that a Kandyan wife can take a conveyance on sale from her husband, such a transaction may not unreasonably be viewed with some jealousy.

Plaintiff, as lessee from one Ukku Banda of the garden Hittinawatta, complained that the defendants ejected him therefrom, and sought to be restored to possession, and also claimed damages consequent on the ejectment. The term of the lease had expired after the institution of the case. Both defendants denied the ouster, and that plaintiff was ever in possession. 1st defendant disclaimed title to or possession of the land; but 2nd defendant claimed to be in possession under a lease from Kiri Menika. Kiri Menika acquired the land by purchase from her late husband, Dingiri Appuhami Korala, from whom plaintiffs' lessor, Ukku Banda, also derived his right, having purchased the land at a sale held by the Fiscal on a writ of execution issued by Ukku Banda against the Korala. It was contended for plaintiff that the sale to Kiri Menika by her husband was made in fraud of his creditors. The issues in the case were: (1) whether the plaintiff entered into possession of the land and was ejected therefrom by the defendant or either of them; and (2) whether the Korala's sale of the land to his wife was made in fraud of his creditors. The District Judge believed that the possession and ouster alleged by plaintiff were purely fictitious, and alleged only as a basis for the action, and that in the opposition raised by the 2nd defendant to plaintiffs' entering into possession 1st defendant

took no part whatever, and dismissed the action, holding that on this finding it was unnecessary to consider the second issue. Plaintiff appealed.

Dornhorst for plaintiff-appellant.

Wendt for defendants-respondents.

On July 22, 1891, the following judgments were delivered:—

CLARENCE, J.—This is an action by a lessee, whose lease has expired since the action was brought, to eject a party claiming adversely to the lessor. Consequently, the only relief which plaintiff can now have is on his claim for damages. The District Judge has dismissed the action, and plaintiff appeals.

Plaintiff avers that the defendant ousted him. The District Judge, however, finds, and doubtless rightly, that neither plaintiff nor his lessor ever had any possession. According to former decisions of this Court, this finding would have been enough to put the plaintiff out of court; but by a late decision of the majority of the Court,* which is binding on me, a purchaser is allowed to maintain an action to eject from the land a party claiming adversely to his vendor, even though he himself has never had any possession under his purchase. It was admitted by respondents' counsel that the principle of this latter decision extends to a lessee. If a lessee can sue under such circumstances to eject a third person from the land, it follows that he can also sue for damages by reason of his having been kept out of possession. Therefore, we have to consider whether plaintiff shews title.

The land admittedly was formerly the property of one Dingiri Appuhami Korala. Plaintiff claims through one Ukku Banda who, being a judgment creditor of the Korala, seized this land, and purchased it at a Fiscal's sale under his own writ some time in 1886. The 2nd defendant claims under a lease from the Korala's wife, to whom the Korala purported to convey it as on sale in 1885. Plaintiff seeks to impeach the conveyance by the Korala to his wife as in fraud of creditors, but the District Judge did not find on that issue, being of opinion that plaintiff's action is not maintainable by reason of plaintiff's never having had any possession.

I think there is good reason to believe that the conveyance by the Korala to his wife was not a conveyance on sale, but

* D. C., Matara, 35,494. IX, S.C.C., p 4. EDS. S.C.R.

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a mere voluntary conveyance intended to defraud creditors. Granted that a Kandyan wife can take a conveyance on sale from her husband, such transactions may not unreasonably be viewed with some jealousy. The evidence points clearly to the conclusion that the Korala, when he made this conveyance, was considerably in debt. He was in debt to Ukku Banda who had made repeated attempts to recover his debt. He made this sale, while Ukku Banda's proceedings against him were pending, and very shortly before Ukku Banda's seizure of the lands. No explanation is offered of the application of the purchase money, which Kiri Menika is said to have paid her husband. We have only Kiri Menika's word that it was paid. The Korale was indebted, at the time, to the extent that he appears to have been unable to find money to pay judgment debts, and yet though he conveyed to his wife a large number of lands for alleged money consideration, no part of that money was applied in paying his creditor, Ukku Banda: and Ukku Banda was allowed to seize and sell this land, as though it was still his debtor's; though, when he endeavoured to take possession, the wife asserted her claim. My belief is that the conveyance to Kiri Menika was purely voluntary, and made for the very object of defeating the rights of Ukku Banda and other creditors of the grantor.

Still, if in fact the grantee was in possession when Ukku Banda purported to seize the land, no seizure and sale could properly be made; until, at all events, the conveyance by the debtor had been set aside. But in my opinion the Korala was still in possession. He and his wife were still living on the land, and there is no reason to consider that there was any alteration of possession.

I think that the judgment should be set aside. Plaintiff is entitled to damages for being kept out of the land. For the assessment of damages the case must go back to the District Court. I would give plaintiff no costs, because plaintiff has endeavoured to mislead the court in two ways: first, by falsely asserting that he had possession, and, second, by falsely charging defendant with an ouster.

I would order as follows:—Set aside the order of the District Court, and declare that plaintiff is entitled to damages payable

by 2nd defendant in respect of his being out of possession between the commencement of this suit and the expiry of his lease. Such damages to be settled by the District Judge. Plaintiff and 2nd defendants to bear their own costs to date in the District Court. The plaintiff to have his appeal costs from 2nd defendant. Plaintiff to pay the costs of 1st defendant in the District Court.

DIAS, J.—It is quite clear from the evidence that the transfer deed of the Korala to his wife was made for the purpose of defeating the Korala's creditors. I agree to the order formulated by my learned brother.

Set aside.

BEFORE *Dias* AND *Lawrie*, J. J.

June 21 and 28, 1892.

WIJEYEKOON *v.* GUNEWARDENE and others.

422, D. C., COLOMBO.]

The Roman-Dutch Law, how far adopted in Ceylon—The Dutch Law of continuing community between a surviving parent and the children—Tacit Hypothec—Sale under Mortgage decree.

The whole of the Dutch Law, as it prevailed in Holland more than a century ago, was never bodily imported into this country. We have adopted and acted upon only so much of it as suited our circumstances, such as the law of inheritance in the maritime provinces, community of property, law of mortgage, &c. The Dutch Law of continuing community, after the death of a parent, between the surviving parent and the children, assuming there was such a Law, which is doubtful, was never adopted by us.

A and B were husband and wife, married in community of property. B died leaving a son (the plaintiff) by A. A remained in possession of the whole of the common estate, and after "The Matrimonial Rights and Inheritance Ordinance, 1876" came into operation, married 2nd defendant. *Held*, that plaintiff had no legal hypothec over the property of the 2nd defendant or, under so much of the Dutch Law as has been adopted in this colony, over the property of his father, A, for his (the plaintiff's) moiety of the common estate of his parents.

Assuming that plaintiff had a legal hypothec over A's moiety of the common estate, he could not prevent a sale, under a mortgage decree, of property forming part of such moiety. All that he might do is to set up a preferent claim to the proceeds.

The facts of the case sufficiently appear in the judgment of DIAS, J.

Layard A.-G. [*Wendt* with him] for 1st and 2nd defendants-appellants.

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Dornhorst [*van Langenberg* and *de Saram* with him] for plaintiff-respondent.

The following among other authorities were cited or referred to in the course of the argument:—V., S.C.C., pp. 163 and 164; Vanderstraaten's Reports, pp. XLIX, LI and 264; Voet (Berwick's Translation) p. 333; Voet ad Pand. II. 2. 23 and 24; Van Leuwen, Vol. II, p. 95; Burge, Vol. I, p. 329; Morgan's Dig. p. 188.

Cur. adv. vult.

On June 28, the following judgments were delivered:—

DIAS, J.—One Wijeyekoon and his wife, Maria, married in community of goods on the 27th June, 1877. They had an only son, the plaintiff. The wife died in October, 1878, and the parents not having made any testamentary disposition of their property, the plaintiff, on his mother's death, became entitled to a moiety of the common estate of his parents, movable and immovable; but the father continued in the possession of the whole estate till 1882, when he married the 2nd defendant. This marriage took place after the Matrimonial Ordinance of 1876 came into operation, and consequently the second wife did not take any interest in the husband's half of the first community. Here I may advert to a question raised by the defendants as to the date when the Ordinance came into operation. The Ordinance had to be proclaimed before it came into operation, and accordingly a proclamation was published in the *Government Gazette* of the 29th June, 1877, *i. e.*, two days after the marriage of the plaintiff's parents. The date of the proclamation was 23rd June, though it was published on the 29th, and it was contended that the proclamation had reference back to its date, the 23rd June, and consequently the marriage took place after the ordinance came into operation. I cannot subscribe to this contention, and it is unnecessary to discuss the matter further, as in the 8th paragraph of the answer the 1st and 2nd defendants virtually admit that the plaintiff's parents married in community of property. Plaintiff's father died in 1890, leaving a last will, which was proved by the 1st defendant, the executor named therein, and he was a necessary party to the action; but what the plaintiff's step-mother, the 2nd defendant, has to do with the case, is more than I can understand. The plaintiff's father, after the death of his first wife, mortgaged an undivided half of a property

called "Mango Lodge," which formed part of the common estate of himself and his first wife, to the 3rd defendant who obtained a decree and a writ of execution on the mortgage, and, through the fiscal, seized the debtor's interest in the property; and the plaintiff seeks to stay the sale on the ground of a tacit hypothec over the property. The above in substance are the material facts of the case, and I shall now proceed to notice the several claims set up by the plaintiff.

1st. The plaintiff prays for an account of the common estate of his parents at the date of his mother's death, as also of the rents and profits of his half of the property received by his father or his executor (1st defendant) or his second wife (2nd defendant.)

2ndly. He prays for a declaration that, in respect of his half of the community, he is entitled to a hypothec over his father's half of the community, and over all the property of his second wife, the 2nd defendant.

This prayer is rather confused, but the above is its substance.

3rdly. He prays for a declaration of his right of a legal hypothec over the "Mango Lodge" property which was mortgaged by his father to the 3rd defendant.

4thly. For an injunction to stay the sale of the "Mango Lodge" property under the 3rd defendant's writ.

At the hearing of the case it was agreed that the District Judge should decide the several points of law raised, leaving the question of fact to be determined by arbitration.

The right of the plaintiff to half of the common estate of his parents, after payment of debts, funeral and testamentary expenses, is not denied; nor do I think it can be denied that the plaintiff is entitled to the rents and profits of his mother's half of the estate, which was in his father's possession after his mother's death; not, however, as the District Judge puts it, on the ground of a continuing community between father and son, but on the broad ground that the father had received what belonged to his son. If there ever was any such Dutch Law as a continuing community, which is very doubtful, (See Vand. Rep. XLIX.) that law has never been imported into this colony. The whole of the Dutch Law, as it prevailed in Holland more

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than a century ago, was never bodily imported into this country. We have only adopted and acted upon so much of it as suited our circumstances, such as the law of inheritance in the maritime provinces, community of property, law of mortgage and so forth; but the Dutch Law of continuing community was never adopted by us, and if I remember right, it was so decided by this court, though I cannot just now put my hand on the authority. Though the District Judge adopted the Dutch Law, he did not give effect to it, to the extent to which it carried him. According to Grotius (Herbert's Grotius p. 117, s. 3) "every thing which accrues to the estate after the death of the first deceased, as well by inheritance or otherwise, comes to the children, and the children are not to be liable for a share of the losses." I do not think it necessary to go further into this matter, as the conclusion of the District Judge is right, inasmuch as he does not give the plaintiff anything beyond a half of the community and the rents and profits of that half after his mother's death.

The 2nd prayer in the libel involves a point of general importance. The plaintiff prayed for a declaration of the court that he, the plaintiff, had a right of legal hypothec over his father's half of the community and all property acquired by his father, after his mother's death, as also over all the property of his second wife, the 2nd defendant.

This prayer was allowed by the District Judge to the fullest extent, and this opinion cannot be upheld for a moment as regards the 2nd defendant, as I fail to see what right or claim the plaintiff has to the property of the step-mother. As to the shortcomings of his father, the plaintiff has his remedy against him or his executor, the 1st defendant. The 2nd defendant is altogether an independent party; she married after the Marriage Ordinance come into operation; so there was no community of property between her and her husband; and the plaintiff, as I have already said, has failed to satisfy me that he has any cause of action against the 2nd defendant, and, as regards her, the plaint ought to be dismissed with costs.

The next question is, whether a party in the position of this plaintiff has any hypothec at all over the property of his

father. This I believe is the first time a claim of this kind has been put forward. In support of this strange proposition Mr. Dornhorst for plaintiff cited Burge 329. In this page, the writer speaks of the Roman Law generally. In the preceding page, he deals with the constitution of certain of the emperors, and in the page cited he says "a tacit hypothec was given to the children of the former marriage on the property of the parent who married a second time." In support of this, he cites the Code which is Roman Law pure and simple, and does neither cite a Dutch authority, nor says, as he usually does, that what he stated is Dutch Law. The other authority cited from Voet, II. 2. 23—24 is more to the point. But, assuming that the Dutch Law is as it is said to be, the plaintiff is bound to satisfy us that it has ever been adopted by this country. As I have already shewn, the whole of the law of Holland was never imported into this Colony. No local decision has been cited which would furnish some evidence that the Dutch Law in this respect has been adopted, and in the absence of any such evidence, I must repel the claim set up by the plaintiff. The so called tacit hypothecs or secret mortgages are not in my opinion to be encouraged and given effect to, unless we are constrained to do so by law. This case is the best illustration of the mischievous consequences of such a law. The 3rd defendant, in good faith, lends his money on the security of the husband's half of the community, and the plaintiff springs upon him a claim which the 3rd defendant could not by any means discover.

The District Judge further ordered that the Fiscal's seizure and proposed sale of half of "Mango Lodge" under the 3rd defendant's writ should be stayed. This he could not do, even if the plaintiff had a legal hypothec over the property. The plaintiff could not prevent a sale under the mortgagee's decree. All that he might have done was to set up a preferent claim over the proceeds. We have swept away by Ordinance the old Dutch Law of general mortgages, and it is to be hoped that all secret mortgages, commonly called tacit hypothecs, will follow suit, as they are very much calculated to hamper purchasers and mortgagees of immovable property.

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The best course to follow is to set aside the order, and make the following order instead:

1st. Declare the plaintiff's right to half of the common estate of his parents, as it stood at the time of his mother's death, after payment of all debts and funeral and testamentary expenses, together with half of the rents and profits of his mother's half which came into the hands of his father or his executor, the 1st defendant. In taking this account, due allowance should be made to the father's executor for the maintenance and education of the plaintiff after his mother's death.

2ndly. If the parties are not agreed on the facts, let the case go down for determination by arbitration, and the arbitrators will take the account on the footing above indicated.

3rdly. The plaintiff will pay the costs of this appeal, and the costs of the hearing in the District Court. All other costs will be at the discretion of the District Judge.

LAWRIE, J.—I agree.

BEFORE *Burnside*, C. J. AND *Dias* AND *Lawrie*, J. J.

June 10 and 29, and July 1, 1892.

SEYADORIS *v.* HENDRICK.

[No. 1,020, D. C., GALLE.]

Roman Dutch Law—Sequestration—Powers of District Courts—Civil Procedure Code, Sect. 4.

Held, by BURNSIDE, C. J. and LAWRIE, J. (DIAS, J. *dissentiente*) that, to the Civil Procedure Code and to it alone, must reference be had for whatever jurisdiction in respect of sequestration may be claimed for District Courts.

Semble, *per* BURNSIDE, C. J.—There is no authority for the position that District Courts had any jurisdiction to issue writs of sequestration as a remedial measure for the protection of property, the subject of litigation, *pendente lite*; and admitting that, by the Dutch Law, goods concerning which there was a dispute might by a decree of the judge be kept in the hands of a third person, until the dispute had terminated, and then be given over to the party who should be adjudged entitled to them, there is no authority for the position that jurisdiction to enforce that law was granted to District Courts.

The District Courts are the creatures of the Charter and the Ordinances succeeding it; and there is nothing which gives them authority generally to administer the Dutch Law; nor had any general right to grant sequestration which existed under the Dutch Law ever been exercised by them.

Per DIAS, J.—A power to issue any order, either in the nature of a mandatory injunction or sequestration, to prevent either of the parties to a suit from improperly interfering with the subject matter in litigation is inherent in the court having jurisdiction over the parties to the subject in litigation.

In view, particularly, of Sect. 4 of the Civil Procedure Code, which enacts that, in every case in which no provision is made by the Code, the procedure and practice theretofore in force should be followed, it cannot be inferred from the fact that the Code provides for injunctions and sequestrations in certain cases only, that all the powers of the court to issue sequestration orders, except in the cases specified in the Code, are abrogated.

The facts of the case sufficiently appear in the judgment of DIAS, J.

Dornhorst [*Grenier* and *de Saram* with him) for defendant-appellant.

Wendt (*Pereira* with him) for plaintiff-respondent.

The following authorities were cited in the course of the argument:—Civil Procedure Code, Sects 4, 653, 671; IX. S. C. C., 203; Voet, II, 4, 18.

Cur. adv. vult.

June 29.—DIAS, J. and LAWRIE, J., before whom the case had been argued, not being able to agree upon a judgment, counsel agreed that BURNSIDE, C. J. should take part in the decision without further argument.

On July 1, the following judgments were delivered:—

LAWRIE. J.—It is not necessary to enquire whether, prior to 1856, District Courts had power at common law to sequester lands or the rents and profits, *pendente lite*; because the legislature in that year made express provision on the subject, and whether the Ordinance 15 of 1856 gave District Judges that power for the 1st time, or whether it enlarged or curtailed existing powers is of little consequence. After the passing of that Ordinance, the law regarding the sequestration of lands and rents ceased to be common law, and became statute law.

The 4th section of the Ordinance enacted "that if the property in dispute consists of houses or land, and the plaintiff shall satisfy the court that sequestration will tend to prevent new or further litigation, then, and in any such case, such issues, rents and profits shall be sequestered." This Ordinance, 15 of 1856, was repealed by 2 of 1889.

Parts of the Ordinance of 1856 were re-enacted in chapter 47 of the Procedure Code, but the part of section 4 which I have quoted was not re-enacted. The power of a court to secure property pending a litigation, in which it is still undecided to whom the property belongs, but when it seems necessary to preserve it, is one for which full provision is made in the

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Code. Chapter 47 is devoted to arrest and sequestration before judgment, and Chapter 48 deals with injunctions, and Chapter 50 deals with the appointment of receivers. It is conceded that the sequestration in this case was not issued in conformity with, nor in exercise of any powers given by, these chapters of the Code, and therefore, I am of opinion that it was illegal. I would set aside the order of the 26th February, and I would dissolve the sequestration with costs.

DIAS, J.—On the 3rd of February, 1892, the plaintiff filed a plaint supported by an affidavit, and moved for and obtained an order of the court to sequester certain plumbago dug by the defendant from a land of which the plaintiff and the 1st defendant are joint owners. The plaint sets out that on the 9th September, 1890, two allotments of Crown land were put up for sale by public auction, and were knocked down to the plaintiff and the 1st defendant, they being the highest bidders. That the purchase money was duly paid to the Government Agent, but no grant has yet been issued. The above facts were supported by an affidavit, and the Court issued an *ex-parte* order in the nature of a writ of sequestration. On the 8th February, 1892, the 1st defendant appeared, and filed a petition with an affidavit and two exhibits, and, under section 377 of the Code, moved for a dissolution of the sequestration. The matter was discussed on the 19th and 21st February, and on the 26th February, the District Judge declined to disturb the order which he had already made, and the 1st defendant appeals.

A long string of objections of a very technical nature was urged for the appellant in the District Court and this court, but I do not think it necessary to take notice of any of them. Mr. Dornhorst, for the appellant, took two objections of a more substantial character, and I shall now proceed to deal with them. 1st. That the remedy by sequestration is taken away by the Civil Procedure Code, and is otherwise obsolete. It is not denied that, up to the passing of the Code, the remedy by sequestration was open to a party litigant, during the pendency of the litigation; and the court had power to issue any order, either in the nature of a mandatory injunction or sequestration, to prevent either of the parties from improperly interfering with the subject in litigation. Such a power is inherent in the court having jurisdiction over

the parties and the subject in litigation as, without it, it is impossible for the court to do justice between the parties. The Code provides for injunctions and sequestration in certain cases, but it does not deal with a sequestration like the one which was issued in this case, and from this I am called upon to infer that all the powers of the court to issue sequestration orders, except in the cases specified in the code, are abrogated. I can do nothing of the kind, particularly in view of the 4th Section which provides that in every case, in which no provision is made by the Code, the procedure and practice hitherto in force shall be followed, etc.

2nd. It was objected that the plaintiff's right to the allotments of land in question is not established; but, on the contrary, his title by purchase is not complete on the face of the plaint and the affidavit; and on that ground he is not entitled to the order of sequestration issued by the court. This is a fair objection on which much can be said on both sides, and accordingly it was very fully and ably argued by the learned counsel who represented the contending parties. It appears that in September, 1890, certain Crown lands were put up to sale by the Government Agent acting on behalf of the Crown, and were sold to the plaintiff and the 1st defendant as the highest bidders; and, according to the plaintiff, the purchase money was fully paid. This is a complete contract of sale between the Crown and the purchasers, as the Ordinance against frauds and perjuries does not affect the Crown. See Section 20. All that is wanting in the case is the grant which is only evidence of the sale, and which the purchaser may compel the Crown to issue. The 1st defendant in his petition, admits the sale averred by the plaintiff, but he says that it was cancelled by the Government Agent, as 9/10ths of the purchase money was not paid. But the 1st defendant does not say who it was who made the default, and I presume it was made by the purchasers. The 1st defendant further avers that the Government Agent having cancelled the 1st sale made a second sale in September, 1891, when the 1st defendant became the sole purchaser. According to the above statement, the issue between the parties is whether the 1st or the 2nd sale is to stand. This is matter of defence to be taken by way of answer to the plaint, but not matter

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on which the order of sequestration can be resisted. Admitting the 1st sale, the 1st defendant avoids it by matters subsequent, which can only be dealt with by a trial on proper pleadings. In the court below, the plaintiff offered to go to trial at once, but the 1st defendant objected to it, probably for very good reason. According to the plaintiff, the first is a good sale, and the plaintiff and the 1st defendant are joint owners of the lands in dispute, and one of these, the 1st defendant in this case, has no right to take plumbago from the lands without the consent of his co-owner the plaintiff. The digging of the plumbago is not denied, and the 1st defendant's intention to appropriate to the exclusion of the plaintiff is manifest from the line of defence taken up by the 1st defendant, and in this state of things, the plaintiff had a perfect right to ask the court for an order on the 1st defendant, to prevent him appropriating the whole of the plumbago of which, so far as appears, the plaintiff is entitled to half. On a careful consideration of the whole case, I am of opinion that the order appealed from must be affirmed.

BURNSIDE, C. J.—Whatever jurisdiction may be asserted to have existed in District Courts to protect, by sequestration, property, the subject of litigation "*pendente lite*," I cannot find it ever even suggested that the District Courts had authority to order sequestration such as that now under consideration, which has been granted for an indefinite period against property in respect of which no litigation is pending, nor even is it alleged that any money is due, and only upon a prayer that the defendants be decreed to pay a sum of money alleged to be due from the defendant to the plaintiff. The District Court had clearly no right to issue such a sequestration, and the order and all the proceedings consequent on it should be set aside with costs and damages. I might content myself with saying no more, but as there has been a disagreement between my learned brothers on the general question of the extent of jurisdiction of the District Courts in matters of sequestration, I would add I can find no authority for the position that District Courts had any jurisdiction to issue writs of sequestration as a remedial measure for the protection of property, the subject matter of litigation, *pendente lite*. Admitting that by the Dutch Law goods concerning which there was dispute might by a decree

of the judge be kept in the hands of a third person, until the dispute had terminated, and then be given over to the party who should be adjudged entitled to them, it yet must be shown that jurisdiction to enforce this law was granted to the District Courts. I confess I can find no authority for the position. It is not enough to say that because such a right existed, therefore, the District Court had the power to enforce it. The District Courts are the creatures of the Charter and of ordinances succeeding it, there is nothing which gives them authority generally to administer the Dutch Law; and if anything is to be gathered from a careful consideration of the Charter and the ordinances, it is, that it was not intended to invest District Courts with any such jurisdiction. Care has been taken to define their jurisdiction in other matters, and to regulate with precision the manner in which such jurisdiction is to be exercised. Nothing whatever is said about sequestration, or any similar jurisdiction, whilst on the other hand the Supreme Court has been invested with powers of issuing Habeas Corpus, mandamus and injunctions in the nature of sequestration to prevent irremediable injury to property which might become the subject of an action. This is a special power, and from the Charter it was continued by the Ordinance 11 of 1868, Section 24, and from it continued as lately as the Courts Ordinance 1 of 1889, Section 22. Had the District Courts had any such power under the Common Law, *a fortiori*, the Supreme Court would have also had it, and as the legislature has been careful to confer the powers by express words on the Supreme Court, the conclusion is unavoidable that the District Courts had no such power. I do not forget that with regard to injunctions it had been held, even before the passing of the Civil Code, and accepted as law, that although no special jurisdiction had been granted by legislation to District Courts to issue injunctions, yet that they possessed the power in right of their general equitable jurisdiction. This, after all, amounts to no more than a mere assertion, partaking of a judge-made invention, out of such material as happened to be readiest, to meet a necessity, like much of our laws of that time, rather than a well founded legal proposition, founded on admitted principles, and it is instructive to note that it is, at the same

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time, asserted that the Charter itself contemplated the existence of this jurisdiction, when it gave the Supreme Court power to issue injunctions to restrain that which may ensue before the party making application for such injunction "could prevent the same by bringing an action in a District Court." Surely it is not complimentary to the framers of the Charter to assume that it was in their hands necessary to invest the Supreme Court with an extraordinary power in order to secure the readier remedy in the Dutch Law; but above all it is significant that care has been taken by the framers of the Civil Code to obtain direct, substantive and positive law, giving to District Courts the powers which judicial assertion had already assigned to them. Surely there would be no necessity for this, if the law had really been what it was asserted to be. However far, however, these assertions may have gone with regard to the powers of the District Courts in relation to injunctions, I do not find that any similar venture had been made with regard to sequestration. It may be that the familiarity with the well known English proceeding by injunction on the one hand, and the want of acquaintance with the more obscure and unknown procedure by sequestration, on the other, may have led to the result, but it is certainly corroborative of the contention, that no general right to grant sequestration which existed by Dutch Law had ever been exercised by the District Courts, when we find that from time to time jurisdiction was given by express law to these Courts to enforce fragmentary parts of that law; and this leads to the necessary enquiry, what powers of sequestration have been expressly conferred by written law.

The first was that conferred by the Rules and Orders made by the judges of the Supreme Court in pursuance of the Charter of 1833. These powers were express, and applied only to (1) Sequestration to compel appearance (2) Sequestration to prevent fraudulent alienation and further litigation.

It is quite possible, and I think most probable, that it was discovered that the jurisdiction and powers which it was then sought to confer by rules made under the authority of the charter could only be created by higher authority, and consequently the Ordinance 8 of 1846 was passed "for rendering the operation

of rules of Court contingent on their enactment by the legislature."

Notwithstanding this Ordinance, however, it was not till the passing of the Ordinance No. 15 of 1856, ten years after that, even this limited jurisdiction of sequestration received legislative sanction. By that Ordinance, the Rule which had been framed purporting to give the right of sequestration on fraudulent alienation was revoked, and the power conferred was that contained in sections 4 and 5, whereby sequestration is made available to prevent fraudulent alienation—alienation after suit brought, a proceeding hedged about with many precautions.

This Ordinance has in its turn been repealed by the Civil Procedure Code, and certain new provisions enacted with reference to the jurisdiction of the District Court in matters of sequestration, but there is no room for contention, nor do I understand it is contended, that the common law power has been granted by the Code, and so in my opinion all powers granted by written law in that respect, have been repealed by the Code. The result is that to the Code and to the Code alone must reference be had for whatever jurisdiction in respect of sequestration may be claimed for District Courts.

BEFORE *Clarence*, A. C. J. AND *Dias*, J.

November 28 and December 16, 1890.

HADJIAR and another *v.* HADJIE and another.

[No. 3,642, D. C., COLOMBO.]

Concurrence—Roman Dutch Law—Practice—Ordinance No. 7 of 1853.

Claims in concurrence under the old Roman Dutch Law procedure have always been entertained by the courts of this colony, notwithstanding that an Insolvency procedure was provided by Ordinance No. 7 of 1853; and such claims must, until legislative interference on the subject, continue to be disposed of according to the old practice.

Under the old practice, when a creditor has made a levy, a second creditor may claim concurrence in the proceeds, at all events, unless and until those proceeds have got home to the hands of the execution creditor.

When the execution purchaser is not the plaintiff, claims of concurrence are not usually entertainable after the proceeds of the levy have been paid over to the execution creditor.

When the plaintiff is the purchaser, and the price falls short of the amount due to the plaintiff, he, as a matter of convenience, is allowed credit for his pur-

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chase money. But, *quaere*, at what point in such a case is a plaintiff's purchase money to be deemed to have got home?

The facts sufficiently appear in the judgment of CLARENCE, A. C. J.

Dornhorst, for plaintiffs-appellants.

Wendt, for claimant-respondent.

Cur. adv. vult.

On December 16, the following judgments were delivered:—

CLARENCE, A. C. J.—This is an appeal by the plaintiff, execution creditor, who has bought property sold under his writ, and obtained credit for the purchase money, against an order obtained by another creditor, or at any rate another person claiming to be a creditor, directing plaintiff to bring into court a certain sum of money to answer a claim of concurrence. Omitting matters not material on this appeal, it is enough to say that plaintiff has a judgment for Rs. 10,000, and interest; and certain sales of movable property not having produced enough to satisfy the judgment, house and land property was put up for sale on 23rd July, when plaintiff himself became the purchaser, and was allowed credit to the amount of the nett proceeds, viz., Rs. 6,024·38. On July 31st, respondent moved that plaintiff be ordered to bring into court a sum of Rs. 1,833·96 to answer respondent's claim in concurrence, founded on a judgment obtained by him against the same defendant for the sum of Rs. 3,333·99, for principal, interest and costs on two promissory notes. Plaintiff, in answer to respondent's affidavit of his unsatisfied judgment, made a general affidavit alleging that he believed the respondent's judgment to be fraudulent and collusive. The learned District Judge ordered plaintiff to bring the Rs. 1833·96 into court within a week, and directed that the money "be not drawn" (*i. e.* be not drawn by the plaintiff) until plaintiff shows that the judgment was fraudulently obtained.

From this order the plaintiff appeals. Mr. Dornhorst in support of the appeal desired to argue that, since an insolvency procedure has been provided by the Legislature, there is no longer any reason for the old Roman Dutch Procedure of claims in concurrence. If the matter were *res integra*, there would no doubt be much to be said in favor of the abandonment of this survival of Roman Dutch Procedure, as an informal machinery for distributing the assets of debtors who cannot or

will not pay their debts, and whose assets can now be more safely and methodically dealt with under the Insolvency Ordinance. But, as we intimated upon the argument of this appeal, we cannot now entertain this contention. Although a special insolvency machinery, borrowed from the English insolvency Act of 1849, was provided in 1853, claims in concurrence have ever since been entertained by the courts; and however desirable it may be that this old Roman Dutch procedure should cease, we cannot now undertake to end it by judicial decision. The matter may well be worthy of legislative interference, but we must continue to dispose of such claims according to the old practice.

Under the old practice, it is clear that, when a creditor has made a levy, a second creditor may claim concurrence to the proceeds, at all events unless and until these proceeds have got home to the hands of the execution creditors. In this latter respect, we have by late decisions usefully trenched up old Roman Dutch practice, and imposed a limit to the period during which claims of concurrence can avail. Where the execution purchaser is not the plaintiff, claims of concurrence are not usually entertainable, after the proceeds of the levy have been paid over to the execution creditor. When, as here, the plaintiff is the purchaser, and the price falls short of the amount due to the plaintiff, the plaintiff, as matter of convenience, is allowed credit for his purchase money. The question has several times been mooted, but never, so far as I am aware, came to a decision—at what point, in such a case, is a plaintiff's purchase money to be deemed to have got home. This question, however, does not arise in the present case, for the respondent's claim was preferred immediately after the sale. The order appealed from is not an order definitively allowing the respondent's claim of concurrence, but merely an order that plaintiff do bring a sum of money into court to abide the claim. Even to this extent, however, I am unable to support the order, for the simple reason that no trace is visible of any computation fixing the amount. If the respondent's claim on his judgment is well founded, the amount which he can claim in concurrence must be computed *pro rata*, according to the amount due to him and the amount due to the appellant. So far as appears, that com-

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putation does not seem to have been made. The order must be set aside, and the matter sent back to the District Court for further consideration with regard to the *bona fides* of respondent's claim. It is unnecessary at this stage for us to say anything. In concurrence, as in insolvency, a judgment against the debtor is not absolutely conclusive in favour of the party claiming under it. No costs of this appeal.

DIAS, J.—I agree.

BEFORE *Burnside*, C. J. AND *Lawrie*, J.

June 22 and July 12, 1892.

ANDERSON and another *v.* LOOS & VANCUYLENBURG.

[No. 1,142, D. C. Colombo.]

Solicitors' lien—Detention of title deeds for fees for attesting deeds.

Plaintiffs agreed to sell an estate to F., and the title deeds of the estate were delivered by plaintiffs' proctors to defendants as proctors of F. for the purpose of preparing for execution a conveyance from plaintiffs to F. and a mortgage from F. to plaintiffs. The conveyance and the mortgage were drawn by defendants, and duly executed. *Held*, that defendants were not entitled to a lien over the title deeds, and to detain the same, as against plaintiffs for fees due to them for preparing and attesting the conveyance and the mortgage.

The facts of the case appear sufficiently in the judgment of BURNSIDE, C. J.

Wendt (*de Saram* with him) for plaintiff-appellant.

Dornhorst (*Loos* with him) for defendants-respondents.

The following among other authorities were cited during the course of the argument:—

Pelley *v.* Wathen I, De Gex, M and G., 16; ***Ex parte*** Quinn, LIII, L. J., Ch., 302; *In re* Snell, XLVI, L. J., Ch., 627; ***Ex parte*** Fuller, 50, L. J., Ch., 448; Wakefield *v.* Newton, VI, Q. B., 276; Colmer *v.* Ede, XL, L. J., Ch., 185; ***Ex parte*** Stirling, XVI, Vesey, Jr., 258; Friswell *v.* King, XV, Sim., 191; Lambert *v.* Buckmaster, II, B. and C., 616; Bozon *v.* Bollond, IV, M. and C., 359; ***Ex parte*** Pemberton, XVIII, Vesey, Jr., 282; Van-Leuwen (Kotze's translation) P. 231; ***Ex parte*** Calvert *in re* Messenger, III, L. R, Ch. Div., 318; Stevenson *v.* Blakelock, I, M. and Sel. 135; Cordery on Solicitors, pp. 296, 297 and 307.

On July 12, the following judgments were delivered:—

BURNSIDE, C. J.—It is scarcely necessary to point out that this is an action of detinue to recover the possession of certain title deeds of an estate of which the plaintiffs are admitted by the defendants to be the owners, and which the defendants admit they received from the plaintiffs. Plaintiffs allege that they are entitled to the possession of the deeds by reason of "being such owners," which is pleading evidence, and does not estop them from recovering on any other title to the possession of the deeds, and what that other title is the defendants have themselves set out. As I understand the pleadings, or perhaps misunderstand them, the defendants do not claim any right to the deeds as against the plaintiffs, from whom they admit they received them, except such as arises in right of a lien which they set up. Looking at defendants' plea setting up such lien, it seems to me to be clear that the burthen of proving it lies on the defendants, and if they proved it to the whole extent to which it goes, I venture to think it would not show that they had obtained a lien on the deeds as against the plaintiffs, from whom they admit they got them. This is what the counsel at the trial treated as the issue between them, and which the District Judge decided, and upon which an appeal was taken, and the case argued before us. I do not gather from the pleadings that the defendants wished to contest with the plaintiffs the barren issue, whether the plaintiffs, as owners of the estate, were entitled to the deeds. What they wished decided, and perhaps, which would have been more strictly an issue of law on the defendants' statement of facts, and which the parties correctly treated as an issue of law, and which the judge decided as an issue of law, is on the facts stated in defendants' plea, did they get a lien against the plaintiffs. Now, what is the defendants' statement of facts on which they rely as giving them the lien. They say the plaintiffs had agreed to sell the estate to one Fyler; that the deeds were delivered by the plaintiffs' proctors, Messrs. Julius and Creasy, to them, the defendants, as proctors of Fyler for the purpose of preparing, for execution, a conveyance from plaintiffs to Fyler and a mortgage from Fyler to plaintiffs; that these deeds were drawn by the defendants, and duly executed; and that they, the defendants, were entitled to certain fees for that work; and that the defendants detained the deeds on a lien therefor. Apart from

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any special agreement between the parties (the defendants allege none) this statement of facts raises the common sense inference, of which proof is not required, that the plaintiffs when they delivered the deeds in question to the defendants as Fyler's Proctors, could not have had any intention to convey to Fyler any right, title or interest in the deeds in question, or in the land to which they relate, which was to exist, and be independent of the mortgage which Fyler was to give him over the property. If there was such an intention, the burthen was on the defendants. It is therefore manifest that Fyler could not have created any lien over the one or the other as against the plaintiffs, and if Fyler could not have created a lien, then his proctors, upon clear law, could not have acquired a lien which their client had no legal right to create. It was argued for the defendants that, as soon as the conveyance to Fyler was complete, the deeds with the estate passed to Fyler, and from that moment Fyler had the right to deal as well with the one as the other. This is clearly fallacious. The inference of fact is that the deeds were delivered to the defendants with the object of making Fyler no further owner of the estate than the qualified one of mortgaging it to the plaintiffs, and it would be most unreasonable to assume that the plaintiffs intended to give Fyler the right to encumber his estate or the deeds of his estate in priority to the mortgage; at least the burthen of proving such intention, if it existed was on the defendants. The defendants' contention rests on the fallacy that every owner of an estate is legally entitled to the ownership and possession of the instruments of title to it, as soon as he becomes owner. That is not so. The ownership of the land and the possession of the instruments of title may legally exist separately, and depend on the contract and intention of individuals, and in the case before us, I take it to be beyond dispute that there is nothing to show or even indicate that when plaintiffs handed the deeds to defendants, they intended to part with the possession of them in favor of Fyler, and of Fyler's limited title as owner. The defendants nowhere attempt to say that the deeds came into their hands from Fyler. It was the plaintiffs who delivered them to defendants. But assuming me to be ever so wrong in the conclusion which I have arrived at as to the issue framed

in the action, there can be no doubt that the defendants cannot claim a lien to the prejudice of a client for whom they were acting in the very matter in which they were bound to protect him. Here the defendants admit that, in drawing the mortgage deed, they acted as plaintiffs' solicitors, although they were to be paid for their work by Fyler, and they are estopped from interposing any claim of their own which would militate against the absolute security which the mortgage was intended to secure. If the defendants could not claim a lien in respect of the particular items of fees for the conveyance and mortgage, *a fortiori*, they could not claim for a general account, and therefore the plaintiffs should have judgment with costs.

With regard to the issue, if issue there was, that the plaintiffs acquiesced in this lien, I can only say that there is no proof of it, and I do not see how the defendants could have relied on that issue in the court below, when I find that the District Judge and counsel directed their attention solely to the legal questions which I have disposed of.

LAWRIE, J.—The plaintiffs are not entitled to succeed on the strength of the only title set out by them, viz., that they are owners of the estate. The defendants, however, cured the defects of the plaint by a statement of the way in which the deeds came into their hands. On their own showing, they have no right to detain the deeds from the plaintiffs.

BEFORE *Laurie*, J.

June 9 and 14, 1892.

GUNESEKERE *v.* BABASINGHO and others.

[No. 3205, P. C., CHILAW.]

Criminal Procedure—Compensation—Crown Costs.

A Police Magistrate cannot legally order a complainant to pay compensation and Crown costs, unless and until all the evidence which the complainant is ready to adduce has been heard.

The complainant appealed from an order by which the Police Magistrate without hearing two headmen whom the complainant desired to call as witnesses condemned him to pay the accused compensation.

De Saram for complainant-appellant. The Police Magis-

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trate could not order the complainant to pay compensation, until he had heard all the evidence that the complainant had to adduce. He cited Ordinance No. 22 of 1890, Sect. 221; P. C., Avisawelle 11,286, II, C. L. R. 51.

Cur. adv. vult.

On June 14, the following judgment was delivered:—

LAWRIE J.—I refer to the judgment pronounced in appeal in Police Court case Avisawella No. 11,286.

A Police Magistrate cannot legally order a complainant to pay compensation and crown costs, unless and until all the evidence which the complainant is ready to adduce has been heard. Here the Magistrate thought that it was not material to examine two headmen, who went to the complainant's garden the morning after the alleged trespass, but if these two headmen had been examined, the Police Magistrate might have been satisfied that the complainant's cocoanut and plantain trees had really been injured, and that the charge was not wholly false and vexatious.

BEFORE *Burnside*, C. J., AND *Lawrie*, J.

July 5 and 12, 1892.

BABAPPU *v.* de SILVA.

[No. 833, D. C., GALLE.]

Warrant of arrest—Signature by stamp or die—Handcuffing road tax defaulters

A warrant of arrest, good on the face of it, and which has not been illegally issued on the contrivance of the party arresting under it, is sufficient to justify such party in making the arrest.

Although there is no objection to the authentication of a warrant of arrest by the name of the official issuing it being impressed on it with a stamp or die, and not being signed in writing, yet, where the genuineness of such authentication is challenged, it is necessary to shew that the impression was made by such official himself, or in his presence and by his authority, as a distinct act of signing.

Courts of justice should scrutinize carefully the acts of those entrusted with the administration of a harsh and oppressive law, where they enforce it with undue harshness and severity, and should make them responsible for every departure from the strict line of their duty.

Observations on the impropriety of handcuffing, and otherwise treating as malefactors, those arrested for default of payment of the road tax, and on the necessity, in the event such proceedings, of courts of justice being watchful to protect the liberty of the subject.

The facts of the case appear in the judgment of BURNSIDE, C. J.

Dornhorst, for plaintiff-appellant.

Wendt, for defendant-respondent cited V, S. C. C. 144.

Cur. adv. vult.

On July 12, the following judgment agreed to by LAWRIE, J. was delivered by

BURNSIDE, C. J.—Apart from the facts of this case, several most important questions of law were raised on the argument in appeal, which we should decide.

The action is one by the plaintiff against the defendant, a police officer, for arresting him, detaining him in custody for twenty-four hours, and in the course of such detention handcuffing him, putting him in the stocks, and otherwise ill-treating him. The defendant admits the arrest, but justifies it under the authority of a warrant which he produces purporting to be issued by the Chairman of the District Road Committee of Galle against the plaintiff as an alleged Road defaulter, and addressed to the defendant. The defendant also admits that he detained the plaintiff about twelve hours, that he handcuffed him, but only on one arm, and he says that this was done at the special request of the plaintiff, and he denies that he put the plaintiff in the stocks. The District Judge has dismissed the plaintiff's action with costs, and hence this appeal. The warrant is one in the Singhalese language, and it bears a name impressed on it clearly by a stamp or die: "P. A. Templer," to which is added in Singhalese these words according to the translation of our interpreter—"Chairman, District Road Committee, Galle."

That the plaintiff, a vederale or native physician, had been arrested on this warrant, that he had been handcuffed and detained under arrest for a day and a night in the defendant's verandah, that he had been taken handcuffed through the public streets to the public Kachcheri at Galle, where he produced a receipt showing that he had paid the tax for the non-payment of which he had been arrested, are all admitted facts; but at the same time there was this warrant, and the defendant justified the arrest under it, and the District Judge has held that being a warrant good on the face of it, it was sufficient to justify the defendant in making the arrest, and we must hold so too on undoubted authority, if we are convinced that the warrant is good on the face of

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it, and that it had not been illegally issued on the contrivance of the defendant. Mr Freeman, the Acting Chairman of the Road Committee, who discharged the plaintiff after his arrest, was called as a witness for the defence, and he produced the defaulters' list for the year, which he testified was made out by the defendant, and in which the plaintiff's name appeared. This evidence points to the fact that it was at least at the defendant's instance that the warrant had been issued; but whatever suspicions may have been aroused, by what subsequently occurred, that the defendant knew that the plaintiff was not a defaulter, I do not think it is sufficient to demand a judicial conclusion from us to that effect, so as to exclude the defendant from the justification which a legally issued warrant will undoubtedly afford him. But it was urged that the warrant had undoubtedly been issued illegally, in that it was against an innocent man, as I have said. Whatever suspicion may be aroused that the defendant procured this warrant with a full knowledge of the plaintiff's innocence, the evidence is insufficient to fix the defendant with responsibility. On that ground the defendant is entitled to the benefit of the doubt. We are bound to support the District Judge's finding that the warrant was sufficient to justify the arrest.

Then again, it was urged that the warrant was not properly signed, the name of the chairman purporting to sign it not being written, but stamped or impressed. I think it most important that we should state what the law is on this important point with no uncertain sound. This court has already held, that no objection lies to a signature which, though not written, is impressed in the way this signature has been; but the impress must be the distinct act of the person whose signature it purports to be. It must be done by him or in his presence by his authority, as a distinct act of signing; and he has no power whatever to give any one a general authority to impress his signature, any more than he has authority to authorize anyone to put his written signature to a judicial act, except in his presence and by his express and particular authority. The use of a stamped signature in cases such as the present, upon warrants by which individuals,

innocent and guilty alike, are arrested and imprisoned, unless it is hedged round with every precaution, is calculated to inflict immense injustice, to which the records of the courts bear testimony. So that, whilst we are called on to hold that a warrant like this is good on the face of it, because the law presumed that everything which is required to be done is rightly done, yet if such a signature were challenged, and evidence was given showing that the stamp had not been affixed under the circumstances which we have laid down as necessary to make it, in each individual case, the signature which it purports to be, the warrant would be bad, and no authority to the party called on to execute it.

So much for the law, and now with regard to the facts. We have already held that an officer making an arrest under warrants like this, had no right to handcuff. I have no doub whatever that the defendant knew this, and there is no doubt that the defdndant did handcuff his prisoner, but he says he did so at the prisoner's request, and that he placed the handcuff on one arm only. Three witnesses swear to the handcuffing, but this improbable statement of the defendant finds favour with tbe District Judge who says, "I believe that the plaintiff's object was to enhance his damages against the defendant." The plaintiff had paid his tax; he had told the defendant so; and if the weight of evidence is to prevail, he had shown the defendant his receipt. He had in fact every way endeavoured to avoid the indignity and degradation of even an arrest, and yet this most improbable assertion of the defendant is believed to his advantage, carrying with it the odious imputation on the plaintiff, that he was willing to undergo the extreme and indelible degradation of being carried manacled through the streets by the plaintiff to secure the bare possibility of being able to obtain enhanced damages against a local headman in a local court. There was the fact that the handcuffs were put on the plaintiff: it was not possible to get out of that; and the defendant's story is a transparent falsehood to endeavour to excuse it.

The plaintiff has proved his allegation that he had been put in the stocks. The plaintiff has proved it beyond a doubt; but no doubt, encouraged by the success of his plea in confession

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and avoidance, the defendant boldly affirms that he never did put the plaintiff in the stocks, again securing the entire credence of the learned District Judge, who, however, goes further, and holds that he would have been justified, if he had done so. That this is a harsh law cannot be denied. Here was an innocent man arrested and dealt with like a malefactor, for not paying a tax which he had paid, and even when conclusive evidence had established the payment. The law being harsh and oppressive, it should result that when the persons entrusted with the administration of it enforce it with a harshness and relentlessness which vie with the law itself, a court of justice should scrutinize their acts most exactly, and, in the interest of the public, hold them responsible for every departure from the strict line of their duty, rather than approve or encourage it. There is no doubt the defendant did put the plaintiff in the stocks, and there was no necessity for it, and he was not justified in doing so. The place of arrest was nine miles from Galle, and the time of arrest, according to the plaintiff and his witnesses, about 8 a.m., according to the defendant's own version, not later than 10 a.m. By noon the plaintiff could have been delivered at Galle in obedience to the warrant; but yet he was detained till the next day. The District Judge excuses this by reference to the arrest as "at this late hour" between 8 and 10 in the morning, and accepting the most frivolous and transparent excuses which are put forth by the defendant, he justifies the detention.

But the facts of the case require more careful scrutiny. The plaintiff's receipt shows that he had paid this tax as early as the 28th February of the year 1891. The warrant to arrest him is dated the 12th May 1891, three months afterwards. This warrant the defendant had in his hands for execution some considerable time before he acted on it, at least as early as the first week in September. Mr. Freeman swears that at that time the defendant came to him, and said that a man whose name he mentioned, but which Mr. Freeman was unable to remember, had refused to come on a warrant, unless he was handcuffed; and Mr. Freeman ordered a pair of handcuffs to be delivered to him. The defendant says he told the plaintiff on the 9th of September that he had this

warrant, that the plaintiff told him that he had paid the money, and had the receipt, and that he would not come, unless he was handcuffed. The Plantiff positively denied all this, and looking at the facts as supported by evidence, I do not hesitate to conclude that this statement to Mr. Freeman was part of the plan which the defendant had determined on beforehand, for he gave no reason for his statement that the plaintiff wished to be handcuffed, except that he was a "troublesome man."

Surely, if, as he says, the plaintiff had told him that he had paid the tax, and should not be arrested, unless he were handcuffed, it was his duty to have told Mr. Freeman that was the reason why the plaintiff desired to be handcuffed, and not simply given as a reason for wanting the handcuffs that the plaintiff was "a troublesome man." Armed, however, with the illegal warrant, and with the handcuffs, he still delayed for nearly three weeks to act on the warrant. The implements of oppression and terror were available against the plaintiff, and powerful ones, no doubt, when the defendant chose to use them to work his will on the plaintiff. The plaintiff swore that when the defendant did come to arrest him, and he was told that the plaintiff had paid the tax, and had the receipt, which he showed the defendant, he said, "this is a false receipt." The plaintiff then asked him to make enquiries at the Kachcheri, to which he replied, he would do so, if the plaintiff "paid him Rs. 2 for his trouble." The plaintiff refused to pay him, and the plaintiff says, "he then arrested me, handcuffed me, and took me to his house, which is fifty or sixty fathoms from my father-in-law's house, and left me in his verandah handcuffed." This evidence of the plaintiff is substantially supported by no less than three witnesses, and had the plaintiff been a less determined man, and yielded to this attempt to enforce blackmail under terror of warrant and handcuffs, it is easy to conceive the result. The plaintiff swears that the defendant was gratifying his ill-will towards him, because for a year past he had been angry with him for not marrying his, the defendant's, daughter, who had been proposed to him in marriage, and he had married another woman. Where are we to find evidence, on the other hand, that the defendant was only

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actuated by an honest zeal in the discharge of duty? Is it in having returned the plaintiff a defaulter, when he was not a defaulter? Is it in the delay in executing the warrant, till he could fortify it with the possession of handcuffs? Is it in the application for handcuffs at the Kachcheri, because the plaintiff was a "troublesome man"? Was it in the arrest at the house of the father of the woman who had been preferred as a wife? Was it in the delay in rendering the plaintiff at the Kachcheri, keeping him meanwhile in his Verandah, exposed as a prisoner with handcuffs and in the stocks? Or, was it in the demand of money as the price of his forbearance to execute the warrant? I confess that all these things leave no other impression on me than that what the Plaintiff has stated was true, and that the Defendant under the colour of the warrant which he had been instrumental in having issued was paying off a grudge. The plaintiff was undoubtedly subjected to deliberate, wilful and unnecessary assault, indignity and insulting detention at the hands of the defendant, a headman, in executing an illegal warrant of arrest, of the illegality of which there is not wanting evidence that he knew. If this case is any type of the usual proceedings to recover this tax under this ordinance, then it is for me to speak, and say they reflect discredit on the law and its administration; and it is for courts of justice to be watchful to protect the liberty of the subject from like proceedings. The plaintiff has established his cause of action against the defendant. It is not denied that he is a respectable man earning at least Rs 1,200 a year by his practice; and I would award him Rs 300 as damages, with costs in both courts.

BEFORE *Burnside*, C. J. AND *Lawrie*, J.

June 29 and July 21, 1892.

RATWATTE *v.* OWEN.

[No. 4,049, P. C., PANWILA.]

Criminal Procedure Code, Ch. X—Public Nuisance—Wire shoot over a public highway.

Appellant, who was the manager and owner of an estate traversed by the high road with, at a particular spot, steep embankments on each side, passed a wire rope over the high road, from one side of his estate to the other, at an altitude

of from eighty to one hundred feet, by which, from time to time, he shot packages of goods across the road. It appeared that if the system of working the wire shoot was carried out without mistake or neglect, there would be no danger to passengers along the road. *Held*, that inasmuch as section 115 of the Criminal Procedure Code conferred on Police Magistrates the power only to order the removal of existing, continuing and public nuisances, and those specially mentioned in that section, the Police Magistrate having held that it was the way in which the wire shoot was worked, and not the wire shoot itself that was a nuisance, it was not competent to him to issue an order under Sect. 115 to remove the wire shoot.

Semble, *per* BURNSIDE, C. J.—It was not the intention of the legislature to give magistrates power to restrain altogether a party from using his property in a particular way on the mere anticipation that a nuisance might result from his using it in an improper way.

An order by a Police Magistrate purporting to be issued under chapter X of the Criminal Procedure Code requiring a party to abate a "nuisance" is *ultra vires*, Police Magistrates being by the Code empowered to deal with *public* nuisances only.

The facts of the case appear in the respective judgments.

Wendt, for defendant-appellant.

Templer, *A. S.-G.*, for complainant-respondent, cited Reg. *v.* The United Kingdom Electric Telegraph Co., Lt., XXI, L. J., M. C., 166; Reg. *v.* Scott, III, Q. B., 543; Ceylon Penal Code, Sect. 261.

Cur. adv. vult.

On July 21, the following judgments were delivered:—

BURNSIDE, C. J.—These proceedings, though nominally by a Ratemahatmaya, are really at the instance of one estate owner against a neighbouring estate owner to compel him to remove what is alleged to be a public nuisance, and the proceedings are taken under the 10th chapter of the Code.

The appeal is by the defendant against whom an order has passed. In view of my judgment on substantial matter, I pass over the appellant's objections to the procedure.

The following conclusions of fact may be accepted. The appellant is the Manager and owner of an estate called Hatale in Watagama. The high road traverses that estate with steep embankments on either side at a particular spot, and the appellant has passed a wire rope over the high road from his estate on the one side of the embankment to his estate on the opposite side, at an altitude of from 80 to 100 feet, by which from time to time he shoots packages of goods from one side of his estate to the other, and across the high road. Mr. Clarke, a neighbouring proprietor, who frequently passes along that road, complained to the Government Agent of it as a public nuisance, exposing him and

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other passengers to danger, and the Ratemahatmaya was directed to give information to the Police Magistrate. The Ratemahatmaya's report was to the effect that "the wire shoot erection by Mr. Owen is a source of danger to the public." The Magistrate seemed, and properly seemed, to consider this information insufficient to ground proceedings; and by letter he requested the Government Agent to inform him "in what way the wire shoot is a source of danger," to which the Government Agent replied forwarding a letter from Mr. Clarke written thus—"I have to invite your attention to the great danger caused the public owing to the erection by Mr. Owen on Hatale of a wire rope shoot which passes above, below and over the Panwila Government cart road. When goods are transported by these means over the road, the danger to travellers is very great, especially to parties riding or driving, as it frightens horses. This was the information to the magistrate upon which he proceeded originally against a Mr. Rudd who, it was said, was Manager of the estate. These proceedings, the magistrate says, were abortive, and he says he thought it best to begin "*de novo*," and they were then directed against the present defendant and appellant who, I find from a statement in the judgment of the magistrate, "had returned from England." The Magistrate examined the Ratemahatmaya and Mr. Clarke a second time, and gave the following judgment—"Let an order issue to Mr. T. C. Owen directing him to remove the public nuisance complained of, and to appear before me on the 29th instant at the Police Court of Panwila at 10 o'clock, and move to have the order set aside, or modified." This judgment was passed on the 11th December, and on the 12th it is noted, "order issued to Mr. T. C. Owen, returnable 29th December, 1891," and this is the order:

Order under Chapter X of Criminal Procedure Code.

To Theodore Charles Owen, Esquire,

Superintendent of Hatale estate in Lower Dumbara.

Whereas it has been made to appear to me that you have caused a nuisance to persons using the Public road way from Panwila to Madulkelle between the 15th and 16th mile posts, by passing goods along a wire shoot, to the danger and obstruction of persons who have occasion to use the said public roadway, and that such nuisance still exists, I do here-

by direct that you do, within 14 days from the date hereof, abate the said nuisance by ceasing to pass goods along the said wire shoot to the danger and obstruction of passengers on the road, or to appear at the Police Court of Panwila on the 29th day of December, 1891, at 10 o'clock in the forenoon, and to show cause why this order should not be enforced.

Given under my hand this 12th day of December, 1891.

J. H. EATON.
Police Magistrate."

It will be seen, and it is not unnoteworthy, that the Magistrate's judgment directing the order to issue runs as if originally it had been written, "remove the nuisance complained of." The word "public" was afterwards interpolated by a carat between "the" and "nuisance," so as to make it run "public nuisance;" but the order issued on that judgment throughout does not refer to a "public" nuisance at all, but simply to a nuisance; and it is only public nuisances that the magistrate is empowered to deal with, and it is by no means beyond contention that such an order was *ultra vires*.

Mr. Owen, however, appeared before the Magistrate in obedience to that order, and called evidence, and contested the issue, whether the Magistrate had authority to make the order, and the Magistrate then made the order absolute in these words. "I make the order in this case, of 12th December, absolute, and I direct that notice hereof be given to Mr. T. C. Owen, the Defendant in this case, that he is required within a month from this date to obey the said order by abating the nuisance, and by ceasing to pass goods along the wire shoot in question, and that on failure of compliance with this order he will be prosecuted for a breach of the 185th section of the Ceylon Penal Code." Hence this appeal.

The order absolute has the same vice as the order *nisi*, in that it only refers to a nuisance, and not a public nuisance; and when I read the Magistrate's statement of his conclusion on the facts, it seems to me that I can arrive at no other conclusion than what was complained of was not in itself a public nuisance. The Magistrate says—"If the system of working could be carried out without the possibility of mistake

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or neglect, then, of course, all danger to passengers riding on horses or in carriages would be absolutely at an end."

The Magistrate does however go on to say that although all danger would thus be removed in respect of those fortunate enough to be able to ride or drive, yet that it would continue in respect of those who walked. Now, I must confess that I have not been able to arrive at the process of reasoning by which to conclude that a weight passing with a noise on a wire overhead was less dangerous to a man riding, or driving, than to one walking. It seems to me that it would be far more dangerous to the former than the latter. If then the Magistrate's conclusion as to persons riding or driving be correct, then *cadit quaestio*. It is not the shoot itself which is an obstacle or nuisance by reason of its causing danger to the public, but it is the way it is worked. It would be as reasonable to order a carriage owner to cease to use his carriage on the high road, because there was the possibility of the mistake or neglect of his coachman rendering it dangerous to the public, as it certainly then might be. The Magistrate seems to have been much impressed with the possibility of neglect or mistake as indicating the character of the shoot. There is the possibility that by mistake or neglect steamers entering the harbour may knock down the light house, and imperil the light keeper's life, but the framers of the Code never apprehended that the Magistrate would for that reason have the power under the 10th Chapter of the Procedure Code to order the owners of steamers not to use them for bringing their goods into the port. The Magistrate has misapplied the case from India which he quotes. That case held, and properly held, that the dam itself was a nuisance, not that catching fish in it was. And it is in this respect that in my opinion he has gone wrong. Had he said—"the wire used as a shoot is a public nuisance. I order it to be removed—" there would then have been an intelligible order within the authority of the Code, but there is no such finding or order. The Magistrate finds the defendant caused a nuisance by passing goods along a wire shoot to the danger" &c. The Magistrate has singularly confused cause and effect. Because the doing of a thing has

resulted in what he holds to be a nuisance, he prohibits the defendant from using his own property in a particular way, however lawfully he might do so. I am not surprised that the Magistrate has gone wrong in this respect, for it would not be evident, without more information than is forthcoming in this suit, how a wire at that altitude in the air could be an obstruction, or be the cause of danger or annoyance to the public, except by its being misused. So I understand the Magistrate to find, and to adjudge that as the defendant may use it without proper care, he must not use it at all. The section of the Code under consideration confer on Magistrates the power only to order the removal of existing, continuing and public nuisances, and such as those expecially mentioned in the 115th section.

The 125th section no doubt empowers a Magistrate making an order under section 115, if he considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, to issue such an injunction as is required to obviate or prevent such danger, and under section 128 a Magistrate may order any person not to repeat or continue a public nuisance; but that is not what the Magistrate has done here, and it will be time enough to deal with these sections when they are before us, but I cannot refrain from expressing an opinion that even by those sections it was not the intention to give Magistrates power on the mere anticipation that a nuisance may result from a party using his property in an improper way, he may be altogether restrained from using it in a particular way.

Applying that law to the present case, the Magistrate had no right on principle to make the order which he has made.

LAWRIE, J.—The Police Magistrate of Panwila on 20th June, 1891, issued an order on the suprintendent in charge of Hatale estate directing him to show cause why an order should not be made directing him to abstain from passing goods on the wire shoot which goes over the public road between the 15th and 16th mile-posts, as the passing of these goods over the public road is a source of danger to passengers on the road.

The Police Magistrate fixed the hearing for the 27th June.

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It is I think plain from the absence of all reference to any section of any ordinance in his order and from the proceedings which followed that the Police Magistrate had not stopped to inquire by what authority the interference of the court was invoked, nor what the issue was which he was ready to try on the 27th June after a variety of amateur proceedings.

The Police Magistrate on 14th November, 1891, suddenly said he would begin *de novo*.

The order or resolution of the Police Magistrate to begin *de novo* must mean that he swept aside all the previous proceedings; but he did not do so. A new information or plaint was not filed; the Magistrate proceeded on the old complaint; and in his judgment he refers to and treats the evidence taken between January and December as regularly before him, notwithstanding that in these previous proceedings there was no complaint before the Magistrate that the Superintendent of Hatale had been guilty of a public nuisance. The Police Magistrate on the 12th December, 1891, issued an order on Mr. Owen who, it may be noted, was not a party to the previous proceedings directing him to remove the public nuisance complained of, and to appear before the Panwila Police Court to move to have the order set aside or modified in manner provided for under chapter X of the Criminal Procedure Code. The order is bad, because it does not use the words, nor fulfil the requirements of any of the sections of chapter X. On 11th March, 1892, the Police Magistrate made the order of 12th December, absolute, and he directed that notice thereof be given to Mr. T. C. Owen, the defendant in this case, and that he be required within one month from this date to obey the said order by abating the nuisance referred to therein, and by ceasing to pass goods along the wire shoot in question, and that in failure of compliance with this order he will be prosecuted for a breach of the 185th section of the Ceylon Penal Code. Now this implies that the Police Magistrate held it had been proved that the passing of goods along the wire shoot was a nuisance which the Police Magistrate had jurisdiction to prohibit.

The Magistrate does not state in his order whence he derived this jurisdiction. The passing of goods along a wire shoot stretched in the air high above the head does not fall under

any of the descriptions in the 115th section of the Code. The nearest description is the first, but in my opinion the passing of goods along a shoot is not an unlawful obstruction or nuisance on a way, harbour, lake, river or channel lawfully used by the public or on a public place. The Magistrate must, I think, have acted under the 128th section. Assuming that the source of the Magistrate's jurisdiction in this matter is the 128th section, he has not brought his order within that section, because he has not found it proved that the act prohibited is a *public* nuisance. His order *nisi* directed Mr. Owen to remove a *public* nuisance. His final order omits the all important word *public*; and if the nuisance was not a *public* nuisance, the Police Magistrate had no power to prohibit it under the 128th section.

But I shall deal with the order as if it expressly held that the defendant had been guilty of a public nuisance. I am of opinion that the evidence does not support such a finding. The 261st section of the Penal Code enacts "a person is guilty of a public nuisance who does any act which causes any common injury, danger or annoyance to the public, or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. Now, to bring the act under the first part of this definition, it must be proved that it caused common injury, danger or annoyance, to the public or to the people in general, &c.

It is clear that the working of the shoot did not cause common or general injury or danger, &c., to the public or to the neighbouring inhabitants. The possible injury, damage or annoyance spoken of by the witnesses is not one affecting the public, but only those who have occasion to use the public right of way.

Hence in my opinion it is the latter part of the 261st section of the Penal Code which is applicable. To make the act a public nuisance within the latter part of the section, it must be proved that the act must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. This wire shoot was in use for some time. It is not proved that its working caused injury to any person at any time. It is clear that it is not necessarily dangerous.

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It is urged that the passage of bags of tea leaf along the shoot over or near the public road must necessarily frighten horses. I see no necessity. It depends on the age and training of the horse. Horses are not necessarily frightened by such sights sounds, and the passing of goods along this shoot is not as loud or as strange as the whistling of a Railway Engine or the groans of a Railway brake. Many acts in themselves lawful may frighten horses, and so may cause injury, damage or annoyance which do not necessarily cause these: It was urged that the passage of these goods along the shoot was dangerous to the passers by, because a bag might fall. It may be so, but the working of the shoot does not necessarily cause that damage. The shoot has been worked in the past without the fall of any goods on any passenger. To protect passengers Mr. Owen should take the most careful precaution, and even in spite of all his care, if some one shall unfortunately be injured, there is a remedy. The power of the Police Court to prohibit acts is confined to those acts which cause injury to the public in general or which necessarily cause injury, danger, annoyance, &c., to those who use a public right. In my opinion the use of this shoot is not a public nuisance, and the order appealed against ought to be set aside, and if costs can be given, I would find the respondent entitled to all the costs to which he has been put. This however being a *quasi* criminal proceeding, it will not be competent to award costs.

BEFORE *Burnside*, C. J., AND *Lawrie* AND *Withers*, J. J.
July 7 and 26, 1892.

CASSIM *v.* MARIKAR and others.

[No. C. 1187, D. C., COLOMBO.]

Title of devisee to property specially devised—Sale of specially devised property under writ against executor—Assent of executor to devises under the will.

In Ceylon, a special devise by will of immovable property passes the estate in such property to the devisee to the extent of the devise, and no formal conveyance by the executor under the will to the devisee is necessary to perfect the title of the latter to such property.

Per BURNSIDE, C. J.—If property specially devised is not required for the purposes of administration, the special devisee takes a clean title unburdened by any right of executor or creditor, and it is always open to him to call on an executor within a reasonable time to make his election as to such property, and an executor not electing within such time would be estopped from doing so.

The mere fact that specially devised property was seized and sold on a judgment against the executor is not sufficient to shew that such property was liable to be sold, in due course of administration, for the testator's debts.

Per WITHERS, J.—No assent of the Ceylon executor or administrator is necessary to pass title to the heir appointed in the will or the heirs at law; for they have this title on the death of the testator or intestate, subject to suspension of enjoyment pending administration, and subject to the estate or title which by probate and letters of administration passes to the Ceylon executor and administrator respectively for purposes of administration and limited thereto.

In this case the land in dispute had been especially devised by will by a testator to the plaintiff. After the death of the testator, on a writ of execution against his executor as such, the land was duly seized by the Fiscal, and sold to the defendant. No notarial conveyance had been executed by the executor in favour of the special devisee, and the question was whether title to the land passed to the special devisee in the absence of assent to the devise by the executor by means of such a conveyance. The Court below held against the special devisee, the plaintiff, who appealed.

Dornhorst, (*Weinman* with him) for plaintiff-appellant.

Layard, S. G., (*Morgan* and *Sampayo* with him) for defendants-respondents.

Cur. adv. vult.

On July 26, the following judgments were delivered:—

BURNSIDE C. J.,—This case is one *prima impressionis*, and we must deal with it on principle, rather than on any decided authority.

I think we may admit that this Court has ruled that on the death of an intestate his immovable property passes to his administrator, and I think it only consistent with this principle that in cases of testacy immovable property, the title to which is not derived or specially appropriated by the will, passes to the executor as against the heir. I myself have so ruled, and I always understood that was the opinion of my brothers, and until the executor or administrator had legally divested himself of the title so acquired, none other could be asserted against it. But as regards immovable property specially devised, and the title to which under the will is distinctly

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recognized by special statute law, it seems to me that there can be no authority for holding that the executor took the estate, notwithstanding the title already created by the will. This would in fact be to repeal the Ordinance 7 of 1840 cl. 3 without the intervention of the legislature I think such a devise does pass the estate in the land devised to the extent of the devise. By English law, specially devised property stands on a different footing to other property, and although such a devise does not *a priori* release the property from liability for debts, it postpones its liability in the order of administration. So with specially devised land here, whilst it would be available for the testator's debts only in the order of administration, the title of the devisee would be imperfect only until it had been discharged of that imperfection. How the title is to be perfected in the hands of the devisee is a question which we should decide. It is only in my opinion when the specially devised land is required by the executor for the purposes of administration that he acquired an interest in it, and that interest is an interest in land, which can only be divested in the way the law requires. So that it is always safer that the executor should recognise the title of the special devisee, and join him in any conveyance he may make; yet if property be not required for the purposes of administration, then the special devisee of it would take a clean title unburdened by any right of executor or creditor. It may be argued that, pending the decision of the question of fact as to the liability or non-liability of such land for debts, the title would be doubtful. No doubt it would, and the title would not be safe till that question had been set at rest, but it would always be open to a devisee to call on an executor within a reasonable time to make his election, and an executor not electing within a reasonable time would be estopped from electing, and it would equally be always open to a creditor in an action against the executor to obtain a decree binding that land to satisfy that debt, if he could shew that it ought to be.

Applying this law to the case before us, it appears that the land was specially devised, but there is nothing before us to show that when Sadiappa got judgment against the executor, it was liable in due order of administration to be sold for the testator's debt to him. No legal presumption can arise, and

the mere fact that it was seized and sold is not sufficient. It may be that there was abundant other property, or there may be other circumstances showing that so far as the event went, the property was not subject to it, and therefore the legal estate acquired by the devise was in no way affected, and the plaintiffs were entitled to succeed.

The judgment of the District Judge will be reversed, and udgment entered for plaintiff with costs.

LAWRIE, J.—I regret that we should attempt to do justice between the parties on these imperfect pleadings.

The plaintiff was allowed by the District Judge to amend the libel averring that the executors had assented to the devise. If that amendment had been made, the defendants could have been called on to admit or deny the averment of assent.

The amendment though allowed was not made, and I do not know whether we are called on to deal with the case as one in which assent was or was not given.

The devise of this land to the plaintiff was made by the testator by a deed executed before a notary and witnesses. It fulfilled the requirements of the Ordinance 7 of 1840.

That devise in my opinion passed the title to the land to the devisee, taking it away, on the one hand, from the heirs at law, and on the other, from the executor of the will.

Holding this opinion I differ from part of the opinion of my brother Clarence reported in the 8th volume of the Supreme Court Circular, p. 192. But though the title passed to the devisee, the land so devised, like the whole property of the testator, was primarily liable for payment of his debts. The title of the devisee was liable to be defeated by the creditors or by the excutor in the course of realizing the estate for the payment of debts.

Until these were paid, the devisee might be required either to relinquish the land or, if he preferred to keep it, to contribute to the payment of the debts to the extent of its value.

As between himself and the executo the devisee might terminate the suspense by obtaining assent to the devise.

In my opinion, such assent need not be signified by deed notarially executed; it need not be an express assent, for in

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some cases the assent may be presumed from the conduct of the executor. In other cases (and this is said to be one) the assent may be expressly given either verbally or in writing.

The question, in what way an executor can legally give his assent is a totally different question from whether, assuming the title to the land to be in the executor, he can pass that title in any other way than by notarial deed. It must at once be considered that if the title be in the executor, a deed is necessary; but as my opinion is that the title passed by the will to the devisee, no transfer is necessary from the executor.

I assume then that the title was in the plaintiff, and that the executor assented, the pleadings seem to me to suggest a different question, whether the assent of the executor removed the land specially devised beyond the reach of the first defendant, a creditor of the testator, whose debt was unpaid at the date of the assent.

Here the land was sold by the Fiscal in execution of a decree against the executors. Presumably, the judgment so obtained against them was for a debt due by their testator, I hesitate to say that under such a judgment a creditor may not levy on any property of the deceased, and if he obtained payment by the sale of land specially devised, it may be that the remedy of the devisee is against the executor or against the other legatees and devisees for contribution.

I feel that the facts of the case are not sufficient before me. The judgment I should wish to give is to set aside the judgment under review and to send the case pack for amendment of pleadings and for trial.

WITHERS, J.—I agree with my lord in deciding that the plaintiff is entitled to judgment rather than the defendants, and that the judgment of the court below must be reversed accordingly. If this were an ordinary case I should say no more, but as the grounds of my opinion do not accord with those of the opinion of the Chief Justice, and as the questions raised are of very great importance, and as the decision of this court regarding them appear to me irreconcilable, I venture with all respect to state my opinion at some length.

I certainly thought till recent times that by the Roman Dutch Law prevailing in this country the property of a testator

whether real or personal, and whether specifically or generally devised, was transmitted on death by the will to the heirs therein appointed, and that property, both real and personal, of one dying intestate descended on death to his heirs according to law.

The learned Solicitor-General, however, contended that this has never been our law, and in support of his contention cited amongst other authorities Gawin *v.* Harder, VIII Moore, P.C.,N.S. and a case reported in the Supreme Court Circular Vol. VIII p. 192.

The passage he cited from the first authority at p. 122, runs thus—"It is stated in the judgment in Ceylon [and the form of the probate and all the proceedings in this case and in the other cases with which they have been furnished show their Lordships that it has been correctly stated] that an executor in Ceylon has the same power as an English executor with this addition, that it extends over all real estate just as in England it extends over chattel personal." I do not think this passage can be construed to mean that the title in all property passes to the Ceylon executor in the same way as it does to the English executor.

The 2nd of those authorities certainly supports the learned Solicitor-General's contention. There is no doubt that the Ceylon executor is a different person to the old Roman Dutch law executor, who had no more powers than the will gave him, and did not represent the deceased testator. Our Ceylon executor and administrator do represent the deceased for the purposes of administration, the probate and letters respectively giving to one and the other the status and powers of a legal representative for that purpose.

There must be of course an estate commensurate with those powers, and by probate and letters an estate sufficient for administration and limited thereto passes to the Ceylon executor and administrator respectively.

I see no more difficulty in the conception of a limited estate being extracted out of the inheritance and given by operation of law to the executor, than I do in the conception of particular estates being carved out of an estate in fee simple.

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By the English law the executor's assent is necessary to give title even to a special legatee, and if our law is the same, the executor's assent, in order to give title to a special devisee, can only be given in the way required by our law, that is, by a duly executed notarial instrument. So it really comes to this, that if a man specifically devises parcels of land to several children, and there are no claims against the testator's estate, the executor is bound to assign each parcel to a particular devisee by a notarial instrument. What burden is thereby laid upon the inheritance? However, if all the property of a testator or intestate, real and personal, specific and general, passes by probate and letters to a Ceylon executor and administrator as movable assets do to an English executor and administrator, let it be so clearly understood, and let this law be once and for ever laid down with a precision that can admit of no mistake. As to the property of a man dying in Ceylon intestate it has been laid down:—

(*a*) That a surviving spouse can liquidate the deceased's estate for actual debts just as well as a legal representative—V. S. C. C., p, 70.

(*b*) That the next of kin of an intestate, if all join in the action, can sue to recover the debt owing to the deceased without a representative—VII, S. C. C. p. 23.

(*c*) That where there are no debts owing to or by the deceased, the next of kin can distribute the property amongst themselves without representation—VII S. C. C. p. 78.

(*d*) That next of kin acquire title on death, and can without a representation unite and dispose of their inheritance to satisfy claims against the estate of the intestate, and pass a title to the purchaser in spite of representation after the sale in liquidation—VIII, S. C. C, pp, 54 and 205.

(*e*) That next of kin to an intestate can recover a judgment for title to land—IX, S. C. C. p, 63.

(*f*) That next of kin to an intestate can redeem a mortage without representation—I, C. L. R., p, 36.

I humbly conceive that no assent of the Ceylon executor or administrator is necessary to pass title to the heirs appointed in the will or the heirs at law; for they have this title on the death of the testator or intestate subject to suspension of

enjoyment pending administration, and subject to the limited estate or title of the executor and administrator which I have spoken of before. An executor's duties concluded, his powers and estate disappear, and what remains after liquidation is left free for enjoyment by the heirs. As to the minor points, I am quite with Mr. Dornhorst in thinking that his clients have sufficient interest in the subject matter of this action to entitle them to bring it, and I cannot say I am satisfied that the premises herein sought to be recovered were sold for a *bona fide* claim against the estate of the admitted owner.

BEFORE *Dias* AND *Lawrie*, J.J.

June 17 and 24, 1892.

JALDIN *v.* NURMA

[No. 56,886, D. C., COLOMBO.]

Fiscal's Conveyance.—Rights of heirs of purchaser at a Fiscal's sale—Practice.

Where a plaintiff, since deceased, bought land sold in execution of the judgment in his favour, but omitted to obtain the formal Fiscal's Conveyance, and after the lapse of some years his heirs applied to be substituted plaintiffs to enable them to obtain such conveyance—*Held*, *per* LAWRIE, J, that the heirs had mistaken their remedy; that the right of the heirs to get a conveyance did not depend on their being substituted plaintiffs, but that the court might on summary petition by them authorise or order the Fiscal to grant such conveyance

The facts of the case sufficiently appear in the judgment of LAWRIE, J.

Dornhorst for Petitioners, appellants.

Wendt for defendant, respondent.

On July 24, the following judgments were delivered:—

DIAS, J.—For the purposes of this appeal all I need say is, that the appellants have failed to satisfy me that they are entitled to the order which they asked. Affirmed with costs.

LAWRIE, J.—The Plaintiff got judgment in 1870. It is admitted that the judgment was fully satisfied. The plaintiff died many years ago. I assume that the petitioners, who desire to be substituted plaintiffs, are his legal representatives.

I agree with the learned District Judge that the prayer of this petition must be refused.

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These legal representatives cannot be substituted plaintiffs, and for this reason, that there is no longer an action in dependence.

It could do them no good to have their names entered in a dead action. They could take no further steps in it, not because it is an old action, but because the judgment is satisfied, and the litigation is at an end.

The petitioners who desire to perfect their title to a land purchased by their ancestor are not without a remedy. It seems to me that they could present a summary petition praying the court to authorize or to order the Fiscal to grant them a conveyance. To such an application all the heirs of the deceased purchaser, the judgment debtor, and also the Fiscal would be made respondents.

The right of the petitioners to get a conveyance would depend on their interest in the land.

A purchaser from the original plaintiff would, I think, have this right. It is a right which does not depend on the petitioners being substituted plaintiffs in the action in which the sale took place.

I do not attach much importance to the lapse of time. The 5th section of the Ordinance 22 of 1871 does not touch the question, because it is admitted that the judgment is satisfied.

The question is, whether the right of a purchaser to get a conveyance from the Fiscal is lost by lapse of many years. There is no statutory limitation, and I hesitate to approve of the court fixing a limitation, when the legislature has fixed none. But when a purchaser at a Fiscal's sale delays to obtain a conveyance, and when the Fiscal declines to give him one without an order from the court, the court on being applied to would probably refuse to interfere, unless it was satisfied that the applicant had had possession by virtue of his purchase, and that no rights, adverse to him, had been created by his delay.

In my opinion the petitioners have mistaken their remedy, and that though this application was rightly refused, it is still open to them, as having acquired a right to the land, to apply by summary petition for a Fiscal's conveyance.

BEFORE *Burnside*, C. J. and *Lawrie*, J.

July, 26 and 29, 1892.

In re the application of Salgado, a law student, for a rule on the Council of Legal Education.

Mandamus—Council of Legal Education—The Courts Ordinance 1889, Sect. 18, and Sch. III, Rules 24 and 31.

There is no express law whereby the Supreme Court is compellable to admit and enrol proctors or the Council of Legal Education is compellable to permit any one to submit himself for examination with a view of obtaining a certificate of qualifiation to enable him to apply to the Supreme Court to be enrolled as a proctor.

The Council of Legal Education have vested in them a discretion to control the education of candidates, and the Supreme Court will not interfere with that discretion, unless it is most unreasonably exercised.

It is not unreasonable for the Council of Legal Education to pass a general resolution restricting the number of examinations for which a candidate may enter.

Joseph Salgado, a law student, who had entered into articles as provided in the Rules and Orders of the Supreme Court dated December 30, 1841, and had completed his term of service, and been allowed three times by the Council of Legal Education to enter for the final examination for the admission of proctors of District Courts, but had failed to satisfy the examiners each time, applied to the Council to be allowed to enter for the examination a fourth time. The Council, in accordance with a resolution adopted by them limiting to three the number of times a law student may enter for such final examination, disallowed the application.

Morgan (*Pereira* with him) for Salgado, now moved for a rule on the Council of Legal Education to shew cause why the Council should not by mandamus be compelled to permit Salgado to enter for the final examination a fourth time.

The case fell under Sect. 18 of "The Courts Ordinance, 1889" and Rules 31 and 24, in Schedule III of that Ordinance. The Section and Rules were as follow:—

Sect. 18—"Subject to the rules hereinafter set out in the third Schedule to this Ordinance annexed, the Supreme Court is authorised and empowered to admit and enrol as advocates or proctors in the said Court, and as proctors in any of the district courts of the island, persons of good repute and of competent knowledge and ability."

Rule 31.—"All persons who, having heretofore entered into articles as provided in the rules and orders of the Supreme Court dated, December 30, 1841, have completed or shall hereafter complete their respective terms of service, shall be eligible to enter for the final examination provided in rule 20. Upon payment to the Secretary of a fee of Rs. 50 one month at least before such examination

In re THE APPLICATION OF SALGADO FOR A RULE ON THE COUNCIL OF LEGAL EDUCATION.

and the production of a certificate from the advocate or proctor to whom the candidate had bound himself certifying that he had well and truly served the said advocate or proctor as clerk during the term of his articles, he shall be examined at the final examination, and if deserving to be passed, shall be awarded a certificate in the Form C. Thereafter, his admission as proctor shall be regulated by rules 25, 26, and 27, save that he shall not be required to serve a proctor of the Supreme Court as clerk after passing the final examination, or to produce a certificate to that effect or the certificates A and B as provided in rule 26. In the event of such candidate failing to satisfy the Council, and desiring to enter for any ensuing final examination, the provisions of rule 24 shall apply to him."

Rule 24—"In the event of the candidate failing to satisfy the Council, and desiring to enter for any ensuing final examination, he shall pay a fee of Rs. 50 for every other final examination for which he may enter."

Cur. adv. vult.

On July 29, the following judgment was delivered by

BURNSIDE, C. J.—Mr. Morgan, at the last sitting of the court, applied on behalf of Mr. Salgado for a rule on the Council of Legal Education to shew cause why a mandamus should not issue requiring them to permit Mr. Salgado to be examined for the fourth time at the final examination preliminary and necessary before being admitted a Proctor of the District Court. It appears that the Council had come to a resolution that a candidate who had failed three times to pass examination should not be permitted to present himself for examination a fourth time. It is not denied that this rule or resolution of the Council is an existing one, not made simply as affecting any particular individual, but affecting all candidates, and under it the Council of Legal Education refused to permit Mr. Salgado to present himself for a fourth time for examination. I have carefully gone through the law applicable to the question, and I can find no express law whereby the Supreme Court is compellable to admit and enrol proctors, or the Council of Legal Education is compellable to permit anyone to submit himself for examination with a view of obtaining a certificate of qualification to enable him to apply to the Supreme Court to be enrolled. The provisions of the law in both cases seem to me to be simply permissive, and in no way imperative, and I think it is perhaps not undesirable that it should be so. It is by no means difficult to imagine a state of circumstances under which, although a candidate might be prepared to fulfil all that he is required to do by law, yet there existed other circumstances which should absolutely prohibit his being admitted to the profession. I think it should be a positive evil

if every one might claim as a right to enter the profession. No doubt exists in my mind that the Council of Legal Education have vested in them discretion to control the education of candidates; otherwise, the object of its existence is not very apparent; and this court would not, if it could, interfere with that discretion, unless it was manifest that it had been most unreasonably exercised. Now, it seems to me that it is not unreasonable for the Council to pass a general resolution restricting the number of examinations a canditate should undergo. As I have already said, the Council are not, as it appears to me, compellable to examine anyone, and if not, *a fortiori*, they would not be compellable to permit him to be examined a second, third or fourth time. I think it would be very unwise in this court to intervene between the action of that body, which is specially provided by law as a safeguard against objectionable admission into the profession. If it is thought that there ought to be such a superintending authority over the body, of which the judges themselves form a part, then let the legislature say so in no uncertain terms. It is quite clear that if the judges themselves in their capacity of members of the Council had been alone responsible for the resolution under which Mr. Salgado is precluded from a fourth examination, it would be idle to ask them to issue a mandamus to themselves; and assuming that they did not take part in it, then if they agreed with it, it would be equally idle to ask them to issue a mandamus to compel their colleagues to change their opinions, and if they disagreed with their colleagues, then it would be grossly anomalous that they should use their judicial authority to coerce the consciences of their colleagues. Then again, as a matter of strict law, a mandamus is never granted, if there is another remedy. Now, it seems to me that if Mr. Salgado thinks he has been illegally dealt with, he has a clear right of action against those who have dealt illegally with him. Even supposing that Mr, Salgado had the legal right to be again examined, that by no means concludes the question of his right to be enrolled, and the probability or improbability of his future success is so purely a question of speculation as renders it eminently a question to be tried and disposed of by a jury. Whichever way I look at the matter,

In re THE APPLICATION OF SALGADO FOR A RULE ON THE COUNCIL OF LEGAL EDUCATION.

I am clearly convinced that no mandamus should ever issue; and I therefore see no reason to let the applicant have a rule. I am alone responsible for this judgment: my brother Lawrie considers himself precluded in taking part in the matter.

BEFORE *Burnside*, C. J. and *Withers*, J.

August 5 and 9, 1892.

ABEYAWARDENE *v.* MARIKAR & another.

[No. 49,861, D. C., Galle.]

Practice—Application by executor of sole plaintiff, deceased, to be substituted plaintiff—Reviving judgment—Civil Procedure Code, Sects. 91, 395 *and* 405.

Plaintiff having died after judgment, his executor applied by motion, on rule served on defendant to shew cause to the contrary, that he (the executor) be made a party on the record in the room of the deceased plaintiff, and that the judgment be revived, and writs issued—*Held*, that the District Judge's order allowing this motion was wrong, 1st, because there is no provision in the Civil Procedure Code for reviving judgments 2ndly, because, before an application to issue execution on a decree could be maintained, there must be a plaintiff on the record, and here there was no plaintiff at the time of the application, and 3rdly, because the motion did not set out the particulars that under the Code should be embodied in an application for execution.

Per Withers J.—Petition by way of Summary Procedure is not the proper way for the legal representative to apply to the Court under Sect. 395 of the Code to have his name entered on the record in place of a sole plaintiff, deceased.

Sect. 405 of the Code applies to cases in Chap. xxv. where the Court has a judicial discretion to exercise in the matter of the particular application, and it does not therefore apply to an application under Sect 395. Such an application should be made in the manner indicated in Sect. 91.

The facts of the case sufficiently appear in the judgment of BURNSIDE, C. J.

Wendt for defendants, appellants.

De Saram for applicant, respondent.

Cur. adv. vult.

On August 9, the following judgements were delivered:—

BURNSIDE, C. J.—In this case the Plaintiff died after judgment, and his executor applied by motion to be made plaintiff on the record in lieu of his testator. His Proctor moved the Court for a notice on the defendants to shew cause why he, the executor, should not be made a party on the record in the room of the deceased plaintiff, and why judgment should not be revived, and writs issued for the recovery of the amount of the judgment with interest and costs. The defendant appeared,

and the District Judge proceeded to hear evidence mainly bearing on the question, whether the judgment should be revived and writs issued thereon. The questions whether the applicant was executor and whether he was entitled to be substituted plaintiff on the record, do not seem to have been contested by the defendants. The learned District Judge thereupon made an order that the applicant be made a party on the record, and also that the judgment be revived, and that execution do issue thereon. The defendants appealed against this order. It was urged before us in appeal, that these proceedings were irregular; that the application to substitute the applicant as plaintiff should have been by way of summary procedure, and not by way of motion. The 395th section ordains that in case of death of a sole plaintiff, the legal representative of the deceased may apply to the Court to have his name entered on the record, in place of the deceased plaintiff, and the Court shall thereupon enter his name, and proceed with the action; and by section 405 it is required that in all applications (excluding those under section 398 which does not touch this matter) for the excercise of the discretion of the Court, under this chapter, all the parties to the action or such of them as may be affected by the order shall be made respondents on the face of the application. The defendants rely on these two sections in support of their contention. For the applicant-respondent reference was made to the heading of the chapter entitled "Incidental Proceedings" and to section 91 (Chapter XIII,) which ordains every application made to the Court in the course of an action incidental thereto, and not a step in the regular procedure shall be made by motion, and it was urged that the application now under discussion was an incidental proceeding and governed by section 91 just quoted. I am not without my doubts as to which is right of the two contentions but I incline to the opinion expressed by my brother WITHERS that an application of this kind is not governed by section 405.

Be this, however, as it may, there seems to be a serious objection to this order, apart from that already dealt with. It is quite clear that the Code makes no provision for reviving judgments; at least, I can find none; and it has

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repealed the prescription ordinance relating to claims on judgments and the provision for reviving them. It would seem therefore that there is now no provision for reviving judgment. So far, therefore, as the order went reviving judgment it is *extra vires*, and must be set aside. Then again, before an application to issue execution on the decree could be maintained, there must be a plaintiff on the record. Now, before the applicant—plaintiff was on the record, the motion was made to issue execution at his instance, and consequently all the proceedings are valueless. Then again, the Code requires that the application for the execution of the decree shall contain many particulars, none of which are embraced in this motion for execution in this case. All these reasons point to but one result viz., that the order must be set aside. I would not give costs to either party, because neither is free from having contributed to it. The order is set aside without costs.

WITHERS J.—The dual motion of a party to be allowed to come in to the record as executor in the room of a sole plaintiff who has died after judgment, and to revive that judgment is bad for more reasons than one.

In the first place, there is no longer such a thing as the revival of a judgment; and in the second place, if there was, the applicant must be on the record before he can ask for it. The dual order allowing that motion is equally bad and must be set aside. Petition by way of summary proceedure is not the proper way for the legal representative to apply to the Court to have his name entered on the record in place of a sole plaintiff deceased. The 405th section of the Code applies to cases in Chapter XXV when the Court has a judicial discretion to exercise in the matter of the particular application.

On the suggestion of death of a sole plaintiff of the survival of interest (manifest here) and the status of the applicant as legal representative, the Court is bound to enter his name, and proceed with the action (see 395 section of the Code "shall thereupon enter"). As this chapter seems to treat an application of this kind as an incidental step, I am of opinion that the application should be made in the manner indicated in the 91st section. There will be no order as to costs.

BEFORE *Burnside*, C. J. and *Lawrie* and *Withers*, J. J.

July 7th and 12th, 1892.

GOONESEKARA *v.* De SILVA and others.

[No. 98,571, D. C., COLOMBO.]

Proctor—Petition of Appeal—Civil Procedure Code Sect. 754.

Mortgagee—Execution Creditor—Restriction of, sale of mortgaged property—Civil procedure Codes Sects. 224, 225, 226.

A petition of appeal to the Supreme Court may be signed by a Proctor of the District Court.

An execution creditor is entitled to a writ in conformity with his decree. A mortgagee in execution cannot be restricted to discuss any particular part of the mortgage property before the other.

The facts of the case appear sufficiently in the judgment of BURNSIDE, C. J.

Dornhorst, for appellant.

Layard, *S.-G.*, for 2nd and 3rd respondents.

BURNSIDE, C. J.—The objection taken to this appeal that the petition was not signed by a Supreme Court Proctor, but by a proctor of the District Court, cannot prevail. The Registrar informed us at the hearing that the practice had been for such appeals to be signed by the Proctor for the appellant in the District Court, but whatever may have been the practice it would be no longer possible, since the passing of the Civil Procedure Code, to contend that such petitions should be signed by a proctor of the Supreme Court. By the 754 section, this is the practice to be observed. The petition of appeal shall be to the Supreme Court, but it shall be presented to the court of first instance for the purpose by the party appellant or his proctor, and the court to which the petition is so presented shall receive it and deal with it. The proctor, referred to, is the proctor in the court below as the subsequent section makes clear. The appeal petition, therefore, and the proceedings on it, till it is forwarded to the Supreme Court, are proceedings in the Court below, in which the proctor in the court below is the proper proctor, I now come to the order which has been appealed against.

The plaintiff's libel was against three defendants, the 1st is his mortgagor and debtor, and the 2nd and 3rd are parties in possession of part of the mortgaged premises, which

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they have bought subsequent to the mortgage. It is not pretended that the 2nd and 3rd defendants owed the plaintiff anything. They were in fact only made parties in order to bind that part of the mortgage property in their possession.

The plaintiff in his prayer asked for a decree against the 1st defendant for the debt and costs, and against all the defendants that the mortgage premises should be decreed executable for the debts only, not the costs. On this libel a judgment by default was obtained, on which a decree passed on the 23rd February, 1888, against the defendants and prayed for and it particularized that the plaintiff do recover from defendant (which defendant is not named) the debt and costs, and that the lands be declared bound, &c. On this decree execution issued against the property "of the defendants," (vide order 29th February, 1888.) Now it is clear there was no authority to issue execution against the property of the 2nd and 3rd defendants. However nothing seems to have been done to realize the execution; some of the mortgaged land was seized and by some arrangement was released, when on the 3rd September, 1891, more than three years afterwards, the plaintiffs proctor moved for notice on the defendant to shew cause why writs should not be issued for the recovery of the debt and interest till payment. The learned District Judge made an order allowing judgment to be revived and execution to issue to be executed in the first instance against that part of the property which was not in defendant's possession. Against this latter part of the order the plaintiff appeals. It cannot be contended that a mortgagee in execution can be restricted to discuss any particular part of the mortgage property before the other. I do not hesitate to say that the condition attached to the learned judge's order could not be upheld. The prescribed procedure under the Code has not been followed; (see sections 224 *et seq*:) and particulary as more than a year has elapsed since the judgment was obtained. I do not think we should at this early stage of a new procedure allow it to be almost entirely ignored in this way. But I have a stronger objection to the order. There is no decree against the defendants, or any particular one of them personally for the debt. If execution issue it cannot be a

partial execution against the mortgaged property alone; it must be against the property of the person or persons as well, liable by the judgment to pay the debt and the decree does not designate such person or persons. No such execution is known to the law as directs the fiscal to levy on any particular property; it must be a general direction to levy the debts on the property of the person liable there for, and in case of mortgage property, the special property mortgaged is pointed out as available under the decree in execution. The only legal way that the judge's order can be dealt with is, either to remove from it the restriction as to particular property and let it go as an order for execution generally, or set it aside altogether. I would adopt the latter course and put the parties at arms length unless indeed the plaintiff preferred to take the partial order which he has received and against which the defendants have not appealed, in which case I would permit him to withdraw his appeal.

LAWRIE, J.—The judgment creditor prayed for execution of a superannuated judgment by the attachment of the property of the 1st defendant.

Due notice was given of the petition notwithstanding the opposition of the 2nd and 3rd defendants. I see no reason why the prayer of the petition should not be granted.

It is not proper to anticipate what property will be surrendered or seized. If any property other than that of the 1st defendant shall be seized, the parties aggrieved can claim and can demand that the seizure be released.

It will be time enough to consider the extent of the liability of the 2nd and 3rd defendants under the decree when it is proposed to attach their property.

I agree with my lord the Chief Justice that the restriction of execution to land A should be struck out.

I would set aside the order under review and I would send the case back to the District Court to deal with the petition.

No costs of this appeal.

WITHERS, J.—I think the order appealed from should be set aside. The execution creditor is clearly entitled to a writ in conformity with his decree when amended and appropriately

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framed. Had the agreement relied on by the District Judge been made between the plaintiff and the 2nd and 3rd defendants after decree, instead of before action, there would have been some ground for staying execution against the mortgaged properties in the possession of those defendants until 1st defendant's property had been judicially sold in satisfaction of the judgment debt, leaving a balance, if any, unsatisfied.

BEFORE *Burnside*, C. J.

February 8th and March 3rd, 1891.

The QUEEN *v.* KOLENDAVAIL.

[No. 4,165, D. C., CRIMINAL BADULLA.]

Irregular Commitment—District Court.

Where an indictment appears good on the face of it, and is supported by a commitment, and the Attorney General's fiat, the District Judge has no jurisdiction to inquire into the validity of the commitment. The remedy against an irregular commitment is by application to the Supreme Court.

In this case the Attorney-General appealed against an order of the District Judge quashing the indictment.

Layard, S. G. for appellant.

On March 3rd, the following judgment was delivered:—

BURNSIDE, C. J.—The order of the District Judge in this case quashing the indictment is set aside. The indictment being good on the face of it and supported by a commitment and Attorney-General's fiat the District Judge had no jurisdiction to inquire into the validity of the commitment.

This court has already decided that when a prisoner is before the court and an indictment is duly exhibited against him it is too late to take exception to the commitment. District Courts have no power to review the circumstances under which a commitment was made; they are required to try such offenders for such offences within their jurisdiction as may be committed for trial before them on the fiat of the Attorney-General. The remedy for an irregular commitment would be by application to this Court.

BEFORE *Lawrie*, J.

February 26th and March 5th, 1885.

SOYSA *v.* PUNCHIRALA and others.

No. 143 P. C., KANDY.

Criminal Procedure Code—Sections 405 and 414.

In a case in which some of the accused have received a sentence, from which an appeal lies, and some a sentence from which there is no appeal, on appeal by the former, the whole of the proceedings may be reviewed under section 414 of the Criminal proceedure Code.

The facts material to this report appear in the judgment.

Peiris for accused-appellant.

On march 5th, the following judgment was delivered:—

LAWRIE, J.—In this case the Police Magistrate found these accused guilty and sentenced the 1st accused to 3 months rigorous imprisonment and the 2nd and 3rd to 14 days simple imprisonment.

Against this all the accused have appealed.

I reject the appeal by the 2nd and 3rd under the 405 section of the Ordinance.

I am, however, inclined to the opinion that in a case in which some of the accused have received a sentence from which there can be an appeal and some a sentence against which no appeal lies, the appeal by the former may bring up the whole case to this Court and that under section 414 the whole proceedings may be revived.

On considering the proof I am of opinion that the conviction is right and that the sentence should be affirmed.

BEFORE *Clarence*, J.

March 11 and 25, 1892,

JONKLAAS *v.* SILVA.

[No. 1,988 A. D. P. C., COLOMBO.]

Sec: 69 and 71 Criminal Procedure Code—Search Warrant.

Under Sects. 69 and 71 of the Criminal Procedure Code, a search warrant may be issued to search for arrack. The expression "other thing" in line 2 of Sect. 69 is not to be construed as referring to a thing *ejusdem generis* with "document" as used in the same section.

The facts sufficiently appear in the judgment.

Dornhorst for accused-appellant.

Dumbleton, C. C. for complainant-respondent.

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On March 25, the following judgment was delivered.

CLARENCE, J.—It was contended in appeal that under the Criminal Procedure Code a search warrant cannot be issued to search for arrack. That contention I cannot sustain. I am of opinion that S.S. 69. 71, do authorize such a warrant; and I do not subscribe to the argument that in S. 69, line 2 "other thing" is to be construed as *ejusdem generis* with "document."

BEFORE *Clarence*, J.

18th January, 1889.

KAMY UMMAH *v.* JUNOOS LEBBE.

[No. 53,464 C. R. COLOMBO.]

Landlord and Tenant—Jurisdiction of Courts of Requests—Agreement to pay Rent.

Plaintiff averred that defendant was his tenant under an agreement. Defendant denied that he entered into any such agreement and pleaded an independent title to the house alleged to have been let to him by the plaintiff. *Held* that the Court of Requests had jurisdiction to try the case and decide whether there was an agreement or not, although the value of the house was Rs. 100.

The facts of the case sufficiently appear in the judgment of CLARENCE, J.

On 18th January the following judgment was delivered:—

CLARENCE, J.—I think that this appeal must succeed. This is an action for rent. In a previous action the Commissioner of Requests nonsuited the plaintiff on the ground that the case disclosed a question of title to land beyond the jurisdiction of the Court of Requests. The same question appears to have been raised in a previous action. This court is not bound by the decision of the Court of Requests on such a question. If defendant did agree to become plaintiff's tenant, he cannot now contend that at the date of the agreement the title was in him and not in plaintiff. I must look into the pleadings, and see whether or not they disclose anything to prevent the Court of Requests from trying the case. The plaintiff avers that the defendant is his tenant under an agreement. Defendant denies that he entered into any such agreement, and avers an independent title. The issue, whether any such agreement was made must be disposed of in the Court of Requests.

BEFORE *Burnside*, C. J. and *Lawrie* and *Withers*, J. J.

July 7th and 12th, 1892.

De SILVA *v.* OSSEN SAIBO.

[No. 28,689 D. C., BADULLA.]

Sale of Land—Ouster by third party—Express Warranty—Implied Warranty.

Where a purchaser of land sues the vendor on a breach of express warranty of title, and fails to establish such express warranty, he cannot avail himself of the implied warranty of title under the Roman Dutch Law.

The facts material to this report sufficiently appear in the judgments of BURNSIDE, C. J. and LAWRIE, J.

Layard, S.-G., (*Sampayo* with him) for defendant, appellant.

Dornhorst, (*Van Langenberg* with him) for plaintiff, respondent.

The following judgments were delivered on the July 12th, 1892.

BURNSIDE, C. J.—The plaintiff in his libel alleges that by deed produced with the libel and pleaded as part of it, the defendant sold and conveyed to the plaintiff certain land, and by the said deed the defendant represented that he was the owner of the said land, and promised to warrant and defend the plaintiff's title to it. I do not think there can be any doubt, indeed it is not questioned, that the libel referred to an express covenant, and one undoubtedly alleged to be contained in the recited deed. For breach, he alleges that a certain official on behalf of the Crown ousted him, that he brought an action to regain possession, that the defendant failed to defend his title, and that he was obliged to compromise his action, as in fact the defendant never had any title to the land, it being the property of the Crown.

To this libel the defendant demurred, or, to use the more prolix words of the Code, "answered on legal grounds"—alleging that the libel discloses no cause of action, and that the averment in the 3rd paragraph of the libel to the effect that by the deed of transfer, which is pleaded and made part of the libel, the defendant promised to warrant and defend the plaintiff's title to the land conveyed thereby, is at variance with the said deed, which contains no such promise or averment. This objection raised a simple issue of law—one that must be

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decided from within the four corners of the deed that was before the Court.

By words of express covenant which appear in the deed the defendant has specially limited the covenant for title to his own acts—He says, I do hereby declare that I did no act whatever previously to invalidate this sale, and do agree to settle all disputes that may arise with respect hereto.

I am sure that no lawyer going through the deed would venture to say that it contained any express contract upon which an action would lie. The covenant which I have quoted clearly extends only to encumbrances created by defendant himself. The District Judge himself does not venture to say that any express covenant for title is contained in the defendant's contract of sale, but proceeds in an elaborate judgment, theorizing about the defendant's liability under what is called Roman Dutch Law to hold that there is an implied contract of warranty under the Roman Dutch Law in the defendant's contract of sale, whereby the defendant was liable to the plaintiff, and he dismissed the demurrer on that ground.

Now suppose, for the sake of argument, we follow where others have not feared to rush in, and suppose we come to the same conclusion, would that entitle the plaintiff to judgment on the express contract which he has set up in this action?

The learned counsel for the plaintiff himself did not pretend to contend that the libel could be supported, unless we were prepared to read it as referring to an implied contract rather than in its plain and unmistakable language. The practice, which is a growing one, of giving judgment one side or the other on issues which the pleadings do not raise, and which neither parties themselves nor their legal advisers ever contemplated or anticipated, however it has been fostered, has no doubt given us much legal dicta, dependent on mere speculation, involving more or less bad or useless law.

The result has been chaos and confusion. The plaintiff's libel discloses no cause of action, and the action should be dismissed with costs.

It will be time enough when the question of the applicability of Roman Dutch Law is properly before us to seek

to gather some principles which may be practically applied to the affairs of the life of the present day; but I do not hesitate to assert, on the research which I have made, that this alleged doctrine of implied warranty in every sale, if enforced in its integrity, would involve results so grotesque and ridiculous as could not be accepted by any one who may even pretend to set it up as touching the title to land among the peasantry of this Colony. In my opinion the judgment should be set aside and judgment entered for the Defendant with costs.

LAWRIE, J.—It is not necessary to discuss or decide the question whether by the law of this colony, there be an implied covenant for title in all contracts of sale in which there was no express covenant. It is certain that a vendor may exclude all questions of implied warranty, either by expressly stating that he does not warrant, or that he limits his liability to his own acts, or to the acts of some other named predecessor in title.

Here, the vendor was not silent. He made an express, though limited, covenant for title, and it is on that covenant that the action is laid.

We are all agreed that the case turns on the construction to be put on the express covenant.

It runs thus:—"I do hereby declare that I did no act whatsoever previously to invalidate this sale, and I do agree to settle all disputes that may arise in respect hereto."

Mr. Justice Clarence, in a draft judgment prepared before he left the island on leave, wrote:—"Can we regard these latter words as a covenant for title? Although not without some hesitation, I think we ought to regard them so. If there be a doubt we should construe the words rather against than for the vendor, and I think that, though the words are rather vague, the intention is that the vendor should, by settling all disputes about the land, settle them satisfactorily for the purchaser."

That is the view taken by the District Judge, and, I might agree to that construction of the words "I agree to settle all disputes that may arise in respect thereto" if these stood alone, but, the clause must be read as a whole, and as a whole, it contains only a covenant as to the vendor's own acts.

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On this ground, I agree with the Chief Justice that the action must be dismissed.

WITHERS, J.—This case was not re-argued in appeal.

The defendant, in my opinion, is clearly entitled to judgment.

The plaintiff declared on an express covenant for title which is not contained in his conveyance. There is no count on the covenant implied in Roman Dutch Law that the purchaser of land should have free and full possession of his property.

Even if there was, it is very questionable whether his plaint discloses a good cause of action for damages for breach of such a covenant. It becomes unnecessary to discuss the points of law so learnedly elaborated in the judgment of the District Judge.

BEFORE *Burnside*, C. J., AND *Withers*, J.

August 5 and 9, 1892.

ORR *v.* MARTIN.

[No. 1,697, D. C. COLOMBO.]

Malicious prosecution—Reasonable and probable cause—Malice.

In actions for malicious prosecution the questions to be considered are (1) Did the defendant take reasonable care to inform himself of the true state of the case, and (2) did he himself believe the case which he laid before the Magistrate?

Where the defendant allowed himself to be entirely guided by an Inspector of Police and instituted proceedings without satisfying himself of their *bona fides*.

Held There was absence of reasonable and probable cause. Judgment of Justice Cave in Brown *v.* Hawkes, 60 L. J. Q., B. 335. followed.

The facts of the case sufficiently appear in the respective judgments.

Dornhorst, for plaintiff, appellant.

Dharmaratne, for defendant, respondent.

On August 9th the following judgments were delivered:—

WITHERS, J.—This is an action for malicious prosecution and the question is, has the plaintiff proved or failed to prove malice and want of reasonable and probable cause for his prosecution by the defendant before a Magistrate on a charge of theft, of which offence he was acquitted. The learned District Judge has dismissed his action, finding that the prosecution was

not malicious, and that there was reasonable and probable cause.

The facts deposed to by the defendant before the Magistrate were that he identified one of his shirts alleged to be stolen by the plaintiff as one of his stock in trade, that this shirt was found in defendant's possession at his house on Saturday the 2nd of April last, that the plaintiff when asked to account for its possession said he had bought it of an unknown hawker, that this was a shirt which had been stolen from his shop in December previous, that plaintiff had said in the presence of Inspector White he had been in the habit of receiving goods for disposal, but that he had not done so after hearing that defendant had offered a reward for information against receivers. This deposition was made on the 6th April, and the case was postponed for further enquiry on April 14. The plaintiff who was out on bail appeared before the Magistrate, but the defendant did not, and on the statement of Inspector White that the defendant declined to attend or to take any more trouble in the case, entered an order of acquittal and then the matter ended. In a case of this kind two questions are always put to a jury, did the defendant take reasonable care to inform himself of the true state of the case, and did he himself believe the case which he laid before the Magistrate? Now it is significant that neither before the Police Magistrate, nor before the defendant, nor in that superfluous part of his answer where he sets out facts shewing reasonable and probable cause, has the defendant declared that he believed the case he laid before the Magistrate.

Looking at the way he completely surrendered his judgment to that of Intpector White and his abandonment of the case it looks as if he had no faith in his case when he charged the plaintiff with theft.

If the facts deposed to before the Magistrate, which I think may be taken to be true and undisputed, shew an absence of reasonable and probable cause, then as Justice Cave says in Brown *v.* Hawkes reported in 60 L. J. B. 335, it was quite unnecessary to enquire whether the defendant took reasonable care to inform himself of the true facts. Then can the facts deposed to be said necessarily to indicate the presence of reasonable and probable cause without anything more? I confess I doubt it, and I am disposed to think that a charge made

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without any honest belief in it argues malice. For these reasons I think judgment should have gone for the plaintiff.

Plaintiff has proved that he has suffered in his pocket, if not in his person, but the case must go back for further enquiry into the question of damages. Judgment is set aside.

BURNSIDE, C. J., I agree. On the argument of the appeal, it appeared to me that the defendant had subordinated his own judgment to that of the Inspector of Police, and made the charge without being satisfied himself of its *bonâ fides*, and when that official found that there was not sufficient evidence to support the charge, it became evident that it had been made without any reasonable or probable cause, and the defendant was compelled to withdraw from it. The case must go back and judgment be entered for the plaintiff with such damages as the District Judge may assess after hearing the parties, with costs in both courts.

BEFORE *Lawrie*, J.

July 28th and August 4th, 1892.

DAVIES *v.* MITCHELL,

[No. 3,116 C. R. COLOMBO.]

Action on tort—Negligent Driving—Liability of defendant.

Where the defendant's horse shied at a donkey cart, and thus brought the defendant's dogcart into violent collision with the plaintiff's phaeton, *Held* that the defendant was not guilty of negligence.

Wendt, for defendant, appellant.

Dornhorst, for plaintiff, respondent.

On August 4th the following judgment was delivered.—

LAWRIE, J.—It seems to me to be well proved that the defendant's horse shied at a donkey cart and swerved suddenly from the left (the defendant's side) to the right (the plaintiff's side) of the road, that the defendant's dog-cart came into violent collision with the plaintiff's phaeton. Though both carriages were damaged, the result of the collison was more serious to the defendant than to the plaintiff.

The defendant and his brother were thrown out of the cart which was overturned. Their horse fell and ran off. It

is not said what damage was done to the plaintiff's carriage, though it is not disputed that the repairs cost Rs. 40. His horse-keeper was thrown from the box. Both the plaintiff and defendant ascribe the accident to negligence and want of skill on the part of the respective drivers. The evidence does not support these mutual accusations.

This case is governed by the class of cases of which Wakeman *v.* Robinson 1. Bing, 213 and Holmes *v*, Mather L. R. 10 Exch. 261 are examples.

In the former, it was held that a defendant was not liable where the horse he was driving being frightened by a sudden noise became ungovernable and plunged the shaft of a gig into the breast of the plaintiff's horse, and in the latter it was held that if A.'s horse runs away with him and in spite of his efforts to the contrary strikes against the plaintiff, A is not liable if he was lawfully driving along a highway and was not guilty of any negligence. The cases of Hammond *v.* White 31 L. J. C. P. 129 and Gibbons *v.* Pepper 1, Lord Raymond 38, support this view. I set aside the judgment under review and dismiss both the claim in convention and the claim in reconvention. I find no costs due to either party—neither having succeeded.

BEFORE *Burnside*, C. J. and *Dias*, J.

August 1st, 1890.

DINGIRI AMMA *v.* MUDIANSE and another.

[No. 21,919, D. C., KURUNEGALA.]

Kandyan law—Right of childless widow to possess husband's paraveni lands for maintenance—Small Estate—Maintenance of widow and possession of estate by heir-at-law.

Where a Kandyan childless widow has no other means of subsistence *Held* that she was entitled to possess her husband's paraveni lands, and to support herself out of them, but her right to do so ceased as soon as the deceased's heir-at-law came forward and undertook to provide for her maintenance. There could be no reason in making an exception where the lands were small and she had no other means of subsistence.

The plaintiff sued the defendant in ejectment and for declaration of title to certain lands. The lands originally belonged to Dingiri Banda as his paraveni property. He died

in 1888 leaving no issue but only a widow, Muttu Menika, who continued to live in his house. She leased the lands to the defendants for fifteen years from 9th May 1889 and the defendants thereupon entered into possession of the lands. Plaintiff sued as Dingiri Banda's first cousin and next of kin. The lands were of small extent and the only lands of Dingiri Banda, whose widow had no other means of subsistence.

The following judgment was delivered by the District Judge (*Arunachalam*) on the 11th of June 1890.

Plaintiff contends that Muttu Menika had no right to possess the lands or to lease them or otherwise deal with them, and that plaintiff as the next of kin is entitled to the lands and possession thereof, and that Mutttu Menika has only a right to be maintained by plaintiff.

For the defence it is contended that Muttu Menika has the right to possess the lands, and to lease them for her benefit, as the lands are of small extent and she has no other means of subsistence.

The defendant's proctor relies upon *Armour* p. 20 where it is stated, "if the deceased's landed property were of small extent and barely sufficient for the support of the widow, then, although she had not a child of the deceased, the widow will be entitled to retain possession of that property to the temporary exclusion of the deceased's heir-at-law (his brother for instance) whose title to the succession shall remain in abeyance until the widow's demise or until she contracted another marriage."

For the plaintiff the decision of the Supreme Court in District Court Kandy 33,964, (reported in Ramanathan 1860—3 pp. 190—1, and more fully in the *Legal Miscellany* of 1866 pp. 32-3) is relied upon where the Supreme Court held that "with respect to the family paraveni property the wife has merely a right to maintenance by the heir who takes possession of such property and that she does not acquire a life estate in it," and that "the heir had a possessory estate in the paraveni lands immediately after the father died." This decision is based on the Supreme Court ruling in District Court Ratnapura No. 662½ which the Supreme Court quotes as a decision made to put an end to the conflicting decisions on the subject and

to establish a permanent rule.

But the Ratnapura decision, so far as it is quoted, seems to me hardly to support the broad rule laid down in D. C. Kandy 33,964, for in the Ratnapura case it is stated "the Supreme Court considers that the widow, being otherwise amply provided for by the will of her husband, has no interest in the land in question," and again, "in this case, being otherwise provided for, the widow does not require and is not entitled to further maintenance."

In the absence of the full judgment in the Ratnapura and Kandy cases, it is difficult to state how far the Supreme Court intended to go in restricting the widow's right to possession of her deceased husband's paraveni lands. At the same time I am unable to reconcile the passage in *Armour* p. 20 on which defendants rely with this passage in p. 26., which makes no exception in the case of the deceased; the lands being of small extent and the widow having no other means of subsistence. "If the deceased left any near relatives, then the widow will have but temporary possession of the deceased's landed property, that is to say until such time as her deceased husband's heir-at-law shall be authorized to come into possession thereof, and thereupon she must relinquish possession of the land.

I am inclined to think that on the whole, this passage represents the customary law of the Kandyans. It seems to carry out most effectually and equitably what was no doubt the great aim of the custom, viz., to provide for the widow's maintenance. She was invested with the right to support herself out of her deceased husband's paraveni lands, but as soon as his heir came forward and undertook to provide for her maintenance, she had to give up possession of the lands to him. There could be no reason in making an exception where the lands were small, and she had no other means of subsistence. In fact it was in such a case that it would be most to her advantage to be maintained by the heir without the worry of possessing and cultivating the lands herself. On the other hand where she had other ample means of subsistence, she might fairly be asked to relinquish her right to maintenance out of the lands.

DINGIRI-AMMA. *v.* MUDIANSE.

In the present case therefore I hold that Muttu Menika having no other means of subsistence was entitled to possess her husband's paraveni lands and to support herself out of them, but her right to do so ceased as soon as her husband's heir, the plaintiff, came forward to take upon herself the charge of her maintenance. The defendant who took the lease from Muttu Menika took it of course subject to this risk. Judgment will be entered for plaintiff for the lands and costs of suit and ten rupees as damages.

In appeal,

Weinman for defendants-appellants.

Dornhorst for plaintiff-respondent.

Affirmed: No reason to the contrary appearing to the Supreme Court.

BEFORE *Burnside* C. J., AND *Withers* J.

August 5 and 9, 1892.

DABERA *v.* MARIKAR.

[No. 27,299, D. C. COLOMBO.]

Civil Procedure Code, Sect. 189—Error in decree—Alteration of judgment—Amendment of Decree.

Under Sect. 189 of the Civil Proceedure Code "if the decree is found to be at variance with the jndgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion, or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error."—

Held, that under this section, a District Judge may amend his decree so as to bring it in conformity with his judgment, but he has no authority to vary or to reopen his judgment and correct what he may consider to be a mistake he has made on the facts.

The facts material to this report sufficiently appear in the Judgment.

Dornhorst, for plaintiff.

Grenier, for defendant.

On August 9 the following judgment was delivered:—

BURNSIDE, C. J.,—These are cross appeals.

The plaintiff it appears took out a summons under Sect 189 of the Code to have the decree in the case amended in a clerical or arithmetical error which had crept into it. The learned District Judge held that the clerk who entered up the decree had fallen into error in the calculation, and he

ordered the decree to be amended so as to make it accord with his judgment, but not content with doing this, he availed himself of the opportunity at the instance of the defendant to alter his judgment and decree to the benefit of the defendant in respect of the damages for which he had already passed judgment against him; and he divided the costs of the motion and order. The plaintiff appeals against that part of the decree which is in defendant's favour on the ground that it was *ultra vires*, and the defendant appeals against that part of the Judge's order which is in favour of plaintiff, on the ground that the District Judge's original judgment was wrong, and the damages given excessive. The plaintiff's appeal must succeed and the defendant's appeal be dismissed with costs. It is manifest that the section of the Code under which the District Judge made the order gave him no authority to vary his judgment. He may amend his decree in the particular specified so as to bring it in conformity with his judgment, but no authority is given him to re-open his judgment and correct what he may consider to be a mistake which he has made on the facts; that can only be done in appeal.

The order of the District Judge is varied. It is affirmed so far as it orders that the decree in Plaintiff's favour be corrected in the calculation to conform to the judgment; it is set aside in other respects, and it is ordered that the defendant do pay the costs in the Court below of contesting the motion for amendment, and of the Judge's order amending his judgment in defendant's favour. The plaintiff has the costs of both appeals.

WITHERS.—J. I concur.

BEFORE *Burnside*, C. J., AND *Withers*, J.

August 16 and 19, 1892.

DEPARIS and another *v.* CHRISTIAN and others.

[No. 3,600, D. C. MATARA.]

Partition suit—Ouster by a trespasser without title—Misjoinder of Defendants.

A trespasser without title cannot be joined as a defendant in a partition suit.

DEPARIS. v. CHRISTIAN.

The plaintiff in a partition suit ought not only to state the extent of plaintiff's claim, but also disclose facts which warrant his claim to the extent of his share.

This was an appeal by a defendant in a partition suit, against whom, as a trespasser without title, the District Judge had made an order of ejectment with costs of the plaintiff.

Dornhorst for 49th defendant-appellant.

Grenier for plaintiffs-respondents.

On August 19 the following judgment agreed to by BURNSIDE, C. J., was delivered by WITHERS, J.

WITHERS, J.—Of all the defendants in this action only the 49th appeals, and he complains of that part of the judgment, which declares that he has no title to the land herein sought to be partitioned, orders his ejectment therefrom, and requires him to pay the plaintiff's costs of the contention. On the very face of the plaint in this partition suit it is apparent that plaintiff should not have joined the 49th defendant, of whom it is alleged that he ousted them from the land as a trespasser without right or title, and against whom there is a prayer for ejectment. Therefore that part of the judgment of which this defendant complains cannot possibly stand, and the judgment must at least be varied by an order dismissing plaintiff's action against the 49th defendant with costs. But the case deserves fuller consideration, and we cannot stop here. The plaint as framed should never have been accepted but returned for amendment, as the plaintiff in a partition suit has to prove his title to the share he claims, his plaint should disclose facts, which warrant his claim to the extent of that share. It is not enough to say that he is entitled with others to a particular share of the land held in common.

To take the present case, he not only omits to say that his father died seized and possessed of the land in question, but he fails to show how the plaintiff inherited from his father as much as one-third of the land. Then his plaint discloses a purchase, but he omits to allege that his vendor was the owner of a share in the land, or what it was or how he was an owner.

The facts disclosing a plaintiff's title, and that of his co-owners, (as far as he knows them), and shares in a common land cannot be too precisely specified; for the decree in a

partition suit is a judgment in *rem* and it is a poor compensation for the *bona fide* shareholder, who may be shut out, to be referred to his action for damages, as is done by the Ordinance 10 of 1863. The fuller the disclosure, the more likely is the Court to discover whether the name of a party has been omitted, who ought to have been joined, and so save him from being shut out by the final decree. Owing to the mischievous inclusion of the 49th defendant the learned judge was diverted from a trial of the issue to the prejudice of the common shareholders.

In my opinion the judgment should be set aside altogether, and the plaintiff's claim dismissed with costs, and it is adjudged and ordered accordingly.

BEFORE, *Burnside*, C. J., AND *Withers* J.

August 20 and 23, 1892.

SIMEON and others *v.* THAMPIMUTTU and another.

[No. 22,914, D. C. JAFFNA]

Mortgage of moveable property—Sale and delivery to a third party—Title of purchaser—Mortgagee's seizure of such property in the hands of a third party.

The sale and delivery of moveable property to a third party confers a valid title on the purchaser and is not executable on the mortgagee's writ.

Casy Lebbe Marikar *v.* Abdul Rahman (S. C. C. IX p 109) considered.

The facts of the case appear in the judgment of WITHERS. J.

Wendt, for 1st defendant-appellant.

De Saram for plaintiffs-respondents.

On August 23 the following judgments were delivered:—

WITHERS, J.—This is an action arising out of a claim to a 10 ton coastwise ship made by the 1st defendant herein, on the occasion of its being seized in execution of a writ issued against the 2nd defendant herein, at the instance of the plaintiff who had received judgment in the lower Court against the latter defendant for a sum of Rs. 100 and interest, and a decree adjudging the payment thereof and directing the sale of this ship in satisfaction of the sum so adjudged.

The Court below having found 1st defendant to be in possession of the ship, ordered it to be released from seizure:

SIMEON. v. THAMPIMUTTU.

Thereupon the plaintiffs brought this action in order to have it declared that the ship was the property of the 2nd defendant, and liable to be sold in satisfaction of the unsatisfied decree.

The defendant admitted having made the claim attacked by the plaintiffs, but alleged that the boat was his at the date of seizure under plaintiff's writ, and says he acquired it without notice of the alleged mortgage.

The result of this trial, was to declare the ship liable to be sold in satisfaction of plaintiff's debt, which the learned judge found to be due, and the ground of the decision was that the mesne assignment of the ship from the mortgagor to the 1st defendant, including his purchase, were bogus transactions, and that even if the sale to 1st defendant was a genuine one, he took the ship with all the equities attached to it, meaning plaintiff's mortgage. One of the points discussed at the hearing in appeal was whether moveables can be followed in the hands of a third party by a special mortgagee of them. If any thing is clear in our Roman Dutch Law, I think this proposition is clear that a mortgagee loses his hypothecary rights over moveables, which have been acquired by a third party under a valid title.

If therefore the 1st defendant had at date of seizure acquired a valid title to this ship, it could not be sold away from him at the instance of a mortgagee.

Now the defendant in his answer says that he purchased the ship of one Vaithiyam Pillai on the 22nd of July, 1891, for a sum of Rs. 200, and thereupon procured the registration of the ship in his own name in the Customs Register at Jaffna.

This has never been denied by the plaintiffs; and their witness, the 1st defendant, is called to prove that he bought the ship of Vaithiyam Pillai, and paid him Rs. 200 for it.

The 2nd plaintiff, the surviving obligee of the mortgage bond, is called as a witness in her own behalf, and admits that she knew of the sale by the mortgagor to Anthony Muttu, which is proved to have occurred in January, 1890, and of latter's alienation to some one else but took no notice of them. In these circumstances I cannot understand why the learned

judge should have characterized the sales as bogus transactions, and I beg to differ from him. The question then remains to be answered, did the sale to 1st defendant give him a valid title to the ship? I think it did. In the Merchant Shipping Acts, alluded to rather than discussed during argument, the provisions as to the strict requirements of registration and transfer do not apply to ships below 15 tons. The Colonial Shipping Act has never, I believe, been acted upon in this Colony.

I know of no local laws or regulations affecting the registration and transfer of small coastwise ships like this.

The 1st defendant has put in evidence certain customs-registers relating to the ship in question, but why these registers are required I do not know, nor did counsel enlighten us.

The local statute of frauds was satisfied by the delivery of the ship to the 1st defendant, and payment by him of the price to his vendor.

For these reasons I think the judgment of the lower Court should be set aside, and plaintiff's action dismissed with costs.

BURNSIDE, C. J.—I quite agree with my brother Withers. I never doubted that neither the Roman Dutch Law nor the English Law permitted a hypothec to prejudice the *bona fide* sale and delivery of movable property. The case cited at the bar and reported in 9 S. C. C. p 109 D. C. Colombo No. 285, did, I must confess, startle me at the time, and I am not quite sure how that it did not, in the effort to support Withall *v.* Hardy decided by the same learned judges, transgress the maxim of the Roman Dutch Law as well as of the English law *Mobilia non habent sequelam*. Interpreted however, as the case has subsequently been, that it went no further than to hold that a mortgagee had a right to priority over moveable property so long as it remained in the custody of the mortgagor, and then contrasted with a decision by the same two eminent judges a short time after and reported in the same number of the S. C. C. p 127, D. C. Kurunegala 7,244, I think we may rest assured that the law remained

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as we always believed it to be. The learned District Judge has treated all the transactions subject to the mortgage as what he calls "bogus" to defeat the mortgage, but I do not find sufficient evidence to support that finding, and therefore the defendant's title to the boat is not affected by the mortgage and he must have judgment for the boat with costs.

BEFORE *Burnside* C.J. AND *Withers* J.

August 19 and 26, 1892.

KIRIBANDA *v.* UKKUWA.

[No. $\frac{3,768}{146}$ D. C. KANDY.]

Signature of Notary—Attesting witness—Section 2 of Ordinance No. 7 of 1840—Attestation—Ordinance 16 of 1852.

In an instrument under Sect. 2 of Ordinance No. 7 of 1840, a notary is an attesting witness in precisely the same sense as are the two witnesses who with him are required to attest the execution thereof.

The mere failure of the notary to attach a formal attestation does not invalidate such an instrument, though it would penalize the notary.

The facts material to this report appear in the judgment of BURNSIDE, C. J.

Dornhorst, for plaintiff-appellant.

Wendt, for defendants-respondents.

On August 26, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—The judgment of the learned District Judge in this case has proceeded on a mistake of law. It is quite true that the rule of evidence is that if you desire to prove a written instrument, to which the attestation of witnesses is necessary to give it validity, you must first call the witness or witnesses to it or account satisfactorily for not doing so; but the learned District Judge has erred in holding that a notary, who attests an instrument under our Ordinance against Frauds, is not an attesting witness so as to bring his evidence within the above rule of evidence. I do not doubt that he must be considered an attesting witness. The law applicable to the deed before us requires that the same shall be signed by the party making the same in the presence of a licensed notary public, and two or more witnesses present,

and the deed "shall be duly attested by such notary and witnesses." Now to this deed is appended the word "witnesses" and under it there are the signatures of two witnesses and of the notary, J. H. E. Mudianse, notary public. This seems to me to be all that the law requires. But besides this the notary has signed the formal attestation, which the rules contained in the then Notaries Ordinance 16 of 1852 laid down for the guidance of notaries. The learned District Judge has said that "the first signature below that of the witnesses was surplusage." I cannot subscribe to that position without holding that that signature in the presence of the other signature of the notary lower down to the formal act of attestation required by the rules in the Notaries Ordinance, was absolutely necessary to make the deed a good one. I emphatically hold that it was all that was necessary to do in satisfaction of the provision of the Frauds Ordinance requiring the attestation by a notary and two witnesses, because although the Notaries Ordinance directs that there shall be a formal attestation of the notary, which shall contain many particulars, yet it has been careful to say that the omission of this formal attestation or any of its particulars shall not make the deed invalid. It penalizes the notary, but does not touch the validity of the deed. So that indeed it is that signature that would be the essential signature to secure the validity of the deed in case the formal attestation directed by the Notaries Ordinance should not be operative. It is not only not superfluous, but, to say the least of it, standing alone it satisfies the Frauds Ordinance and becomes the signature of an attesting witness, although of a designated and requisite character and calling. I do not however disagree with the learned District Judge in the measure of precaution which he would observe in the proof of this particular deed, and I think it was desirable that more inquiry should have been made as to the existence of one of the other attesting witnesses, Syatu, and I think the best course to pursue is to send the case back to enable the plaintiff to produce Syatu as well as the Notary, and in case he cannot produce Syatu, and satisfies the District Judge that he cannot, then that the District Judge may judge on

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the evidence of the notary alone how far he is satisfied of the due execution of the deed. The District Judge has not yet heard the notary's evidence. I would reserve all questions of costs.

WITHERS, J.—It is purely out of deference to the learned Judge that I add anything. I must however record my respectful dissent from the proposition, as I read it in his judgment, that in the class of instruments aimed at in the 2nd section of our Ordinance of Frauds a notary is not an attesting witness in precisely the same sense as are the two witnesses who with him are bound to attest the execution of an instrument. The case must be sent back as proposed by the Chief Justice.

BEFORE *Burnside*, C. J. AND *Withers*, J.

August 26 and 30, 1892.

SIRIWARDANE and another *v.* LOKU BANDA.

[No. 120 D. C., KEGALLA.]

Civil Procedure Code Sect 402—Res judicata—Conveyance by Infant—Repudiation—Execution of second deed.

Previous to bringing the present action, the plaintiff had brought another action to the same effect in the same Court, which, not having been proceeded with, the District Judge ordered to be struck off the roll. The defendant having pleaded "res judicata,"

Held, that the plea was not maintainable as the Code gives no power to a District Judge in default of proceedings for a year to order a case to be "struck off," what the Civil Procedure Code (see sect 402.) directs being that an order may pass that the action shall "abate."

A conveyance by an infant being only voidable, and not void, the mere execution by him of a second deed after attaining majority expressing the disposal of property already conveyed by him during infancy, does not avoid the latter conveyance.

The plaintiffs appealed from an order of the District Judge, upholding defendant's plea of *res judicata*. The facts sufficiently appear in the judgment of BURNSIDE, C. J.

Wendt, for plaintiffs-appellants.

Dornhorst, (*Van Langenberg* with him) for defendant-respondent.

On August 30 the following judgments were delivered:—

BURNSIDE, C. J.—This is an action of ejectment brought by the plaintiffs to recover from the defendants certain land, of which the plaintiffs admit the defendant to have been in

possession since 1876, upwards of 16 years. These are the short facts. The land was the property of one Mudianse Ratemahatmaya. He died in 1873 having, as it is said, previously gifted the land to his then minor son Bandara who, it is alleged, then succeeded his father in title, and that this son in April 1884 sold the land to the wife of the plaintiff. The defendant says that on the death of the Ratemahatmaya administration of his will was taken out, that this land had not been specifically devised, and that the administrator with the leave of the court sold it to the defendant, who entered upon and ever since has been in possession and that in the year 1881. Bandara himself sold the land and made a conveyance to him on 6th June 1881. The facts of the above transactions are not so much in dispute, as the legal bearing of them. The defendant also pleads prescription and claims by adverse possession since the sale to him by the administrator for the full period of ten years immediately preceding this action, which was commenced in March 1891. The determination of this issue must depend on the date on which Bandara came of age, if the property did really pass to him from the father. For the plaintiff it was urged that the land had become the property of Bandara, but that the deed from Bandara to the defendant in 1881 was void and passed no title, as he Bandara was then a minor, and that the deed from Bandara when he came of age to the plaintiff in 1884 was operative to convey the title which remained in Bandara, notwithstanding the deed of 1881, but in any case that the deed of 1884 took priority to that of 1881 by reason of previous registration. It appears that previous to bringing this action the plaintiffs had brought another action to the same effect in this Court, which not having been proceeded with the District Judge ordered to be struck off the roll, and the defendant alleged that the action thereby abated and he pleaded it as *res judicata* to this action.

There are incidental points in the case which will appear and be dealt with as I go on.

The learned District Judge has given judgment for the defendant and the plaintiffs appeal on the point lastly mentioned. The learned District Judge holds for the defendant,

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and that the order of the District Dudge in the previous suit barred this action, I cannot agree with that holding. The order was a worthless one, having no effect whatever.

The code gives no power to a District Judge in default of proceedings for a year to order a case to be "struck off" as was ordered in this case. What the Code directs is that an order may pass that the action shall "abate," and no such order was passed. The defendant's plea of *res judicata* therefore fails. It was however urged for defendant that if the action had not abated by the order, it was pending, and therefore was an answer to this action as "*lis pendens*," to which the reply is that the defendant has not pleaded it as "*lis pendens*" but as *res judicata*. The crucial question seems to me to be whether the sale and conveyance by the administrator in 1876 was good and valid to pass the property which its purports to dispose of. I cannot see why it did not. If the deed to Bandara be regarded as a deed of gift and not a testamentary instrument, there is the fact that administration was duly granted upon it, and that Bandara plaintiffs' vendor had recognized and dealt with the administrator as such and the plaintiff is estopped from contesting the *bonâ fides* of this administration in the same way that his vendor was estopped. If the deed be a testamentary disposition *cadit questio*. Whether this was a special devise or not the administrator took the estate and dealt with it in administration, and I do not find it contested that he had the right to do so in the regular course of administration. Of course if Bandara took direct from his father, it was quite competent for him to have executed the deed to the defendant in 1876, and such a deed would not have been void as contended for by the plaintiff but only voidable, and it could have been avoided only in the regular manner, but I do not think that the mere execution of the 2nd deed in 1884 to the plaintiff *de jure* avoided the first. I can find no expression of such an intention or anything beyond the mere disposal of the same property, as giving countenance to this contention, and I must regard the two deeds simply as conveying an adverse interest under the Registration Ordinance. For whatever purpose therefore the second deed might be effectual the prior regis-

tration of it gave it priority over the defendant's deed. I have no hesitation in ruling that Bandara took no estate which could defeat the title which the administrator dealt with as in him as administrator in 1876, and that the two deeds of 1881 and 1884 from Bandara to the defendant and the plaintiffs respectively were not worth the paper which they spoiled, and the defendant's possession under his title in 1876 enured to him to give him a good paper title, and he obtained as well as had acquired a title by possession under it at the time this action was brought in 1891, I take no heed of the bringing of the other action. Whatever of interruption it created could only avail in that suit and have no relation to this.

The judgment of the District Judge should be affirmed.

WITHERS, J.—I agree in affirming the judgment, and I think it is a sufficient ground for my concurrence with the Chief Justice to say that Punchi Banda was estopped by his assent to the administrator's disposal of the land in question from denying his right to do so, that assent not being followed by an act of repudiation upon his coming of age when he was of course fully aware of the circumstances of that disposition and his own confirmatory disposition to the defendant at a later period in June 1881. The conveyance in 1884 to the 2nd plaintiff was no such act of repudiation.

BEFORE *Burnside*, C. J. *Lawrie* AND *Withers*, J. J.

August 30 and September 2, 1892.

ASSAUW *v.* PESTONJEE.

[No. 2,273, D. C., COLOMBO.]

Civil Procedure Code, Sect. 755—Petition of Appeal—Signature of Proctor—Signature of Advocate.

Under section 755 of the Civil Procedure Code "all petitions of appeal shall be drawn and signed by some Advocate or Proctor or else the same shall not be received."

Held, that (1) the words "drawn by" do not mean that the original conception, as well as manual draft of the petition, should be that of the Advocate or Proctor. It is sufficient if the petition itself bears the proper signature of the Advocate or Proctor. (2). The Proctor who signs the petition must be the Proctor on the record, (3) another Proctor may not sign the petition on behalf of the Proctor on the record (4) as the Ordinance is satisfied if the authentication is by Advocte or Proctor, in a case where the authentication by one of them is bad, the Ordinance is satisfied, if that of the other is good.

ASSAUW v. POSTONJEE.

This was an appeal by the defendant.

Wendt, for plaintiff-respondent objected to the appeal. The petition of appeal bears the signature of Walwin LaBrooy for J. N. Keith, proctor for defendant. There is no act of substitution appointing the former in place of the latter; nor is there anything on the face of the petition to show that the former is a proctor. Sect. 755 of the Code requires all petitions of appeal to be drawn and signed by a proctor or advocate. (S. C. C. IX. 65.)

Dornhorst, for defendant-appellant. One proctor may appear for another (D. C., Colombo 81,616 S. C. Civil Minute March 29, 1887). On the same principle one proctor may sign on behalf of another proctor. Even if respondent's objection is maintainable, the petition bears the signature of an advocate, and his signature would satisfy the requirements of Sect. 755 of the Code.

Wendt, in reply. It is true the petition bears the signature of an advocate, but it purports to be by defendant's proctor, J. N. Keith, and it does not bear his signature.

On September 2 the following judgment agreed to by LAWRIE and WITHERS, J. J. was delivered:—

BURNSIDE, C. J.—The defendant in this suit has appealed. The petition of appeal is in this form. "The petition of appeal of the abovenamed defendant and appellant by John Neil Keith his proctor states as follows," and signature to the petition was thus:—

WALWIN LABROOY,
FOR J. N. KEITH.
Proctor for Defendant.

WALTER PEREIRA,
ADVOCATE.
21-4-92.

Mr. *Wendt* for the plaintiff objected to the appeal being received quoting the words of the 755 sect. of the Code as follows "all petitions of appeal shall be drawn and signed by some advocate or proctor, or else the same shall not be received." I presume that what the legislature meant was that on the face of the petition it should appear to have been signed by one or the other, proctor or advocate, and if it did so purport, it would be sufficient, though not conclusive of the fact of

drawing as well as of signing, but it would be open to any one asserting the contrary to establish that it was neither signed nor drawn as required. The important requirement of the Code is the signature. I do not interpret the words "drawn by" as meaning that the original conception, as well as manual draft of the petition should be that of the advocate or proctor. If the petition itself bears the proper signature of advocate or proctor the necessary presumption would arise that the proctor had drawn it, or the advocate had drawn or settled it, and had thereby made it his own, in the same way as regards all other pleadings, with this exception that an advocate who draws or settles is not required to sign them whilst the proctor is. Now we have held that the proctor who signs the petition must be the proctor on the record, authorized to do every act in the cause until his authority has been revoked, in the regular way, and a new appointment made; and I pause here for myself to say I repudiate any suggestion or authority which would give countenance to the position that one proctor may sign another proctor's name for him, and that his right to do so should rest on the bare assertion one way or the other of the parties themselves. I cannot conceive anything more calculated to prejudice and endanger the interests of suitors or jeopardize the fair fame of honourable members of the profession and subject it to the acts of others less scrupulous. Now whilst in the body of this petition it purports to be by the petitioner's proctor John Neil Keith, it is in fact not signed by him but by somebody else who signs for him, and does not claim to be, and who may or may not be a proctor, and there is nothing to show that he was authorized by Mr. Keith to sign for him. Such a signature we cannot recognize, but the petition is signed and properly signed by an advocate. The Ordinance is satisfied if the authentication is by advocate or proctor, and I am prepared to hold that although the authentication by one of them may be bad, yet if that of the other is good the Ordinance is satisfied. The apparent object of the law is to guard against frivolous or vexatious or insufficient appeals, and I think that is sufficiently secured under our interpretation of the section in question. **The appeal should be heard.**

SALESTINA HAMY *v.* SIMON PERERA.

BEFORE *Burnside*, C. J., *Laurie*, AND *Withers*, J. J.

August 30 and September 2, 1892.

SALESTINA HAMY *v.* SIMON PERERA.

[No. 165, ADDL. P. C., COLOMBO.]

Maintenance—Ordinance No. 19 of 1889, Sect. 3, 14 & 17—Appealable order—Ordinance No. 1 of 1889, Sect. 39—dismissal of application for maintenance—Criminal Procedure Code Sect. 404—Appeal by Attorney General.

In proceedings under the Maintenance Ordinance No. 19 of 1889 the only appealable orders are those under section 3 requiring a husband to make his wife or a father his child, a monthly allowance, and those under section 14 refusing to issue summons after examination of a person, who applies for an order, or a warrant to enforce an order of maintenance (See Sect. 17.)

An order dismissing the application for an order of maintenance is not appealable by the applicant and (per BURNSIDE C. J.,) as the order amounts to an acquittal, the appeal must be by the Attorney General.

Per LAWRIE J. (*dissentiente*) The right to appeal against a dismissal is expressly conferred by section 17 of the Maintenance Ordinance. Even if it does not the Supreme Court has appellate jurisdiction under section 39 of Ordinance No. 1 of 1889.

Applicant asked for an order of maintenance against the respondant who is alleged to be the father of the child sought to be maintained. The Police Magistrate dismissed the application holding that the paternity of the child was not satisfactorily proved, and the applicant appealed.

Wendt, for applicant-appellant.

Dornhorst, for respondent.

On September 2, the following judgments (LAWRIE J. *dissentiente*) were delivered.—

LAWRIE, J.—In this application under the Maintenance Ordinance 1889 the Magistrate after hearing evidence pronounced the following final order.

"I do not think that it is satisfactorily proved that the defendant is the father of the child; the application is dismissed". My Lord the Chief Justice and my brother Withers are agreed that the appeal against this order must be rejected. I am unable to concur, I would hear the appeal on its merits.

For reasons which I shall afterwards give, I am of opinion that the right to appeal against a dismissal is expressly conferred by the 17th section of the Maintenance Ordinance, but at present I shall assume that it is not so conferred, but the Ordinance 1 of 1889

section 39, following the charters and older ordinances confers on the Supreme Court appellate jurisdiction which extends "to the correction of all errors in fact or in law committed by any Police Court."

This express enactment conferring jurisdiction cannot be repealed or even limited by mere implication, the jurisdiction expressly conferred by the legislature can be taken away only by equally express enactment. The Maintenance Ordinance is silent as to the general powers of the Supreme Court, it re-iterates and emphasizes the right to appeal from certain orders. Assuming that the order now appealed against is not one of these, it seems to me that the omission to re-iterate the general law that this Court has jurisdiction to correct all the errors which a Police Court may commit in dealing with applications under the Maintenance Ordinance does not affect nor diminish the powers expressly given to us. The rule *expressio unius est exclusio alterius* does not in my opinion apply. Another question is, assuming that this Court has jurisdiction to review in appeal an order dismissing an application under the Maintenance Ordinance, is such an order an acquittal of an accused and as such must the appeal be at the instance of the Attorney-General under the 404th section of the Criminal Procedure Code ?

I think not, because my opinion is, that the Maintenance Ordinance expressly gives the right of appeal against a dismissal. It gives a right of appeal against all orders made by a Magistrate under section 3. That section gives the Magistrate power, on cause shewn after due proof, to order a defendant to make a monthly allowance. Such a power necessarily includes the power on cause shewn, after due inquiry, to refuse to make the order. The Magistrate is bound to decide one way or the other. He must dispose of the case. Which ever way he decides it is equally a decision under the section of the ordinance which gives him power to decide, and in my opinion a judgment dismissing an application because the proof is insufficient, is as much an order under section 3 as a judgment to make a monthly allowance, because the proof is sufficient.

BURNSIDE, C. J.—I have no doubt whatever that this appeal cannot be supported, and I think there is much reason that it should not be. The only order which a Magistrate is empowered

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to make under section 3 of the Maintenance Ordinance is to "order such person (father of child or husband) to make a monthly allowance," &c. If the Magistrate makes such an order then "the party dissatisfied with it" has the right to appeal against it, but if he makes no order there is nothing to appeal against.

In this case the Magistrate says "the application is dismissed." I construe that to mean "I make no order," consequently no appeal lies, but if it be said that the Magistrate's order is a definite order beyond his powers, then I answer, if an appeal lies it must be under the general law, giving the genera right of appeal from Police Courts to the Supreme Court, and such appeal must be governed by the general law, and as the order amounts to an acquittal, the appeal must be by the Attorney General.

WITHERS, J.—This is an appeal from a refusal of the Magistrate after an examination of the complainant and her witnesses to order the husband to make his wife, the complainant, a monthly allowance. Can we entertain the appeal? In my opinion we cannot. The right of appeal is not a right of common law, but of statute and what does our statute 19 of 1889 say? It says in section 17 that any person who shall be dissatisfied with any order made by a Police Magistrate under section 3 or 14 may appeal to the Supreme Court.

The order under section 3 is an order requiring a husband to make his wife as a father his child a monthly allowance.

The order under section 14 is a refusal to issue a summon, after examination of a person who applies to the Police Magistrate for an order of maintenance or for a warrant to enforce an order of maintenance; save these two orders no order in proceedings under this ordinance can be appealed from.

BEFORE *Burnside*, C. J. AND *Lawrie* AND *Withers*, J. J.

August 30 and September 6, 1892.

GUNEWARDENE and another *v.* NATCHAPPA CHETTY and others.

[No. 443, D. C., NEGOMBO.]

Civil Procedure Code Sect. 246 and 247—Claim in execution—Previous claim by same party—Estoppel—Costs.

Plaintiff claimed certain lands, seized by the 1st defendant under writ of execution against the 2nd defendant. Plaintiff had claimed the same lands when seized in execution by another judgment creditor in a previous case as against the same judgment debtor the 2nd defendant, and his claim had been disallowed.

Held, that the order disallowing the plaintiff's claim in the previous case was no bar to the present action, and was not conclusive as against another judgment creditor, not privy to the one against whom the plaintiff lodged an unsuccessful claim.

The 1st defendant appealed from the order of the District Judge establishing plaintiff's claim to the lands seized in execution. Before the institution of the present action the said lands were sold by the Fiscal under 1st defendant's writ and were purchased by the 3rd defendant. The plaintiff appealed against that part of the order of the District Judge, which condemned him in the costs of the 3rd defendant.

Sampayo, for 1st defendant-appellant.

Wendt, for plaintiff-appellant.

Fernando, for 3rd defendant-respondent.

On September 6 the following judgments were delivered :—

WITHERS, J.—This is an action under 247th section of the Civil Procedure Code in which joint claimants seek to establish their rights to a portion of land called Delgahawatte, and an undivided ½ share of certain other three allotments of land named in the plaint, which portions and shares they claimed on the occasion of a seizure made in execution of a writ issued by the 1st defendant herein against the property of the added defendant Dona Anahami, in an action No. 16,505 of the District Court of Negombo, wherein the 1st defendant had recovered judgment against the said Dona Anahami.

Plaintiff's claim on that occasion was disallowed and the premises were sold by the Fiscal and purchased by the other added party Nicholas Mendis.

This action is brought within 14 days of the order dis-

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allowing the plaintiff's claim. The learned judge has established the right claimed herein by the plaintiffs, as against the 1st defendant and execution creditor in District Court case 16,505 and has decreed a cancellation of the Fiscal's sale. The 3rd and added defendant, Mendis, having had his purchase money handed back to him is content and does not appeal. The 1st defendant appeals from the adverse decision against him, on the ground that a court of competent jurisdiction had prior to this suit, disallowed a claim to these very premises made by these plaintiffs on the occasion of a seizure under a writ of execution against the property of the 2nd and added defendant herein issued at the instance of a judgment debtor in the Negombo Court of Requests case No. 46,163, and that these plaintiffs had not within 14 days of that order made on the 31st day of January 1891 instituted an action to have their rights so claimed established.

The execution creditor in the Court of Requests case was not the execution creditor in the District Court case, but counsel contended that the Commissioner's order disallowing plaintiff's claim to the very same premises, as against the same judgment debtor, to wit, the added defendant herein Dona Anahami, was conclusive and barred them from ever, claiming any right to the premises so as to stay execution by that execution creditor or any other execution creditor, who might recover judgment against the said Dona Anahami and seek to satisfy it out of a sale of her property.

For some reason or another, there was no sale of the property after seizure under the Court of Requests writ, and it was on the occasion, as before mentioned, of a subsequent seizure under the District Court writ, that the plaintiffs made this second unsuccessful claim, which is the subject of the present action.

Counsel's contention was pressed in the court below, and overruled.

We agree with the judgment on this point.

A claim, once disallowed, is conclusive in this sense that whether the property claimed is sold in due course upon the disallowance of that claim, or at a later stage after, it may be, successive seizures by the same judgment creditor, the

claimant, who does not, within 14 days of the date of the order of disallowance, commence an action to establish his rights to the property claimed, is barred from re-lodging a claim to the same property or bringing an action to establish his right thereto for the purpose of defeating that judgment creditor's right to buy his judgment debt, by a sale of the property.

It does not conclude him against another judgment creditor, not privy to the one against whom he lodged an unsuccessful claim for, *non constat*, that if the premises are not sold at all by the successful execution creditor, the claimant may not acquire title which will support his claim to the premises when seized thereafter under the writs of other judgment creditors.

There was an appeal by the plaintiff against that part of the judgment which witheld from them their costs.

The learned judge would not give them their costs, because they had not attempted to stay the sale pending the action, but he has overlooked the case (9. S. C. C. 179) in which the court decided that the institution of an action under section 247 of the Civil Procedure Code does not entitle the plaintiff to a stay of execution under the order disallowing his claim pending action.

The judgment must be varied by giving plaintiffs their costs in both courts, and striking out that part of it which makes him pay the 3rd added defendants costs in the court below.

BURNSIDE, C. J.—I can add but little to this judgment. The order upon a claim can only operate as *res judicata* between the parties to it, and their privies, because it is quite possible that property may be liable to seizure and sale in execution at the suit of one plaintiff as against a claimant, and not be liable at another time at the suit of another plaintiff, as against the same claimant.

The parties to the order and their privies in estate, of whom the purchaser at the Fiscal's sale may be embraced, alone are bound by the order.

LAWRIE J.—The only question argued in appeal, which, I think it is necessary to deal with, is, an objection taken by the defen-

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dant that the plaintiffs are estopped from setting up any claim to these lands, because they had made claim to them in January 1891, when they were seized by a third party, which claim had been disallowed by the Court. The District Judge rightly held that this did not create an estoppel.

An order passed under the 245th section of the Civil Procedure Code, concludes the claimant only in the question between him and the judgment creditor. The order enures to the benefit only of the person in whose favour it is passed.

BEFORE *Burnside*, C. J. AND *Lawrie* AND *Withers*, J.

August 30 and September 6, 1892.

The QUEEN *v.* PUNCHI BANDARA.

In the matter of the Forest Settlement of the Village Gilimale, Ratnapura, Claim No. 182.

Ordinance No. 10 of 1885—Claim by Government Agent on behalf of the Crown—Adjudication by Forest settlement Officer—Appeal to Government Agent.

The constitution of the Government Agent, as the appellate Court to which an appeal lies in the first instance from adjudications made by the Forest Settlement Officer on claims under the Ordinance No. 10 of 1885, virtually deprives the Government Agent of all executive functions in reference to such claims.

The facts material to this report sufficiently appear in the judgment of BURNSIDE, C. J.

Dornhorst, (*Sampayo* with him) for claimant appellant.

Templer, *A. S. G.*, for the Crown.

On September 6 the following judgment agreed to by LAWRIE and WITHERS, J. J. was delivered by BURNSIDE, C. J.

BURNSIDE, C. J.—We must quash all these proceedings notwithstanding that the Solicitor-General appeared to support them on behalf of the Crown. The Forest Ordinance 1885 has constituted the Government Agent the appellate court to which appeal shall be made in the first instance from all adjudications made by the "Forest Settlement Officer" on claim under the ordinance. This virtually deprives the Government Agent of all executive functions in reference to such claims. It would be a public scandal if it were otherwise. In this

case the Government Agent of the Province appeared before the Forest Settlement Officer and claimed the land on behalf of the Crown as against the subject whose claims were under enquiry, and gave evidence in support of the claim of the Crown and the Forest settlement officer rejected the claim of the subject and the Government Agent as the court of appeal affirmed the Forest Settlement Officer's judgment. These are unsavoury proceedings. The claimant has been found to appeal to us and it is our duty to set aside all the proceedings and to order that all the costs be paid by the Crown, and we cannot think that the matter should be again adjudicated on by the same Forest Settlement Officer.

BEFORE *Burnside*, C. J. AND *Withers*, J.

August 19 and 26, 1892.

WATSON *v.* ALAGAN.

[No. $\frac{4,967}{145}$ D. C. KANDY.]

Promissory Note—Stamp—Objection to insufficiently Stamped document tendered with plaint.

The burden of proof of the sufficiency of a stamp affixed to an instrument alleged to be invalid by reason of its not being the kind of stamp required by law to be affixed to the particular kind of instrument is on the party who alleges its sufficiency.

Semble *Per* WITHERS J.—When an insufficiently stamped document tendered with a plaint is objected to by the defendant or the officer of the court brings to the notice of the court the impropriety of the stamp the document ought to be rejected.

Dornhorst for defendant appellant.

There was no appearance of counsel for the respondent.

The facts material to this report appear in the judgment of BURNSIDE, C. J.

On August 26, the following judgments were delivered.

BURNSIDE, C. J.—The important question in this case was whether the promissory note, sued on by the plaintiff, and tendered in evidence at the trial was properly stamped. It was a note payable to the payee on demand and it had been stamped with an inland revenue postal stamp of 5 cents. The defendant had warned the plaintiff of the objection in his answer in which he pleaded to the sufficiency of the stamp.

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Notwithstanding this patent objection, at the trial the plaintiff tendered the Note in evidence, and although again objected to the learned District Judge admitted it and gave judgment with costs for the plaintiff and the defendant has appealed. I am sorry that I cannot follow the learned Judge in treating an objection to the sufficiency of a stamp as a "petty refinement." The law has said it shall not be lawful to use stamps other than the special stamps provided for particular instruments, it has declared that no instrument shall be pleaded or given in evidence as good useful and available in law unless it is duly stamped "in accordance with law." Now this instrument is not stamped in accordance with law. The stamp used on it is a postal revenue stamp, and if it had been contended that the Governor in council had, as he may have done, permitted postal revenue stamps to be used for commercial instruments, it was on the plaintiff to show it. We are bound to take judicial notice of proclamations in this respect, and we find that although it has been permitted to use postal revenue stamps for certain instruments, promissory notes of this description have been expressly excluded from the list. I think it would be very unfortunate if in a country like this we encouraged or permitted that looseness on the application of the stamp laws, which has become almost a part of the practice and procedure of our Minor Courts, and I make bold to say that it is a matter of extreme importance, if the legislature says that a blue stamp shall be used on a particnlar instrument that we should not adjudge that a green one will do as well, nor can I see that it is ridiculous that a distinction should exist in the colour or shape of stamps indicating particular instruments. On the contrary it appears to me to be orderly and sensible and calculated to prevent frauds on the revenue and on the stamping of instruments and whatever our own opinion may be it is the legislature who has prescribed it and that should be sufficient for us.

The note in this case was valueless and should not have been admitted in evidence, and the plaintiff's action must be dismissed with costs in both Courts except the defendant's costs of his claim in reconvention which he has not attempted to prove and which the defendant will pay.

WITHERS, J.—There is a class of defence which may not be very creditable to him who pleaded it, but if it is a legal one it must be sustained.

When this note was tendered in evidence it was properly objected to. It cannot avail the holder. If the officer of the Court had brought to the Court's notice, the impropriety, so to call it, of the stamp on the note when it was produced with the plaint to be filed, the note would have been rejected and much expense and disappointment saved.

BEFORE *Burnside*, C. J. AND *Lawrie*, AND *Withers*, J. J.

September 2 and 6, 1892.

BAWA SAIBO *v.* JACOB COORAY.

[No. 3,905 D. C. COLOMBO.]

Landlord and Tenant—Proviso of re-entry—Claim for Rent—Damages—Penalty.

Where by an indenture of lease it is agreed that the landlord should have the right of re-entry on failure of the tenant to pay rent due in advance, and the landlord re-enters upon such failure, he can have no further claim for rent not in arrear; but can recover damages actually sustained by the breach of the covenant to pay rent.

Per WITHERS J.—Where it is stipulated to pay damages on a breach of contract, and the stipulation is made in respect of a sum certain, and the amount fixed on as damages is greater than that sum, it is generally to be treated as a penalty and not as liquidated damages.

The plaintiff claimed Rs 1,500 as rent due on April 1890 on an indenture of lease and for damages Rs 3,000 for a breach of the agreement as stipulated by the agreement in the event of failure to pay rent for the space of 30 days after it is due.

The lease bore date 19th August, 1885, and was to run for 8 years. The defendant as lessee paying Rs 1,500 every 8 months as rent, the first payment being on the date of the execution of the lease; and in failure of payment of any one instalment within 30 days from the date of payment, the defendant agreed to pay Rs 3,000 as damages, and gave the plaintiff the right to re-enter and take possession of the land and to determine the lease.

The defendant admitted that he failed to pay the rent due on April 19th, 1890, but stated that after breach of the

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covenant on his part to pay the instalment due on that date. It was agreed by the plaintiff and himself that the plaintiff be allowed to resume possession and take the issues and profits during the unexpired term of the lease, and that in pursuance of the agreement plaintiff did on the 30th May, 1890, receive possession and has ever since taken and continued to take the issues and profits thereof.

The plaintiff admitted that he resumed possession on the 30th May, and had ever since been in possession of the demised land, but denied the agreement set out by defendant and said he resumed possession in terms of the stipulation as to re-entry in the lease.

The District Judge having dismissed the plaintiff's action with costs, because of the exercise of his right of re-entry under the contract of lease, the plaintiff appealed.

Grenier for plaintiff-appellant. The judgment of the Court below is based upon a misconception of the essential requisites of a surrender at law. Upon the pleadings, the defendant admitted that he had, firstly, committed a breach of covenant, and secondly, that the instalment of rent payable in terms of the indenture of lease had become due and payable. This was an admission of plaintiff's claim, and if these averments stood alone, plaintiff was entitled to ask the Court to sign judgment for him. The defendant, however, sought to avoid his liability by pleading an agreement which was not enforceable in law, The learned District Judge says that it was immaterial in what way the plaintiff got back into possession, so long as he did not, by means of an action at law, regain such possession. There is no rule of law that prevents a lessor from re-entering land that has been abandoned by the lessee, nor does re-entry under these circumstances deprive the lessor of the benefits of the covenants in the lease, one of the covenants being that the lessee should keep the land in good order and condition until the expiration of the term. Here there was no surrender at law which would entitle the defendant to be relieved from damages. A surrender at law takes place where by agreement between landlord and tenant, the latter gives up possession, and the former re-enters on the footing that the tenancy has terminated. Phrene *v.* Popplewell

31 L. J. C. P. p. 235. Here the parties are at issue on the question of surrender, and the act of the plaintiff in re-entering land which had been abandoned by the defendant, admittedly, in breach of covenant, cannot be construed into a surrrender at law.

Dornhorst (*Sampayo* with him) for defendant-respondent. The plaintiff had no right to re-enter and take possession without the authority of a competent court, though a provision as to re-entry is made in the agreement. A written lease can only be cancelled by an instrument of a similar form and equal solemnity. Plaintiff cannot maintain this action as there was a surrender at law.

WITHERS J.—In an indenture of lease of certain premises for a term of eight years from its date, the 19th August, 1888, the defendant covenanted to pay a sum of Rs 12,000 to the plaintiff by way of rent in instalments of Rs 1,500 at stated times, and in this contract was a proviso of re-entry in case any one instalment was in arrear for the space of 30 days next after it became due and payable, and an agreement that in that event the plaintiff might determine the lease and recover the sum of Rs 3,000 as, and by way of damages, the lessee foregoing all instalments that might have been paid before such breach.

An instalment of Rs. 1,500 became due and payable under the lease on the 16th of April, 1890, which remained unpaid for the space of 30 days then next following. In consequence the plaintiff says he is entitled to Rs 3,000, but he claims Rs 4,500 which includes the unpaid instalment of Rs. 1,500 due for rent in advance.

He certainly cannot recover both rent and damages. If he exercised his right of re-entry and determining the lease, he can only claim damages. Nor could he well claim damages without re-entering the premises and determining the lease If he re-entered, he lost his claim to rent not in arrear.

His plaint discloses no cause of action for damages, but in his reply to meet a defence by way of confession and avoidance, he pleads that, on or about the 30th May, 1890, he did re-enter the demised premises under the agreement that he might do so if any particular instalment was unpaid for 30 consecutive days

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next following that on which it became due and payable, and that he did so because of the instalment of Rs. 1,500, being unpaid for 30 days after the 15th of April, 1890.

The learned judge has dismissed the plaintiff's claim for rent and damages because of the exercise of his right of re-entry under the contract of lease. As regards the lump sum payable by way of rent in advance the learned judge is right, but when he says that he has no claim for damages, he is wrong.

The defence of accord and satisfaction could, in the circumstances, be proved by nothing less solemn than a notarial instrument of contract, and there being none it fails.

Then the question remains to what damages is the plaintiff entitled? Can he recover the amount in full or only such damages as he has actually sustained by the breach of the contract? In other words, is the sum of Rs. 3000 fixed by the parties to the lease as damages, a penalty or not?

A guiding principle for the determination of such a question is this. When the stipulation is made in respect of a sum certain and the amount fixed on as damages is greater than that sum, it is in general to be treated as a penalty securing the contract, and not a sum as liquidated damages. Here the sum fixed upon is no doubt less than the rent of Rs. 1,500 agreed upon to be paid, or the balance after the breach of paying any instalment except the last two, but when one considers the issues and profits of the leasehold premises which the lessor will enjoy after his re-entry for the remainder of the term, the value of those issues and profits plus the sum of Rs. 3,000 is in ordinary circumstances likely to exceed any sum payable by way of rent, and for this reason, though not without hesitation, I think on a full consideration of the contract that the sum must be regarded as a penalty. The judgment in my opinion should be set aside, and the case go back for enquiry as to damages. The appellant will have his costs in appeal. All other costs to be costs in the cause.

LAWRIE, J.—I agree with my brother WITHERS.

It is admitted by the plaintiff lessor, that he re-entered. It is admitted by the defendant that the re-entry was lawful

with his consent, and in consequence of an agreement between him and the plaintiiff

It is difficult to see how the learned District Judge, came to the conclusion that the re-entry was unlawful, and that, by his unlawful act, the plaintiff was estopped from claiming damages for breach of contract. By the re-entry the landlord lost his claim for rent not in arrear. The defendant does not aver that the plaintiff lessor, waived his right to damages. That claim is unaffected by the re-entry. I agree that the case should go back to the District Court for assessment of damages.

BURNSIDE, C. J.—There was no rent in arrear, but only a breach of covenant to pay rent in advance. By that breach the plaintiff became entitled to re-enter and the defendant consented, so the Roman Dutch law is silenced. The lease contained a clause for the payment of liquidated damages. In this case there is only one covenant for the breach of which the plaintiff may recover damages and such damages are easily ascertained.—Such damages are not recoverable by way of penalty. See Kemble *v.* Farren 6 Bing 148. Wallis *v.* Smith L. R. 21 Chancery division 243. I agree to send the case back.

BEFORE *Burnside*, C. J. AND *Withers*, J.

August 23 and 30, 1892.

MARIKAR *v.* BELL.

[No. C. 1,944, D. C., COLOMBO.]

Landlord and Tenant—Re-entry - Tacit hypothec—Jus retentionis—Roman Dutch Law—English Law—Landlord's lien.

Per BURNSIDE, C. J.—A landlord has no right to lock up the house of his tenant and exclude him from the beneficial enjoyment of the leased premises, either to enforce his lien, or to prevent the tenant from removing the goods from the premises, nor can he, if he makes a distress for rent, exclude the lessee from any part of the demised premises.

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Per WITHERS, J.—A substantial interruption by the landlord of the enjoyment of demised premises discharges a lessee from liability to pay rent, except what has accrued due, and entitles him to claim annulment of the contract of lease, and damages, if any, for the interruption.

The facts sufficiently appear in the judgment of BURNSIDE, C. J.

Van Langenberg, for defendant-appellant.

Dornhorst, for plaintiff-respondent.

On August 30 the following judgments were delivered:—

BURNSIDE, C. J.—This is an action for three months rent payable on a lease for two years in which is contained a clause of re-entry in these words "if the said monthly rent or any part thereof shall be in arrear and unpaid for the space of ten days on which the same shall become due, it shall be lawful for the said lessor to cancel and determine these presents and eject the tenant from the premises."

The defendant admitted that the rent was due, and he pleads that the plaintiff unlawfully entered upon and took possession of the premises and kept defendant out of possession, and he asks for cancellation of the lease and for damages in reconvention and also to set off Rs. 200 which he had paid in advance for the rent of the two months at the end of the term against the rent admitted to be due. The plaintiff replied denying that he took possession of the premises. He alleges that the defendant being indebted to him for rents as claimed in this action was removing goods from the premises in order to defeat and deprive the plaintiff of the tacit hypothec which the plaintiff had over the goods on the premises, and in fraud of the plaintiff's rights the defendant continued to remove the said goods and the plaintiff believes did actually remove all or the greater part of his goods and the plaintiff therefore to conserve his said hypothec placed extra locks upon the outer doors. The plaintiff also denied the right of the defendant to obtain a cancellation of the lease, or to set off the rent paid in advance.

These are the pleadings and upon the face of them it cannot fail to strike one's curiosity to discover how the plaintiff could conserve a hypothec over goods by locking up the room from which they had been in his own belief previously removed. I do not believe such a power is given by Roman Dutch

Law. The facts as disclosed in the evidence are substantially those alleged in the pleadings and the District Judge gave judgment for the plaintiff for the rent due and dismissed the defendants claim in reconvention holding that the plaintiff had a right to prevent the removal of any property from the demised premises till the arrears of rent were paid. The defendant has appealed. Without going in to the recondite mysteries of Roman Dutch law and theorizing about the *jus retentionis* under a tacit hypothec it may be freely admitted that in this case the landlord had a lien for rent due and a right to distrain on the property of his tenant on the demised premises, quite as extensive a lien or right to protect it as any claimed for the landlord under the imperfectly understood mediaeval theories which have been invoked, but he has no right whatever to lock up the house of his tenant and exclude him from the beneficial enjoyment of the leased premises, either to enforce his lien or to prevent the tenant from removing the goods from the premises, nor can he, if he makes a distress for rent, exclude the lessee from any part of the demised premises. Granted therefore that even to enforce his *jus retentionis* and to maintain his tacit hypothec he had the right to distrain these goods, it remains to be shown by what law he might lock up the house and keep the tenant dispossesed and evicted. The learned counsel who argued this case with his wonted earnestness and ingenuity for the respondent urged that the plaintiff had the right under the covenant to re-enter and terminate the lease, as the covenant for payment of rent had been broken. I would be prepared to grant him that right, although it is said that by the aforesaid Roman Dutch Law he cannot do so except by judicial process. I would prefer to adhere to the English Law by which the people themselves believe that they were bound, but if I assented to that proposition then the re-entry of the landlord no doubt terminated the lease and the plaintiff has asserted in his pleadings that the lease has not been and that the defendants have no right to have it terminated. The clear law on the matter is that the defendant owes the plaintiff three months rent, that the plaintiff in entering upon the premises and excluding the defendant therefrom committed an

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eviction which justifies the defendant to claim damages and a declaration that the tenancy and the right to rent has terminated and that the plaintiff has received from the defendant Rs. 200 as rent which he is not entitled to retain. Under all the circumstances I do not think plaintiff is entitled to any exemplary damages. I would give him Rs. 75 damages and I would decree that tenancy had terminated and no right to further rent exists and I would decree that the plaintiff pay the defendant the sum of Rs. 200 already paid by the defendant to plaintiff in lieu of rent after deducting the sum of Rs. 75.

Judgment would therefore be given for plantiff for Rs. 75, each party paying his own costs in the court below and the plantiff paying the costs of appeal.

WITHERS J.—Whether a local landlord can re-enter on demised premises under a proviso for re-entry without judicial sanction or whether without such sanction he can distrain for rent on the premises are questions which it is unnecessary to discuss, because in my opinion the conduct of the plaintiff in this action was not an exercise of either right. I have no doubt by our law a substantial interruption by the landlord of the enjoyment of demised premises discharges a lessee from any liability to pay rent (except of course what has accrued due) and entitles him to claim anullment of the contract of lease, and damages, if any, for the interruption.

It cannot be contended that the padlocking of the doors by the landlord in the manner described was not a substantial interference with the lessee's ordinary and lawful enjoyment of the demised premises. For these reasons I concur in my Lord's judgment.

BEFORE *Burnside*, C. J. AND *Withers*, J.

August 5, 1862.

MARIKAR *v.* BAWA LEBBE and another.

[No. 39,967 D. C. KALUTARA.]

Sect 402 Civil Procedure Code – Case "struck off"—Effect of such order.

Although an order that the case be struck off the Roll is not the proper order under Sect. 402 of the Civil Procedure Code, when no steps have been taken in the case for over a year, yet such an order would operate in fact, till the case is restored to the Roll; and the proper course is to move for a

summons to issue on the other party to shew cause, if any, against an application to have the case restored to the roll.

On July 17, 1890, the case was struck off the roll, as no steps had been taken in the case for over twelve months. On January 19, 1892, plaintiff filed petition and affidavit, praying to be allowed to continue the action, and order *nisi* was allowed and copy of said order and petition served on the respondent. On the returnable day, the respondents were absent, but the Court disallowed the petition on the ground that the cause alleged for not continuing the action was not satisfactory.

Canekeratne, for plaintiff-appellant.

On August, 12 the following judgments were delivered:—

WITHERS, J.—There was no appearance for the respondent. The application to the District Judge to set aside his predecessor's order of the 17th July, 1890, was misconceived and was properly refused.

The appellant's proper course was to move for a summons to issue to the other party to show cause, if any, against an application to have the case restored to the roll.

The order of the 17th July, 1890, was no doubt irregular for it was not in accordance with the provisions of the Civil Procedure Code section 402 by which it is enacted that "If a period exceeding 12 months, in the case of a District Court, elapses subsequent to the last entry of an order or proceeding in the record without the plaintiff taking any step to prosecute the action when any such step is necessary, the Court may pass an order that the action shall abate."

Still that order operated in fact till the case was restored to the roll.

No doubt on a proper application the District Judge would direct the case to be restored to the roll, but then and there it would be within his discretion to pass an order that this action shall abate, and no doubt he would make such an order on the present materials. He has already expressed a strong opinion on the merits. The order now appealed from must be affirmed with costs.

BURNSIDE, C. J.—I concur.

BEFORE *Lawrie*, J.

June 30 and July 28, 1892.

RAMEN CHETTY *v.* CARPEN KANGANY.

[No. 852 C. R., AVISAWELLA.]

Splitting of action—Sect. 34 Civil Procedure Code—Sect. 91 Courts Ordinance—Omission of part of claim.

The plaintiff instituted two actions against the same defendant on the same promissory note, one for interest, and one for the principal sum due on the note. The action for interest having come on for hearing, the plaintiff abandoned it, and elected to proceed on with the action for the principal sum only.

Held that this action can be sustained under the exception mentioned in Sect. 34 Civil Procedure Code, and the words in that section "except with leave of the Court obtained before the hearing" mean that if a plaintiff has omitted a part of his claim, he may, before that claim is heard, ask the leave of the Court to sue for the omitted remedy.

The facts material to this report appear in the judgment.

De Saram, for defendant-appellant.

On July 28 the following judgment was delivered:—

LAWRIE, J.—On the same day the plaintiff instituted two actions against the same defendant on the same contract, action No. 851 for interest due on a promissory note and action 852 for the principal sum due on the same note.

Under the provisions of the 91st section of the Courts Ordinance, and of the 34th section of the Procedure Code the plaintiff could not split his action and had he insisted in both there could be no doubt that the second action must have been dismissed.

When the action for interest first instituted came on for hearing the plaintiff abandoned it and elected to proceed on with the second action only. Whether he could do so depends on the construction to be put on the words "except with leave of the Court before the hearing." The 34th section enacts "a person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but if he omits (except with leave of the Court obtained before the hearing) to sue for any such remedies he shall not afterwards sue for the remedy so omitted." The words "except with leave of the Court obtained before the hearing" mean that if a plaintiff has omitted a part of his claim he may (before that claim be heard) ask the leave of

the Court to sue for the omitted remedy. Here the plaintiff got leave of the Court to abandon his first action before it was heard and it was dismissed before this action was ripe for hearing.

I am of opinion that the case comes under the exception of the 34th section, and that this action can be sustained without departing from the wholesome and fixed rule against splitting. The plaintiff undoubtedly split but the Code permits the Court to allow that error to be rectified. Here the Commissioner could not give leave to amend the first action by adding a prayer for judgment for the omitted principal, because that would have made the amount sued for beyond the jurisdiction of the Court of Requests but it was in the Commissioner's power to give the plaintiff leave to abandon the action for interest and when that was done the splitting of actions came to an end. The plaintiff's action for the principal alone remained. This seems to me to be in accordance with the 91st section of the Courts Ordinance. On the issue of fact raised I do not disturb the verdict of the Commissioner. I vary the judgment under review by finding no costs due to or by either party.

BEFORE *Burnside*, C. J. AND *Withers*, J.

September 13 and 20, 1892.

APPUHAMY *v.* de SILVA.

[No. 3,553 D. C., KANDY.]

Tenant—Compensation for improvements—Land—Jus retentionis.

Neither by Kandyan law nor Roman Dutch law can a tenant retain leasehold premises against all the world, till compensated for the benefit to the owner of the soil from improvements made by the tenant.

The facts material to this report appear in the judgment of WITHERS J.

Morgan, for defendant-appellant.

On September 20, the following judgments, were delivered:—

WITHERS J.—I think the judgments is right and should be affirmed.

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I venture to think so notwithstanding the observation in the judgment directing the case to be remitted to the lower court for no obvious reason, that the defendant had made out a *prima facie* case for the right which he had claimed of retaining the premises till compensated for improvements. These improvements consisted of a few fruit trees which the defendant had planted in a piece of ground which he occupied as a monthly tenant under the plaintiff's vendor.

I can find no authority in Kandyan or Roman Dutch law for the proposition that a tenant can retain leasehold premises against all the world, till he has been compensated for the benefit to the owner of the soil from the trees he has planted in it. Such a proposition indeed stands self condemned. The very peculiar circumstances under which indeed a tenant was actually allowed to retain leasehold premises till compensated for improvements by this Court in 1877 Ramanathen's Reports p. 33 do not apply to this case. The judgment must be affirmed with costs.

BURNSIDE, C. J.—I quite agree—we have carried the law respecting the right of retention far enough, I think too far, and created another pitfall for owners of land.

BEFORE *Lawrie*, AND *Withers*, J. J.

September 16 and 20 1892.

MUTTIAH CHETTY *v.* MEERA LEBBE MARIKAR and another.

[No. 607, D. C., COLOMBO.]

Writ against person—Ex parte application—Release of debtor—Section 347 and 224 Civil Procedure Code—Discretionary power to release.

The District Judge released the 2nd defendant who was arrested under writ of execution, and brought before the Court, on the ground that the writ ought not to have been allowed, as it had been, on the *ex parte* application of the plaintiff.

Held, that the proper course was for the plaintiff, not to appeal against the order of release, but to move the District Court for a re-issue of the writ against person after due service of the application on the said defendant.

The law reposes in Courts large discretionary powers to release debtors arrested and brought before them.

Per WITHERS, J.—The "petition" referred to in section 347 of the Civil Procedure Code obviously embraces the written application required by Sect. 224.

Writ against the person of the 2nd defendant was allowed on the *ex parte* application of the plaintiff on April 8, 1892, and the said defendant was arrested and brought before the Court. The District Judge released the said defendant as no opportunity had been given him to show cause why the decree should not be executed against him. The plaintiff appealed praying that the Court do set aside the order of release and do direct that the said defendant be arrested and committed under writ of April 8, 1892.

Sampayo, for plaintiff-appellant.

On September 20, 1892, the following judgments were delivered :—

LAWRIE, J.—On 8th April, 1892, the District Judge of Colombo allowed a writ of execution to issue against the person of the defendants.

On the 28th of July, the second defendant was arrested and brought before the Court.

On cause shown the District Judge released him.

The District Judge recorded as his reasons that the writ against person ought not to have been allowed on the *ex parte* motion of the plaintiff, that it was necessary in the circumstances of the case that an opportunity should have been given to the judgment debtors to show cause why the decree should not be executed against him.

On consideration of the section of the Code relating to arrest and imprisonment, I am satisfied that the law reposes in Courts large discretionary powers to release debtors arrested and brought before them. In most of the cases in which the discretion can be exercised the release is not equivalent to a discharge. The writ may again be moved for and issued and the debtor may again he arrested.

I need not decide whether in the case before me the issue of the writ against person was illegal. It is sufficient that the conscience of the District Judge was touched and that he felt that a precaution for the benefit of the debtor had not been taken. The appellant in his petition of appeal

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prays that this Court do set aside the order of relase and do direct that the 2nd defendant be arrested and committed under the exigency of the writ of the 8th April, 1892.

That certainly we cannot do. The appellant might have moved the District Court for a re-issue of the writ against person after due service of the application on the defendant. If either before or after hearing the defendant the District Court refused the application, an appeal would lie, but I cannot sustain this appeal against an order which the District Judge has made on the footing and under the belief that by a mistake of the Court itself the defendant did not receive proper notice. I would affirm the order with costs.

WITHERS, J.—I think the writ against person has been rightly discharged. More than a year having elapsed since the last order against the party defendant on the previous application for execution, to wit the 12th of August, 1891. The application for execution of the 28th January, 1892, should have been served on the judgment debtor as required by the 347 section of the Civil Procedure Code, and this I take it was not done in this case. Petition in this section to my mind obviously embraces the written application required by the 224th section.

BEFORE *Lawrie*, J.

September 8 and 13, 1892.

DORA SAMY *v.* MANYARJIE.

[No. 12,685, P. C., GAMPOLA.]

Ordinance 11 of 1865—Wilful desertion—Minority—Liability of minor.

The liability of a minor to punishment for desertion under the Ordinance No. 11 of 1865 depends on the age and mental and bodily capacity of the minor. The mere fact that the minor is under 21 years of age will not relieve him from responsibility.

Allagan *v.* Allagie 1. S. C. R. p. 42 referred to.

The Attorney-General, appealed from an acquittal of the accused on the ground of minority.

Dornhorst, for appellant.

On September 13, the following judgment was delivered:—

LAWRIE, J.—On this appeal from an acquittal at the instance of the Attorney-General I set aside the acquittal and send the case back for the Police Magistrate for a new trial.

The question whether a minor is liable to punishment for desertion under the Ordinance 11 of 1865 depends on the age and mental and bodily capacity of the accused. The mere fact that she is under 21 years of age will not in my opinion relieve her from responsibility and punishment for wilful desertion.

It is right that these proceedings should commence *de novo* and that the complainant should be called on to produce fuller evidence as to the circumstances of the alleged desertion; for instance did the girl go away alone or with her parents or with a husband.

Before either convicting or acquitting a young Tamil woman charged with desertion, I should think it necessary to hear her story and to know, as nearly as possible, her age, whether she is not married or whether she be of such tender years that she has not attained puberty. The judgment of the Chief Justice in the case referred to by the Police Magistrate, (Supreme Court Reports p. 42) shews that this Court is disposed to regard the liability of a minor to punishment for desertion rather as a question of fact or of mixed fact and law than of pure law. Until the court has more evidence before it of the position, age and capacity of this accused, and until it hears her own story it cannot safely give judgment.

BEFORE *Lawrie*, J.

September 8 and 13, 1892.

PEACHY *v.* MASTANKAMY.

[No. 865 P. C., MANAAR.]

Ordinance 10 of 1885 Chapter IV—Rules prescribed by Government Agent—Evidence.

In a prosecution for breach of any of the rules prescribed by the Government Agent under Chapter IV of Ordinance 10 of 1885, a copy of the rules must be put in evidence, and the Court cannot take judicial cognizance of such rules, until they are proved.

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The facts sufficiently appear in the judgment.

There was no appearance of counsel on either side.

On September 13, the following judgment was delivered.—

LAWRIE, J.—This conviction and sentence are set aside and the accused acquitted.

At an early stage of the case, the same Magistrate convicted this accused on insufficient evidence after proceedings which disregarded the provisions of the Criminal Procedure Code.

The Chief Justice on appeal set aside the conviction and sent the case to the Police Court in order that a proper complaint or charge be framed. When the case went back a new complaint was presented and after the examination of the witnesses for the complainant the Magistrate in opposition to the directions of this Court did not frame a charge. He did not call on the accused to plead nor did he inform him of his right to make a statement. The Magistrate records a statement of the accused but it is not in the statutory form nor is it recorded that the accused was duly warned. These irregularities alone would be sufficient to justify me in again setting aside the conviction. The Magistrate has convicted on evidence which is legally insufficient. The complaint set forth a breach of rules of the Government Agent of the Northern Province published in the Government Gazette of 18th February, 1887. No copy of the rules has been put in evidence. Of such rules the Court cannot take judicial cognizance until they be proved. Even if the rules had been in evidence and were in the terms suggested in the complaint, it was necessary to prove that the firewood in question was taken from a Crown or reserved forest. Of that there is no proof. The Mudaliyar of the Kachcheri does not say so, and he admits that a part of Udaadi jungle was sold by Government to Mr. De Hoedt. There is no evidence that this firewood was taken from land over which the Government Agent had any control, or regarding which he had right to make rules.

BEFORE *Lawrie*, J.

September 8 and 9, 1892.

THE QUEEN *v.* MENDIS.

[No. 397, D. C., Criminal RATNAPURA.]

District Court - Indictment—Sect. 263 Criminal Procedure Code—Charge framed by Attorney-General.

In the trial of an accused in the District Court an indictment was presented which embodied the charge framed by the Attorney-General in terms of Sect. 263 of the Criminal Procedure Code.

Held that the District Judge had no right to ask the Secretary of his court to present a new indictment charging the accused with an offence under another section.

The District Judge having convicted the accused on an indictment, which did not set out the offence in the charge framed by the Attorney-General but a cognate offence, the accused appealed.

There was no appearance for appellant.

Drieberg, for respondent.

On September 9, the following judgment was delivered :—

LAWRIE, J.—I must quash these proceedings. The Ordinance confers on the Attorney-General large powers of control over indictments and trials in District Courts. Sect. 263 enacts that the charge upon which an accused person is tried in the District Court shall be that which has been approved of or framed by the Attorney-General, and shall be embodied by the Secretary of the Court in an indictment.

In the case before me this was done, but the District Judge considering that the charge had been made under a wrong section of the Penal Code requested the Secretary to frame a new indictment charging the prisoner with a cognate offence under another section. This I hold he had no power to do.

The accused after conviction appealed. The Crown Counsel for the Attorney-General says he cannot support the procedure. The conviction must be set aside.

BEFORE *Burnside*, C. J., AND *Laurie*, J.

July 5 and 26, 1892.

FERNANDO and others *v.* FERNANDO and others.

[No. c. 1875 D. C., COLOMBO.]

Marriage in Community—Mortgage by husband—Action against mortgagee by children for mother's share—Claim in reconvention by mortgagee.

A while married in community to B, mortgaged certain land to C. B having died, the executrix of C. assigned the mortgage to X. who sued upon the mortgage and had the mortgaged land seized and sold under his writ. The plaintiffs, who are children of A and B, having instituted an action against A and X for a declaration of title to an undivided half of the said land by right of inheritance from B.

Held, that X. had a right to claim in reconvention a decree declaring the plaintiff's share of the land bound and executable under the mortgage to his assignors by their father A.

The first defendant and one Simona Peiris married in community of property and lived as husband and wife.

During the existence of the marriage the 1st defendant on the 19th June, 1882, by deed mortgaged the whole of certain lands to the Rev. Mr. Dias. Simona Peiris, the wife, died on 1st April, 1886. She, by her husband, the 1st defendant, left, surviving her, several children, who are the plaintiffs.

The widow and executrix of the Rev. Mr. Dias the mortgagee, assigned the mortgage to the 2nd defendant on the 3rd February 1890. The 2nd defendant assignee put the mortgagee bond in suit in District Court Colombo No. 1,206, as against the 1st defendant, as mortgagor, and obtained an hypothecary decree, making the land mortgaged bound and executable for the debt, and had the whole of the mortgaged property seized and sold under writ.

The plaintiffs say that by inheritance from their mother, Simona Peiris, they are entitled to an undivided half of the property in question, and that the 2nd defendant had no rigeht to seize and sell the whole of the property, particularly as the plaintiffs were not parties to the action No. 1,206 and are not bound by the decree pronounced therein.

The second defendant by his answer made a claim in reconvention alleging that he is now entitled to have made and pronounced in this action against the plaintiffs a like decree that in default of their paying the said claim and further interest till date of payment and costs of the said action No. 1,206 and this action within one month from the date of the final judgment in this action, the said lands and premises should be declared so bound and executable.

The District Judge dismissed the plaintiffs' case with costs and entered a decree for the 2nd defendant in accordance with his claim in reconvention, and the plaintiffs appealed.

Canakeratne, for plaintiffs-appellants.

The plaintiffs were no parties to the suit, in which the 2nd defendant obtained his mortgage decree. The judgment entered in that case estops 2nd defendant from having another judgment on the same bond. A mortgage decree cannot be properly entered against executors *de son tort*, as 2nd defendant says the plaintiffs are.

Dornhorst (*Morgan with him*), for 2nd defendants-respondents. The judgment in the previous suit does not create an estoppel. The 2nd defendant's claim in reconvention is right and must be upheld.

On July 26, the following judgments were delivered:—

BURNSIDE, C. J.—The land in question was clearly liable under the mortgage for the debt for which the plaintiffs' father had mortgaged it, and unless the plaintiffs were prepared to contend to the contrary, or to contend that the debt had been paid or redeemed, or that they were prepared to pay off the mortgage, it does not appear to me that they had any interest in being parties to the mortgage suit. Now they do not allege one of these alternatives in their libel, and I fail to see what useful object could be obtained by their claim. It is the defendants alone, and those claiming under them, who may be prejudiced by the plaintiffs not having been made parties to the mortgage suit, and I protest, as I have always protested, against the doctrine that no title can be made under a mortgage decree so obtained. It seems to me that all that would affect the title is the plaintiffs' right to come in at any time, open up the liability on the mortgage, and claim to redeem,

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However, in this case, that question has been set aside by the claim in reconvention—a claim, which always may be engraffed on suits like this, in which, a decree in defendant's favour having been obtained on that claim, there is an end of the matter.

The plaintiffs have been met in this untimely action, as like plaintiffs may always be met in setting up title against a mortgage decree, by the defendants saying, if you wish to redeem bring in your money; if not, you are estopped, and so put in a worse position than if you had waited till you were prepared to redeem.

LAWRIE, J.—The plaintiffs were not called as defendants in the mortgage suit, and were not bound by the decree, and hence they were entitled to insist that their land should not be sold in satisfaction of the mortgage until the subsistence of the debt was established in an action against them.

But, though the plaintiffs were within their rights in requiring that they should be parties to an action on the mortgage, it was a foolish demand, because they had, it seems, no defence to such an action, and, if they had no defence, it was absurd to stand on a right which could do them no good.

Instead of acquiescing in the seizure of the property under the first decree, they, by instituting this action, at once exposed themselves to a claim in reconvention to which, when made, they had to submit.

The mortgage decree, now obtained in reconvention against these plaintiffs, cures the defect of their nonjoinder in the previous suit, and perfects the defendants' right to have the land sold under the mortgage.

I agree to affirm the judgment.

BEFORE *Lawrie* AND *Withers*, J. J.

September 23 and 28, 1892.

RATU RALA *v.* KUMA APPU and others.

[No. B. 25, D. C., BADULLA.]

Application for letters of administration—Inquiry into claim—Issue of fact as to ownership of property claimed to be administered.

A. applied for letters administration to the estate of B., his wife, who had died intestateand leaving property, and the applicarion was opposed by narties interested in the estate of a previous husband deceased of B. The District Judge refused A's application having found in the course of inquiry into A's claim, that the property which A claimed to administer belonged, not to B., but to her former husband.

Held, that such an issue could not be summarily determined in the present proceedings, and that A. had a *primâ facie* claim to letters of administration.

The facts material to this report appear in the judgment of WITHERS, J.

Dornhorst, for petitioner-appellant.

Van Langenberg, for opponents-respondents.

On September 28, the following judgments were delivered:—

WITHERS, J.—The appellant is an applicant for letters of administration to the estate of one Herat Mudianselage Hudu Kuma Magandua deceased on the ground that she was his wife and died intestate leaving certain property movable and unmovable. His application was opposed by those interested in the estate of a previous husband of the said Hudu Kuma whom he predeceased. The learned District Judge has refused to grant the applicant letters, because, in the course of inquiry into the applicant's claim, it transpired, and so the Court has found, that the property which the petitioner claims to administer was not that of the petitioner's late wife but that of her former husband Punchirala, and that in effect she left nothing to administer.

The evidence led by the petitioner no doubt pointed to that conclusion, but I question if an issue of the kind can be summarily determined in the present proceedings.

The petitioner has a *primâ facie* claim to administer whatever estate his wife may have died undisposed of, and I think he is entitled to the letters he applied for.

We express no opinion as to the applicant's claim to the

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effects scheduled in his affidavit. Judgment accordingly with costs.

LAWRIE, J.—I agree. I am of opinion that the order under review should be set aside, that the opponents-respondents should be decreed to pay all the costs occasioned by their opposition including the costs of this appeal, and that the record should be sent back to the District Court with instructions to issue letters of administration to the applicant. The opponents do not pretend to have any interest in the estate of the deceased Hudu Kuma, and their opposition to the widower obtaining administration was altogether unfounded.

There is reason to believe that applicant's object is to others enable him to maintain an action against the opponents and for property in their possession, which the applicant asserts is part of his deceased wife's intestate estate.

The District Judge was of opinion that the applicant's claim was unfounded but he is entitled to have it decided in a regular action after pleadings and proof. Such an action he cannot maintain unless he be vested with the powers of an administrator.

BEFORE *Withers*, J.

September 15 and 16, 1892.

CASIM *v.* MUHAMADU.

[No. 424, P. C., MANAAR.]

Criminal Intimidation—Section 483 and 486, Penal Code—. Threat of procuring imprisonment—Injury.

In a prosecution for criminal intimidation, the nature of the threat and of the intent should be specified in the charge.

The threat of procuring a person's imprisonment is not a threat with an injury, such as is contemplated by Penal Code.

Imprisonment by a competent Court is not harm illegally caused to the person undergoing it.

The charge in this case was that the accused did on July 20, 1892, at Manaar threaten Dipu Kasim with injury to his property and person, by threatening that he would get him unjustly put in jail with intent to cause him to omit to do an act, which he was legally entitled to do, namely, to

make a complaint to the Court and the Deputy Fiscal about the false service of a notice, as the means of avoiding the execution of such threat, and thereby committed an offence punishable under Sect. 483 and 486 of the Penal Code.

Wendt, for accused-appellant.

On September 16, the following judgment was delivered:—

WITHERS, J.—This conviction cannot stand for more than one reason.

In the first place the accused was charged and convicted *uno flatu* after evidence had been heard on both sides.

The charge should have been made at the close of the prosecution but instead of that, when the prosecution was closed, the accused was called on for a statement and for any evidence in his defence.

At that time he did not know what he was charged with.

The language of criminal intimidation cannot be too precisely charged as well as the intent with which such language is used, so that the accused may if possible be able to contradict or explain the one or the other.

Now on the part of the prosecution there was very conflicting evidence as to the nature of the so called intimidation, the matter to which it referred, and the intent with which it was addressed, and it therefore was incumbent on the learned Magistrate then and there to specify the nature of the threat and of the intent in a charge before he called upon the accused for his defence.

This conflict of testimony was, indeed, another reason why the accused should have had the benefit of the doubt and been acquitted.

Lastly the threat of procuring the complainant's imprisonment is not a threat with an injury such as is contemplated by the Penal Code. Injury under the Code denotes any harm whatever illegally caused to any person in body, mind, reputation or property, &c. Imprisonment by a competent Court of Justice is not harm illegally caused to the person undergoing it.

The conviction must be set aside.

BEFORE *Lawrie* AND *Withers*, J. J.

September 20 and 28, 1892.

SIDDARTE UNANSE *v.* SUMANA UNANSE and another.

[No. c 88, D. C. KEGALLE.]

Ejectment—Title—Right to immediate possession—Kandyan Law—Donation—Revocation of gift.

In an action in ejectment the plaintiff has not only to prove that his title is superior to that of the defendant, but also that at the time of action brought he was entitled to the immediate possession of the land he seeks to recover.

The facts sufficiently appear in the judgment of WITHERS, J.

Dornhorst for defendant-appellant.

Wendt for plaintiff-respondent.

On September 28, the following judgments were delivered:—

WITHERS, J.—This plaint has been explained to us as meaning that the plaintiff seeks to recover certain fields and highlands from the defendants under an alternative title, claiming them either as Sangika property belonging to the Ganewatte Pansala of which he alleges he is the lawful incumbent, or as his private property under a deed of gift No. 24,072 and bearing date the 15th day of December, 1865, from one Ayagama Attadassi Unanse at that time said to be absolute owner of the lands. At the trial he elected to stand by his alleged right as a private owner of the properties, and yet judgment has gone for him as incumbent of the Pansala.

The defendants in their respective answers admitted they were in possession of these fields and claimed to be entitled to hold them as the pupils of the late Palla Vudia Domma Dassi Unnanse of Viharagedera Pansala to whom and to whose pupils in generations succeeding, by a deed bearing date the 6th day of February, 1872, the plaintiff had duly donated them.

In his replication the plaintiff admits he executed the deed of donation, but attempts to avoid it on the ground of having revoked it by a deed executed on the 15th day of September, 1891, so that this alleged revocation was effected more than six months after the commencement of this action. Respondent's counsel could not meet this difficulty when presented to him.

At least he did not satisfy me that was surmountable.

This is an action in ejectment in which plaintiff had not only to prove that his title was superior to that of the defendants, but that at the time of action brought he was entitled to the immediate possession of the lands he seeks to recover.

At that date on his own showing he had no title or right to possession of the land in question.

The judgment must be set aside, and the plaintiffs' claim dismissed with costs.

LAWRIE, J.—I agree. I have only to add that I am of opinion that the deed of gift executed by the plaintiff in 1872, was not revocable.

BEFORE *Lawrie*, J.

September 8 and 16, 1892.

DISSANAYAKE *v.* TAMBY CHETTY and others.

[No. 325, C. R., KEGALLE.]

Sect. 325 and 326 Civil Procedure Code—Hindering judgment creditor—Thirty days imprisonment.

The penal provision of Sect. 326 of the Civil Procedure Code applies only to one of the two offences mentioned in Sect. 325, viz: that of resisting or obstructing the officer charged with a writ of possession, and does not apply to the offence of hindering a judgment creditor from taking complete and effectual possession after the officer has delivered possession.

Plaintiff having obtained judgment, the Fiscal formally put him in possession of a field which was under crop. The day after plaintiff was put in possession, the appellants forcibly reaped and took away the crop. Plaintiff having presented a petition under Sect. 325 of the Code, the District Judge found upon inquiry that the appellants had hindered the plaintiff, who was the judgment creditor, from taking complete and effectual possession, and purporting to act under Sect. 326, committed the appellants to jail for thirty days, in order that the judgment creditor may be put in possession of the field.

Dornhorst, for appellants.

VanLangenberg, for judgment-creditor-respondent.

On September 16, the following judgment was delivered:—

LAWRIE, J.—The conviction and sentence passed on the respondents is set aside. Disanayake obtained judgment and on

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the 27th February, the Fiscal formally put him in possession of a field which was then under crop. No one was then on the land. The officer charged with the execution of the writ was not resisted nor was he obstructed in any way.

The judgment creditor put Mudalihamy in charge, and the day after the formal delivery of possession the respondents reaped and took away the crop in spite of Mudalihamy's protests.

The judgment creditor then presented a petition under the 325 and 326 sections of the Code, and the Commissioner, after hearing evidence, held it proved that the respondents had hindered the judgment creditor in taking complete and effectual possession, and he ordered that the respondents be kept in jail for 30 days to enable the petitioner to obtain full possession of the field.

The 325 section of the Code speaks of two offences (1) resisting or obstructing the officer charged with a writ of possession, (2) hindering a judgment creditor from taking complete and effectual possession after the officer has delivered possession. For the first of these offences provision is made by the 326 section of the Civil Procedure Code, enabling a court to send to jail for 30 days the person who obstructs or resists the officer, provided the Court be satisfied that those persons are the judgment debtors or persons acting at their instigation. That section does not provide any punishment for those who after possession has been delivered, hinder the judgment creditor in taking complete and effectual possession.

This offence is not mentioned in the Indian Civil Code. Our legislators who introduced into the Code the words "*or if after the officer has delivered possession to judgment creditor is hindered by any person in taking complete and effectual possession*, did not provide in the subsequent section the punishment for such misconduct.

It is not possible to take for granted that the legislature meant to impose the same punishment for hindering a judgment creditor after he got possession, as for resisting and obstructing an officer charged with the execution of the writ, possibly the form of imprisonment would have been less than 30 days, but it is in vain to speculate. These sections which create offences and impose punishments must be strictly construed. As no punishment is provided for the offence of hindering a judgment creditor the

Commissioner was not justified in making the order for 30 days imprisonment, which is set aside.

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BEFORE *Burnside*, C. J. AND *Lawrie*, J.

September 13 and October 7, 1892.

KURUKAL *v.* MURUGAN and others.

[No. 22,683 D. C., JAFFNA.

District Court—Administrator—Action to set aside judgment obtained in a Court of Requests—Fraud—Minor.

Plaintiff, as administrator, brought an action in the District Court of Jaffna to set aside a judgment fraudulently obtained by defendants in the Court of Requests of Point Pedro against a minor, as representative of plaintiff's intestate's estate.

Held, that the District Court of Jaffna had no power to enforce a decree against another Court, although of inferior jurisdiction and that the Court itself, in which the fraud has occurred should be called on to deal with it.

The facts sufficiently appear in the judgment of BURNSIDE, C. J.

Wendt, for plaintiff-appellant.

Dornhorst, for defendant-respondent.

On October 7, the following judgments were delivered:—

BURNSIDE, C. J.—There was no appearance on this appeal when it was first presented to us and the question of law involved being one of considerable inportance, and as I could find no direct authority bearing on it, I ordered it to be set down for hearing before my brother LAWRIE and myself, as my brother WITHERS had been engaged in the case as counsel.

The plaintiff appellant brings this action as an administrator in the District Court of Jaffna, praying that a judgment obtained by the defendant in the Court of Requests of Point Pedro against a minor, as the representative of the plaintiff's intestate's estate after his death, be set aside on the ground that it had been obtained by the fraud of the defendant in collusion with others who had obtained letters of guardianship over the minor heirs of the intestate and claimed to represent them in that suit.

The learned District Judge, without hearing evidence, refused to adjudicate on the matter, dismissed the plaintiff's action and recommended this appeal. The District Judge held that the action ought to be brought in the court in which the judgment had been obtained, as the District Court had no power to enforce

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a decree, if obtained, against the Court of Request of Point Pedro.

I agree with his judgment. It would not be possible for the District Court of Jaffna to operate by any decree against the proceedings of another Court although of inferior jurisdiction, and it seems only a matter of common sense that the Court itself in which the fraud has occurred, should be called on to deal with it, subject to the superintendent jurisdiction of this Court in appeal. The judgment should be affirmed with costs.

LAWRIE, J.—I agree with the Chief Justice that the judgment dismissing this action must be affirmed. A District Court has no power to set aside and cancel as null and void a judgment pronounced by another Court.

BEFORE *Lawrie*, J. AND *Withers*, J.

September 27 and October 7, 1892.

GOMES *v.* TIKIRI BANDA.

[No. 191, D. C., KEGALLA.]

Lease—Informal agreement—Failure to execute deed—action for repayment of rent.

A, on an informal agreement that B would execute a notarial lease of land, paid the consideration for the lease and entered into possession of the land. Some months after, A sued B alleging that B had refused to execute the deed of lease, and prayed for repayment of the rent paid.

Held, that A's action was misconceived, and that B's alleged refusal to execute the deed of lease gave A no cause of action.

Per WITHERS, J.—An agreement for a demise, unless it is expressly contemplated that a more formal instrument shall be executed, operates as a demise.

Defendant agreed, by a writing, which was of no avail under Ordinance 7 of 1840, to execute a formal deed of lease, leasing certain specific land to plaintiff. Plaintiff paid the consideration for the lease and entered into possession of the land. Defendant having refused to execute the deed of lease, plaintiff sued him, alleging the said refusal and prayed for a refund of the rent. The District Judge having given judgment for plaintiff, defendant appealed.

Wendt, for defendants-appellant.

Sampayo, for plaintiff-respondent.

On October 7, the following judgments were delivered:—

LAWRIE, J.—This action is founded on an informal writing. Though the parties are agreed as to its terms it has not been produced in evidence; it is however certain that it is a writing which purported to create an interest in land, and that under the Ordinance 7 of 1840, it has no force or avail in law, but the parties acted upon it. The plaintiff paid the consideration for the lease and there seems little doubt that he entered into possession of the land. Some months afterwards he instituted this action, in which he alleged that he paid the rent or consideration in advance, and that the defendant, though often thereto requested, failed and neglected to execute a deed of lease.

These allegations are practically admitted. They do not support the prayer of the libel, which is for repayment of the rent. To that remedy (which the learned District Judge has given) the plaintiff has, no right.

He has not asked for specific performance of the alleged implied obligation to execute a notarial lease. To gain that end the plaintiff might have tendered a deed for signature. He has not asked for damages for breach of contract. In my opinion the judgment must be set aside and the action dismissed with costs.

WITHERS, J.—The plaintiff's alleged cause of action is that the defendant "failed and neglected to execute" a deed of lease pursuantly to the agreement set out in the first paragraph of his plaint, an agreement which defendant admits.

If that was a binding agreement it operated then and there as a lease, and nothing more was required.

An agreement or a demise unless it is expressly contemplated that a more formal instrument shall be executed, operates as a demise.

The agreement, signed by the defendant on the 6th day of March, 1891, was to let to the plaintiff for two years from that date a ⅓rd share of the produce and profits of a certain land, in consideration of the payment of rent at the rate of Rs. 120 a year, and was a demise in itself.

Hence defendant's alleged refusal to comply with plaintiff's demand for a more formal instrument gives him no cause of action.

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Then defendant has pleaded matter in excuse to the effect that the agreement, if any, for a more formal lease was abandoned by plaintiff's entry into possession and his acceptance of "lease receipts" and this plea is confirmed by plaintiff not having within a reasonable time after the agreement come to Court to compel a specific performance.

If the agreement was not binding, because not notarial, it is not available to him here, on the alleged cause of action.

His cause of action therefore fails, and it must be dismissed with costs.

Judgment is set aside and it is adjudged and ordered accordingly.

BEFORE *Burnside*, C. J. AND *Withers*, J.

October 12, 1892.

FERNANDO *v.* JOHANES APPU and others.

[No. 364, D. C., KALUTARA.]

Trial—Judgment—Further evidence after case closed.

Plaintiff and his witnesses, and defendant and his witnesses having been heard in due course, and the case closed, the District Judge reserved judgment. On the day fixed for delivery of judgment, the District Judge made order to the effect that he was unable on the evidence on the record to decide the issue framed and re-fixed the case for the reception of further evidence, which the parties may choose to adduce.

Held, that the case having been closed, the District Judge had no right to call for further evidence, but was bound to give judgment on the materials on the record.

This was an action in ejectment. Plaintiff and 6th defendant were owners of adjoining lots of land, and plaintiff claimed two plumbago pits as being situated within his lot, which the 6th defendant denied. The first issue framed was did the pits in question lie in plaintiff's lot or in 6th defendant's lot? The District Judge having heard the evidence of plaintiff and his witnesses, and the defendants and their witnesses on this point reserved judgment, and upon the day fixed for delivery of judgment made the following order:—

I regret that upon the materials before me, I am not able to determine the 1st issue in this case viz, whether pits 2 and 3 are within the lot 80087.

If the survey A. and D. made by Mr. Caldera, when he went the third and fourth time to the land, which show that these pits are in lot 80087 and 30 links from the south-east boundary of this lot, are correct, his survey C. made when he went the second time and when he had a safer and surer point to start from in the rock marked on lot 131,629 must be considerably wrong, for according to this survey C the pits are not 30 links away from the southeast boundary, but very much nearer their orifices being partly on lot 80,087 and partly on the adjoining lot belonging to 6th defendant.

It cannot be again said that the rock which happens to be marked on lot 131,629 was a point eminently more satisfactory to start from than any of the others selected by Mr. Stewart or Caldera and that survey C is therefore bound to be more accurate than surveys A. and D.

But while it is true that survey C also shews that the pits are within lot 80,087, according to it they are 8 or 10 links on the northwest side of the southeast boundary, I am by no means sure that survey C is more accurate than Mr. Juan de Silva's survey T which was also made with the rock on lot 131,929 as the starting point and which places the pits 7 or 8 links outside plaintiff southeast boundary.

The route taken by Mr. Caldera from the rock to 80,087 was not the same as that taken by Mr. Juan de Silva, and it is not improbable that one route was less favourable than the other, which would account for the difference in their surveys.

Had Mr. Caldera when he last went to the land tested the correctness of his survey C, by adopting the route taken by Mr. Juan de Silva from the rock, instead of being guided by the trenches which he found purporting to indicate the north boundary of 6th defendant's lot and the north and west boundary of plaintiff's lot, there would have been less difficulty in deciding whose survey was likely to be more accurate.

At present upon the materials before me I find myself unable to decide the question and I leave the parties to take further action in the matter to have the point settled.

(Signed) F. J. DE LIVERA,
District Judge.

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I fix the 22nd July for the reception of any other evidence the parties may choose to adduce with reference to the situation of pits 2 and 3.

(Signed) F. J. DE LIVERA,
District Judge.

The 6th defendant appealed. The other defendants also appeared on the trial, on a notice served on them by plaintiff, that he would tender further evidence on his behalf at the argument.

Wendt (*Fernando* with him) for 6th defendant appellant. The District Judge being unable to decide in plaintiff's favour on the materials placed before him by the plaintiff, should have dismissed the plaintiff's action, and had no right to ask for further evidence. The plaintiff having failed to prove his case, defendants must have judgment in their favour.

Grenier, *A. G.* (*Dornhorst* with him) for plaintiff-respondent The District Judge has a right to ask for further evidence, where he thinks the evidence before him is not sufficient in order to decide the issue; especially in a case like this where the issue rests upon scientific or professional testimony.

Grenier for 1st defendant.

Peiris for 2nd 3rd 4th and 5th defendants.

The Court (BURNSIDE C. J. and WITHERS J.) held that the order appealed against was wrong, and sent the case back to the District Court, directing the District Judge to give judgment confining himself to the evidence on the record.

BEFORE *Withers*. J.

August 25 and September 1st 1892.

BASTIAN PILLAI *v.* GABRIEL.

[No. 903 C. R. BATTICALAO.]

Contract of hire of moveable—claim for return of moveable—Destruction by fire—Roman Dutch Law

Plaintiff sought to recover arrears of rent for the use of a jar, and also claimed the return of the jar, or its value, the contract being determined, and it was alleged by way of defence that the jar was destroyed by fire through no fault of the defendant.

Held, that the defence was a good one under the Roman Dutch Law, but the *onus* was on the defendant to prove that the fire, which destroyed the jar, was caused by unavoidable accident.

The facts material to the report appear in the judgment.

Sampayo, for defendant-appellant.

Drieberg, for plaintiff-respondent.

On September 1st the following judgment was delivered:—

WITHERS J.—The plaintiff in this action seeks to recover Rs. 4 being arrears of rent for the use of a 45 gallon jar let to the defendant on hire at 50 cents a month and also claims the return of the jar detained after determination of the contract of lease and hire, or its value Rs. 75.

The defence is that the jar was destroyed by fire on the defendant's premises through no fault of his own.

I cannot agree with the Commissioner that the defence on the face of it is a bad one, but the *onus* is on the defendant to prove that the fire, which destroyed the jar, while he was enjoying the use of it in the ordinary and lawful way, was occasioned by unavoidable accident. If the jar was burnt in this way, then the defendant is not liable to make compensation to the lessor according to the Roman Dutch Law.

It would have been different if the defendant expressly stipulated for remuneration for the safe keeping of the jar. Defendant must prove the date of the occurrence of the alleged accident as arrears of rent up to then, if any, must be paid by him.

Judgment must be set aside and the case remitted for the defendant to make good his defence. All costs to be costs in the cause except costs in appeal to which defendant is entitled.

BEFORE *Lawrie*, J.

September 8 and 16, 1892.

PIERIS *v.* RANASINGHE.

[No. 3,282, C. R., COLOMBO.]

Sect. 194 Civil Procedure Code—Payment by instalments—Decree.

Under Sect. 194 of the Civil Procedure Code "In all decrees for the payment of money, except money due on mortgage of movable or immovable property, the Court may order that the amount decreed to be due shall be paid by instalments, &c.," *Held*, that where judgment has been pronounced and the judgment creditor holds a decree, for the whole sum, the Court has no power under this section to limit, by a subsequent order to pay by instalments, the right of the creditor to enforce the decree.

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Plaintiff obtained judgment for Rs. 86·75 with interest and costs, and on writ issuing, the defendant, upon affidavit, applied for leave to pay by instalments. The Commissioner having allowed the defendant's application, the plaintiff appealed.

Wendt, for plaintiff-appellant.

Dornhorst, for defendant-respondent.

On September 16, the following judgment was delivered:—

LAWRIE J.—The order under review is set aside. The plaintiff holds a judgment for Rs. 86·75 with interests and costs.

On writ issuing the defendant filed an affidavit stating that he was a cangany drawing a wage of 75 cents, for every working day, and that he had a family and that he could not afford to pay to the plaintiff more than Rs. 2·50, a month.

In presence of the parties and after making some further inquiry, the Commissioner ordered that the defendant do pay Rs. 5 per mensem till liquidation in full.

The Code gives a court power to pass an instalment decree, which expressly decrees that the sum shall be paid in certain instalments at certain dates, but if a defendant does not apply for this indulgence before the final judgment is pronounced, the Code does not give a power by a subsequent order to limit the right of the creditor to enforce the decree.

BEFORE *Lawrie* AND *Withers*, J. J.

September 27 and October 7, 1892.

RANG MENIKA and others *v.* PUNCHI MENIKA and others.

[No. 117, D. C. KEGALLA.]

Ejectment—Loss of original title deeds—Certified copies of duplicates from the Registrar of Lands—Admissibility in evidence—Ordinances 7 of 1840, 16 of 1852, 8 of 1863 and 12 of 1864—Lost document.

Plaintiffs set up title under two deeds, one of 1845 and one of 1854, and the originals having been lost, while in the possession of their mother, who was the widow of the purchaser under the deed of 1854, they produced certified copies of the duplicates in possession of the Registrar of Lands.

Held, that the certified copies were admissible in evidence, and that the law as to the admissibility of lost documents was not applicable, because the copies tendered in evidence were copies of deeds existing in the custody of a public officer.

Dingiri Menika was the original owner of the lands in dispute. By deed dated August 15, 1845, Dingiri Menika sold the lands to Mudalihami, and Mudalihami by deed dated January 26, 1854, sold them to Punchi Menika, the 1st defendant, and to Punchi Rala, under whom the plaintiffs claim as his children. Punchi Rala died 15 years ago, intestate. The defendants denied the plaintiff's right to an undivided half share of the lands in dispute, and also the execution by Dingiri Menika of the deed dated August 15, 1845, and by Mudalihamy of the deed dated January 26, 1854. The original deeds were in the hands of Punchi Rala, and, before his death, he handed them to Muttu Menika, his wife, the mother of the plaintiffs, and the deeds were subsequently lost or stolen. Plaintiffs produced at the trial certified copies of the duplicates of these deeds, which were filed in the Land Registrar's Office, in support of their title. The District Judge having given judgment for defendants, plaintiffs appealed.

Grenier, for plaintiffs-appellants. It has been established that the originals of the deeds relied on by plaintiff were handed by Punchi Rala to his wife, and that they were subsequently lost or stolen. The duplicates in the Land Registrar's Office are originals in the sense that they bear the signature of the vendors, and are admissible in evidence. The certified copies of the duplicates are sufficient, when produced, in proof of title, under Ordinance 12 of 1864.

Van Langenberg, for defendants-respondents, The duplicates in the office of the Registrar of lands are not originals, as contemplated by law. Assuming for argument that they are originals, in that case they should have been produced, and the copies, produced by the plaintiffs are clearly insufficient in proof of title.

On October 7, the following judgments were delivered:—

LAWRIE, J.—The plaintiffs' title depends on proof of the two deeds dated 1845 and 1854. These deeds are more than 30 years old, and if they come from the proper custody and are unblemished by any alterations, they prove themselves. Their bare production is sufficient. The subscribing witnesses are presumed to be dead.

The plaintiffs produced two copies certified to be correct by the Registrar of Lands. The law as to the admissibility

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of secondary evidence of a lost document is not here applicable, because the copies tendered in evidence are the copies of deeds existing in the custody of a public officer.

The Ordinances 7 of 1840, 16 of 1852 and 8 of 1863 explain how it is that originals of private deeds executed in 1845 and 1854 are to be found in the office of the Registrar of Lands.

By the Ordinance 7 of 1840 section 15, notaries were required to see that deeds attested by them are executed in duplicate.

The grantor of and witnesses to each deed are obliged to sign two deeds, one to be handed to the party entitled thereto, and the others to be transmitted by the Notary to the District Court.

The Ordinance 16 of 1852 repealed the 15th section of 7 of 1840 but re-enacted it with additions, and by the 26th section of that later Ordinance it was enacted that all parties interested shall be entitled on presenting the proper stamp, to demand copy of extract of any such deed certified to be correct by the Secretary of the District Court.

The Ordinance 8 of 1863 Sec. 34 enacted that the Secretary of every District Court in the Island shall on the passing of the Ordinance deliver all deeds and protocols in his possession to the Registrar of the Province.

These Ordinances show how it is that the Registrar is in possession of one of the two originals.

At the trial the original in the Registrar's custody was not produced, but the certified copy was equally good. The Ordinance 12 of 1864 provided that whenever it shall be necessary for any person to adduce proof in any Court of justice of the contents of any book or document in any public office or in charge of any public officer, he shall only produce a copy or extract therefrom, signed and certified by the officer to whose custody the original is entrusted, and such copy or extract shall be admissible in evidence in such Court in place of the original. By the production of these certified copies the plaintiff proved the bare execution of the deeds.

To make these deeds admissible in evidence it was not necessary to prove that they were acted on. The absence of proof of possession affects merely the weight, and not the admissibility, of the instruments.

There is (I think) evidence that the lands were possessed and cultivated by the members of the family of whom the plaintiff's father was one. The crop was brought to the house where he lived.

I would set aside the judgment under review and would give judgment for plaintiffs with costs.

WITHERS, J.—In this case in my opinion neither plaintiffs nor defendants disclose any right to a decree of title by prescriptive possession. The contest between them must be decided on the issue of a documentary title. Plaintiffs being out of possession must prove a superior title.

The two parties claim by title under conveyances from Dingiri Menika. The plaintiffs claim under mesne conveyances from her to one Mudalihamy and from the latter to one Punchirala and his sister Punchi Menika the 1st defendant, and thus by descent from Punchirala as his lawful children, he dying intestate. The defendants claim under a direct conveyance from the said Dingiri Menika. The defendants by express denial put in issue the conveyances declared on by the plaintiffs.

The 1st plaintiff, I should have said, is the widow of Punchirala and mother of the other plaintiffs. Copies only of the conveyances declared on were produced with the plaint. This was because the originals to Mudalihami and his to Punchirala and Punchirala's sister were said to have been lost while in the custody of the plaintiff, to whom they were entrusted by her late husband before his death in 1877. Shortly after his death they were lost or stolen while in 1st plaintiff's custody. So she alleges in her evidence and I see no reason to disbelieve her. I believe the evidence led by her of both Mudalihami and Punchirala being admitted into possession of the premises under their respective conveyances. While I think it would have been more prudent in plaintiffs' part to have cited the Registrar to produce the duplicate originals of those two conveyances, so that the court might have had sight of them, and while I think the judge might have required their production for his satisfaction, I am of opinion that the certified copies were admissible in evidence, the fact of their being certified copies of the Registrar's duplicates not being seriously questioned.

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Their age over 30 years, their coming from proper custody the delivery of their counter parts (sufficiently proved as I consider) to the mesne assignees who enjoyed the premises there under *prima fâcie* establish their validity. Their validity established the superiority of plaintiffs title is established.

I would set aside the judgment of the court below and give judgment for plaintiff as prayed for with costs.

BEFORE *Laurie* and *Withers*. J. J.

September 30 and October 11, 1892.

NATCHIAPPA CHETTY *v.* MUTTU KANGANY,

[No. 370, D. C. BADULLA.]

Civil Procedure Code Sect 86 and 87—Decree Nisi—Decree absolute—Right of appeal.

Where a defendant appears and contests a decree *nisi* and it is made absolute, no appeal lies against the order making it absolute. The only appeal against an order making a decree absolute is on the ground that the defendant had no information of the proceedings, or was prevented, by accident or misfortune, from appearing.

This was an action on a promissory note. Upon notice of decree *nisi* being served on defendant he moved for leave to file answer on affidavit stating that summons had not been served on him. The decree having been made absolute, the defendant appealed.

Wendt, for defendant-appellant.

Van Langenberg, for plaintiff-respondent.

On October 11, the following judgment, agreed to by Lawrie J. was delivered:—

WITHERS J.—Section 87 of the Code takes away the right of appeal against a decree *nisi* for default.

Section 86 gives a remedy in case the decree has been improperly obtained by shewing cause against it on the motion to make it absolute, but if it is made absolute there is no appeal against the rule absolute (section 87.)

Nor can any appeal against the rule making it absolute lie except it be obtained for default, when the defendant may revive it before the court below, on the ground that he

had no information of the proceedings or was prevented by reason of accident, &c., from appearing, &c.,

It thus appears that the only appeal against an order making a decree absolute must be on the ground that the defendant had no information of the proceedings or was prevented by accident, &c, from appearing. If a defendant appears and contests a rule *nisi* and it is made absolute, no appeal lies against the order making it absolute.

The learned Judge's attention is invited to the printed form of decree *nisi* adopted in his court, with the absurd and erroneous heading under the Royal Arms dismissing the action in default of appearance of defendant.

BEFORE *Burnside*, C. J.

October 13 and 18, 1892.

The QUEEN *v.* AMBLAVANAR and others.

[D. C., CRIMINAL JAFFNA, No. 1,353.]

Weapon likely to cause death—sticks and cudgels—Unlawful assembly—Indictment—Omission to state particulars—Sect. 138 Penal Code, and 210 Criminal Procedure Code—Special privileges claimed by a particular caste—Regulation No. 18 of 1806.

The question whether a particular weapon is likely to cause death is not one of law, but depends on the fact of how it was intended to use the weapon.

In a prosecution for unlawful assembly, where the indictment omits to mention the particular or particulars under Sect. 138 of the Ceylon Penal Code which made it unlawful, such ommission is cured by Sect. 210 of the Criminal Procedure Code, unless the accused was misled by such omission.

Observations on some special privileges claimed by the Vellalas of the Northern Province under Regulation 18 of 1806, and on their right to enforce them.

The facts of the case sufficiently appear in the judgment.

Ramanathen, for accused-appellants.

Cooke, C. C., for respondent.

On October 18, the following judgment was delivered:—

BURNSIDE, C. J.,—The appellants, nine in number, were charged with being members of an unlawful assembly, being armed with certain cudgels and sticks which, when used, are likely to cause death, in breach of Sect. 141 of the Ceylon Penal Code.

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The learned District Judge has found the prisoners guilty of being members of an unlawful assembly, under Sect. 140 of the Code, and they all appeal. The learned District Judge has, following a judgment of a learned Judge of this Court, held as a matter of law that cudgels and sticks, cannot be regarded as weapons likely to cause death when used as weapons of offence. I do not go to that extent. I think that a cudgel or even a stick might be used in such a way as would be as likely to cause death as a more formidable weapon. I think each case should depend on its own facts, and whether any weapon was or was not a weapon likely to cause death, must be a question the answer to which is dependent on the fact of how it was intended to use it, and not of law.

The appellants contend that as the learned Judge did not find that they were armed, as laid in the indictment, he should have acquitted them altogether.

There is no ground for such contention. The 212th section of the Criminal Procedure Code specially empowers him to convict of the minor offence, and the appellants cannot be aggrieved because they were convicted of a less penal offence than that they were charged with.

Then, the appellants contend that the indictment was defective, in that it did not specify in what particular the assembly was an unlawful assembly. Upon this point there are conflicting authorities among the Indian Judges, but they are in no way binding on this Court, and I do not for myself hesitate to express an opinion that it is always safe to charge, in the indictment, the particulars of the assembly which made it unlawful under one or more of the six definitions given in section 138, as I can well understand cases in which the want of such particulars might be held by the Court of Appeal to be material, because the accused was misled by such omission in which case the omission would not be cured, as I hold in this case it has been cured, by section 210 of the Code. The accused have in no way been misled because they directed their defence particularly to the contention that the assembly was not unlawful within the fifth definition of the Code, viz., by means of criminal

force or show of criminal force to compel any person to do what he is legally bound to do, or to omit to do what he is legally entitled to do.

The appellants could only assert a right of appeal on questions of law, and I have disposed of them all as already stated, and I might be contented to say no more, but I think I should say a few words more, because the learned counsel, who argued this appeal, urged on the merits that the evidence disclosed no offence. The facts of this case are simply these. A man of one caste wished to bury his wife with certain ceremonies, barbarous or honourable or otherwise it matters little, which his neighbours of a different caste conceived were their own special privileges, and so they assembled together and prevented him from doing so, and the learned District Judge rightly held that this was an unlawful assembly, because the common object of the assembly was, by means of criminal force, to compel the widower to omit to bury his wife in the way he wished and as he was legally entitled to do. But, urged the learned counsel, the widower had no legal right to bury his dead with the special privileges claimed by those who had assembed together to prevent him, and he cited the following venerable authority, which still may be consulted amongst the valuable compilation of the laws of the colony. Sec. 8 of Regulation No. 18 of 1806, "for the security of property and the establishment of a due police in the district of Jaffnapatam" declares, that "all questions, between Malabar inhabitants that relate to the rights and privileges which subsist in the said province between the higher castes, particularly the Vellalas on the one side, and lower castes, particularly the Covias, Nalluas, and Palluas on the other, shall be decided according to the said customs and the ancient usages of the province."

In the present day, it might be sufficient to ask, what does this mean? Does it really mean that by the laws of this country one of Her Majesty's subjects could be prevented from honouring the dead in a particular way, because some other persons or body of people said they had the exclusive privilege of doing so? But, suppose it is conceded that that is the law, and that the Supreme Court could be moved for a writ of injunction to prevent a woman from being carried to the

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grave to the sound of a tomtom, does it follow that a body of men may assemble themselves together, and by a show of force, and to the terror of the other subjects of the Queen, enforce their own edict to that effect against the party who favoured the tom-tom. I apprehend not. I say it with diffidence, in the face of the learned Counsel's contention. I trust that none of the ancient rights of the Malabar inhabitants of Jaffnapatam will be jeopardized. Notwithstanding the contention and the venerable authority on which it is based, I make bold to hold that the Malabar inhabitants of the province of Jaffnapatam, whoever they may be, must one and all be subject to the universal proposition of law applicable to the whole colony, that the people cannot take the law into their own hands, and seek to administer it after the fashion of Judge Lynch. The law is, I am sure, against it. The Code says "It is an unlawful assembly if the object is to enforce any right or supposed right." The appeal is dismissed.

BEFORE *Burnside*, C. J., and *Lawrie* and *Withers*, J. J.

October 7 and 11, 1892.

CAROLIS APPU *v.* RATNAIKE and another.

[No. 1,023, D. C., GALLE.]

Ordinance No. 10 of 1863, Sect. 5 and 9—Partition Decree—Stranger to Partition suit—Title—Remedy—Damages.

A partition decree is good against all the world, and by Ordinance No. 10 of 1863, a stranger to the action, damnified by the decree has no remedy left him, save an action for damages. (9, S. C. C., p. 198 followed.)

Per LAWRIE, J.—(*dissentiente.*) If in the final scheme of division in a partition suit, the parties to it include land, which did not belong to them in common, the decree has no strength or effect against a stranger to the suit.

It is the decree for partition which, under Sect. 5 of Ordinance No. 10 of 1863, precedes the issue of the commission for partition, which is conclusive under Sect. 9 (1, S. C. C., p. 19.)

The first defendant's daughter and the 2nd defendant were respective owners of two gardens adjoining each other; the former was called Ulugedere Watte, and the latter Mahaulugederewatta. The 2nd defendant, who claims the well in dispute, leased

it, *inter alia*, to the plaintiff. The plaintiff alleging that he was in possession of the well, and thereafter had the use of it, complained that the 1st defendant took forcible possession of it and prevented him from using it, and called upon the 2nd defendant to warrant and defend his title, and asked for a declaration of title to the well and for damages. The 1st defendant contended that the well was on Ulugedere Watte, which was the subject of the partition suit No. 53,560 District Court, Galle, and pleaded the decree in that action in bar of the plaintiff's claim, by which the well had been allotted to the 1st defendant's daughter, on whose behalf he claimed.

The District Judge found that the strip of land with the well on it was part of 2nd defendant's garden, that it was improperly included in the partition decree, and that the evidence, led by 1st defendant, of user of the well was untrustworthy, and gave judgment for plaintiff.

Dornhorst, for 1st defendant-appellant.

The strip of land, on which the well stands, was the subject of a partition decree in District Court, Galle, 53,560, and certified copy of the decree is in evidence in the present case. That decree binds the whole world, and a stranger to the suit, if damnified by the decree, has his remedy in damages. The effect of the order appealed from is to render inoperative the decree in District Court, Galle, 53,560, which the District Judge has clearly no power to do. (9, S. C. C., p. 198.)

Grenier, for plaintiff-respondent.

The plaintiff has fully established the right of the 2nd defendant, his lessor, to his portion of land in dispute. The partition decree made in District Court Galle 53,560 cannot possibly bind the 2nd defendant, and indeed such a contention was not raised in the Court below. The 2nd defendant cannot be bound by a decree in a suit to which he was no party, and in which the portion of land now in dispute was not included as the subject of litigation. The decree passed in a partition suit can only affect those who are interested in the land as co-owners, etc., because the Ordinance undoubtedly pretends to deal with lands that are owned in common. Here, in the first place, the 2nd defendant was not a co-owner with the parties to the suit No. 53,560 and, in the second place, the

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land now in dispute was not, either wholly, or in part, the subject of that partition suit. It was a distinct *corpus*, and was included in the decree under the following circumstances:— When the Commissioner appointed to carry out the partition decree partitioned the land, the portion of land now in dispute was pointed out to him as forming part of the land to be partitioned and he accordingly surveyed it, and it was allotted to the 1st defendant's daughter, together with the land to the west of it. The decree so far as it affected the land in dispute was, therefore, inoperative, inasmuch as it pretended to deal with land that was not the subject of the partition suit at all.

Wendt, (Van Langenberg with him) for 2nd defendant-respondent.

On October 11 the following judgments were delivered:—

BURNSIDE, C. J.—The judgment in this case must be set aside and the plaintiff's action dismissed with costs in both Courts.

The evidence of possession of the well in dispute is, like all evidence of possession of land in dispute in this country, of the most unsatisfactory and conflicting character. I think it preponderous in favour of the 1st defendant's contention. The District Judge has found that it supports the case set up by the 2nd defendant and I am free to admit that if the case turned upon that point only I should not disturb the District Judge's finding, but it seems to me that the title to the well is clearly established by the documentary evidence. The 2nd defendant's plan attached to his title deeds fixes his western boundary as a line north and south bending slightly to the west at its northern extremity. Now if the line were produced from its northern extremity directly straight, as 2nd defendant wishes to do, it would certainly take in the well, but if it followed the diversion to the east, as the 2nd defendant's plan requires, it passes to the east of the well and leaves the well to the west on the 1st defendant's land.

If the plans put in by the surveyor appointed by the Court are consulted and contrasted, this is palpable. But the plans and 2nd defendant's title deeds afford still stronger evidence than this. The eastern boundary of the plaintiff's land according

to his deed is the "Ella." Now in fixing boundaries no proposition is clearer than this, if a natural start point can be obtained there the survey should begin. In this case the Ella is a natural boundary from which the 2nd defendant's land should be defined westerly and if this is done he is outside the place of the well, but it appears that the 2nd defendant elects to start from a fence on his eastern boundary which stands to the west of the natural boundary, the Ella, and so it comes that he makes his western boundary extend further to the west and take in the coveted well. The District Judge says the 1st defendant consented to this. The District Judge is mistaken. The surveyor says the 1st defendant agreed that the fence should be the boundary. This is hearsay and no evidence, and most improbable. I cannot see how the 2nd defendant should know anything of the eastern boundary of his neighbours land on the east. The District Judge has made some comparison between the survey of the 2nd defendant's land and that of his neighbour to the east and he says, that this conclusively proves that the fence on the eastern side of the 2nd defendant's garden correctly marks the eastern boundary. With due respect to the District Judge it is not possible to show conclusively that an Ella is a fence. The boundary of the 2nd defendant's land to the east is an Ella, the fence is to the westward of it. It is quite possible that the 2nd defendant has lost the strip of land between the Ella and the fence on his eastern boundary, but that is no reason why he should endeavour to obtain another strip corresponding with it on the western bounbary and with it the more valuable well. I should have been prepared to give 1st defendant judgment on this evidence alone, apart from the evidence arising out of the partition decree. Certified copies of the decree with the plan annexed have been put in as required by the Code. They were not objected to and, afford all the proof required that the land on which this well stands was allotted, as the 1st defendant contends, to his child, in a partition suit. The learned District Judge finds this as a fact, but he finds as a fact that the well was not affected by the partition suit. I cannot follow the District Judge. If he means that although the partition suit as a fact gave the land and well to the 1st defendant's child, yet as a matter of law it conferred no title to the land, there the District

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Judge is wrong, because once it is conclusively established that in a partition suit land has been identified and partitioned, that is conclusive of title. In this case the land on which the well stands is clearly identified, and it was allotted to the 1st defendants' child, and it is now too late to say that the 2nd defendant was not bound by it because he was no party to the decree. That law has been settled long ago. In this aspect of the case therefore as well, the plaintiff's judgment should be set aside and his action dismissed with costs.

I am not sorry to arrive at this conclusion. Taking the dates of the partition suit and the date of the 2nd defendant's lease, I am impressed with the conviction that the plaintiff and the 2nd defendant are not so antagonistic as the pleadings would make them appear, but that the 2nd defendant hoped by setting up the independent plaintiff as a lessee, he might defeat the partition. The copy of the lease put in by the plaintiff has been accepted as executed on the day it bears date, and I do not think it is the plaintiff and the 1st defendant who are acting in collusion. If they were, then the 2nd defendant will be satisfied at his lessee being defeated in his attempt to defraud him.

LAWRIE, J.—I will not enter on the question whether the decree in the partition suit is binding on the plaintiff and his lessor, the 2nd defendant.

I retain the opinion expressed by me in 1886, when in dealing with District Court, Galle 47,431, 7 Cir. p. 125, I said "if in the final scheme of division in a partition suit the parties to it include land which did not belong to them in common, the decree has no strength or effect against a stranger to the suit." What was that decree? It was decided by the Collective Court in D. C. Galle 31,975, reported 1 Cir. p. 19 that it is the decree for partition, which, under section 5, precedes the issue of the comission for partition, which is conclusive under section 9. That decree is not in evidence, we have no knowledge of its terms. We cannot make the unknown decree the ground of judgment now.

Further, if contrary to the decision I have just referred to which was approved and followed by Clarence J. in the case reported in 5 S. C. C. p. 181, it be held that the conclusive

decree is not the first decree for partition or sale but the final decree allotting the shares, then if we turn to the certified copy of that decree (at page 54) we find that it is incomplete without the survey which forms an integral and important part of it. The decree bears that the plaintiff is entitled to lot A. in a figure of survey filed with a report by M. Gunasekara, surveyor, dated 25 and verified 28th Oct: 1889. The survey so filed in the District Court partition suit has not been put in evidence. There is a survey at page 57, but where that came from does not appear. It cannot be the original taken from the partition record, it is not so marked. Besides the District Judge would not allow an important part of a partition decree to be abstracted from the record in which it was filed. If it is not the original what is it? It is not said that it is a copy or a duplicate.

There is no evidence that this is the survey on which the decree of 8th december, 1889, proceeded.

That being so, the applicability of the proceedings and decree in the partition suit has not been established. I am unable to agree with my brother Withers that it has been proved that the strip of land with the well on it was included on the portion of land allotted to the 1st defendant's daughter.

The question remains, did the 1ts defendant trespass on land which belonged to the 2nd defendants, and which was leased by him to the plaintiff? The District Judge holds that the proof establishes the 2nd defendant's ownership the possession and the trespass. I see no reason to differ from the finding of fact. I would affirm the judgment with costs.

WITHERS J.—This is an action for trespass to a well which plaintiff asks to recover from the 1st defendant, who he says retains possession of it after having expelled him therefrom in March, 1891.

The 1st defendant puts in issue plaintiff's right to the possession of the well and the alleged expulsion, and he justifies his possession of the land as the natural guardian of his infant daughter, to whom be says this well was with other land allotted by a partition decree of this Court.

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The 2nd defendant has been joined by the plaintiff as his lessor in order to warrant and defend his title.

The 2nd defendant has cheerfully accepted the position and prays prayers in language now a days quite obsolete. At the close of the trial the learned District Judge was unable to satisfy himself as to the site of the well, so he ordered a survey.

One J. W. Amarasekara surveyed the premises and brought in 3 plans, but his evidence in explanation of his plans was so unintelligible, that the learned Judge was advised to inspect the premises. At the inspection he met the surveyor Amarasekara by arrangement, and by the direction of the Judge the surveyor made a fresh survey of the premises. This he brought to Court, and was examined on it at a later stage of the case. The material facts found by the learned Judge in his judgment may be briefly summarised as follows.

The 2nd defendant and the 1st defendant's daughter own two adjoining gardens, known respectively as Mahaulugedera watte and Ulugederawatte. Ulugederawatte was the subject of a partition suit to which the 1st defendant's daughter was a party, and the western portion of it contiguous to the 2nd defendants garden was allotted to the 1st defendant's daughter by a decree of this Court in September, 1889. The strip of land with the well on it was included in the portion allotted to 1st defendant's daughter.

This appears to us to conclude the matter for this Court (9 S. C. C. page 198) has held that a partition decree is good against all the world and that by our Partition Ordinance No. 10 of 1863 a stranger to the action who is damnified by the decree has no remedy left him save an action for damages.

No doubt the learned Judge has also found that the strip of land with the well on it is a part of 2nd defendant's garden, that it was improperly included in the partition decree and that the evidence on first defendant's side of user of the well by the predecessors in title of her, under whom he justifies, was untrustworthy but this cannot avail the plaintiff who is bound by this partition decree In any event it was

bviously wrong to order the first defendant to pay the 2nd defendant's costs.

The judgment appealed from must be set aside and the plaintiff's action dismissed with costs.

BEFORE *Laurie*, J.

October 6 and 13, 1892.

THE QUEEN *v.* KIRISNEN.

IN REVISION.

[No. 2,353 D. C. CRIMINAL, TRINCOMALIE.]

Ordinance 6 of 1891 Section 1 Sub Sect. 1—Release on probation—Grievous hurt.

Under Sect. 1, Sub Sect. 1 of Ord. 6 of 1891 "in any case in which a person is convicted of any offence punishable with not more than three years' imprisonment before any Court, and no previous conviction is proved against him, the Court may release upon probation of good conduct instead of sentencing to imprisonment."

Held, that this section does not apply to the offence of voluntarily causing grievous hurt, and that it could only apply to comparatively lenient offences, which are not punishable in any Court with more than three years' rigorous imprisonment.

The facts sufficiently appear in the judgment.

Cooke C. C., for the Crown.

Wendt, for the accused.

On October 13 the following judgment was delivered:—

LAWRIE, J.—The Ordinance 6 of 1891 enacts that "in any case in which a person is convicted of any offence punishable with not more than three years' imprisonment before any Court, and no previous conviction is proved against him, the Court may release upon probation of good conduct instead of sentencing to imprisonment."

Muruken Kirisnen was committed for trial before the District Court of Trincomalie, and he pleaded guilty to an indictment charging him under section 316 of the Penal Code with having voluntarily caused grievous hurt.

Before sentence was passed, witnesses, as to the accused's character, were examined, and the learned District Judge holding that this was a case which might be dealt with under the Ordinance 6 of 1891, released the accused on his entering

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into a recognizance of Rs. 400 and two sureties of Rs. 200 each for two years, to appear and receive judgment when called upon, and in the meantime to keep the peace for good behaviour. On the motion of the Attorney-General the proceedings were brought before me in review. I am unable to give the Ordinance the construction put on it by the learned District Judge. I hold that indulgence is extended only to comparatively lenient offences which are not punishable in any Court with more than three years' rigorous imprisonment. Those who are guilty of offences of a graver kind for which the Code provides a higher maximum punishment than three years, do not benefit under the Ordinance 6 of 1891.

I must set aside the order and remit to the District Judge to sentence according to law.

BEFORE *Burnside*, C. J., and *Laurie*, J.

September 13 and October 11, 1892.

JAIN CORIM *v.* PAKEER and another.

[No. 98,202, D. C., COLOMBO.]

Prescription—Adverse Possession—Ordinances No. 8 of 1834 and No. 22 of 1871—Tenant by sufferance—Occupation—Ut dominus—Burden of proof.

A obtained possession of a land from the owner B., who was her brother, with his leave and consent, and retained such possession for over the prescriptive period without disturbance, by the tacit acquiescence of B.

Held that such possession was "adverse" within the meaning of the Prescription Ordinances. in that it was not accompanied by payment of rent, or performance of service, or some act from which an acknowledgement of title in another may be inferred.

The facts material to this report appear in the judgment of BURNSIDE, C. J.

Dornhorst, for defendants-appellants and intervenients-appellants.

Wendt, for plaintiff-respondent.

On October 11, the following judgments were delivered—

BURNSIDE, C. J.—In my opinion the District Judge has misapprehended the law. The learned District Judge has found that the "possession" of defendant's mother was one by sufferance, the right and title to the house "remaining in

Kuppa Tamby," and therefore he holds that such possession could not be considered as giving her a right adverse to and independent of the owner, so as to obtain title by prescription. With due respect to the learned District Judge I must differ from him. The learned District Judge has perhaps gone wrong by endeavouring to follow the English law of adverse possession, one of the least settled heads of English law as it existed previous to the passing of the Prescription Act 3 and 4. Will IV. C. 27 and overlooking the fact that what is "adverse possession" has received an express definition in the Ordinance of Prescription itself, a definition which has found place throughout all our Ordinances, the Ordinances 3 of 1822, 8 of 1834, and the present 22 of 1871. This is the definition, "a possession unaccompanied by payment of rent or produce or performance of service or duty, or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred." I have in vain endeavoured to discover the origin of these words, whether they have been taken from any English Statute, or are due to the wit of the colonial draftsmen, but however that may be, this Court has already decided, overruling a previous decision to the contrary, that the words contain "a definition of the words previously made use of by possession by adverse title." The Judges in the case overruled regard them as being introduced only by way of illustration and explanation, and as containing only certain examples of the kind of possession intended by an adverse possession. This interpretation says the judgment from which I am just quoting appears to do violence to the words, "that is to say," by which the definition is introduced, which do not mean the same as the words "as for instance" or "by way of example" and we can see no reason or necessity for understanding them in any but their literal sense as connecting the equivalent and co-extensive propositions. See C. R. Batticaloa 9,653 Vanderstraaten p 44. This is a binding decision and I must agree with it. Such being the effect of the words of our Ordinance the material question to be determined is whether there has been a *de facto* possession upon which the claim of prescription is based. The District Judge has distinctly found that the defendant's mother "was in possession, but as that possession has been obtained by leave

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and retained without disturbance by the tacit acquiescence of the owner he holds that prescription could not run with it. I desire to point out that such a possession, if not accompanied by payment of rent or performance of service or some act from which an acknowledgment of title in another may be inferred, and if it so continues for the prescriptive period, gives a good title by prescription, and a mere verbal acknowledgment is not sufficient to arrest it. It must be a substantial act of acknowledgment to prevent the entire possession from being adverse as defined by our Ordinance. In the present case the evidence leads to no other than the conclusion that the defendant's mother entered into possession of the tenement out of the charity of the owner, her brother, that she possessed it by residing in it with her family alone without interruption or disturbance from him for long over the prescriptive period, perhaps out of his sheer benevolence and during that period she never paid rent, nor performed service to him, nor did she do any act by which his ownership is acknowledged. I take it as beyond doubt that she acquired prescriptive title as against him and those claiming under him. Mere occupation such as that of an agent, or servant, or guest of another would not in my opinion amount to possession under the Ordinance, but on this point I take it the evidence is clear that hers was not a mere occupation such as I have referred to. She lived in the house as the head of the family exercising independently acts of ownership by repairing the house at her own expense. She was married in it, divorced in it, and still remained in it, and she received into the house inmates at her discretion, and it is beyond doubt that her separate possession was regularly recognised by Cuppy Tamby the owner, as well as the plaintiff's vendor, who says "I never gave plaintiff possession of the house where Saibu Umma lived." But there can be no doubt on this point for the pleadings treat the property in dispute, although part of the same curtilage with others, as an independent tenement in the sole possession of defendants, and of which the plaintiff in his libel prays to be restored to possession. The judgment should be reversed and judgment entered for defendants with costs.

LAWRIE, J.— Although our Ordinances regulating prescription have not expressly so declared, I take it that the undisturbed and uninterrupted possession which entitles a possessor to a decree in his favour must have been a possession *ut dominus*.

The possession of a usufructuary mortgagee, of a tenant, of a planter, of an agent, of a trustee, of an incumbent of a temple, or the holder of an office, of a person standing in *loco parentis* to the owner, and in some cases even the possession of near relations, have been held not to entitle the possessor to a decree as against the original owner, although in these cases the possession was unaccompanied by payment of rent or produce or performance of service or duty or by any "other act by the possessor from which an acknowledgment of a right existing in another person could fairly and naturally be inferred." When, however, the bare fact of possession, unaccompanied as aforesaid, is proved, the party claiming adversely to the possessor must allege and prove that the possession was not *ut dominus*.

If he succeeds in proving that the possession began otherwise than *ut dominus* then the burden of proof is shifted, for to use the words of Rough Chief Justice, which have often been quoted with approval in this court, "It being shown that the possession commenced by virtue of some other title such as tenant or planter, the possessor is to be presumed to have continued to hold on the same terms until he distinctly proves that his title has changed."

In the case before us, it is proved that Kuppa Tamby became owner of the premises by deed, 18th December, 1838, that some time between 1855 and 1865, (I do not think the proof fixes the date more precisely) Saibu Umma, a sister of Kuppa Tamby, began to possess a part of the premises now in question and that she continued to possess until her death in 1885, and that her daughter the defendant is now in possession.

The defendants allege that Saibu Umma's title was a verbal gift by Kuppa Tamby.

The learned District Judge so expresses himself that it is

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plain that he did not believe that there was a verbal gift, and he holds it proved that Kuppa Tamby "by way of charity" allowed Saibu Umma to "occupy the house which at that time was not a separate or distinct house, but formed part of the premises occupied by Kuppa Tamby and his wife," and the District Judge adds "It was a mere license to occupy."

I have read the proof with care and if there be evidence of this act of charity, or of this license to occupy, it has escaped my notice. The entry of Saibu Umma into posseesion was about 30 years ago, none of the witnesses profess to remember the fact nor can any tell what Kuppa Tamby and Saibu Umma then did or said.

If I am right in holding that Saibu Umma's possession must be presumed to have been *ut domina* unless the contrary be shown, and if it be the case that the contrary has not been shown, then she acquired by possession a prescriptive right for there is proof that she possessed for more than ten years without interruption and without payment of rent, &c.

If it be the fact that when she began to possess she lived in a room not separate from, but a part of the house of her brother, Kuppa Tamby, it is clear that at some remote time this mode of possession changed, and that her room or rooms were separated from the rest of the house in which Kuppa Tamby and his family lived. When this separation took place her possession must have become markedly *ut domina*.

Even if I take the charitable act and the license to occupy as proved, I arrive at a result different to that which the learned District Judge reaches.

If Kuppa Tamby was charitable enough to permit his sister to possess, if he was good enough to give a license to occupy, the charity and the license, when followed by possession, must be presumed to be a permission to possess *ut domina*, not in any other capacity.

It is true that Kuppa Tamby could have recalled the license within ten years, but if he allowed (and I think it is proved he did allow) Saibu Umma to possess *ut domina* for ten years she acquired a right against him.

The plaintiff has not proved by production of the decree or by other sufficient evidence, that he obtained judgment against Saibu Umma or that by that or by any act of her own she acknowledged his right. I agree with the Chief Justice that the judgment under review must be set aside and the action dismissed with costs.

BEFORE *Burnside*, C. J., AND *Withers* J.

October 14 and 21, 1892.

LE MESURIER *v.* LE MESURIER.

[No. 4,417, D. C., KANDY.]

Decree—writ of execution—Judgment—Payment of an annual sum as alimony—Application for issue of writ.

Decree had been entered "that the defendant do pay plaintiff the sum of Rs. 10,000 per annum on 3rd April, 1891, as alimony and as reasonable provision for the support of plaintiff."

Held that this was a bad decree, and must be reformed to express on the face of it the sums which, and the periods at which the defendant is required to pay the annual rate fixed in the decree as alimony for the plaintiff and the children in her custody.

This was an appeal from an order allowing the plaintiff's application for issue of writ in execution of the decree in the case.

Grenier for defendant-appellant.

There is no decree in point of law on which execution can issue. The so-called decree to be found in the record is too vicious to be judicially recognised as a valid decree. The Code prescribes the proper form of decree in an action of this kind, which has not been adopted in this case, Form 95. The trial was *ex parte*, and therefore the Court could only pronounce a decree *nisi*. Assuming that such a decree was pronounced, it was never made absolute, and execution cannot issue upon a decree *nisi*. Section 85 C. P. C. The judgment and the so-called decree are not dated as required by Section 188 C. P. C. The judgment condemns defendant to pay alimony for the support of plaintiff and the children of the marriage, while the so-called decree says that it is to be paid for the support of the plaintiff only. The writ is not in comformity with the so-called decree, as it directs the immediate levy of a large

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sum of money, the decree itself being silent as to the time when payment has to be made. The judgment, decree and writ are at such utter variance with each other, that execution under the circumstances should not have been allowed.

Wendt for plaintiff-respondent.

It is too late to question the validity of the decree. The decree, such as it is, must stand, there having been no appeal from it, and the defendant cannot avail himself of his present appeal, which is from an order allowing the issue of a writ of execution, to question the validity of the decree.

On October 21, the following judgment, agreed to by BURNSIDE, C. J., was delivered.

WITHERS, J.—On the 18th of August last plaintiff's proctor submitted an application to the District Court for a writ to issue in execution of the decree in this case.

A writ had been issued before, but had been returned for some reason or other unexecuted.

Mr. Vanderwall for the defendant was allowed to show cause against that application, but the learned Judge on the next day granted Mr. Sproule's application, and it is from this order that defendant appeals.

It was urged by Mr. Grenier, for the defendant, first of all, that there was no decree to found a writ at all, or that the so-called decree was too intrinsically vicious to found one.

This, we think, is going too far. There is a subsisting decree, from which no appeal has been taken, and that decree, such as it is, must stand.

It was also urged that the writ was not in conformity with the decree, inasmuch as it directs the immediate levy of a sum of money where no time has been fixed in the decree for payment.

The material part of the decree runs thus:—"It is further decreed that the defendant do pay plaintiff the sum of R10,000 per annum on 3rd April 1891 as alimony and as reasonabt. provison for the support of plaintiff."

Now, this decree only fixes as annual rate of payment.

It does not say either how long it is to continue, or at what

periods, or in what sums it should be paid.

The frame of the decree is such as to compel us to look into the judgment, and we find that the decree does not conform with the judgment.

It was found in the judgment that a sum of R10,000 in the year, which means we suppose per annum, was the proper sum to be paid by the defendant for the support of the plaintiff and her two children with regard to whom it was decreed that she was entitled to the custody of the boy until he attained the age of ten years, and of the two girls until they attain the age of 14 years. Moreover, this provision of R10,000 per annum was, respectively, to be paid so long only as the plaintiff and defendant continued to remain apart under the decree of judicial separation.

Again there was an option given to the defendant to pay this provision in the currency of England or France, at the rate equivalent to the amount in local currency.

In these circumstances, we do not see how a writ of execution of such a decree can go out against the defendant, and we think the order granting the application for the re-issue of the writ must be set aside.

Before writ can issue hereunder the decree must be reformed so as not only to conform with the judgment but to express on the face of it the sums which, and the periods at which the defendant is required to pay the annual rate fixed in the decree as alimony for the plaintiff and the children in her custody.

The Court has been somewhat embarassed by the nature of the so-called order appealed from, which is rather the expression of an opinion than a substantive order, but, for the purposes of this matter, we have treated it as an order.

BEFORE *Burnside*, C. J.

October 13 and 21, 1892.

VELAUTHEN *v.* NALLATAMBY.

[No. 977, C. R., BATTICALOA.]

Payment of debt due by another—Implied promise—Mortgagor and Mortgagee—Sale for non-payment of Commutation Tax.

A was the holder of a mortgage over a land, of which B was owner, and A had obtained a mortgage decree, declaring the land bound and executable for the debt. B having failed to pay the commutation tax due on the land, which had accrued subsequent to the mortgage, the Government seized and sold the land, but on A coming forward and paying the tax, the sale was cancelled and B released from his liability to pay the tax.

Held, that A could claim from B the sum so paid by A as commutation tax, on the promise implied by law, that, when one person is compelled to pay money, which another is legally compellable to pay, the latter will repay it.

Such implied promise is independent entirely of any express contract of the parties by way of guarantee, indemnity, contribution, or otherwise.

Plaintiff was the assignee of a mortgage over certain land, of which the defendant was the owner claiming title under the mortgagor. Plaintiff had obtained a mortgage decree declaring the land bound and executable for the debt. The defendant failed to pay the commutation tax, which he was legally bound to pay in respect of the land, and which had accrued subsequent to the mortgage, and the Government seized and sold the land, but as the plaintiff came forward and paid the tax, Government cancelled the sale. The plaintiff then brought action, and claimed the sum so paid as money paid by him for the defendant at his request, on the promise implied by law, when one person is compelled to pay money, which another is legally compellable to pay, that the latter will repay it. The Commissioner, without giving any reasons, held that the plaint disclosed no cause of action, and dismissed the plaintiff's action with costs.

Wendt for plaintiff-appellant.

Sampayo for defendant-respondent.

On October 21, the following judgment was delivered:—

BURNSIDE, C. J.—The cause of action alleged in the plaint in this case is that the plaintiff is the holder of a mortgage over certain land of which the defendant is the owner, and that the plaintiff obtained a mortgage decree declaring the land bound and executable for the debt. That the defendant,

as owner of the land, was legally bound to pay the commutation tax due on the land which accrued subsequent to the mortgage, but failed to pay it. The Government seized the land and sold it, but, as the plaintiff came forward and paid the tax, the Government cancelled the sale and the defendant was released from the liability to pay the tax, and the plaintiff claims the sum so paid as "money paid" by the plaintiff for the defendant at his request, on the promise, implied by law when one person is compelled to pay money, which another person is legally compellable to pay, that the latter will repay it.

To this plaint the defendant answered on legal grounds that the plaint discloses no cause of action in that the payment was made voluntarily and under the circumstances does not raise the promise on the part of the defendant to repay the plaintiff. The learned Commissioner disposed of this legal point in these words "as the plaint discloses no cause of action, I dismiss plaintiff's action with costs," and the plaintiff appeals.—I wish I could deal thus summarily with this most important question of law. I have no doubt I should have derived valuable assistance in disposing of it, if the learned Commissioner had favoured the Court of Appeal with the reasons by which he was enabled to dismiss the plaintiff's claim in the emphatic terms of his judgment, but without that assistance I must approach the consideration of the law on the subject with some diffidence in view of the decided opinion of the learned Commissioner. Had the plaintiff been the mortgagee, and the defendant the mortgagor, I think I might have ventured on good authority to differ at once with the learned Commissioner, and hold that the law did imply a promise from the mortagagor to repay money, which subsequent to the mortgage the mortgagee had been compelled to pay, and which the mortgagor was compellable to pay. The case of the Orchis (for the reference to which I am indebted to my brother Withers) 59 L. J. Ad. App. p 31 is an authority directly in point. The plaintiff in that case was mortgagee of a ship of which the defendants were owners. Subsequent to the mortgage the captain of the ship incurred liability in respect of the ship

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and binding on the defendants. The ship was arrested for this debt, and in order to obtain her release and get possession of the ship, the plaintiff came forward and paid the debt, and then brought an action against the defendants to recover the amount, and BUTT J., in the Court below held, the Court of Appeal affirming, that the action will lie. BUTT, J. said "they (the plaintiffs) paid the money without any express authority from the defendants and they base their claim to reimbursement upon a promise which the law implies and implies under the circumstances by the defendants to repay them, they being compelled to pay a sum to pay which the defendants were legally compellable." This authority is direct and settles the question as between mortgagor and mortgagee, but I have been a little embarrassed by the particular circumstances of this case. The plaintiff was not the actual mortgagee but an assignee of the mortgagee, and the defendant is not the mortgagor but the owner claiming title from the mortgagor, and the question which suggested itself to me was whether the implied promise grew out of the contractual relations previously existing between parties, by which the one may have agreed to guarantee or damnify or contribute to the other, or simply from the relations in which the parties might find themselves with respect to particular property, one party being compelled to pay money in respect of it which the othe was primarily compellable to pay. I have satisfied myself on the point by reference to all the authorities, particularly those like that of the owner of a coach destrained on for rent due by the coachmaker on whose premises it was standing and who paid the rent to obtain the possession of his coach, and I have arrived at the conclusion that the promise which the law implies is independent entirely of any express contract of the parties by way of guarantee, indemnity, contribution or otherwise. LINDLAY J. in EDMUNDS *v.* WALLINGFORD, 54 L. J. Q. B. 305, says the right to indemnity or contribution exists, although there may be no agreement to indemnify or contribute, and although there may be in that sense no privity between plaintiff and defendant. The case is, therefore, brought within the common law rule laid down in *Edmunds v. Wallingford*, that if by reason of the default of one person the property of another become

subject to detention by law and the person, whose property is so detained, pays the debt, the law implies a promise from the one whose debt is paid to repay it to the person who has paid it. It may be here urged that the plaintiff was not the owner of the property, neither were the plaintiff in the case of the "*Orchis*" but as against the defendant in that case he was entitled to the possession of the property, and so in this case the plaintiff had the right to the possession of the property as against the defendant, which gave him the right to pay to secure that possession.

The Commissioner says that the case decided by Mr. Justice Clarence, reported in 1 C. L. R., p. 73, is not parrellel but again he gives no reason to the dictum, and but for it I should have said it is exactly in point.

The plaintiff will have judgment with costs on the legal issue and the case sent back in order that the issues of fact may be disposed of.

BEFORE *Burnside*, C. J.

October 13 and 18, 1892.

THE QUEEN *v.* HERAS APPU and others.

[No. 2450, D. C., CRIMINAL, KURUNEGALA.]

Attorney-General—Lodging of appeal petition—Forwarding appeal petition by post—Sect. 754, Civil Procedure Code.—

All criminal prosecutions are at the instance of the Sovereign, and the Attorney-General represents the Sovereign in her executive capacity in all Her Majesty's Courts.

In cases where the Attorney-General appeals there should be the manual act of lodging the appeal in the Court by the Attorney-General or some one, whom he may authorize to act for him.

The prisoners were charged with causing grievous hurt to one Tamby Hamy and thereby committing an offence punishable under section 316 of the Ceylon Penal Code. After hearing evidence the District Judge acquitted and discharged the prisoners finding that the evidence failed to establish the offence. —The Attorney-General appealed against the District Judge's order, whereupon, on 12th August, 1892, a motion was made on behalf of the Crown proctor that the record be forwarded in appeal, and the District Judge made the following order, viz:—

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"It appears that a petition of appeal was received by post under cover of a letter to the District Judge, but it has not yet been filed in the record by any order of Court and it has been remarked frequently in the Supreme Court that letters addressed to the judge are not a course of regular procedure. The appeal petition bears no appeal stamp, and it does not appear that the Attorney-General is a party to the case at all.

The printed form of the information names the Queen as a party but apart from the fact that the Sovereign does not and is not usually considered to plead in an inferior Court and that the Code has guarded against the Attorney-General being required to become a party, the information itself makes no reference to the Queen and is merely signed by the Secretary of the Court on behalf of the complainant in this case, one Francina Hamy. Sect. 406 of the Code limits appeals to parties and Sect. 407 requires a stamp and the petition now before me does not meet either of these requirements. I may be wrong in my view, but as the matter appears to me, I cannot forward the case in appeal, I cancel from the journal the entries made out of Court by the Secretary, and will allow notice to be served on the accused persons to the effect that on a day to be fixed motion will be made to lodge the appeal and file petition.

If on the date fixed no objection is taken and notices have been served, I will order petition to be filed and the case to be transmitted. The accused do not seem to have had any notice of these proceedings. Date to be fixed for hearing, motion to file appeal and notice of the motion to be served on the accused."

At the hearing exception was taken to the petition being filed on the following grounds.—

(1) That it is not filed in time

(2) That it bears no stamp

(3) The Crown Proctor has no authority to file a petition of appeal on behalf of the Attorney-General—his authority was only to appear at the trial. The District Judge then made the followiug order.

"On the question of time I think that the delivery of the petition on behalf of the Crown Proctor complies with the requirements of the Code as to time. As the requirement is only that the petition shall be lodged with the Secretary in sect 406 of Code and in sect. 8 of 1 of 1888 it is said that the Attorney-General may file his petition in Court within 21 days, it appears to me that for the Attorney General to transmit the petition by post does not meet either of these requirements, but the tender in Court may be taken as sufficient.

As to the absence of the stamp I confess I read the Code as requiring a stamp in all cases. The Attorney-General is not a party to the case as the indictment is drawn by the Secretary on behalf of the complainant in the case, and whether the expession "at the instance of the Attorney-General" means that that officer should actually become the appellant seems doubtful. The Code seems to recognize the original complainant as the party appellant; if so, there ought, I think, to be a stamp. The case has been entitled "The Queen *v.* Heras Appu and others." As to the Crown Proctor's authority he appeared at the trial on a writing by the Attorney-General authorising him to appear in all cases tried on a certain date. There was nothing said about appealing and the objection seems to have some force. I will, however, now forward the record to the Supreme Court as it has been filed in due time. I leave the other objections which have been taken to be dealt with in the higher Court.

The accused are now informed that the case will be sent in appeal and are required to take notice of it."

Templer, A. S. G., for the Crown

Dornhorst for accused, objected to the appeal.

On October 18 the following judgment was delivered:—

BURNSIDE, C. J.—Two questions of some importance arise here, 1st In what relation does the Attorney-General stand with regard to criminal prosecutions. There is but one answer. All criminal prosecutions are at the instance of the Sovereign, although her royal name or title may not appear on the record, and the Attorney-General represents the Sovereign in her executive capacity in all Her Majesty's Courts. His commission confers that authority on him. It does not require the authority of the

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Governor and Legislative Council to empower the Queen to create the office of Attorney-General and invest him with the executive functions which by right and law are inherent in the Crown and which by her commission she may delegate to her Attorney-General.

The second question is can the Attorney-General file a petition of appeal by merely forwarding it by post to the judge of the Court. The Solicitor-General says that such has always been the custom and practice. I think it was a most convenient practice and no reason has been urged for challenging it by the Court itself. As it has been challenged I must say that it does not satisfy the strict requirements of the Code, which requires that the petition should be lodged in court by the person appealing. There should, therefore, be in cases where the Atrorney-General appeals the manual act of lodging the appeal in the court by the Attorney-General, or some one whom he may authorize to act for him. As the petition has not been thus lodged it must be rejected.

BEFORE *Burnside*, C. J. AND *Withers*, J.

October 11 and 13, 1892.

In the matter of the estate and effects of Andris Perera Dharmagoonawardena.

(No. 5,001 D. C. TESTAMENTARY, COLOMBO.)

Sect. 725 and 726 and Chapter LV and XXXVIII Civil Procedure Code—Judicial Settlement—Estates of persons dying before the Procedure Code came into operation.

Chapter LV of the Civil Procedure Code is ancillary to Chapter XXXVIII, and the provisions of the former in respect of the judicial settlement of the account of an executor or administrator do not apply to the estates of persons, who died before the Code came into operation.

Muttupillai v. Selamma. 9 S. C. C. p. 179 referred to, and followed.

The facts relative to this appeal sufficiently appear in the judgment of WITHERS, J. The appeal was by Don John Goonewardena, the first respondent to the application of Siman Perera Dharmmagoonawardena, one of the administrators.

Dornhorst (*Sampayo* with him) for appellant.

Sir Samuel Grenier, A. G. (*Wendt* with him) for the applicant-respondent.

IN THE MATTER OF THE ESTATE AND EFFECTS OF ANDRIS PERERA DHARMA-GOONA-WARDENA.

On October 13, 1892, the following judgments we e delivered:—

WITHERS, J.—On the 30th of June, 1890, letters of administration were granted to three persons jointly to administer the estate of one Lansige Andris Perera Dharmagunawardana Muhandiram, who appears to have died in Colombo, but when, I have failed to discover, though it must have been before the Code came into operation. A son and two daughters were the sole next of kin of the intestate. The son and the husbands of the two daughters are the joint administrators.

Pursuantly to a conditional order for the issue of letters those three persons on June 4, 1890, executed a bond with the conditions of rendering into Court a complete inventory of the estate and a true account of their administration. The times fixed in the bond, and in the final order for a grant of letters for rendering inventory and final account were July 4, and August 4, 1890, respectively.

It is almost needless to say that all three administrators violated the engagements in their joint oath of administration and bond, and failed to render their account within the time prescribed, which was certainly a narrow one. On December 11, 1890, all three were "noticed for default" in filing their accounts. On September 24, 1891, two of them, the appellant and one of the respondents herein, filed their final accounts. On October 29, 1891, the third administrator, the other respondent herein, filed his final account and on this day the three administrators who had evidently fallen out were required to examine each others accounts and accept or contest each other's accounts, as the case might be.

On November 16, 1891, one of the respondents herein lodged some objections to the accounts of the other two. Thereupon the Secretary of the District Court was directed to inquire into these objections, and to examine the several accounts. He reported his inability to comply with these directions for want of dates in the accounts and vouchers in support of payments, and he further required an explanation of the nature of the objections lodged by the administrator abovementioned. This was on December 21, 1891, on which day the District Judge ordered one of the respondents herein to bring into Court

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without delay a sum of Rs. 1877·09 (a requirement which had been moved for on behalf of one of the other joint administrators) on the curious ground that as this administrator's account as compared with the accounts of his joint administrators showed that he had that amount in hand, he had no right to detain it.

That order was appealed against and naturally discharged by this Court. Then after a skirmish about a sum of Rs. 150 the applicant herein applied on July 23, 1892, for a citation in terms of clause 726 of the Civil Procedure Code on the two other administrators and respondents herein and himself as administrator to show cause why all three administrators should not be compelled to have their accounts judicially settled.

The joint administrators appeared to the citation and, after hearing argument, the Court ordered all three to account at the cost of the respondents herein. From this order the appeal with which we are concerned was taken. It was contended for the appellant that the principle of the decision of this court in 9 S. C. C. 179, applied by the Chief Justice to the case reported in the C. L. R. Vol. 1 p. 99, governs this case and I think that is a right contention, for Chap. LV, of the Code is ancillary to Chap. XXXVIII, which was held in the former case not to be retrospective as regards the estates of persons dying intestate before the Code came into operation. Under the old practice there was no right to compel a judicial settlement of an administrator's account. In the ordinary course of testamentary proceedings, if a question arose of a character unfit to be settled therein, the interested party was referred to his remedy by administration or other appropriate suit where the Court could deal with and decide the questions involved. The *motif* for this application for a judicial settlement is on the face of it, the apparent balance in hand of one of the respondents of the sum of Rs. 1,189 odd, which the applicant wants to reach and for which he may have a just claim for all that I know, and this, under the old practice, was a question which could not have been settled in the matter of these testamentary proceedings, but would have required a separate suit or action.

It was further contended that the proceedings, under the Sects. 725 and 726 of the Code, were irregular. The application should have been by petition and should have been entitled

as of the actions in which the joint grant of administration issued. This was not quite strictly observed, for the application is not a petition and is not entitled as of the action as numbered on the court files, but this defect of form is not sufficient to imperil the application, and we cannot forget that the applicant is not only one of the next of kin, but a joint administrator. The Code does not provide for the petition from joint administrators for the judicial settlement of accounts by the other administrators, but on principle, I do not see why a person in the position of the applicant should not present a petition for that purpose, as he is interested in the estate and has asked that the order for a judicial settlement do pass against himself, as well as his joint administrators. This chapter (L V) has been taken from the New York Code, but the forms of oath and bond required in the old practice of our courts have been substantially re-introduced into the Code, (see schedule II forms 88 and 90, pp. 541, 542 of the Civil Procedure Code,) while the bond in the New York Code is at large, conditioned for the due administration of the estate and effects of the decedent.

An administrator does not bind himself there as here to render a final account by a given date. He can, after a certain time had elapsed from the date of his letters, ask that his account be judicially settled. Now, the three administrators in this matter have filed their final accounts as they engaged themselves to do by oath and bond, though not within the time prescribed by their oath and bond.

In these circumstances can a joint administrator compel the other administrators to exhibit their accounts over again without disclosing material *prima facie* probative of errors in those accounts? A judicial settlement under the New York Code presupposes either the non-existence of any account or the existence of an interim account which an administrator is at liberty for his own protection to file in certain circumstances preparatory to an account to be judicially settled thereafter.

I confess this question embarrasses me, but I am disposed to answer it in the negative.

However, I would set the order aside on the ground previously indicated that the applicant is not entitled to the remedy sought for, which applies only to cases in which

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estates of persons dying after the Code came into operation are being administered.

BURNSIDE, C. J.—I have nothing to add to the opinion of my brother WITHERS. I adhere to my previous ruling that the provisions of the Code are not retrospective as regards the rights of persons in respect of estates of persons who died before the Code came into force and this is sufficient to support the appeal. I agree that the order appealed against must be discharged with costs.

BEFORE *Burnside*, C. J. *Lawrie* and *Withers*, J. J.
November 3, 1892.

MINUTE ON THE DEATH OF SIR SAMUEL GRENIER ATTORNEY-GENERAL.

On the assembly of the Court his lordship the Chief Justice said:—Mr. Attorney and gentlemen of the Bar,—Since this Court last met the country has sustained a very great loss by the death of Her Majesty's late Attorney-General, Sir Samuel Grenier. The public estimation in which Sir Samuel was held was apparent in the large assembly of all classes of the community, the highest, the high and the low, the rich and the poor, collected together to mourn their loss and pay a tribute of respect to all that was mortal of him, who was laid to rest last Tuesday evening. It is befitting to me, and it is a contribution of justice and of love to speak of him, in this great hall of justice in which his first steps were taken in that brilliant career which has terminated so suddenly, and to us so sadly, as a great lawyer. Deeply read, a profound thinker, with a logical mind, matchless industry, pains-taking and conscientious, these were the qualities which placed him at the head of the profession where he was conspicuous as a distinguished ornament of it, and wore the guerdon of his Sovereign's special and gracious favour, which he had honourably and worthily won. The early days of his career are better known to many of you, gentlemen at the Bar, than they are to me. You have heard how steadily he pressed forward in the work he had set himself to do. I must be content with saying that I valued it as one of my privileges, when at the head of the Bar, to have Sir Samuel Grenier as my opponent, and often as well to

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fight side by side with him. It was then that I first learnt to know what a fortress he was to assail, what a tower of strength he was to rely on. As Chief Justice presiding in this Court, I have often listened with admiration to his clear, incisive and convincing arguments in a voice sweet and persuasive, a voice, which I had full confidence would in no distant future be heard from this Bench,—enunciating those principles of law which he knew so well,—but which now, alas! is silent for ever. But it was not Sir Samuel's greatness as a lawyer only which made him conspicuous; he was a good man. I know that it is forbidden on high authority to say of any man that he is "good," to attempt to assert that of which, we are told, there can be but one Judge. But if honesty, consideration for others, love of peace, kindliness of heart, charity with all modesty and humility go to make up the lovable character which we count for goodness, then we may be permitted to say that the friend whom we mourn was a good man, for who among us who knew him will not say how lovable he was, both in public and in private life, and, with that latter life in view, I would ask you to tread softly and unobtrusively with us into the sanctuary of grief, where now those who knew and loved him and whom he loved best, are torn with grief, and tell them of our sympathy and speak to them words of comfort. I have but one word more to say. It would not be to any good purpose to keep green in our memories the lives of those who had become conspicuous for their talents, or for their virtues, if it did not have a practical effect upon us. To you, gentlemen of the Bar, who have already borne much of the burden and heat of the day, I say, let the example which has been set you urge you to redouble your efforts to the goal which is still before you. To you, the junior Bar, who may see, near or far away, obstacles seemingly insurmountable ask yourself, are they greater than he surmounted? And it will be good for us all to keep green in our memories the life and career of Sir Samuel Grenier.

The Acting Attorney-General:—My Lords, after the able, eloquent and feeling remarks that have fallen from your lordship the Chief Justice it will only be necessary for me briefly, on behalf of the Bar, to express the great loss our profession has

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sustained in the death of the late Attorney-General—one who was as remarkable for his abilities and legal knowledge as he was for his integrity and single-mindedness. Though his voice will never again be heard in these Courts, he has left behind him a memory which will be ever dear to his fellow-countrymen and an example that it will be difficult for any of us to live up to. The Bar have lost in him a sincere and true friend and your lordships' Court, if I may be permitted to say so, a wise and discreet counsellor. I would ask your lordships, under the circumstances, to allow this court to be adjourned to-day out of respect to the memory of Sir Samuel Grenier.

The Chief Justice (after consultation with his brother Justices)—Mr. Attorney, the Court willingly accede to the proposal which you have made and before adjourning the Court, I direct the Registrar to place on the records of the Court, the few observations which I have so insufficiently made, and your worthy tribute to the memory of the deceased Knight. The Court will now adjourn.

BEFORE *Burnside*, C. J. AND *Withers*, J.

October 25 and November 8, 1892.

MOHAMADO UMMA *v.* MOHIDEEN.

(No. 401, D. C., CHILAW.)

Sect. 481 Civil Procedure Code—Minor—Appointment of Next Friend—Plaint.

The plaint in an action intended to be brought on behalf of a minor must accompany the application under Sect. 481 of the Civil Procedure Code for the appointment of a next friend, and where such application has been allowed on insufficient materials, the defendant should not file answer, but move the Court to strike the libel off the file.

The facts sufficiently appear in the judgment of WITHERS, J.

Wendt for defendant appellant.

There was no appearance of counsel for respondent.

On November 8, 1892, the following judgments were delivered:—

BURNSIDE, C. J.—The order of the District Judge in this case must be set aside.

Our ruling in the case reported, Vol. 2, C. L. R. p. 82, governs the case. I incline to the opinion of my brother Withers, as to the practice which should be observed in applications for the

appointment of a next friend to enable a minor to institute a suit. The Code is certainly perplexing on the question, and it is as well that some indication of our opinion should be given for the guidance of practitioners pending an authoritative decision if it should become necessary.

WITHERS, J.—According to the plaint this purports to be an action in ejectment by one Mohamado Umma a minor by her next friend Tangachi Umma; the plaint itself purports to be that of the plaintiff by her Proctor, James Lemphers.

The plaint was improperly accepted by the Court and would no doubt not have been accepted if attention had been called to our judgment reported at page 82 of Vol. II., C. L. R., not but that the acceptance of the plaint at all is matter for great surprise, for there is really no order herein sanctioning the appointment of a next friend.

There is an order on a petition at p. 22 of this record allowing the application therein, but that petition is intituled in a separate suit No. 25,641 of the District Court, Chilaw, and the ground in that petition for the appointment of a next friend was the intention to institute an action on behalf of the present minor to set aside the judgment in 25,641 as one recovered by deceit against the minor and others, whereas the object of this suit, as I have said, before is to eject certain people from certain lands.

The defendant in the present action, appeared by his Proctor, filed answer on the 18th of August last, and then and there moved the Court to take the plaint off the file, for the reason, among other, that the provisions of Sect. 481 of the Civil Procedure Code had not been complied with. The motion was disallowed by the learned Judge and it is from his order of the 6th of September, that this appeal is taken. The 481st section was not brought to our notice during the argument of the case reported in II. C. L. R., page 82, before referred to, and though we think the plaint must be taken off the file for the reasons hereinbefore indicated, it behoves us to deal with this particular point.

The section in chapter 35 of the Civil Procedure Code with the exception of sect. 492, 494, and 502 and the section in

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question, 481, are borrowed from the Indian Civil Procedure Code. Sect. 481 down to the words "in the action" with which the 4th line commences, corresponds with the provisions of Sect. 445 of Indian Civil Procedure Code; the rest is entirely new matter and very embarrassing matter too.

This section provides that the application for the appointment of the next friend of a minor, shall be made after application by way of summary procedure supported by affidavit showing the fitness of the person proposed and also that he has no interest adverse to the minor, and that to such application the defendant shall be made respondent.

In chapter 24, relating to summary procedure, is laid down how a petition by way of summary procedure is framed. Such a petition has to contain *inter alia* the name, description and place of abode of the respondents, and therefore the Court is empowered to make an alternative order of the nature indicated in Sect. 377 of the Code.

Now the word defendant implies its correlative a plaintiff, but in a case like the present when there is no action instituted, the object of a petitioner is to obtain leave to institute one by a next friend. Then there can be no plaintiff at the time the petition is presented and consequently no defendant.

It was suggested by Mr. Wendt that to meet such a case a defendant must be taken to mean an intended as well as an existing defendant. To make the new and added matter in this section sensible, either that suggestion must be given effect to, or we must hold that this section is intended only to apply to cases where a petition for a minor to be represented by a next friend is made in the course of an action, or incidental to an action to adopt the language of Sect. 375 of the Civil Procedure Code.

Hitherto, and as I believe is still the practice in our courts at home, an application by a minor for the appointment of next friend to institute a suit on his behalf has been made *ex parte* on the usual well known materials, it being open to a defendant to apply to have the order vacated on the ground that the proposed next friend is not a fitting and competent person.

For my part I think that practice should still be maintained, section 481 notwithstanding. In any event this

order must be set aside with costs arising out of and incidental to, the application. MAHAMUDO-UMMA v. MOHIDEEN.

The defendant must pay the costs of and consequent on his answer which be filed in bold disregard of the judgment of this Court reported in Vol. II of the S. C. C. 43.

BEFORE *Lawrie*, J.

November 10 and 15, 1892.

PASCOE *v.* WEERASINGHA.

(No. 22,357, P. C., COLOMBO.)

Cheating—Sale—Misrepresentation in regard to article sold.

A asked B if he had Blackstone tea, and on his saying that he had, A purchased a quantity of it, and at the time of purchase A knew it was not Blackstone tea.

Held, that as A was not deceived by B's description of the tea as Blackstone, B could not be convicted of cheating.

The facts material to this report appear in the judgment.

Dornhorst for accused-appellant.

Morgan (*Wendt* with him) for complainant-respondent.

On November 15, 1892, the following judgment was delivered:—

LAWRIE J.—The complainant asked the accused if he had any Blackstone tea, and on being told he had, the complainant purchased 10 lbs. of tea in two boxes, one of it was marked "B" the other "Valley field." Neither box bore the name of Blackstone. The complainant did not examine the tea. He paid the price asked. The charge has not been proved to be more than the tea was worth. On examination the complainant found that the boxes did not contain tea of the kind grown on Blackstone Estate. Mr. Pascoe then charged the accused with cheating. The question to be answered is—Did the accused deceive the complainant or fraudulently and dishonestly induce him to pay money which he would not have paid, if he had not been so deceived? My verdict is that the accused is not guilty, he did not deceive and he did not induce payment by deception. It is I think plain on the evidence that the accused did not advertise or publicly profess to sell tea grown on Blackstone Estate, he had no packages or boxes marked. He did not warrant that the tea he sold had been grown or made on Blackstone. Blackstone is not

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a registered trade mark, and, unless the accused represented that the tea was grown on that estate, I cannot hold him guilty of cheating, any more than I should convict a grocer for cheating who should sell me what he called a Stilton cheese or Yorkshire ham or Yarmouth bloaters, but which had been made at other places than the names they bore. The purchaser might have imported the tea, he might by touch or smell or taste have satisfied himself whether it was the article known to him as Blackstone tea, but he did not. Had this been a civil suit the rule *caveat emptor* would have applied. Further it is necessary for the commission of this offence of cheating that the statement that the tea was Blackstone tea was believed. Otherwise it had no weight. In a well known case the Queen *vs.* Mills, 26 L. J., p. 79, a prosecutor paid money knowing that the statement of the accused was untrue. Cockburn, C. J., said: "The conviction cannot be supported; the prosecutor knew that the pretence was false. The question is, what was the motive operating on the mind of the prosecutor to induce him to make the payment? If it was belief in the prisoner's false statement, the offence of obtaining money under false pretence is made out, but it is not so if, as in this case, the motive be a mere desire to entrap the prisoner with some such belief." And in a case quoted Mayne, p 353, where a prosecutor knowingly bought watered milk with a view of putting a stop to this practice the conviction was quashed. The evidence will shew that Mr. Pascoe, who is interested in Blackstone estate, had heard that tea was sold in Colombo as Blackstone tea, which had not been grown or made there. He employed the services of Mr. Nicholls, who seems to have said he would point out a place where the illicit sale was going on. It was, however, necessary to prepare the accused and to instruct him to say "yes" if he was asked for Blackstone tea. Having made this preliminary trial Nicholls took Mr. Pascoe to the accused's boutique. Mr. Pascoe knew what was going to happen, he bought tea which he had every reason to suspect, indeed he was certain, was not Blackstone tea. I think he would, have been disappointed had it proved to be the genuine article of which probably he had enough. He was not induced to pay by being deceived by the accused. The accused is acquitted.

BEFORE *Burnside*, C. J. *Lawrie* and *Withers*, J. J.

October 7 and 11, 1892.

WIJESEKARA *v.* JAYASURIYA.

(No. 36,247, D. C., KALUTARA)

Sect. 337 Civil Procedure Code—Decree obtained before the Code—Prescription—Sect 5 of Ordinance No. 22 of 1871—How far repealed.—

Sect 337 of the Civil Procedure Code does not apply, on the question of prescription, to decrees obtained before the passing of the Code. Such decrees are still governed in regard to prescription by the provisions of Sect 5 of Ordinance No. 22 of 1871.

This was an application to execute a decree obtained before the passing of the Civil Procedure Code. Although ten years had elapsed when the motion was made, intermediate steps had been taken from time to time to keep the decree alive. The District Judge held that the decree being more than 10 years old, Sect 337 of the Procedure Code prevented any order being made to execute it and disallowed the motion.

Wendt for plaintiff-appellant.

The defendant was not represented by counsel.

On Oct. 11, 1892 the following judgments were delivered.—

BURNSIDE, C. J.—The decree in this case had been obtained before the passing of the Code and more than ten years had elapsed, when the present motion was made under the provisions of the Code to execute the decree. The decree itself had not been prescribed under the Ordinance 22 of 1871, Sect. 5, because intermediate steps had from time to time been taken to keep it alive, but the District Judge held that the decree itself being more than 10 years old Sect. 337 of the Code prevented any order being made to execute it, and he disallowed the motion, and the plaintiff has appealed.

I do not think that Sect. 337 on the question of prescription was intended to apply to decrees which had been obtained before the passing of the Code, and to which a particular law of prescription was applicable. I think, as a matter of procedure the clause governs and must be held to apply to everything done under the Section, *i. e.*, where

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there has been an application to execute the decree. This would be governed no doubt by the prescription and other provisions of the Section, but with regard to decrees obtained before the Code, they must still be governed by the provisions of the 5th Sect. of the Ordinance 22 of 1871, which, although repealed, still applies to rights, obligations or liabilities acquired or incurred under it which have been specially conserved.

We must set aside the judge's order, and send the case back in order that the learned District Judge may deal with the other question raised, and which he abstained from deciding because he considered that the point which he decided defeated the whole motion.

The appellant will have his costs of appeal.

LAWRIE, J.—The repeal of Section 5 of Ordinance, No. 22 of 1871, on August, 1890, did not effect the presumption that all judgments, which at that date were more than ten years old, were satisfied.

But on August 1, 1890, the judgment in this case was only eight years old and it was not yet of an age to be deemed to be satisfied. When the judgment subsequently attained the age of ten years it did not then fall under the presumption, because the section creating the presumption was by that time repealed and, though rights privileges, obligations or liabilities accrued and incurred on August 1, 1890, were unaffected by the repeal, the presumption of satisfaction was not extended to judgments which had been pronounced within ten years of that date.

The defendant in this case cannot claim any benefit from section 5 of the Ordinance, No. 22 of 1879. It seems to me that the procedure should be governed by section 347 and not by Section 337 of the Code. The restrictions on the re-issue of execution contained in section 337 apply only to cases where an application to execute a decree has been made under chapter XXII and has been granted. The section directs the Courts how to deal with subsequent applications. This is the first application which has been made under chapter XXII, and so the rule regarding subsequent applications do not apply.

The District Judge is untrammelled by presumptions of satisfaction or by restriction as to re-issue. He is free to

decide whether the judgment is satisfied (as the defendant says it is) or whether there be a balance still due and, if so, what that balance is. I agree that the order must be set aside with costs.

WITHERS, J.—This was not an application under Sect. 337 of the Civil Procedure Code, as the learned judge seems to have treated it, for that section applies to cases where application to execute a decree for the payment of money has been made under Chap. XXII of the Code and granted. Now no such application had been made and granted in this action, under this chapter. The petition was to revive a stale judgment for the purposes of execution, and I know of no provisions in the Code for reviving a stale judgment. An order abating dormant proceedings can be set aside. The judgment sought to be revived was long anterior to the time when the Civil Procedure Code came into operation, and the procedure adopted was the old one in a new guise. Had this been an application under Sect. 337 of the Code I do not think the judge would have been precluded from entertaining it by the provisions of that section.

The right (on good cause shown) of prosecuting a judgment pronounced before the Code came into operation within the time limited by the repealed section 5 of Ordinance No. 22 of 1871, is a right, I take it, especially conserved by Section 2 of the Civil Procedure Code.

The order appealed from must be set aside and the case sent back for the learned District Judge to hear and determine the application on its merits. The appellant will have his costs.

BEFORE *Burnside*, C. J.

November 17 and 18, 1892.

BARKLY *v.* KATTAN and others.

[No. 5,541, P. C., HALDUMULLA.]

Labour Ordinances, No. 13 of 1889, and No. 7 of 1890—Arrears of Wages—Desertion—Termination of Contract of Service.

By Sect. 1 of Ordinance 7 of 1890 the wages of a labourer shall be payable within sixty days from the expiration of the month during which such wages shall have been earned.

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Quære (per BURNSIDE, C. J.) whether the non-payment of wages within the term prescribed in the above Section does not in itself terminate the original contract of hiring.

The accused, who were estate coolies, were convicted for desertion, on a prosecution instituted by their master. It appeared that their wages were in arrear for a period of sixty days at the time of their alleged desertion.

Wendt for accused-appellant.

Sampayo for complainant-respondent.

On Nov. 18, 1892 the following judgment was delivered:—

BURNSIDE, C. J.—The prosecution in this case was by a master against three estate coolies for desertion. They have been convicted, and they have appealed.

Although three separate prosecutions were instituted against the accused, the Magistrate tried them all in one trial, and has sent to this Court one record in which he adopted the novel and more saving procedure of trying three people, accused of distinct and separate offences, at one trial. This is so grossly irregular that it involves the whole proceedings and invalidates them, and the accused are accordingly acquitted and discharged.

I do not think I ought to set aside these proceedings on the objection to the procedure, without also calling attention to a very important question on the merits which the facts disclose.

The wages of these accused were in arrear for a period of sixty days. Now, under the Ordinance 13 of 1889, before arrears of wages could afford an answer to the cooly charged with desertion, it was necessary that he should have demanded his wages, and that a period of 48 hours should have elapsed after notice and the wages remained unpaid, but, by the amending Ordinance, if the wages are in arrear for the prescribed term, it in itself affords a full answer to any prosecution for desertion, &c.; and this raises the very important question to which I have alluded, viz., whether it does not terminate the original contract of hiring. I have not thought it necessary to decide the point in view of my decision on the procedure, but it will be seen that the point mentioned seriously affects the labour laws, and should not be disregarded in

similar prosecutions in the future, and it is questionable how far it is discreet to bring into prominence questions of this kind by a reckless prosecution, such as this.

BEFORE *Burnside*, C. J. AND *Withers*, J.

October 25 and November 16, 1892.

ROSLING *v.* SAVERIMUTTU.

5,183.
(No. ——D. C., KANDY.)
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Ordinance No. 8 of 1890 Sect. 19 and 32—Stamp—Promissory Note—Powers of Commissioner.

The Commissioner of Stamps can properly exercise the powers conferred on him by Sect. 32 of Ordiance, No. 3 of 1890, to stamp a promissarry note which had been executed without being duly stamped, if bought to him within a year after it had been executed, and a promissory note is not such an instrument as is affected, by either of the two concluding provisoes to the section.

The facts material to this report appear in the judgment of WITHERS J.

Grenier for defendant-appellant.

Dornhorst for plaintiff respondent.

On November 16, the following judgments were delivered:—

BURNSIDE, C. J.—On the merits I agree with the judgment of the Court below and with my brother Withers, that that judgment should not be disturbed. The contention of the defendant that there was no consideration for the note required more proof than he was enabled to advance in support of it and to rebut the inference which the note itself raised that the consideration was that stated in it.

On the question of the stamps, I am also of the same opinion as my brother Withers. The stamp affixed by the stamp office covers the note and is quite sufficient to raise a *prima facie* conclusion that the Commissioner had properly exercised the powers conferred on him by sect. 32 of the Stamp Ordinance to stamp an instrument which had been executed without being duly stamped, if brought to him within a year after it had been executed, and a promissory note is not such an instrument as is affected by either of the two provisoes to the section.

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The appeal will be dismissed with costs.

WITHERS, J.—On the merits I think the judgment is right. What was principally pressed upon us in appeal by the appellant's counsel was the fact that the note declared on was not duly stamped and consequently inadmissible in evidence. The note as originally stamped is *ex facie* defective, but counsel contended that the defect had not been cured by the Commissioner who caused a 5 cent stamp to be affixed to the instrument and cancelled as required by law, because the new stamp was not affixed and cancelled within 14 days from the date of the note; and our attention was invited to the 19th section of the Stamp Ordinance 3 of 1890. The new stamp was clearly not affixed and cancelled within 14 days from the date of the note.

But this does not conclude the matter. It is provided by the Sec.t 32 of the Stamp Ordinance just referred to that "when it shall appear to the Commissioner upon oath or otherwise to his satisfaction that any instrument has not been duly stamped previously to be signed or executed, by reason of accident, mistake, inadvertency, or urgent necessity, and without any wilful design or intention to defraud Her Majesty of the duty chargeable in respect thereof, or to evade or delay the payment of such duty, then and in every case if such instrument shall be brought or sent to the Commissioner to be stamped within 12 months after the first signing or executing the same by any person, and the stamp duty chargeable thereon by law shall be paid, it shall be lawful for such Commissioner with the previous sanction and under the authority of the Governor to remit the whole or any part of the penalty payable on stamping such instrument, and to cause such instrument to be duly stamped in manner abcvementioned (affix to the said instrument a stamp of the proper amount or deficiency of duty and cancel the said stamp in the manner directed by this Ordinance) when payment of the whole or of the deficiency of the stamp duty chargeable thereon by law as the case may be, and either with or without any portion of the said penalty."

This provision is not to apply to any instrument the

stamping of which, after the signing or execution thereof, is expressly prohibited or restricted by our law, but this Court has declared that a promissory note can be cured after signature or execution by the judge of the Court before which it is produced at the trial of a cause for the purposes of evidence.

Nothing appearing to the contrary, we must take it for granted that the defect of this note was duly cured by the Commissioner, and the cure was effected within 12 months after the first signing of it.

For these reasons I think the objection taken before untenable and affirm the judgment with costs.

BEFORE *Burnside*, C. J. AND *Lawrie*, J.

November 18 and 25, 1892.

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No. 1,251, D. C., COLOMBO.

Civil Procedure Code Sect. 779 and 780—Courts Ordinance Sect. 42 Sub Sect. 2—Appeal to Privy Council— Hearing in review—Final judgment—Civil right of value of Rs. 5000—Ordinance No. 6 of 1859.

The Supreme Court held, setting aside the judgment of the Court below, that the defendants had infringed the plaintiff's Patent and remitted the case to the District Court in order that the District Judge may deal with the plaintiff's prayer for an assessment of all gains and profits derived by defendants from importing into use and sale of infringement of plaintiff s patent. On an application by defendants, praying for a certificate under Section 781 of the Civil Procedure Code for hearing in review previous to appeal to Her Majesty in Council.

Held, that the application could not be allowed; in that there was no final judgment, decree, or sentence or any rule or order made in the action having the effect of a final, or definitive judgment, decree, or sentence in terms of Section 779 of the Civil Procedure Code; and in that the judgment given and pronounced on the bare question of fact of infringement or no infringement involves no definite sum or matter at issue of any definite value, nor does it involve directly or indirectly the title to property or to a civil right exceeding the value of Rs. 5,000 (see section 42 sub-section 2 of the Courts Ordinance.)

The right of appeal given by the Inventions Ordinance is now governed by Section 42 of the Courts Ordinance.

This was an action by plaintiff against the defendant, alleging an infringement of a patent, and the plaintiff prayed (1) for an injunction to restrain the infringement, (2) for an account of all gains and profits received by defendants from importing into use and sale of infringement of plaintiff's patent,

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and a decree for the amount of such gains and profits accruing from such infringement, (3) for costs, (4) for further relief. The defendants denied the infringement and the District Judge dismissed the plaintiff's action with costs, finding as a fact that the defendants had not infringed the plaintiff's patent.

On appeal the Supreme Court set aside the judgment of the Court below, and held that the defendants had infringed the plaintiff's patent, and remitted the case to the District Court in order that the District Judge may deal with plaintiff's prayer for the account of all gains and profits derived by the defendants in respect of the infringement. The defendants then made the present application for hearing in review previous to appeal to Her Majesty in Council.

Browne (*Dornhorst* with him) for defendants.

The case fell within the category set out in Section 42 of the Courts Ordinance. The appeal asked for was clearly from a final or definitive judgment of this Court. There need not necessarily be a decree for a specified sum as damages before application can be made for leave to appeal to the Privy Council. As regards the value of the case the patent right involved more than Rs. 5,000 in value. If the value of that right did not appear in the proceeding, the Supreme Court had the power to direct an inquiry in respect of it (Sec. 14 L. R. Q., B. D. p. 627.; 20 L. R. Q., B. D. p. 318; Caffræ *v.* Delmege, 8 S. C. C., p. 170.

Wendt, for plaintiff, opposed the granting of the certificate, the requirements of the Code not being complied with. There must not only be a final or definitive judgment, but it must involve in money above Rs. 5,000. The cases cited by the defendant's counsel do not touch this case because they were under the Bankruptcy Act. The Privy Council has held that in a case where there was something further to be determined no appeal lies to it (See Cameron *v.* Fraser, IV Moor P. C. p. 1; Allan *v.* Pratt, 57 L. J. P. C., p. 104.)

BURNSIDE, C. J.—This was an application by the defendants praying for a certificate under 781 Sect of the Civil Procedure Code for hearing in review previous to appeal to Her Majesty in Council. The plaintiff showed cause against the granting of the certificate. The action is in the District

Court of Colombo by the plaintiff against the defendants, alleging an infringement of a patent, and the prayer was for (1) an injunction to restrain the infringement; (2) for an account of all gains and profits derived by the defendants from importing, use, and sale of infringements of plaintiff's patent, and a decree for the amount of such gains and profits accruing from such infringement; (3) for costs; (4) for further relief. The defendants traversed the infringement, and at the trial on the merits in the Court below, the learned District Judge dismissed the plaintiff's action with costs, on his finding of fact that the defendants had not infringed the plaintiff's patent, and the plaintiff appealed to this Court. On the appeal the District Judge's finding of fact was reversed, and the judgment of the Court below was set aside, this Court holding on the facts that there had been an infringement by defendants of the plaintiff's patent. The following is the decretal order which the defendants desire to appeal from:—"It is ordered and decreed that the decree made in this action by the District Court of Colombo, and dated 2nd day of May, 1892, be, and the same is, hereby set aside, and in lieu thereof it is decreed and declared that the plaintiff is entitled to, and it is accordingly ordered that the District Court do issue, an injunction restraining the first defendant and the second defendant company and their servants, agents, or workmen severally, from importing into, using, selling, or procuring to be imported, used, or sold in Ceylon, any tea-leaf rolling machine possessing the arrangement of transmitting motion to the top rolling surface through the case or jacket surrounding it, as described in the plaint and in the specification therein mentioned, and claimed by the plaintiff as novel and original, and further from infringing the plaintiff's grant of exclusive privilege and invention in manner aforesaid.

And it is also further ordered and decreed that the case be, and the same is, hereby remitted to the said District Court, in order that the District Judge may deal with the plaintiff's prayer for an account of all gains and profits derived by each of the defendants from the importing into, use, and sale in Ceylon, of tea-leaf rolling machines, infringing as aforesaid, imported into Ceylon, or used

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or sold here by the defendants, or either of them, or by any person or persons by the order or for the use of the defendants or either of them, and that thereafter the defendants be severally ordered to pay to the plaintiff the amount of the gains and profits so derived by them. And it is also further ordered and decreed that the defendants do pay the plaintiff the costs of this appeal". By the Courts Ordinance and by the provisions of the Civil Procedure Code, clause 63, the power of this Court to grant leave to appeal the Privy Council is restricted to cases in which an appeal is sought against a party or parties to a civil action on (1) any final judgment, decree, or sentence, or (2) against any rule or order made in any such civil suit or action having the effect of a final or definitive judgment, decree, or sentence, and by section 42, sub-section 2 of the Court's Ordinance, every such judgment, decree, sentence or order shall be given or pronounced for, or in respect of, a sum or matter at issue above the amount or value of Rs.5,000, or shall involve directly or indirectly the title to property or to some civil right exceeding the value of five thousand rupees.

It is not possible to read the Courts Ordinance and the Civil Code on this subject together without, I admit, encountering some, if not considerable, confusion ; but I think it is clear that both provisions contemplated that the judgment to be appealed against must satisfy the material requirements which I have just quoted. But whether it is the judgment in review which is the matter of appeal, or the judgment reviewed, is certainly not clear, and both Ordinances leave it quite open that it may be both judgments.

Sect. 42 of the Courts Ordinance refers to the desire, in the first place, to appeal against the judgment at first pronounced, and the first proviso declares that before any "such appeal" shall be "so brought," such judgments shall, &c. The plain meaning of this is that whatever occurs subsequently, that is the judgment to be appealed against. Then the second proviso refers to "such judgments, &c., in review," clearly referring to the judgment in review which, under the latter part of the previous proviso, the Court has had authority to pronounce, and it is to this judgment in review only that the provision as to value, finality etc, attaches, and it is the third proviso which gives

direct authority to appeal against such judgment. But when we come to the Code we find that, precisely as in the Courts Ordinance, it refers to the right to appeal to Her Majesty against any final judgment, decree, &c., and the desire to appeal against such "judgment;" it is therefore the original judgment against which the desire must exist to appeal, and it is against this judgment by section 780 that he must apply by petition to have brought in review, and against which he must state his grounds of appeal, and he must pray for a certificate that as regards amount, and value, or nature, the case fulfils the requirements of section 42 which I have just quoted or *that it is otherwise a fit one for appeal to Her Majesty in Council.* I will dispose of this latter exception directly.

Here then by the Code with regard to the original judgment, as by the Courts Ordinance with regard to the judgment in review, finality and value are essential ingredients, and that this was distinctly contemplated is made clear by the subsequent 782 section which declares that the judgment, decree, order, or sentence of the Supreme Court after such hearing in review shall be pronounced in accordance with the rules hereinbefore prescribed for the judgment and decree in appeal, and then comes section 783, which says:—"The person feeling aggrieved by such judgment in review shall, if he desires to appeal therefrom, apply, &c." I do not think, therefore, it possible to successfully contend that no conditions attached to the judgment at first pronounced, and that any such judgment must be heard in review if a desire to appeal is asserted.

The question, therefore, for us to decide is, does this judgment or decree in question come within the category of those above enumerated, and against which only we are empowered to grant a certificate that it may be heard in review previous to an appeal to Her Majesty in Council. I have most carefully considered it without any reference to my own feelings or inclinations, except so far as they would naturally lead me to grant leave, if I thought we had the power to do so, and I can arrive at no other conclusion than that we have no power to grant the certificate asked for. In disposing of the question, it is proper to deal with the provisions of the Code as to the value of the judgment. Till that point is settled, it is immaterial whether the judgment, decree, or order be final

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or not, and this brings us to decide at once whether the judgment is given or pronounced for, or in respect of, a sum or matter at issue above the amount or value of Rs. 5,000. For myself I have no hesitation in saying it is not. It is on the contrary as yet, and so far, only a judgment given and pronounced upon the bare question of fact of infringement or no infringement, and involves no definite sum or matter at issue of any definite value, save and except the costs of appeal.

Then does it involve directly or indirectly the title to property or to a civil right exceeding the value of Rs. 5,000? It was not denied at the hearing that upon the face of the proceedings it was not easy to gather what was the value of the property, the right which was affected by the judgment; but it was suggested that this Court might order information to be obtained by enquiring, in accordance with some dictum based on circumstances only which is to be found in the other authorities of this Court, in which it was assumed that a money value could be attached to a decree for a divorce upon a fiction as to the value of every marriage. It is scarcely necessary to say that these *dicta* are of little or no value in the light of decided authorities by which we must be governed. Lord Selbourne laid down the rule in Allan *vs.* Pratt, 57 L. J. P. C., that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself of it by appeal. If there is to be a limit of value at all, that seems evidently the right principle on which to measure it, and, looking at this case upon that principle, I cannot see how it can be, but that the value of any right or property affected by it exceeds Rs, 5,000. Coming to the question as to the finality of the judgment, I am also of opinion that the partial decision of the action by our decree is not final, so as to bring it within the category of judgments or orders upon which we are permitted to allow an appeal. There can be but one final decision in an action, and this is certainly not the final decree. No final decree can be made till the District Court has adjudicated on the matter remitted to it, and which involves the decision of the general question of costs. As the decree in respect of which the certificate is required now stands, it is final on a question of fact, but not final regarding the object of the suit, viz., damages for the

infringement of the plaintiff's patent.

I am now brought to the words to which I have promised to refer, and which find place in the Code with respect to the original judgment, but are not to be found in the Courts Ordinance or in the Code in relation to the judgment in review, "or that it is otherwise a fit one for appeal to Her Majesty in Council." Beyond the fact that these words have been taken from the Indian Code, I cannot find any authority as to their intent and meaning, and I am disposed to think that they have found their way into our Code rather through inadvertency than from any deliberate intention to confer on a single judge of this Court any unlimited discretion to grant a certificate in any case, which one judge of this Court may consider a fit one for appeal. Looking at the source from which the words come. I think they must be construed to refer to cases peculiar to India in which the particular castes, customs, and the life of the people often called on the local courts of law to decide large questions involving not merely rights of property, but of personal status and of caste, affecting as well Imperial interests and rules as the interpretation of many systems of laws. I have carefully examined the reports of all the cases dealt with by the Privy Council for the last 30 or 40 years, and I can find none in which an appeal has been taken by leave of the local Court on principles analogous to this case. The defendants have the right to go to the Privy Council for special leave to appeal, and, looking to the practice of the Council not to grant special leave in those cases in which the Court below have improperly granted leave which has been set aside, I feel it the safer course, and more in the interests of the defendants, to refuse a certificate, and so leave them free to go to the Privy Council for special leave, which will certainly be granted if we are wrong, without the prejudice against granting special leave, if without authority we grant leave improperly. I would add that my brother LAWRIE, whilst concurring in this judgment, has had some dfficalty in arriving at the conclusion that it is requisite that the judgment sought to be appealed from should, in the first instance, and before the certificate is granted, disclose the money value referred to in the order. His opinion was that it was only the judgment in review to which the money valu-

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ation applied, and in agreeing with this judgment he has done so more in deference to the strong opinion which, as head of the Court, I have expressed, and I may say here with regard to the Inventions Ordinance which contains a clause giving a right of appeal to the Privy Council, that clause requires that the appeal should be governed by the same rules as those laid down in the Charter. The Charter has since been repealed and the terms of it re-enacted in section 42 of the Courts Ordinance, so that our judgment applies as well as to the rights of appeal as given by the Inventions Ordinance.

BEFORE *Withers*. J.

October 20 and 27, 1892.

PIETERSZ *v.* WIGGIN.

[No. 12,946, P. C., GAMPOLA.]

Section 488 Penal Code—Public Place—Police Station—Misconduct.

A public place within the meaning of Sect 488 of the Penal Code is a place to which and from which the public have ingress and egress and regress as of right, and without reference to any particular purpose, and a police station is not such a public place.

This was an appeal from a conviction under Sect. 488 of the Penal Code.

Wendt, for the accused-appellant,

On October 27, the following judgment was delivered:—

WITHERS, J.—I cannot agree with the law laid down by the PoliceM agistrate, that the inside of a police station is a public place within the meaning of those words in section 488 of the Penal Code. I should have thought a police station was essentially a private place and none the less so because members of the public can enter it for a limited purpose. It might as well be argued that the office of the head of a public department was a public place.

In my opinion a public place in the said section is a place to which and from which the public have ingress and egress as of right and without reference to any particular purpose, as a public thoroughfare, square, &c.

The conviction must be set aside and the defendant acquitted and discharged.

BEFORE *Burnside*, C. J., *Lawrie* AND *Withers*, J. J.

November 25 and 29, 1892.

SILVA & Another *v.* GOONEWARDANA.

[No. 246, D. C., MATARA.]

Civil Procedure Code (Sects 244 to 247)—Slander of title—Execution debtor—Action to set aside claim—Common Law.

Per BURNSIDE, C. J.—The allowance by a Court of a claim to the property of one man by another gives no cause of action to the owner.

Per LAWRIE, J.—A party whose lands have been successfully claimed by another has an action at common law to have their respective rights determined. An execution-debtor is not "a party against whom an order, &c is, passed" within the meaning of Sect. 247 of the Civil Procedure Code.

Per WITHERS, J.—The only parties against whom an order under Sect. 244, 245 and 246 can be said to pass is the execution-creditor, the third party claiming or objecting, and a mortgage or lien holder. (Silva *v.* Silva, II. C. L. R. p. 51 considered.)

The plaintiffs' property having been seized in execution at the suit of a judgment-creditor, the defendant claimed it, and on a summary inquiry, the Court allowed the said claim. The plaintiffs alleging that a cause of action had thus arisen, prayed to have the claim set aside.

Dornhorst, for defendant-appellant.

Grenier, for plaintiffs-respondents.

On November 29 the following judgments were delivered:—

BURNSIDE, C. J.—The defendant should have judgment on his legal objection to the plaintiffs' plaint, that it discloses no cause of action. It is unnecessary to say that a mere claim by one person to the property of another does not give the latter a cause of action against the claimant, nor as a matter of law does the plaintiffs' libel rest on such a cause of action. The cause of action which the plaint alleges is that the plaintiff's property having been seized in execution at the suit of a judgment creditor, the defendant "claimed it" and that on a summary inquiry held by the Court, the Court allowed the said claim, whereby a cause of action had accrued to the plaintiff to have the claim set aside. The plaint does not allege that by virtue of any particular Ordinance the cause of action accrued, nor that the enquiry into the claim and the adjudication into it and allowance of it was done by virtue of any statutory provision. I do not, therefore, feel that in considering whether this libel is good on the face of it or not, I

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a n bound to regard it as a libel framed to meet the contingency provided for by Sect 247. If I did, I would feel bound to hold at once that the libel was bad, because it is only "the party against whom an order under Section 244, 245 or 246 is passed" who, under Section 247, has a right of action conferred on him with regard to that order, and the plaint does not allege that any order was passed against the plaintiffs, and so if the plaint be considered as one under that Section, it is undoubtedly bad for that reason. Then, does it disclose any common law right of action? I know of no law by which the allowance by a Court of a claim to property of one man by another gives a cause of action to the owner. If such allowance be *res judicata* of title, *cadit questio*; if it be not, it is *brutum fulmen* and cannot affect the owner's rights and certainly cannot give a right of action. I think the plaint in this case must be regarded as one of the latter character and it is bad. I express no opinion on the case decided by my brother Dias, and reported in II C. L. R., p. 51, because I do not think it necessary to do so. The plaintiff in this case does not claim to be a person against "whom an order is passed" under the provisions of the Code, and consequently it is unnecessary to decide what rights he would have, if he were.

The plaint is bad in law, and the defendant should have judgment.

LAWRIE, J.—I agree that the judgment be set aside and that the action be dismissed, but not on quite the same grounds as those given by my Lord the Chief Justice and my brother Withers.

Assuming that the plaintiffs are parties against whom the order on the claim was passed, and that the 247th section of the Procedure Code obliged them within 14 days to institute an action to establish the right which they claimed, this action is not of that description. The plaintiffs do not pray that they be declared entitled to any right, they merely pray that the defendant's claim be set aside.

The time for asking that had passed. Not only do the plaintiffs not pray for a declaration of a right, but their libel does not set forth what right they assert in the 1st and 2nd plantation. I do not find in the libel anything to show whether

the plaintiffs assert a right to an undivided 1/18 of the soil of the garden and to the whole of the trees of the 1st and 2nd plantation, or whether to only an undivided 1/18 of those plantations. The learned District Judge has given judgment declaring the plaintiffs entitled to 1/18 of the land and plantations, and that is not what the plaintiffs claimed, and an attentive perusal of the proof leads me to the conclusion that the plaintiffs have not proved their right to that in respect of which the District Judge has improperly given judgment.

On this simple ground I think the action must be dismissed.

I agree with the rest of the Court that the plaintiffs were not concluded by the order allowing the claim. They were not parties against whom that order was passed, but I do not agree with all that the Chief Justice and my brother Withers have said as to the inability of a man, whose lands have been successfully claimed by another, to institute an action at common law to have their respective rights determined. I am of opinion that an action is competent. But the present plaintiffs have not set forth a wrong. They seem rather to have gained an advantage than suffered a loss. Their creditor cannot again seize the plantations, because he is concluded by the order. The plaintiffs are still in possession. They do not say that their other property or that their persons have been put in jeopardy by the defendant's claim having been allowed. It is not even said whether the 1/18 of the soil has been sold. It may be that that may fetch enough to pay the writ, in which case the plaintiffs are gainers by the claim.

WITHERS, J.—This plaint may be freely but fairly paraphrased as follows:—

The 2nd plaintiff, wife of 1st plaintiff, was on the 14th August, 1891, seized and possessed of one-eighteenth share of a garden called Camaragawatte, under the will of her father being the special devisee thereof, one Don Daniel, *alias* T. Don Andiris, who at some date not mentioned, but prior to 18th August, 1891, died seized and possessed of the premises aforesaid.

The 1st and 2nd plantations of the premises were made by the said testator. The 2nd plaintiff and her predecessor in title acquired a prescriptive right to the said premises and planter's share thereof.

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The alleged cause of action is that on the aforesaid 14th day of August, 1891, the Court by an order of that date released from seizure the planter's share of the said two plantations at the instance of the present defendant, who claimed such planter's share and objected to the seizure thereof.

The said 1/18th share of the garden was at the date of the said order under seizure in execution of a mortgage decree recovered against the present plaintiffs by the administrator of their mortgagee, one A. E. G. Philippu de Silva.

The plaintiffs in this suit seek to set aside the claim made to the planter's share by the defendant, and join with that a prayer for general relief.

Now, I apprehend that at common law the plaint discloses no cause of action, it certainly does not amount to a slander of title. A claim to property not sounding in special damages is not an injury in common law sufficient to support a right of action.

The repealed Ordinance, 4 of 1867, Section 61, contemplated the right of a party to prevent a trespass to his property by applying to a Court for a writ of injunction to stop the seizure or sale thereof, or if the property had been sold, to bring his action to establish his right thereto, the sale notwithstanding.

The Ordinance, No. 5 of 1887, also repealed, contemplated, not only the rights just described, but that of a writ holder to institute an action against the claimant, who had preferred a claim to the Fiscal or his deputy against the seizure or sale of property sought to be levied by the writ holder, for the purpose of having that claim set aside, but these rights are not of the same kind as that which the plaintiffs attempt to enforce in this case.

The plaintiffs' counsel, however, contended that the right of an execution-debtor to have a claim by a stranger to his property, when seized in execution, set aside was given to him by the Civil Procedure Code under the provisions in Sections 241—247 both inclusive and he cited as authority for that proposition the case of Silva *v.* Silva, reported in II C. L. R. p. 51, and no doubt that authority is in his favour.

The present case was originally argued before my brother Lawrie and myself, but, as we thought the law laid down in the

case cited was open to question, we ordered the present case to be reargued before the full Court.

Mr. Dias considered the point as one of great importance, and in his opinion the question turned upon the words "party against whom an order, etc.," in Section 247 of the Civil Procedure Code, whether they take in the judgment-debtor as well as the judgment-creditor and the claimant, and he decided that those words embraced the execution-debtor as well as creditor and claimant. If he is right, the plaintiffs have established their cause of action, as they have brought it within 14 days of the order complained of.

For my part I confess that I cannot agree with that decision, Sections 241—247 relate (see their title) to claims to property seized, and, to begin with, it is difficult to understand in what sense an execution debtor can be said to claim his own property, which is seized in execution of a judgment against him, or how he can object to the seizure or sale of it under a writ which conforms to the decree against him, unless of course he has satisfied the judgment, but this is a matter otherwise provided for by Section 349 of the Civil Procedure Code.

From the object and language of those provisions it seems to me plain that the only parties against whom an order under sections 244, 245 & 246 can be said to pass is the execution-creditor, the 3rd party claiming or objecting, and a mortgagee or lien holder.

It is true that this Court has declared (See. II, C. L. R. p. 45,) that an inquiry into a claim to property seized under judgment should be made in the presence of all parties concerned, including execution-creditor and debtor, in order to give them an opportunity of attending the inquiry, if they so desire, but we have never laid it down that an execution debtor, whether present or absent with notice, is bound by the order made at the instance of a third party releasing the property from seizure. All that we have laid down is that an execution creditor and a third party claimant are mutually bound by an order made upon enquiry into a claim or objection, if no action is brought by one or the other within 14 days of the order, to have the question of the claim re-tried. In my opinion this

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plaint discloses no cause of action, and I think the judgment of the lower Court should be set aside and plaintiffs' claim dismissed with costs.

BEFORE *Burnside*, C. J., *Lawrie* AND *Withers*, J. J.
November 22 and 29, 1892.

LOKUHAMY *v.* SIRIMALA.

[No. 5,619 D. C., KANDY.]

Civil Procedure Code Sects. 79 and 813—Replication when necessary—Settlement of Issues.

Under the Civil Procedure Code when there is new matter pleaded in the answer by way of defence, and there is no replication, every material allegation shall be deemed to have been denied, and the burthen of proof of such new matter shall be on the party asserting it.

Per WITHERS, J.—There is no necessity for a replication to an ordinary answer containing a plea in bar by way of confession and avoidance.

This was an action in ejectment. The District Judge dismissed the plaintiff's action, and in his judgment expressed a desire for a direct and binding ruling on the effect of Sect. 79 of the Civil Procedure Code, where no replication has been filed.

Grenier, for plaintiff-appellant.

Wendt, for defendant-respondent.

On November 29, the following judgments were delivered :—

BURNSIDE, C. J.—The learned District Judge has gone wrong on the point of law that the deed in question had been denied by the defendant. The deed was not denied by the defendant, so as to put plaintiff to the proof of it. The defendant simply denied its validity setting forth nothing as constituting it invalid, and, if this denial raised any issue at all, the burthen of it whatever it may be, was on the defendant. In this view my inclination was to send the case back in order that the judgment of the District Judge might turn on whatever value the deed might possess, but when I come to examine the deed itself carefully it seems to me that it cannot possibly help the case for the plaintiff. She pleaded the original deed as conveying her title to the land giving certain abuttals which she says are from memory. The deed does not support such a description. The defendant specially denied that it did,

and the production of the deed would certainly entitle the defendant to the judgment of the Court on that issue. On the issue therefore that plaintiff derived no title by deed from Dingiria she must have been defeated. Then assuming that the plaintiff had properly pleaded a prescriptive title, has the evidence come up to the requirement of the 3rd section of the Ordinance? I think not. The occupation by Kankani, her Agent was at most of an exceedingly interrupted character, and it is by no means clear that even that possession had existed for ten years before he died. The judgment must be affirmed.

The learned District Judge has expressed a desire for some direct and binding ruling on the effect of section 79 of the Code where no replication has ben filed. As the point has arisen in the case, I think we may decide authoritatively, and for myself I adhere to my ruling in Weerawago *v.* Bank of Madras II C. L. R. p. 11 that where there is new matter pleaded in the answer by way of defence and there shall be no replication, every material allegation shall be deemed to have been denied and the burthen of proof of such new matter shall be on the party asserting it. This pratice will secure a joinder of issue, at least in every issue tendered in answer by way of defence, and besides, will secure uniformity of practice and procedure in District Courts and Courts of Requests (Sect. 813 of the Code.

LAWRIE, J.—I agree.

WITHERS, J.—I agree in affirming the judgment of the Court below. As to the important point of practice raised by the learned Judge, I think it well that it should be, once and for all authoritatively settled, in view particularly of the conflict of opinions of members of this Court on the question of the necessity of a replication to new matter pleaded by way of defence, nor is it too late in the day to alter a practice under the new Code, which to my knowledge has in the District Court of Colombo been recently shaped on *dicta* of former members of this Court. For my part I confess that it always seemed to me that the *dicta* as to the requirement of a replication to new matter pleaded by way of defence rendered nugatory the provisions of the 79th section of the Civil Procedure Code which to my mind aimed in this respect at the simplification of pleadings, so as to

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avoid delay as well as expense to suitors. Mark the imperative nature of the language of that section which says that no pleading after answer (not being a claim in reconvention) shall be filed except by order of Court on special motion after due notice to the other side, and no such order shall be made (except as aforesaid) unless the Court is satisfied on such motion that the real issues between the parties cannot be conveniently raised without such further pleading.

Remembering that one of the ordinary offices of a replication is either to demur to, or traverse new matter pleaded by way of avoidance, if this is insisted on as a matter of course in every case where new matter is so pleaded, the 79th section of the Civil Procedure Code is virtually blotted out o the statute.

I think it was the intention of this section, that new matter pleaded by way of avoidance in an answer should be taken as denied (unless of course admitted by a plaintiff) in the way more particularly provided for in the chapter relating to Courts of Requests, and that in consequence there is no necessity for a replication to an ordinary answer containing a plea in bar by way of confession and avoidance.

It will be undoubtedly open to a plaintiff, if so advised, to press the Court on the day fixed for trial to settle as one of the issues in the case that of a matter of law on the point whether the new matter pleaded by way of avoidance is, if true, an answer to the declaration or no. Cases are quite conceivable where a replication would be properly applied for and allowed, as for instance, where a plaintiff while confessing the new matter pleaded in bar, is able himself to plead new matter going to avoid the effect of what is pleaded in the answer, or in other words a replication by way of confession and avoidance on his part.

But how rarely does occasion for this further pleading arise when the material facts are well pleaded in the first instance by plaintiff and defendant? I am decidedly for ruling that a replication is not necessary in our Courts to an answer, which in common parlance would only require to be traversed or demurred to, if not admitted outright.

BEFORE *Burnside*, C. J. *Lawrie* AND *Withers*, J. J.

November 22 and 29, 1892.

PERERA *v.* FERNANDO and another,

[No. 261, D. C., CHILAW]

Ordinance No. 22 of 1871 Sect 4—Possessory action—Co-owner—Roman Dutch Law.—

The possession of a co-owner is not such an exclusive possession as entitles him to a possessory action in the event of his being dispossessed.

This was an action under Ordinance, No. 22 of 1871, for a decree against the defendants for the restoration of the plaintiff to the possession of a (1) parcel of a cocoanut garden, (2) of an undivided ½ of a paddy field. As to the latter cause of action the defendants contended that the remedy of a possessory action was not open to the plaintiff, he being the claimant of an undivided share.

Peiris, for defendants-appellants.

Ramanathan (*Wendt* with him,) for plaintiff-respondent.

On November 29, the following judgments were delivered:—

BURNSIDE, C. J.—I have always been of opinion that no possessory action could be brought by one co-owner against an intruder, who entered and dispossessed him, because the possession of a co-owner is not such an exclusive possession as entitles him to an action, the main features of which assume that the possession shall be exclusive, and the remedy in which is by being restored to exclusive possession. If possessory acts were permitted to joint owners separately, then clearly questions of title must be raised to decide the interest of the co-owner seeking the benefit of it, for he could not thereby show that he was in possession of an undefined interest, but it would be necessary for him to show the extent of such interest, and, in deciding this question, the possession of the other co-owner might be prejudiced without his being a party to the suit. It is not like the case of trespass by a co-owner, where it is especially permitted to contest and decide the plaintiff's title without in any way affecting the title or possession of a co-owner. I would, therefore, dismiss the plaintiff's action in respect of the field, and in respect of the garden, I see no reason why the judgment should not stand

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with regard to it, as from the evidence I gather that the plaintiff was in sole possession of that part which defendant took possession of, and that is all that is necessary to maintain such an action. Both parties having succeeded, no costs will be given on either side in either Court.

LAWRIE, J.—On reading the evidence in the case I hold it proved that the plaintiff was in exclusive possession of the garden for a year and a day prior to and including the 29th June, 1891, that on the 30th of June, the defendant illegally took forcible possession of the garden and ousted the plaintiff. The plaintiff's right to be restored to the possession of the garden seems to me to be well established.

The decree, however, goes too far. It declares that the plaintiff is the lawful owner and proprietor. That must be corrected. This is a possessory suit and as no question of title was involved, of course no declaration of title can be given.

With regard to the field it is alleged and proved that the plaintiff has for many years been in possession of one-third. The mode of possession was peculiar. The whole field is divided into three lots, probably of different sizes and fertility; each of the three co-owners possessed and cultivated each of these lots in turn, each a different lot each year, so that in the course of three years each had cultivated all the three lots.

It is proved that the defendant in 1891 prevented the plaintiff from cultivating the lot which fell to his turn, but of that lot the plaintiff had not been in possession for a year and a day previous. On the contrary it had been possessed by one of the other shareholders. Thus whatever be the title of the plaintiff, he has not proved the possession of a year and a day prior to ouster which is essential in a possessory suit. I would, therefore, dismiss the plaintiff's prayer for a possessory decree regarding the field.

I would give no costs to either party.

WITHERS, J.—This is an action under the Ordinance, No. 22 of 1871, for a decree against the defendants for the restoration of plaintiff to the possession of a (1) parcel of a cocoanut garden called Paragahawatte alias Godaporagahawatte, (2) of

an undivided ½ of a paddy field called Purana Kumbura. As to the latter cause of action, a point was taken both in the Court below and before us in appeal, that the remedy of a possessory action is not open to the claimant of an undivided share of immovable property. On this point the defendants are entitled to succeed in my opinion.

The 4th section of Ordinance 22 of 1871 expressly provided that nothing therein contained shall be held to affect the other requirements of the law as respects possessory cases.

The law referred to is the Roman Dutch Law. What does that law require? Quiet and undisturbed possession for more than a year and a day (Vander-Linden, p. 185.) What are the requisites of possession (1) Physical power to dispose of the *corpus* just as a man pleases, to the exclusion of any other person whomsoever, (2) the intention of keeping the thing over which a man has such physical control as his own, *animus rem sibi habendi*, or, as it is sometimes called, *animus domini*.

Possession then according to law must be exclusive, for it is possession *corpore et animo*.

According to the Roman Law two or more people cannot possess one and the same thing each as a whole. "*Plures eandem rem in solidum possidere non possunt*" and this self-evident possession founded on the date of physical occupation with intent to keep to oneself is naturally accepted by the Roman-Dutch Law authorities, (See Voet 41, title 11 p. 5.) It is only a possessor *corpore et animo* who was entitled to the interdict *recuperandæ possessionis* from which he was put out otherwise than by process of law.

The proposition referred to does not in the least conflict with the law of joint tenancy where several hold "*per mie et per tout*" constituting but one owner in the exclusive rights, each owner of his own share.

That is a question of title which is quite foreign to a possessory action. The case cited to us by respondent's counsel in support of the judgment overruling the point of law taken to the claim to an undivided 1/3rd of the field was not a strict

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possessory action. The head note to the case is incorrect, at least it is not supported by the report of the case itself.

There are numerous cases where it has been laid down that a joint or co-tenant can sue for trespass to his share by a stranger without making the other joint or co-tenants parties to the action, while a majority of this Court appears to have laid it down as law that a co-owner cannot sue a stranger in ejectment, where he has to recover on the strength of his title without joining the other co-owners; but I am not aware of any case where one of two or more tenants in common has been allowed to bring a possessory action for his undivided share, nor do I see how he could possibly do so. As to the first cause of action I think the plaintiff has proved his claim to be restored to the possession of the parcel of the garden Paragahawatte, referred to in the second paragraph of his plaint, from which the defendants have dispossessed him; for though there are no cross conveyances between him and the alleged owners of the two other parcels of the garden, yet the evidence shows that he has exclusively occupied his share with intent to keep and enjoy it for himself for several years past, and as the defendants have expelled him therefrom, and he has brought this action within one year of dispossession, he is entitled to be put back again into the premises. That part and that only of the judgment would I affirm, and I would give the plaintiff no costs in either Court as he has only partially succeeded.

BEFORE *Laurie* AND *Withers*, J. J.

December 2 and 6, 1892.

MENIK and others, *v.* HAMY and others.

[No. 4,084 D. C., KANDY.]

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Civil Procedure Code Sects. 325 and 326—Hindering judgment-creditor from taking possession.

More than three months after an execution-creditor was put in possession of land under a writ in execution of the decree, the judgment debtor and others at his instance hindered the execution-creditor in the exercise of his right over the land.

Held, that the procedure by petition prescribed by Sect. 326 of the Civil Procedure Code did not apply.

Per WITHERS, J.—Because the hindrance contemplated by this Sect. must occur at the time of the delivery of possession to the judgment-creditor, and not at any time after the delivery.

Per LAWRIE, J.—Because the penal Provision of Sect. 326 only applies to resisting or obstructing the officer charged with a writ of possession, and not to that of hindering a judgment-creditor from taking complete and effectual possession after the officer has delivered possession (See 1, Supreme Court Reports p. 257.)

The facts sufficiently appear in the judgment of WITHERS, J.

Dornhorst, for petitioners-appellants.

On December 6, the following judgments were delivered:—

WITHERS, J.—I do not think the 325th and 326th Sections of the C. P. C. apply to a case like the present, where 3 months and 3 weeks after an execution-creditor has had a decree for the possession of land duly executed by being put into possession of it under a writ in execution of the decree the judgment-debtor and others at his instigation hinder the judgment-creditor in the exercise of his rights over the land.

What is meant by "taking" possession of a thing after it has been "delivered" is not quite apparent, but anyhow I think the attempt to take complete and effectual posssession of that which has been but imperfectly delivered to the execution-creditor (a state of things I repeat not very intelligible) should follow as instantly upon the so-called delivery as the circumstances of the case will permit, and that the hindrance is contemplated as occurring at that time and not at any time after the delivery of possession. Taking cannot mean keeping possession. In this case I should say the execution-creditor had had complete possession given to him, but he was interrupted in the exercise of his proprietory rights.

LAWRIE, J.—I agree—I understand from my brother Withers that he prefers to rest his judgment on the grounds given by him, rather than on those which I gave in deciding the case reported 1 Supreme Court Reports, p. 257. For myself I adhere to that decision, and in agreeing with my brother Withers in this case, I do not find anything in this judgment which conflicts with my former one.

With regard to the refusal of the learned District Judge to issue the writ of possession, I am not prepared to disturb

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his order. At the same time I feel that it is a question of some difficulty and importance whether a Court is *functus officii* on receiving from a fiscal a return to a writ of possession that he has put the party in possession.

My inclination is to extend the powers of our Courts to enforce their decrees and when the obedience shown to the order of a Court is proved by the subsequent conduct of the party, to have been a pretended and not a real obedience, I would reissue the writ. When, for instance, a man against whom a decree in ejectment was given, makes no appearance on the day when the Fiscal Officer goes to put the successful man in possession, but afterwards resumes the possession in defiance of the decree, I am much inclined to the opinion that a Court ought to have power to compel complete obedience to its decree, and on due proof of dispossession that a fresh writ of possession ought to issue. I am aware that that is opposed to the practice in England where it has been held in Pate *v.* Roe, 1 Taunt, p. 55, that if the possession is once given under a writ the plaintiff cannot sue out another writ of possession even if he be disturbed by the same defendant. The only decision in our own Ceylon Law Reports which I have found is one of this Court, delivered by CARR, C. J., on 20th Oct. 1846, where he said that the general practice in Colombo where a party has once been put into quiet possession by the Fiscal under a decree, and a subsequent tresspass occurs, is to seek redress by instituting a new action in which the plaintiff has only to plead his having been put into possession under the former decree, and the defendant's subsequent disturbance, and the defendant must join issue on these points and could not be allowed to enter into further proof of his claim set up in the former suit.

In cases where the decree holder is ejected soon after the Fiscal has put him in possession he might, I think, complain to the Fiscal in order that his complaint might be reported to the Court in the return, but when, as in the present case, the disturbance or ejectment complained of occurred several weeks after the plaintiff was put in possession, the only remedy may be the very insufficient one of a new action. I am inclined

to treat with disfavour any rule of practice which renders judgments of Courts ineffectual.

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BEFORE *Withers*, J.

October 27 and November 4, 1892.

THE QUEEN *v.* SAMARANAYAKA and others.

[No. 11,959 D. C. CRIMINAL, GALLE.]

Criminal Procedure Code, Sects. 207 209 210 113—Joinder of charges—Indictment—General verdict and sentence.

In the case of distinct offences being properly joined in one charge or indictment, an accused should be separately sentenced for each separate offence that he is found guilty of.

When there are several counts in a charge or indictment framed to meet a doubtful case (*e. g.* illustration to Sect. 210 Criminal Procedure Code) a general verdict and sentence would not be inappropriate.

The facts sufficiently appear in the judgment.

Dornhorst, (*Seneviratne* with him) for 1st accused-appellant.

Wendt, for 3rd and 5th accused-appellants.

Dumbleton, C. C., for the Crown.

On November 4 the following judgment was delivered:—

WITHERS, J.—This case has been given me the most anxious consideration. I order all the proceedings herein to be quashed from the indictment to the convictions and sentences, all included.

Five distinct charges are joined in this indictment.

The charges briefly are.

(1) Criminal trespass on property in the possession of one Enderissa.

(2) Voluntarily causing hurt to the said Enderissa.

(3) Voluntarily causing hurt to one Adonissa.

(4) Falsely charging the said Enderissa and Adonissa with the commission of an offence, knowing that there is no just or lawful ground for such charge, and with intent to cause him injury.

(5) Causing criminal proceedings against those two persons, knowing that there is no just or lawful ground for such proceedings and with intent to cause injury to those persons.

Five persons are indicted. All five on the first four charges

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and two of the five on the 5th charge.

It is because this is illegal I order all the proceedings to be quashed. All these charges should not have been joined in one indictment. The learned Judge should not have tried all these charges together.

It is true that all the accused were represented by Proctors in the Court below and that their advisers did not protest against this procedure. But I do not see how illegality can be waived. I call the procedure illegal because our law lays it down that for every distinct offence of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately (see section 207 Criminal Procedure Code.)

The exceptions to that rule of law to be found in sections 208, 209, and 213 of the same Code do not apply to this case.

The first three offences, though distinct, could be joined, and the 5th accused could be charged together with committing them, for those offences may be said to come under the exceptions of Sections. 209 and 213 of the Criminal Procedure Code. But the 4th and 5th offences are absolutely disconnected from the others and are absolutely distinct offences, and could not possibly be joined together in one indictment.

Nor do I see my way to disassociate the good parts from the bad parts of this indictment. I must quash it in whole, I cannot quash it in part and this, too, for an additional reason, viz, that while the learned Judge has found all the accused guilty of the first three charges and the 1st 2nd and 4th accused guilty of the fourth charge, and the 1st and 4th accused guilty of the fifth charge, he has imposed but one sentence on each of those accused.

If I quash the indictment in part, that is, as to the 4th and 5th charges, what sentence am I to impose on the accused for the first three charges?

In the case of distinct offences being properly joined in one charge or indictment, an accused should be separately sentenced for each separate offence that he is found guilty of.

Otherwise, if in appeal a conviction for one out of several distinct offences is reversed, it is impossible for this Court to

determine to what portion of the aggregate imprisonment the accused remains liable.

Where there are several counts in a charge or indictment framed to meet a doubtful case, to take, for instance, the exception aimed at in Section 210 of the Criminal Procedure Code, a general verdict and sentence would not be inappropriate, for it would be attributed to that offence which the circumstances show it to be.

BEFORE *Burnside*, C. J. AND *Lawrie* AND *Withers*, J. J.

November 25 and 29, 1892.

SILVA and another *v.* WIJAYESINHE.

[No. 1,172, D. C., GALLE.]

Practice—Right of claimant in execution, whose claim is disallowed by reason of his having called no evidence in support of it, to institute action under Sect. 247 of the Civil Procedure Code—Costs.

A claimant of property seized in execution who abandons his claim, and leaves the Court without any evidence in support of it may still, if the Court make order disallowing his claim, institute an action under Section 247 of the Civil Procedure Code to have such order set aside. But in such case, the plaintiff, even if successful, should be condemned to pay the defendant's costs.

The plaintiffs, who claimed certain property seized in execution at the instance of the defendant, took no steps to support their claim in court, and the claim was accordingly disallowed. They thereupon instituted the present action, under Section 247 of the Code, to establish their right to the property seized, and obtained judgment with costs. The defendant appealed.

There was no appearance of counsel in appeal.

Cur. adv. vult.

On November 29, the following judgment, agreed to by LAWRIE and WITHERS, J. J., was delivered by

BURNSIDE, C. J.—A point of much importance arises out of these proceedings, and that is, can a claimant abandon his claim, and leave the Court without any evidence in support of it, upon which, if the Court proceeds to adjudicate against him, then may he bring an action under Section 347 to set aside such order? This court has already held that the mere

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fact that a claimant abandons his claim does not prevent the Court from dealing with it, and making an order; but it seems to me that it is contrary to principle, and it is most inconvenient and oppressive to permit the claimant, after such an order against him to seek to set it aside by an order under Section 247. Yet it does not seem that the Code has provided against it. In this case, it appears that the plaintiffs as claimants offered no evidence on their claim, and an order having passed against them, brought this action, and have obtained judgment in their favour with costs. I think we should speak authoritatively on the point; and, if necessary, lay down a rule that in every like case the plaintiffs should pay the defendant's costs. This judgment seems right on merits, and should be affirmed; but the plaintiffs should pay defendant's costs at least in the court below. Plaintiffs will have costs of appeal. Defendants should not have appealed.

BEFORE *Withers*, J.

December 8 and 13, 1892.

BUCHANAN *v.* CONRAD.

[No. 22,645, P. C., COLOMBO.]

Criminal Breach of Trust—General deficiency in accounts kept by a clerk.

On a charge against a clerk by his employer for Criminal Breach of Trust under Section 389 of the Ceylon Penal Code, it is not sufficient at the trial to prove a general deficiency in account. Some specific sum must be proved to have been embezzled by the accused or dishonestly converted by him to his own use.

The facts of the case sufficiently appear in the judgment,

Dornhorst, for accused-appellant.

There was no appearance for complainant-respondent.

Cur. adv. vult.

On December 13, the following judgment was delivered:—

WITHERS, J.—On the point of jurisdiction the Magistrate is right. I think, however., that it would be discreet in all Magistrates, where the value of property in cases of criminal breach of trust exceeds Rs. 50 or at the most, Rs. 100 to refer for instructions to the Attorney-General's department before committing for trial or undertaking a trial.

The offence is a particularly serious one, while the class of case often presents features of great difficulty which require the most careful management, whether regard be had to the protection of the innocent or the interest of the public in having the guilty exposed and punished.

The charge against the accused is in brief that, in his capacity of clerk to the Firm of Buchanan Frazer & Co., he was entrusted with that firm's petty cash, and, on or about the 1st day of November, 1892, at Colombo, committed criminal breach of trust in respect of a sum of the petty cash so entrusted to him amounting to Rs. 180·30.

This is not a simple case of a particular sum of money being entrusted to a clerk, which he dishonestly converts to his own use, or dishonestly uses for some other purpose than that for which he received it, and for which he was in duty bound to apply it.

It is a case in which a clerk, on the last day of his term of employment, when called upon to give up his books, render his accounts, and pay over any money in his hands, fails to account to his employer for a sum of money which his own books show to be standing to his debit. Mr. Buchanan and his head clerk differ as to the time at which the accused was employed as the former's petty cash keeper. The latter says that accused's duties as petty cash keeper commenced on the 2nd of July, 1892, while Mr. Buchanan says that he was petty cash keeper from the 23rd of September, succeeding his head clerk, first witness, in that capacity, and this of course must be taken to be the true state of the case.

The two books of account kept by accused from that date were one styled "Petty Cash Book," the other, "Cash account D. R. B. & G. F."

This particular petty cash book was opened on the 9th of April, 1892, with credit and debit balances, carried forward in pencil, of Rs. 335·25 credit, Rs. 675·93 debit, and it contains entries on one side of a page of cheques of varying amounts—the debit side; on the other, payments to various people and for a great variety of accounts—the credit side.

The entries all through the book are in ink. The credit sides are totalled, during each month, at unfrequent intervals, excepting the last month, October, when, with few exceptions,

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the items on the credit side are totalled daily, and from the 20th October, the "Petty Cash Book" shows the initials of Mr. Buchanan put there day by day.

The former book again is balanced in pencil, except the final monthly totals which are written in ink.

The monthly credit balances are carried forward in pencil, and, on the first October, this petty cash book shows a debit balance carried forward of Rs. 101·25.

The "Cash Account G. D. B. & G. F." contains entries of payments to both Mr. Buchanan and Mr. Frazer, each of which entries is initialled by those gentlemen respectively.

This book was opened as regards Mr. Buchanan in July 1891, and as regards Mr. Frazer, in August 1891, but the entries in it in accused's handwriting are from the 23rd of September last only.

The prosecution led evidence of the accused's capacity as a clerk in the aforementioned firm, produced these two books, proved the entries in them to be in accused's handwriting from the 23rd September last, and proved that on the 1st November the head clerk was ordered to take over accused's books and balance.

The books were handed over by the accused to the head clerk with a balance of Rs. 160·25 cts. This cash was counted over in accused's presence. On the same day, Mr. Buchanan had both the accused and his chief clerk before him, and asked them both if "the cash was all right," and both replied in the affirmative, and the accused went away.

On the following day, the 2nd of November, the chief clerk says that he made the discovery of an incorrect computation on the last page of the book, Rs. 2,071, 25 having been brought forward instead of the correct amonnt Rs. 2,251. 31 on the debit side, so that a further sum of Rs. 180 odd had to be accounted for.

Mr. Buchanan then balanced the October account himself, and verified the incorrectness. Mr. Buchanan says he thereupon wrote to the accused informing him that his balance was wrong and asking for an explanation, but the accused did not come. (How the letter was sent, or whether it reached the accused does not appear.)

After the case was instituted, the accused went to Mr. Buchanan who asked him to explain the deficiency, but he offered no explanation. His answer was he had taken no money—a statement he repeated when Mr. Buchanan observed to him that he had handed the chief clerk Rs. 160-30 instead of Rs. 340 which his books shewed to be due. The sum of Rs. 340 being the difference of the October debit sums as entered in the petty cash book and the entries of that month on the disbursements side and of payments to Messrs. Buchanan and Frazer in the other book.

The statement of the accused is as follows:—"The additions in both books are not in my handwriting, and when I left the firm, I handed over everything correctly. Mr. Buchanan asked the head clerk if everything was correct, and he said, yes, and I left."

Cross-Examined.—"The head clerk told me there were 340 odd Rupees."

Unfortunately, the question in cross-examination, to which this answer is given, was not recorded as it should have been, and, without it, the answer has no significance. It might have thrown light on what is a significant statement of the accused who says, "when I left the firm, I handed over everything correctly;" but I cannot charge myself as jury that that, as it stands, is equivalent to saying, "I admit I had Rs. 340 in hand of my employer's money on the 31st of October, but I delivered the full sum to the head clerk." Had he said so in so many words, and had I disbelieved his statement, I should have had no hesitation in convicting him.

There is no evidence as to whose handwriting the balances totalled from time to time in pencil are.

The head clerk, however, swears that the total, *i. e.*, final total, on page 50 of Rs. 1,370.15 (credits) in ink (apparently over pencil) is in accused's handwriting, and the final Rs. 2,271.31 in ink (also apparently over pencil) is in his handwriting also. If the pencilled balance on page 49 on the credit side of Rs. 2,051.31 cts. is in accused's handwriting, it is so placed over the receipt of Rs. 200 cheque entered just underneath it thus, $\frac{2051\ 31}{200}$, that, through carelessness,

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it might naturally be carried forward Rs. 2,071 instead of Rs. 2,251; but again there is a pencilled balance carried forward on page 50 of the correct amount Rs. 2,251 which stands just over the incorrect balance and remains untouched thus, $\frac{2251}{2071}$ 31, but there stand the erroneous computations.

As to the evidence of the books against the accused, I think the pencil balances in his handwriting on the 1st October of a debit of Rs. 101. 25 in view of entries on that very day on the credit side nearly exhausting it is proof that he had that sum in his hand that day as a clerk and as to the debit entries they are evidence that he received the cheques—all receipts were by cheque—but no more.

It is to be noted that the receipts are all duly entered: it is only the calculation that is wrong on the 50th page. A child could add up the receipts and expose the error. It is upon this evidence that the accused has been convicted of dishonestly converting to his own use petty cash to the amount of Rs. 180.30—the deficiency that is shown by his books. I think the evidence is insufficient to bring the charge home to him.

To begin with, there is no evidence what the duties of the petty cash keeper in general were and of this accused as petty cash keeper in particular. There is nothing to show when the firm's petty cash keeper or the accused had to settle accounts and pay up balances in hand. On the 1st of November last it would appear indeed that this was the first time, according to the book which begins in April 1892, that the petty cash keeper had been required to account to his employer in the strict sense of the term for his receipts.

It is not proved that the cheques admittedly received by the accused were cashed and the proceeds received by him, and at least as regards the last cheque entered by him on the debit side of his account, evidence on this point was of consequence.

I do not see how the Code as to breach of criminal trust varies from the law as to embezzlement in England in certain of its aspects. It may be said, I think, here as there that the mere failure to pay over sums admittedly received by a servant from his master or a clerk from his employer is not in itself embezzlement or breach of trust; that alone argues no more than

a civil liability—See R. v. Hodgson, III, C. & P. 442—and that it is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled as in R. *v.* Lloyd Jones, VIII, C & P., 288, or dishonestly converted to the clerk's use.

Further, the fact, if it be one, that the wrong computation was designedly entered to cover a deficit for which the accused could not account, carries the case no further as a dishonest conversion of the deficiency.

It may be or not a criminal offence in itself, but it is not this offence and not necessarily proof of it. If done, it was a very stupid, a very wrong and, perhaps, even a criminal—though I do not impute the latter—attempt to conceal a deficiency for which the accused could not account. He simply says I did not take the money. He may not have entered certain payments—there is slight evidence in his October book of his having omitted to put any sum opposite a credit item—but to return to what I observed at first, there is no proof that he received the money which he is convicted of having converted to his own use dishonestly.

Conviction set aside and accused acquitted and discharged.

BEFORE *Burnside*, C. J. AND *Withers*, J.

October 18 and 21, 1892.

PATUMA *v.* MOHAMADO.

[No. 31,135, D. C., KANDY.]

Practice—Right of successful party in appeal to be placed in possession of property of which he had been deprived by process of Court pending appeal.

Plaintiff recovered judgment for a house alleged to be in defendant's possession and for certain movables alleged to be detained by defendant. In appeal by defendant this judgment was set aside, and plaintiff's claim dismissed. Pending appeal Plaintiff had been placed in possession of the house and movables. On application by defendant, the District Judge made order (conditional on defendant's filing a list of the movables) that he be placed in possession of the house and movables. *Held*, that defendant was entitled to such order.

The facts of the case sufficiently appear in the judgment.

Grenier, (Morgan with him) for plaintiff, appellant.—The

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order appealed from is *ultra vires* of the District Court. The defendant not having given security in appeal to satisfy the judgment pronounced against him in the District Court, the plaintiff was justified in issuing writ, and enforcing the decree of ejectment which he had obtained. There is no provision in the Code authorising the practice adopted by the District Court. The Supreme Court in appeal simply dismissed the plaintiff's action, but made no such order as is contemplated by Section 777 of the Civil Procedure Code. Therefore, the defendant's remedy, if any, is by action against the plaintiff to be restored to the possession of the premises in question.

Dornhorst for defendant-respondent—The District Court had the power to make the order in question restoring the defendant to the possession of the premises in dispute. The Supreme Court having set aside the judgment of the Court below, the parties reverted to their original position, and the District Court had the inherent right to restore the defendant to the possession of the premises from which he had been ejected.

On October 21, the following judgment, agreed to by BURNSIDE C, J., was delivered by

WITHERS, J.—In this action plaintiff sought to recover a house alleged to be in the defendant's unlawful possession and to have certain movables alleged to be detained by the defendant restored to her. She recovered judgment as prayed for in the Court below. An appeal was taken against this judgment, and the was judgment set aside, and plaintiff's action dismissed with costs.

Pending appeal, the plaintiff was placed in possession of the boutique and the movables inside it.

On the 21st of July, the successful appellant applied by petition to the District Court for an order giving him possession of the house and movables in it.

On the 1st of August the District Judge, after hearing the petition and the plaintiff-respondent, made an order as applied for, conditional on the defendant's filing a list of the movables he had in the boutique at the time that plaintiff was put into possession of the boutique pending appeal. On the 3rd of August the defendant's proctor filed the list required of his client, and moved for and obtained a writ to replace him in possession of the boutique and the goods in it.

The word "month" meant a lunar month, and not a calendar month—Rogers *v.* Kingston-upon-Hull Dock Co., XXXIV, L. J., Ch., 165. The order awarding costs to the defendant was clearly wrong.

Sampayo for the defendant, respondent. The letter of the 29th July was in good time, but did not contain a notice to quit. The letter of the 1st August was a sufficient notice, but it was sent too late. As laid down in the case reported in II, *Grenier*, (1873) p. 23, the notice must be "one commensurate with the term for which the letting was." The word month meant a calendar month, and not a lunar month. The order awarding the defendant costs was right, because it was the plaintiff who was responsible for this action.

Cur. adv. vult.

On December 15, the following judgment was delivered by

WITHERS, J.—I think the judgment is right, and should be affirmed. As the learned Commissioner says, the first letter was in good time, but was a bad notice, while the second letter was a good notice, but given too late. A notice to quit cannot be too clear and distinct in its terms, but the first letter was ambiguous and optional. The law laid down by the late Sir Edward Creasy in the case cited to me, II, *Grenier* (1873) p. 2, I understand to be as follows, and, as so understood, I adopt it—In the case of monthly tenancies, either party must have a complete calendar month to find a new house or engage a new tenant. To ensure this, a notice to quit must be given before the commencement of the month at the expiry of which the tenancy is to determine, so that the party noticed shall have from midnight of the last day of the month immediately preceding the month, at the end of which the tenancy is determined by the notice, to midnight of the last day of the expiring month of the tenancy, as thus determined, for the purpose of making fresh arrangements. If I am not mistaken, this law expresses the prevailing custom of the country.

BEFORE *Lawrie*, AND *Withers*, J. J.

December 16 and 22, 1892.

KURUKEL *v.* KURUKEL.

[No. 154, D. C., TRINCOMALIE.]

Hindoo Temple—Officiating Priest—Prescription—Jurisdiction of District Courts over Ecclesiastical matters.

Plaintiff alleged that he was a Brahmin and a Priest of *Iswera* gods; that for upwards of thirty years he officiated as priest of a certain Temple, the officiating priests of which were the heirs of its donors; that during that time, as such officiating priest, he had enjoyment, use, and possession of the offerings and income of the Temple; and that defendant invaded his right, and deprived him of his share of the revenue. He prayed for a declaration that he was priest of the Temple, and as such entitled to the receipt and appropriation of one half of its revenue, and that he be quieted in the exercise of his right, as priest, to have and receive such share of the revenue.

Held, that the above allegations did not entitle plaintiff to the relief sought.

Semble, *per* WITHERS, J.—A District Court has no jurisdiction over purely ecclesiastical matters, and cannot interfere in the concerns of a religious community, unless in the rules which it has made for its members in relation to the religious object which it has combined to maintain and support, a civil element enters, which brings it within the sphere of the Court's civil jurisdiction.

The facts of the case sufficiently appear in the judgments.

Dornhorst, (*Sampayo*, with him) for defendant, appellant.

Dharmaratne, (*Canekeratne*, with him) for plaintiff, respondent.

Cur. Adv. Vult.

On December 22, the following judgments were delivered:—

LAWRIE, J.—The plaintiff alleges that he is a Brahmin and a priest of *Iswera* gods, and that for upwards of thirty years he officiated as priest of the temple, Kandasamy Kovil, at Trincomalie.

I understand him to say that the managers have right as trustees to the contents of the temple and to all the offerings and income, bnt that for many years the managers have not taken any share of the income, and that the officiating priests thereof alone had the enjoyment, use, and possession of all the offerings and income of the temple, and that these officiating priests have been and are heirs of the donors. The plaintiff asserting that he officiated as priest for 30 years, claims to have acquired a prescriptive right to the office, and pleads the Ordinance No. 8 of 1834 and 22 of 1871. I do not find in the plaint any assertion of a title by a grant, by inheritance, or by election, or by personal initiation or consecration,

which gives the plaintiff a right to the office or to property attached to it. He does not sue as a trustee. His only claim is to be declared an officiating priest, to receive offerings. The title which he asserts is that founded on long possession. He has not acquired prescriptive right under the ordinance, because the third section of the prescriptive ordinance applies only to claims to land or immovable property. A man who seeks to have a declaration of status must prove his right, not mere possession.

Proof that a man has been held reputed to possess a status for many years, throws on the person denying it the burden of proof that the repute was erroneous. But here the burden is on the plaintiff. He seeks to recover a status, which he has lost, and it lay on him to allege facts, which, if admitted or proved, would warrant the declaration in his favour. If everything alleged by the plaintiff were admitted, he would not be entitled to the judgment he prays for.

Take it to be true, that he is a Brahmin and a priest of *Iswera* gods, that he is an heir of the donors of the temple, "Kandasami," that he for thirty years officiated, I think this Court could not declare that he himself was entitled to regain, and to possess in future, the position which he formerly enjoyed, but which he has lost. In short, he has not averred title, but only possession, and possession is unavailing. If he had besought the assistance of the Court immediately on being dispossessed, he might have been found entitled to a possessory judgment; but then he alleges that he was ousted from the temple three years before he instituted his action. The remedy of a possessory suit is lost, the action not having been instituted within a year of ouster. His claim for damages is also prescribed.

I would set aside the judgment, and would dismiss the case with costs.

WITHERS, J.—Respondent's counsel may rest assured that this Court knows no distinction of persons who seek redress before it, but he must not forget—what I doubt not he well knows—that not every wrong can be redressed by a court of justice, but only such wrongs as the law itself recognises. Now, the

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question of law which we have to consider, and which was put rather than tried before the court below is, has the plaintiff made out a case in his pleadings which can effectually be tried and determined. Respondent's counsel having won considerable ground in the lower court, naturally tried hard to push his victory a little further, as he considered the justice of his claim required, but he did not address himself wholly and exclusively to the contention of the appellant's counsel, that on the face of his plaint he had made out no claim at all for the relief he sought.

The relief sought is a declaration that he is a priest of the Kandesami temple in Vellundi in No. 2 Division, Trincomalie, and as such priest, entitled to the receipt and appropriation of half of the revenue, elsewhere called income, of that temple, and a decree that he be restored to, and quieted in the exercise of the right as such priest to have and receive half the revenue as aforesaid.

There is a further claim against the defendant for damages, in that the defendant has invaded his right, as aforesaid, and deprived him of his share of the revenue. Now, it must be borne in mind, at the outset, that a District Court has no jurisdiction over purely ecclesiastical matters, as on reference to chapter VI, of the Courts Ordinance, 1889, will be plainly seen. I take it that a District Court has no jurisdiction to interfere in the concerns of religious communities, unless in the rules which any religious community has made for its members in relation to the religious object which it has combined to maintain and support, a civil element enters, which brings it within the sphere of the Court's civil jurisdiction.

This element, if I mistake not, in every case of the kind which has come before our Courts, is one involving some rights of property, such as an estate in the land on which a temple stands, or in the fabric of the temple or a tenure of one or the other amounting to a beneficial user of the land and the buildings erected on it for religious purposes. The holder of an office who has been duly appointed thereto by the religious community to which he belongs, or who succeeds in due course to such office according to rules

binding on the members of that community, has been and will always be supported in the exercise of that office, if there is attached to it, as an incident, some estate in tenure of, or right to the possession and enjoyment of, real or movable property. Now, there is no complaint by the respondent that he has been debarred from using the temple for performing his functions as a priest, in all that concerns the observance of his religion. His complaint is that the defendant has violated his right of taking—I think he means appropriating—half of the income of the temple, to which he says he has gained a prescriptive title. What the "income" or "revenue" of the temple is the plaintiff does not condescend to particularise. He hints at its nature in the words "offering of jewels," &c., though in another part of his libel he speaks "of all the offerings and income" of the temple, as if there was a source of income other than offerings. It is needless to observe that our statutes of prescription cannot possibly apply to the so-called right of appropriating gratuitous offerings to a temple by its devotees. It cannot relate to some easement in land or interest, or estate in land and the fruits or produce thereof. There is not a suggestion in the plaint that the income of the temple is of that character. Then, what rule or law of this particular community is indicated in the plaint which binds the parties to this case, so as to impose on them either a mutual contract or mutual obligation by which one is bound to permit the other to appropriate half of the revenue of the temple? I can find none. The deed of dedication of the land to this particular community reserves no such rights in the donors, which would bind them and their successors under the deed. What is said in this plaint is, that the management and direction of the income of the temple, once admittedly in other hands, having fallen into abeyance, the disposal of the income was left to the discretion of the officiating priests, for the time being. How can what is left to the discretion of two people bind them one to the other with a legal sanction? The pleader had probably no material for framing a good case, and even with good material there is no class of case so

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difficult to work up into a form which will stand the test applied to, in the question before us here—"Does the plaint disclose any, that is, any good cause of action"? I see no answer but one to this question here, and I agree with my brother LAWRIE that the action must be dismissed with costs.

BEFORE *Lawrie*, AND *Withers*, J. J.

December 16 and 20, 1892.

SYADORIS *v.* HENDRICK.

[No. 1,020, D. C., GALLE.]

Receiver—Co-owners—Civil Procedure Code, Section 671.

Per LAWRIE, J.—In an application under Section 671 of the Civil Procedure Code for the appointment of a receiver in respect of any property, the Court is not authorized to appoint one to protect the pecuniary interests of one of two joint owners, but only to protect the property itself. And when there is no reason to think that the property is in danger, or that the receiver could deal with it otherwise or better than the co-owner in possession, then the Court ought to refuse to interfere.

Per WITHERS, J.—At the time when an order for a receiver is asked for under Sect. 671 of the Civil Procedure Code, the applicant must have a right to the immediate possession of the particular property in respect of which the application is made, or a vested interest in it sufficient to entitle him to have it protected in circumstances which appear to the Court to necessitate its protection by an independent and competent person.

The facts of the case appear in the judgment of WITHERS, J.

Rama Nathan, S.-G. (*Dornhorst*, with him) for defendant, appellant.

Wendt, for plaintiff, respondent.

Cur. adv. vult.

On December 20, the following judgments were delivered:—

LAWRIE, J.—I am of opinion that the order of appointment must be set aside. In the first place the land was not then the subject of an action. True it is that more than ten months ago the plaintiff filed a plaint, but on the 28th October, when this order for a receiver was made, summons had not issued. The 671st section of the Code gives jurisdiction to a Court to appoint a receiver only in the course of an action, and there is no action until summons is issued (Sec III, S.C.C., 158 & VI, S.C.C., 93.)

But in view of the opinion of the Chief Justice in the case last referred to, this first ground on which I rest my judg-

ment may be doubtful; and I rely, secondly, on this, that the plaintiff has not shown that the appointment of a receiver is necessary for the restoration, preservation or better custody or management of the property. It is not alleged either in the plaint or in the application for a receiver and the affidavit thereto annexed that the 1st defendant is mismanaging the land. As far as appears, he is carrying on the same operation in the same way as a receiver would do. There is here no question as to the restoration, preservation, better custody, or management of the property. The reason why a receiver is asked for is to protect the plaintiff's pecuniary interest, to ensure that half of the profits derived from the digging of plumbago shall be reserved for him in neutral hands. As I read the 671st section, a Court is not authorized to appoint a receiver to protect the pecuniary interests of one of two joint owners, but only to protect the property itself; and when there is no reason to think that the property is in danger, or that a receiver could deal with it otherwise or better than the co-owner in possession, then the Court ought to refuse to interfere. The observations of, CLARANCE, J., in the Corbet case, IV, S.C.C., 147, are in point—"It is not shewn in support of the application—and in fact there has been hardly the attempt to shew—that the estates are being impaired or mismanaged *ad interim* * * * Plaintiff in asking for a receiver * * * does so upon the merits of his case, and nothing else, and to ask the court to grant a receiver upon such grounds is, in effect, to ask the Court upon a motion, for a receiver, an *interim* matter, to prejudge the whole case." Lastly, assuming the defendant to be what the plaintiff alleges he is (and the plaintiff cannot ask us to regard the defendant in any other way) the defendant is jointly entitled to the property with the plaintiff. The relative rights and remedies of co-owners of land from which one is removing plumbago were fully considered by this Court in D. C., Galle, 41,723, reported in II, S.C.C., 166. There, Sir John Phear held that if one co-owner was wasting the common property in excess of his co-proprietary rights, the proper course for the injured co-proprietor was to ask for an injunction and for an account of the plumbago already raised, or, if he desired

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it, for a partition of the land. An injunction would be granted only to restrain waste, or the exercise of power in excess of the co-owner's rights. An injunction, I apprehend, would not be granted to restrain one co-owner from the exercise of the usual rights of ownership—only to prevent destruction or waste. In the present case, from the application for a receiver, from the powers granted to him by the Distrit Court on the motion and with the approval of the plaintiff, it is plain that the plaintiff desires that the plumbago be dug and sold. He does not complain that such digging and selling is waste. It is, according to him, proper management of the estate, the only question is as to his share of the profits; and for the reasons I have given, I think he is not entitled to remove his co-owner at this stage from managing the common property in a way which both are agreed is the right way.

I would set aside the appointment with costs.

WITHERS, J.—As it is a condition precedent required by the 671st sect. of the Civil Procedure Code that a party to an action, who applies to the court for the appointment of a receiver of property, the subject of that action, shall establish a *prima facie* right to and interest in such property, before he can secure the desired order, the first and principal question for us to decide is, whether the plaintiff has shown himself entitled to the order he has obtained. The subject of the action, which was instituted on the 5th day of February, 1892, is two parcels of land in which plumbago has been found; and though the prayer of the action, as originally framed, was limited to an order of sequestration and judgment for damages against this appellant and others, it was extended by leave of court on the 28th September, so as to embrace a declaration of title in a moiety of the two parcels and a decree of possession. These are the facts upon which the plaintiff bases his alleged *prima facie* right to or interest in the two parcels of land:—

The parcels were Crown land. On the 9th September, 1890, the plaintiff and 1st defendant signed printed forms of conditions of sale acknowledging, in one, to have that day

The word "month" meant a lunar month, and not a calendar month—Rogers *v.* Kingston-upon-Hull Dock Co., XXXIV L. J., Ch., 165. The order awarding costs to the defendant, was clearly wrong.

Sampayo for the defendant, respondent. The letter of the 29th July was in good time, but did not contain a notice to quit. The letter of the 1st August was a sufficient notice, but it was sent too late. As laid down in the case reported in II, *Grenier*, (1873) p. 23, the notice must be "one commensurate with the term for which the letting was." The word month meant a calendar month, and not a lunar month. The order awarding the defendant costs was right, because it was the plaintiff who was responsible for this action.

Cur. adv. vult

On December 15, the following judgment was delivered by

WITHERS, J.—I think the judgment is right, and should be affirmed. As the learned Commissioner says, the first letter was in good time, but was a bad notice, while the second letter was a good notice, but given too late. A notice to quit cannot be too clear and distinct in its term, but the first letter was ambiguous and optional. The law laid down by the late Sir Edward Creasy in the case cited to me, II *Grenier* (1873) p. 2, I understand to be as follows, and, as so understood, I adopt it—In the case of monthly tenancies, either party must have a complete calendar month to find a new house or engage a new tenant. To ensure this, a notice to quit must be given before the commencement of the month at the expiry of which the tenancy is to determine, so that the party noticed shall have from midnight of the last day of the month immediately preceding the month, at the end of which the tenancy is determined by the notice, to midnight of the last day of the expiring month of the tenancy, as thus determined, for the purpose of making fresh arrangements. If I am not mistaken, this law expresess the prevailing custom of the country.

BEFORE *Lawrie*, AND *Withers*, J. J.

December 16 and 22, 1892.

KURUKEL *v.* KURUKEL.

[No. 154, D. C., TRINCOMALIE.]

Hindoo Temple—Officiating Priest—Prescription—Jurisdiction of District Courts over Ecclesiastical matters.

Plaintiff alleged that he was a Brahmin and a Priest of *Iswera* gods; that for upwards of thirty years he officiated as priest of a certain Temple, the officiating priests of which were the heirs of its donors; that during that time, as such officiating priest, he had enjoyment, use, and possession of the offerings and income of the Temple; and that defendant invaded his right, and deprived him of his share of the revenue. He prayed for a declaration that he was priest of the Temple, and as such entitled to the receipt and appropriation of one half of its revenue, and that he be quieted in the exercise of his right, as priest, to have and receive such share of the revenue.

Held, that the above allegations did not entitle plaintiff to the relief sought.

Semble, *per* WITHERS, J.—A District Court has no jurisdiction over purely ecclesiastical matters, and cannot interfere in the concerns of a religious community, unless in the rules which it has made for its members in relation to the religious object which it has combined to maintain and support, a civil element enters, which brings it within the sphere of the Court's civil jurisdiction.

The facts of the case sufficiently appear in the judgments.

Dornhorst, (*Sampayo*, with him) for defendant, appellant.

Dharmaratne, (*Canekeratne*, with him) for plaintiff, respondent.

Cur. Adv. Vult.

On December 22, the following judgments were delivered:—

LAWRIE, J.—The plaintiff alleges that he is a Prahmin and a priest of *Iswera* gods, and that for upwards of thirty years he officiated as priest of the temple, Kandasamy Kovil, at Trincomalie.

I understand him to say that the managers have right as trustees to the contents of the temple and to all the offerings and income, but that for many years the managers have not taken any share of the income, and that the officiating priests thereof alone had the enjoyment, use, and possession of all the offerings and income of the temple, and that these officiating priests have been and are heirs of the donors. The plaintiff asserting that he officiated as priest for 30 years, claims to have acquired a prescriptive right to the office, and pleads the Ordinance No. 8 of 1834 and 22 of 1871. I do not find in the plaint any assertion of a title by a grant, by inheritance, or by election, or by personal initiation or consecration,

which gives the plaintiff a right to the office or to property attached to it. He does not sue as a trustee. His only claim is to be declared an officiating priest, to receive offerings. The title which he asserts is that founded on long possession. He has not acquired prescriptive right under the ordinance, because the third section of the prescriptive ordinance applies only to claims to land or immovable property. A man who seeks to have a declaration of status must prove his right, not mere possession.

Proof that a man has been held reputed to possess a status for many years, throws on the person denying it the burden of proof that the repute was erroneous. But here the burden is on the plaintiff. He seeks to recover a status, which he has lost, and it lay on him to allege facts, which, if admitted or proved, would warrant the declaration in his favour. If everything alleged by the plaintiff were admitted, he would not be entitled to the judgment he prays for.

Take it to be true, that he is a Brahmin and a priest of *Iswera* gods, that he is an heir of the donors of the temple, "Kandasami," that he for thirty years officiated, I think this Court could not declare that he himself was entitled to regain, and to possess in future, the position which he formerly enjoyed, but which he has lost. In short, he has not averred title, but only possession, and possession is unavailing. If he had besought the assistance of the Court immediately on being dispossessed, he might have been found entitled to a possessory judgment; but then he alleges that he was ousted from the temple three years before he instituted his action. The remedy of a possessory suit is lost, the action not having been instituted within a year of ouster. His claim for damages is also prescribed.

I would set aside the judgment, and would dismiss the case with costs.

WITHERS, J.—Respondent's counsel may rest assured that this Court knows no distinction of persons who seek redress before it, but he must not forget—what I doubt not he well knows—that not every wrong can be redressed by a court of justice, but only such wrongs as the law itself recognises. Now, the

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question of law which we have to consider, and which was put rather than tried before the court below is, has the plaintiff made out a case in his pleadings which can effectually be tried and determined. Respondent's counsel having won considerable ground in the lower court, naturally tried hard to push his victory a little further, as he considered the justice of his claim required, but he did not address himself wholly and exclusively to the contention of the appellant's counsel, that on the face of his plaint he had made out no claim at all for the relief he sought.

The relief sought is a declaration that he is a priest of the Kandesami temple in Vellundi in No. 2 Division, Trincomalie, and as such priest, entitled to the receipt and appropriation of half of the revenue, elsewhere called income, of that temple, and a decree that he be restored to, and quieted in the exercise of the right as such priest to have and receive half the revenue as aforesaid.

There is a further claim against the defendant for damages, in that the defendant has invaded his right, as aforesaid, and deprived him of his share of the revenue. Now, it must be borne in mind, at the outset, that a District Court has no jurisdiction over purely ecclesiastical matters, as on reference to chapter VI, of the Courts Ordinance, 1889, will be plainly seen. I take it that a District Court has no jurisdiction to interfere in the concerns of religious communities, unless in the rules which any religious community has made for its members in relation to the religious object which it has combined to maintain and support, a civil element enters, which brings it within the sphere of the Court's civil jurisdiction.

This element, if I mistake not, in every case of the kind which has come before our Courts, is one involving some rights of property, such as an estate in the land on which a temple stands, or in the fabric of the temple or a tenure of one or the other amounting to a beneficial user of the land and the buildings erected on it for religious purposes. The holder of an office who has been duly appointed thereto by the religious community to which he belongs, or who succeeds in due course to such office according to rules

binding on the members of that community, has been and will always be supported in the exercise of that office, if there is attached to it, as an incident, some estate in tenure of, or right to the possession and enjoyment of, real or movable property. Now, there is no complaint by the respondent that he has been debarred from using the temple for performing his functions as a priest, in all that concerns the observance of his religion. His complaint is that the defendant has violated his right of taking—I think he means appropriating—half of the income of the temple, to which he says he has gained a prescriptive title. What the "income" or "revenue" of the temple is the plaintiff does not condescend to particularise. He hints at its nature in the words "offering of jewels," &c., though in another part of his libel he speaks "of all the offerings and income" of the temple, as if there was a source of income other than offerings. It is needless to observe that our statutes of prescription cannot possibly apply to the so-called right of appropriating gratuitous offerings to a temple by its devotees. It cannot relate to some easement in land or interest, or estate in land and the fruits or produce thereof. There is not a suggestion in the plaint that the income of the temple is of that character. Then, what rule or law of this particular community is indicated in the plaint which binds the parties to this case, so as to impose on them either a mutual contract or mutual obligation by which one is bound to permit the other to appropriate half of the revenue of the temple? I can find none. The deed of dedication of the land to this particular community reserves no such rights in the donors, which would bind them and their successors under the deed. What is said in this plaint is, that the management and direction of the income of the temple, once admittedly in other hands, having fallen into abeyance, the disposal of the income was left to the discretion of the officiating priests, for the time being. How can what is left to the discretion of two people bind them one to the other with a legal sanction? The pleader had probably no material for framing a good case, and even with good material there is no class of case so

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difficult to work up into a form which will stand the test applied to, in the question before us here—"Does the plaint disclose any, that is, any good cause of action"? I see no answer but one to this question here, and I agree with my brother LAWRIE that the action must be dismissed with costs.

BEFORE *Lawrie*, AND *Withers*, J. J.

December 16 and 20, 1892.

SYADORIS *v.* HENDRICK.

[No. 1,020, D. C., GALLE.]

Receiver—Co-owners—Civil Procedure Code, Section 671.

Per LAWRIE, J.—In an application under Section 671 of the Civil Procedure Code for the appointment of a receiver in respect of any property, the Court is not authorized to appoint one to protect the pecuniary interests of one of two joint owners, but only to protect the property itself. And when there is no reason to think that the property is in danger, or that the receiver could deal with it otherwise or better than the co-owner in possession, then the Court ought to refuse to interfere.

Per WITHERS, J.—At the time when an order for a receiver is asked for under Sect. 671 of the Civil Procedure Code, the applicant must have a right to the immediate possession of the particular property in respect of which the application is made, or a vested interest in it sufficient to entitle him to have it protected in circumstances which appear to the Court to necessitate its protection by an independent and competent person.

The facts of the case appear in the judgment of WITHERS, J.

Rama Nathan, S.-G. (*Dornhorst*, with him) for defendant, appellant.

Wendt, for plaintiff, respondent.

Cur. adv. vult.

On December 20, the following judgments were delivered:—

LAWRIE, J.—I am of opinion that the order of appointment must be set aside. In the first place the land was not then the subject of an action. True it is that more than ten months ago the plaintiff filed a plaint, but on the 28th October, when this order for a receiver was made, summons had not issued. The 671st section of the Code gives jurisdiction to a Court to appoint a receiver only in the course of an action, and there is no action until summons is issued (See III, S.C.C., 158 & VI, S.C.C., 93.)

But in view of the opinion of the Chief Justice in the case last referred to, this first ground on which I rest my judg-

ment may be doubtful; and I rely, secondly, on this, that the plaintiff has not shown that the appointment of a receiver is necessary for the restoration, preservation or better custody or management of the property. It is not alleged either in the plaint or in the application for a receiver and the affidavit thereto annexed that the 1st defendant is mismanaging the land. As far as appears, he is carrying on the same operation in the same way as a receiver would do. There is here no question as to the restoration, preservation, better custody, or management of the property. The reason why a receiver is asked for is to protect the plaintiff's pecuniary interest, to ensure that half of the profits derived from the digging of plumbago shall be reserved for him in neutral hands. As I read the 671st section, a Court is not authorized to appoint a receiver to protect the pecuniary interests of one of two joint owners, but only to protect the property itself; and when there is no reason to think that the property is in danger, or that a receiver could deal with it otherwise or better than the co-owner in possession, then the Court ought to refuse to interfere. The observations of, CLARANCE, J., in the Corbet case, IV, S.C.C., 147, are in point—"It is not shewn in support of the application—and in fact there has been hardly the attempt to shew—that the estates are being impaired or mismanaged *ad interim* * * * Plaintiff in asking for a receiver * * * does so upon the merits of his case, and nothing else, and to ask the court to grant a receiver upon such grounds is, in effect, to ask the Court upon a motion, for a receiver, an *interim* matter, to prejudge the whole case." Lastly, assuming the defendant to be what the plaintiff alleges he is (and the plaintiff cannot ask us to regard the defendant in any other way) the defendant is jointly entitled to the property with the plaintiff. The relative rights and remedies of co-owners of land from which one is removing plumbago were fully considered by this Court in D. C., Galle, 41,723, reported in II, S C.C., 166. There, Sir John Phear held that if one co-owner was wasting the common property in excess of his co-proprietary rights, the proper course for the injured co-proprietor was to ask for an injunction and for an account of the plumbago already raised, or, if he desired

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it, for a partition of the land. An injunction would be granted only to restrain waste, or the exercise of power in excess of the co-owner's rights. An injuction, I apprehend, would not be granted to restrain one co-owner from the exercise of the usual rights of ownership—only to prevent destruction or waste. In the present case, from the application for a receiver, from the powers granted to him by the District Court on the motion and with the approval of the plaintiff, it is plain that the plaintiff desires that the plumbago be dug and sold. He does not complain that such digging and selling is waste. It is, according to him, proper management of the estate, the only question is as to his share of the profits; and for the reasons I have given, I think, he is not entitled to remove his co-owner at this stage from managing the common property in a way which both are agreed is the right way.

I would set aside the appointment with costs.

WITHERS, J.— As it is a condition precedent required by the 671st sect. of the Civil Procedure Code that a party to an action, who applies to the court for the appointment of a receiver of property, the subject of that action, shall establish a *prima facie* right to and interest in such property, before he can secure the desired order, the first and principal question for us to decide is, whether the plaintiff has shown himself entitled to the order he has obtained. The subject of the action, which was instituted on the 5th day of February, 1892, is two parcels of land in which plumbago has been found; and though the prayer of the action, as originally framed, was limited to an order of sequestration and judgment for damages against this appellant and others, it was extended by leave of court on the 28th September, so as to embrace a declaration of title in a moiety of the two parcels and a decree of possession. These are the facts upon which the plaintiff bases his alleged *prima facie* right to or interest in the two parcels of land:—

The parcels were Crown land. On the 9th September, 1890, the plaintiff and 1st defendant signed printed forms of conditions of sale acknowledging, in one, to have that day

purchased one parcel for Rs. 60, and, in the other, to have purchased the other parcel for Rs. 205. A condition of both the purchases was, that one-tenth of the price should be paid on the day of purchase, and the balance (*sic*) within one month from that day. That condition unfulfilled, the terms were that the purchase shall be considered void, and the one-tenth deposit and certain sums and fees forfeited. In neither case was the required condition fulfilled. Accordingly (so the learned judge finds), the parcels were advertised for re-sale on the 1st of September, 1891, but they were not put up for sale a second time.

What happened instead was this.—On the 16th September, 1892, the Government Agent of the Southeen Province caused this amongst other entries to be made in his Register of Government land sold in the District of Galle, in the column entitled "name of purchaser"—"Let original purchaser pay balance with interest up to date, Syadoris (*i. e*, plaintiff) to waive his rights in favour of Hendrick (*i. e.* defendant)—present—the other man." Hendrick accordingly did pay up the balance with interest due on the original sales. Previously to this record in the Register just referred to, crown lands sale slips N. & O. in the said Government Agent's office, relating to the parcels in question, were filled up on the 1st September, 1891, with the numbers of the lots and the name of W. A. Hendrick as purchaser. On the 11th October, two grants of these two lots were made out in favour of plaintiff and defendant jointly, but they have never been delivered to the grantees therein named, because, according to Mr. McLeod, the grantees have not attended to receive them as he says they should do. The appellant appears to have paid the deposit money on account of both parcels at the date of the original sale. Neither was let into possession of the parcels by competent authority. The appellant says he was put into possession, but he does not say by whom; so I suppose it was by himself. Not that I wish to imply that he did so *mala fide*, for I think he had fair ground to consider himself the sole purchaser of the two parcels in September, 1891. It may be as well here to answer the appeal made to us to interpret the words, "on the application of any party who shall establish a *prima facie* right to or

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interest in such property," which are introduced into chapter L of our Civil Procedure Code, which, with the exception further of Section 672 in the same chapter, are borrowed from the provisions of Chapter XXXVI of the Indian Civil Procedure Code. The words just recited were, I imagine, put in *pro abundante cautela*, for no party to an action could very well apply for the appointment of a receiver who had no right to or interest in the property which is the subject of the action. I presume that at the time when the order is asked for, a party must have a right to the immediate possession of the particular class of property or a vested interest in it sufficient to entitle him to have it protected in circumstances which appear to the court to necessitate the protection of the property by an independent and competent person. A party may have a right to the immediate possession of property without any estate in or title to it, or he may have an estate in or title to property without the right to immediate possession of it, such as a usufructuary mortgagee or a lienholder. on the one hand, and a remainderman, on the other. Again, whether the party has such a present right to or interest in any particular kind of property will depend on the nature of the property. If immovable property, there must be a crown grant, notarial instrument, or agreement or assignment or a duly executed will followed by the death of a testator, or an intestacy with next of kin in a recognised degree. I say it with diffidence, and should prefer not to say so at all for fear of prejudging the case, but I feel bound to express an opinion on the point that, at the date of the order, the plaintiff had disclosed a *prima facie* interest in these two parcels of land, and my authority for this opinion is the judgment of the Privy Council reported at page 54 of the Law Journal Reports, Vol. L II.

This, however, by no means concludes the matter. In the first place it is to be remembered that this application is one incidental to the main action, and not a separate, independent matter of summary procedure; and before the application could be allowed, I think it was incumbent on the plaintiff to show that, at the date of the institution of this action, he had a right to or interest in the property in ques-

tion. In the absence of the completed crown grant at that date, I cannot say that he has established as at that time a *prima facie* right to or interest in the lands, and I can only repeat my regret that I feel bound to express my opinion on the matter at all.

For this reason, I am of opinion that the order appointing a receiver should be set aside, and the plaintiff's application dismissed with costs in both Courts.

END OF VOLUME I.