SUPREME COURT DECISIONS

IN APPEAL

DURING 1899

WITH INDEX.

REPORTED BY

GLADWIN KOCH

(*Alias "Lux."*)

Advocate of the Supreme Court of the Island of Ceylon.

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IMPORTANT DECISIONS
BY THE
SUPREME COURT
OF THE
ISLAND OF CEYLON.

SUPREME COURT DECISIONS, 1899.
CRIMINAL.

No. 27099. Police Court, Hatton.

E. B. Jonklaas *vs* A. M. Doraisamy and 2 others.

Difference between cruelty to animals and mischief—Ordinance 9 of 1862 and § 408 of the Penal Code—erroneous reasoning of Magistrate.

In this case three accused were charged with committing mischief by burning a dog with kerosine oil.

Per Lawrie, J:—"In my opinion, the charge against the accused ought to have been for cruelty to animals under Ordinance 9 of 1862: this is not a case of mischief; there was no intention to cause wrongful loss to any one.

The reason given by the Magistrate for charging under § 408 and not under the cruelty to animals Ordinance, viz., that he thinks that the punishment of fine provided by the Ordinance is not sufficient, does not seem to me a good reason. We must take the law as it is made by the Legislature.

To call this mischief, and not cruelty to animals and thereby to enhance the punishment, was in my opinion, quite wrong"

16th February, 1899

No. 230/2,567. District Court, Chilaw.

Queen *vs.* Christian Fernando and 2 others.

Procedure under the Evidence Ordinance 14 of 1895—What questions may be put by one accused to another accused.

Per Lawrie, J.:—"Was the District Judge wrong in refusing to allow the counsel for the accused to ask the 2nd accused when giving evidence on his own behalf (under § 120 of the Evidence Ordinance 14 of 1895) whether he had seen the 1st and 3rd accused at the spot.

The Ordinance permits an accused to give evidence in the same manner and with the like effect and consequences as any other witness. He may give all the evidence he can to exculpate himself, and the defence may well be that one of the other accused committed the offence. I cannot see how that evidence could be excluded. I see no difficulty in one accused asking another a question tending to exculpate himself, and I hold that the District Judge was wrong to refuse to allow the question to be put."

16th February, 1899.

No. 18. District Court, Tangalla, 252.

Distinction between robbery and theft—When offence may be tried under § 380 and when under § 382 of the Penal Code—Accused cannot be convicted of hurt, when the charge of theft is disproved.

Per Lawrie, J. :—"In all case of robbery there must be either causing hurt or causing fear of hurt. When the hurt is slight, when no more hurt has been caused than is inherent in robbery, only such an amount as distinguishes the case from a case of theft, the offence may be laid under § 380 and tried in a District Court.

To justify a charge under § 382 punishable by 20 years' rigorous imprisonment, something more is needed than the slight hurt almost inseparable from robbery.

The hurt spoken of in the present case was slight, blood was not drawn, medical or surgical aid was not called for nor necessary.

The accused, in my opinion, are entitled to be acquitted of the charge of robbery, and it is not possible to convict them of hurt only, the essential part of the charge, *i.e.*, theft, having been disproved. I set aside and acquit."

16th March, 1899.
"LUX."

No. 12,914. Police Court, Tangalla.

Doctrine of recent theft and presumption.

Per Lawrie, J.—"From recent possession of stolen property the law allows a Court to presume that the possessor is the thief or that he received with guilty knowledge, but the presumption is not permissible unless the possession be recent after the theft. If it be not recent, some direct evidence of theft or of receiving with guilty knowledge is necessary."

27th February, 1899.

No. 3,293. Police Court, Galle.

Offering illegal gratification—§§ 210, 211 of the Penal Code—Applicable to screening of serious offences and not to trivial matters—Driving without a light.

In this case a Police Constable arrested a man for driving his cart without a light, and when the Constable was taking the man to the Police Station, the accused in this case came forward and offered the Constable 50 cents to let the man go.

Per Lawrie, J.—"The arrest (of the carter) was unnecessary. This accused's conduct should not be interpreted to mean more than an offer of 50 cents to let the man go then and not to take him

away from his cart under arrest to the Police Station.

The offer did not mean necessarily that the Constable was not to take the man's name and address, the No. of his cart, and make a complaint.

It is to be remembered that the §§ of the Code relative to the offering of illegal gratifications do not apply to compoundable offences—the whole tenour of the §§ shews that they refer to the screening of serious offences, not to trivial matters such as driving without a light. I set aside and acquit."

27th February, 1899.

No. 6. District Court, Tangalla. 243.

Voluntarily causing grievous hurt—wi l a blow with the fist which breaks a rib come under this —8 S. C. C. p 115—question of procedure.

The appellants were brought before the Police Magistrate of Tangalla on a charge of robbery and causing hurt, which was triable only by the Supreme Court and a jury. After the complainant was examined, the Police Magistrate formed the opinion that the charge of robbery was false, and that the hurt caused was grievous and he framed a formal charge under § 316 and under Ordinance 8 of 1896 proceeded to try the case as District Judge.

Held (per Lawrie, J.) :—That the procedure adopted by the Magistrate is regular.

Per Lawrie, J. :—"The question remains, was the giving of a blow with the fist which broke a rib voluntarily causing grievous hurt. A man is presumed to intend to do what he does, and though I have difficulty in reconciling this decision with that of the full Court reported in the 8th S. C. C, p. 115, I hold that the fracture of the rib was the natural consequence of the blow, and that it was right to find the 1st and 2nd accused guilty of voluntarily causing grievous hurt, the 2nd accused because he inflicted the blow, and the 1st because he held the complainant when the blow was given."

7th February, 1899.

CIVIL.

District Court, Galle.

Execution of judgment decrees—application made to execute decree made before enactment of the Code not an application under Ch. XXII. of the Code, and therefore Sec. 337, no bar to a subsequent application made before the coming into operation of the Code—under the old practice decrees allowed to be revived as a matter of course, no explanation necessary for delay in making application—3, Lorenz 210.

Per Bonser, C. J.—"The case raises an important point as to the execution of judgment decrees. It appears that the original decree was dated 10th September, 1884. Execution was taken out upon that decree, but the whole amount was not realised. In 1886 the decree was revived, and execution was taken out again in September, 1887, but the full amount of the decree was not realised.

The matter then slept until August, 1897. Before the 10 years had elapsed from the last issue of execution an application was made that the heirs of the judgment-debtor, who had died in the meantime, should be substituted on the record in lieu of the judgment-debtor, to enable the plaintiff to make an application for executing the decree.

The District Judge made an order allowing notices to be served on the heirs, but it stated that he said that it was unnecessary that an application should be made for a formal order to revive the judgment, but that it would be quite sufficient if an application were made to substitute the heirs on the record and for execution to issue against them.

That application was accordingly made, and was resisted by the heirs on the ground that there was no explanation of the delay in making application and that the application was stale.

It is admitted that it was not prescribed by law. The District Judge held that no cause was shewn against the application, and allowed execution to issue.

In my opinion that order was right. I should have been glad to find any reason for holding that the application was too late but I have been unable to do so. The case does not come under sec. 337 of our Procedure Code. The application must therefore be dealt with under the old practice. It has been decided by this Court, unfortunately I think, that an application to execute a decree made before the coming into operation of the Code is not an application under Ch. XXII. of the Code, and therefore that sec. 337 is no bar to a subsequent application made after the coming into operation of the Code. It appears that decrees under the old practice were allowed to be revived as a matter of course. It was necessary to cite the debtors, but that was only for the purpose of giving them an opportunity to shew if they could that the debt had been paid or otherwise satisfied. It would appear that it was not necessary for the plaintiff to give any explanation of his delay. The case reported in 3, Lorenz 210, seems to be clear on this point. That being so, the petitioner in this case is entitled to issue his writ.

Withers, J.—Agreed.

3rd February, 1899.

No. 962, District Court, Puttalam.

In an appeal taken against an order of the District Court "that a notice do issue be allowed."

Held (per Bonser, C. J.):—That there is nothing to appeal from: "the only order that has been made is an order that a motion, that a notice do issue, be allowed. There is no determination of the rights of the parties."

Withers, J.—Agreeing.

9th February, 1899.

No. 1,866, District Court, Colombo.

Arrest of insolvent by Fiscal on incorrect warrant—unlawful amendment of incorrect warrant by District Judge does not cure defect.

In this case the appellant, who is an insolvent, was arrested by a Fiscal on a warrant stating that the debt for which he was arrested was R10,381·56. When he was brought up before the District Judge it was discovered that this warrant was incorrect —that owing to the carelessness of the Proctors who had applied for the warrant a sum of R10,381·56 had been substituted for a sum of R3,381·56, which was the proper amount. The District Judge thereupon, being of opinion that the error was immaterial, amended the warrant there and then.

Held (per Bonser, C. J., *et* Withers, J.) :—That this warrant was bad, and the subsequent amendment did not cure the defect and render the previous arrest lawful. The debtor could only be arrested for the amount of his debt and ought to be discharged, as his warrant was taken out for three times the amount of his debt.

9th February, 1899.

No. 2,789, District Court, Negombo.

Liability of husband for wife's acts—is he liable when he joins with his wife in filing answer? *Obiter Dictum.*

In this case a father, mother and son are sued under the following circumstances:—The father was possessed of a garden which he had leased to the plaintiffs for four years, the plaintiffs allege that the family, father, mother and son one day came and plucked the nuts from this garden and refused to allow the plaintiffs to enjoy the produce. The District Judge did not believe that the father, the 1st defendant, had anything to do with the plucking, but held that, inasmuch as he had joined with his wife in filing an answer he was jointly liable.

Held (per Bonser, C. J.):—That the husband is not jointly liable simply because he has joined with his wife in filing answer.

Per Bonser, C. J: (*Obiter Dictum*):—"An interesting question was raised in the course of the argument as to the liability of a husband for the delicts of his wife. Under the circumstances of the case it is not necessary to decide that point, but my present opinion is that the husband is liable for any injury occasioned by his wife to a third person, not amounting to a serious crime, at all events to the extent of the wife's half of the joint property or of any dowry which he may have received whith her."

The judgment of the District Court was supported on the evidence.

WITHERS, J., Agreeing.
10th February, 1899.

No. 2,067. DISTRICT COURT, MATARA.

Motion for amendment—proper course in regard to amendments—Section 146 of the Civil Procedure Code, framing of issues after examination of parties.

In this case the Judge made an order disallowing an amendment which the plaintiff asked leave to make, because the plaintiff had not complied the conditions on which that amendment had at first been allowed. The plaintiff appealed against that order.

Per Bonser, C. J.:—"It seems to me that the motion for amendment ought not to have been allowed whether with or without any conditions, and that it was afterwards disallowed under an equally mistaken idea of procedure.

It has more than once been pointed out by this Court that the proper course to be adopted in regard to amendments was that laid down in Section 146 of the Civil Procedure Code, which has been altogether ignored in this case.

It is the duty of the Court, if the parties are not agreed as to the questions of fact or law to be decided between them, to ascertain by examination as may appear necessary, upon what material propositions of fact or of law the parties are at variance, and the Court shall then proceed to record the issues on which the right decision of the case appears to depend. The Court will then, if necessary, amend the pleadings to bring the issues and the pleadings into conformity.

WITHERS, J.,—Agreed.

I. CRIMINAL.

No. 136, POLICE COURT, GALLE.

An order of discharge not subject to appeal, this ruling called in question by the Chief Justice, but not authoritatively set aside, reconsideration of the ruling advisable.

Per Withers, J.—"It has been decided that an order of discharge is not subject to appeal, under the Ordinance, but this ruling has been called in question by the present Chief Justice; but until that decision is set aside, I must follow it, although for myself, I am open to reconsider it. The appeal is dismissed.

25th March, 1899.

No. 13,276. Police Court, Batticaloa.

Misjoinder of accused in a Criminal case under clause 1 of Ordinance 13 of 1887, failure of Justice occasioned thereby—Distinct offences to be tried separately under separate charges by § 178 of the new Criminal Procedure Code. Exceptions to this rule enumerated in § 184 of the same Code—erroneous interpretation of this section by Magistrate.

In this case 12 persons have been joined as defendants and convicted of fishing in the Batticaloa lake with a prohibited net, vec chevalai, within the prohibited period, in breach of the proclamation of the 10th October, 1894, under clause 1 of Ordinance 13 of 1887. They were each sentenced to pay a fine of Rs. 20.

Per Withers, J:—"Apart from the merits the ground of appeal is that these 12 persons ought not to have been tried together and that this has occasioned a failure of justice. The objection was taken before the Magistrate in the Court below and the objection ought to have been sustained. All the defendants were not fishing in the same boat and using the same net. They were fishing in groups of three men in different parts of the water; each group had its own net and boat, and these groups were fishing independently of each other.

Now it is clear that the use of each net, if it was a breach of local law or rule was a distinct offence, and only engaged in using a particular net should have been tried together. Section 178 of the new Criminal Procedure Code enacts: "for every distinct offence for which any person is accused there shall be a separate charge and every such charge shall be tried separately, except in the cases hereinafter mentioned in the 17th chapter." The Police Magistrate seems to think that this case came in under the exception in Sec 184 of the same Code, which runs thus:—"When more persons than one are accused of jointly committing the same offence, or of different offences committed in the same transaction, or when one person is accused of committing an offence and another of abetment, or of attempt to commit such offence, they may be charged and tried together or separately as the Court thinks fit, and the provisions contained in the former part of this chapter shall apply to all such charges."

But these people were not concerned in the transaction; each group was concerned with its own net and its own transaction, and even supposing that these four groups of men formed one association fishing together for common profit, using similar nets, even then it would be inconvenient and embarrassing to try them all together. I therefore quash the proceedings of this trial, and the judgment. If they are to be re-tried, only those can be joined together who used one and the same net."

27th March, 1899.

32. District Court, Galle, No. 12,711.

Distinction between house breaking and house trespass by night. Making a small breach is house trespass only punishable under sections 433 and 438 according to intent. Precautions taken to conceal the house trespass as defined in Sec. 429. Acts which must be proved against an accused to establish a charge of house trespass. Directions of the 298th section of new Code to be followed in cases of the kind.

Per Lawrie, A. C. J :—"This is not a case of house-breaking, it is at most a case of house trespass by night. Making a breach in the wall of a dwelling house large enough to put only a hand through the aperture, is, in my opinion, house-trespass only, punishable under sections 433-438 according to the intent with which it is committed.

In the present case there is no evidence that precautions were taken to conceal the house-trespass as defined in section 429. In the indictment no intention to commit an offence is set forth, the offence is one punishable under section 434 with a year's rigorous imprisonment or a fine of R100 or both But in my opinion the evidence discloses a case of suspicion only. The accused was not seen nor caught in the act of making a breach in the wall, the most that is said against him is that he ran away and was caught at once near the house the wall of which was broken, no instrument for house-breaking was found either at the house or in the accused's possession. He had a knife, I presume an ordinary knife, one which presented no appearance of having been used to make a hole through a masonay wall. In my opinion the evidence is not inconsistent with the accused's innocence, and I set aside and acquit.

Let me point out to the District Judge that he has omitted to follow the directions of the 298th Section of the New Code.

10th April, 1899.

II. CIVIL.

No. 29, District Court, Batticaloa.

Procedure under Section 31 of Ordinance 2 of 1895, "caveat" against the issue of a certificate for marriage. 7 S. C. C, p 56, overruled by 5 S.C.C., p 9. Position of a woman who has lived with and has borne children to a man, who contemplates lawful marriage with another woman. By Sec. 31 (2) of Ordinance 2 of 1895, inquiries into caveats to be summary and order as to issue of certificate to be made as to the judge shall seem just. Conflicting decisions of the Supreme Court on the point.

In this case a woman who had lived for many years with a man and had borne him children applied for a 'caveat' against the issue of a certificate for his marriage with another woman. The procedure is set forth in the Ordinance 2 of 1895, Sec. 31. The District Judge, after hearing evidence decided that the applicant was not the legally married wife of the respondent and he allowed the certificate to issue. The applicant appealed

Per LAWRIE, J. :—"The applicant has, I think, been treated badly by the respondent. The District Judge follows the decision of this Court reported in 7, S. C. C. p 56 which overruled the decision reported in 5 S. C. C. p 9.

As the effect of dismissing this appeal would practically be to bastardize the children of the applicant and to declare her to have been a mistress and not a wife, it is right to consider the case on its merits, and on the merits I think the order should be set aside and that the certificate should not be issued."

Per WITHERS, J :—"The District Judge's view of the law may or may not be sound, but as there are conflicting decisions of this Court it must be regarded as doubtful. To this state of things it would be, I think, highly unjust to allow a certificate to issue.

According to Sec. 31 (2) of Ordinance 2 of 1895, enquiries into caveats are to be summary and an order that a certificate do issue or do not issue is to be made as to the judge shall seem just.

It is most unjust here and the order ought to be reversed and an order that the certificate do not issue should be substituted."

23rd March, 1899.

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497. Court of Requests Colombo, No. 7179.

J. K. Mandy vs. The Galle Face Hotel Company, Limited.

Extent of liability of hotel for loss of property of guest. Can Hotel relieve itself of responsibility by a special notice to that effect. When can a visitor to the Hotel be treated as a guest—persons using swimming bath, billiard-room, etc., as entitled to the protection of the law regarding inn-keepers as those who live in the hotel.

Per LAWSIE, J. :—"In the Court below the Company treated the plaintiff as their guest and as such sought to bind him by a notice to guests which contained a clause—'no responsibility shall attach to the Hotel for any property unless previously placed in the manager's charge for safe custody.' It was not proved that the plaintiff saw or read this notice. There was no special contract between the plaintiff and the Company which relieves the latter of its common law liability.

In the case of ordinary guests who saw and read the notice the hotel could not, in my opinion, by the notice relieve itself of responsibility for articles which could not reasonably be left in the manager's charge. A guest cannot be expected to put in the manager's charge his hat, umbrella, his everyday clothing, his dressing things, etc., for these are constantly needed. When a guest brings a bicycle to a hotel it is for daily use and it would be ridiculous to insist that the bicycle must be locked up in a manager's room.

I am of opinion that the notice in question did not limit the responsibility of the hotel for the loss of parts of the bicycle belonging to the plaintiff, if he was a guest of the hotel and had read the notice.

On the plea urged in appeal that the plaintiff was not a guest, I hold that the defendant-company was a host and the plaintiff a guest. It is not necessary that a guest should sleep at an inn to make the inn-keeper liable ; in the old days of posting travellers stopping at an inn for a few hours by day were equally entitled to the protection afforded by the law as those who stayed in the inn for the night.

In the Galle Face Hotel are many extra attractions for visitors, a swimming bath, billiard-rooms and a bar. In my opinion, these are parts of the hotel, and persons using these parts are as entitled to the protection of the law regarding inn-keepers as those who live in the hotel and use the bedrooms and dining room. I affirm"

24th March, 1899.

COURT OF REQUESTS, MATALE, No. 3,084.

(In revision.)

Action under Ordinance 9 of 1895, judge may authorise any person to administer oath and record evidence of person sworn.

Per Lawrie, A. C. J. : If a party to an action under Ordinance No. 9 of 1895, section 9, offers to be bound by an oath or solemn affirmation which cannot be conveniently taken in open Court, then the judge may authorise any person to administer it and to take and record in writing the evidence of the person to be sworn *or* affirmed and return it to the Court.

20th March, 18
"LUX."

CIVIL.

No. 1, Interlocutory.

District Court, Matara, 9385.

Waste Lands Ordinance, 1 of 1897—Can Special Officer delegate any part of his duty—notice sent in blank to Government Printer irregular.

In this case the District Judge, before whom a reference was made under Ordinance 1 of 1897, dismissed the case, because it was proved that the notice which was the foundation of the proceedings was irregular and was the joint work of the Special Officer and the Government Printer. The Special Officer signed the notice in blank; he filled in the names of the lands affected by the notice, but he left the date from which the three months were to run, and within which the claimants were to make their claim, blank. The Assistant Government Agent appealed against this decision of the District Judge.

Per Bonser, C. J.:—"The Assistant Government Agent, as the ground of his appeal, says:—The fact that the Government Printer inserted the necessary dates instead of the Special Officer d s not invalidate the notice. The Special Officer and thorised the Government Printer to insert the dates by sending the notices to him for publication in the "Gazette" leaving the spaces for dates blank, and adopted his act as his by allowing the notices to be published under his name."

"If that be the case, the Special Officer delegated a part of his duty under the Ordinance to the Government Printer. I cannot find in this Ordinance any authority for this delegation. If he may delegate one part of his duty he may delegate another part. It seems to me that he had no authority to delegate this duty of filling up the dates to the Government Printer, and the decision of the District Judge must be affirmed."

Withers, J.:—"I agree. It was argued in the alternative that the date was not a material part of the notice, that we ought to take it as if the date was in this case left out; and the three months were to run from the date of the publication of the notice in the *Gazette*. But it is evident from the Ordinance that the date is a material part of the notice. . . . .

The form of the notice given in the Schedule shews that the date of the notice ought to be embodied in the notice. It runs thus:—"Take notice that within three months from the—day of—being the date of this notice, etc." If that date is left unfilled intending claimants would not know what notice they had."

3rd February, 1899.

No. 27 Final.

DISTRICT COURT, KALUTARA, 1717.

Action under section 247 of the Civil Procedure Code—effect of seizure by Fiscal—Amounts to dispossession in law—14 days limit.

This is an action brought under section 247 of the Civil Procedure Code by an unsuccessful claimant whose property had been seized in execution of a decree against a third person. The plaintiff was the owner of an undivided half of the divided northern portion of the garden called Kandagodayawatte. The fiscal at the request of the defendant in this action, who is the execution-creditor of a third person, seized the whole of the Northern portion of this garden. The plaintiff thereupon put in a claim, but owing to illness he was unable to attend and sustain his claim, and his claim was dismissed. Thereupon he brought this action.

After going into evidence, the District Judge found that the weight of the evidence was in favour of the conclusion that at the time of the seizure the plaintiff was in the actual possession of this property, but he said:—"I dismiss his action on the sole ground that he has no actual cause of action,—he has not been disturbed in the possession of the property he claims, and he has suffered no damages by any act of the defendant."

Per Bonser, C. J.—"It seems to me that the District Judge was quite wrong in the view he took of the effect of the seizure. A seizure by the Fiscal is in law dispossession, and if the owner puts in a claim to the property and that claim is disallowed, unless within 14 days from the date of disallowance he brings an action under section 247 he is for ever debarred from alleging that the property was not liable to be sold under that seizure.

The proper order in this case is what the plaintiff ought to have prayed for his plaint, *i. e.*, a declaration that he is entitled to have the undivided half share of the northern portion of the garden, which was seized by the Fiscal at the instance of the defendant, released from seizure."

Lawrie, J:—"agreed."

28th February, 99.

No 361 Final.

DISTRICT COURT, COLOMBO, 10518.

Framing of vague issues Procedure for ascertaining proper issues—Section 146 of the Civil Procedure Code.

Per Boner, C. J.: "It seems to me that the issue framed in this case is too vague, for it is little more than this:—Is the plaintiff or the defendant entitled to succeed?"

The case must go back for the District Judge to adopt the procedure laid down in Section 146 of the Civil Procedure Code for ascertaining the proper issues.

Withers, J:—"Concurred."

16th February 1899.

No 22 Interlocutory.

DISTRICT COURT, GALLE, 5137.

Partition actions— 3 N. L. R., p. 12 does not lay down ti a general rule.—Section 4 of the Partition Ordinance.

This was an action by the plaintiff for partition, in which the defendant disputed the plaintiff's title, and the District Judge relying upon the case reported in 3 N. L. R. p 12 dismissed the action.

Per Bonser, C. J:—"I think that this case should go back for trial. The District Judge relied upon the case of Nona Baba vs. Namohamy, reported in 3 N. L. R. p 12, which he thought justified him in dismissing the action. It seems to me that the District Judge has assumed that that case laid down a general rule, binding in every case, whereas it is clear from the report that the remarks of the learned Judge were directed to the facts of that particular case. He did not intend to lay down the general proposition that whenever a defendant in a partition action disputes the plaintiff's title the case should be dismissed, for that is contrary to section 4 of

the Partition Ordinance, which provides that "if the defendants or any of them shall appear and dispute the title of the plaintiff. . . . . the Court shall in the same cause proceed to examine the titles of all the parties interested therein." But I entirely agree in the remarks in that case to which I have referred as to the impropriety of making partition suits a substitute for actions "rei-vindicatio."

LAWRIE, J.—"Agreed."

2nd March, 1899.

I. CIVIL.

No. 20 F., DISTRICT COURT, Jaffna, 233.

Action for partition—Decree under § 7 of the Partition Ordinance to be prefaced by a statement—No authority under the Ordinance for selling one share alone—If partition is impracticable the whole land must be sold and purchase money apportioned according to the interests of the parties:—

The facts of this case appear sufficiently from the judgment.

Per BONSER, C. J.—"This is a partition action between a number of parties, all of whom seem to be agreed as to the shares to which they are entitled. The decree, however, is not altogether in a satisfactory state. The 2nd plaintiff is decreed to be entitled to a certain specified share, and the defendants are declared to be entitled to the rest. Such a decree is allowable under § 7 of the Partition Ordinance, but only on condition that the owners, other than the plaintiff, are willing to possess their shares in common, and do not therefore require a declaration of possession of individual shares. I suppose that is the condition of affairs in the present case. But if that is so, the decree is to be prefaced by a statement to that effect.

Then the decree goes on to say that "it is further ordered that the plaintiff's portion be divided off in severally, if possible, but to be sold, if impracticable." That will not do at all. There is no authority for selling one share alone; if a partition is impracticable the whole land must be sold, and the purchase-money apportioned according to the interests of the parties in the land. The decree must therefore be amended in the way I have pointed out. Then the defendants complain that the costs of the suit are directed to be borne by the parties in proportion to their respective shares in the land. This appears to me to be quite right. The defendants, who are willing to hold their shares in common, are jointly and severally liable to pay that proportion of the costs which agrees with the shares to which they are declared to be jointly entitled. They will have no difficulty to apportion what they have to pay amongst them. As they are willing to hold in common, they must know what their shares are. I see nothing to object to in the decree, as far as the costs are concerned.

I think that the costs of this appeal should be divided in proportion to their respective shares of the parties. . . ."

Per WITHERS, J.:—"I agree in the modification of the order. If the plaintiff's share were to be sold, as the Judge has ordered it should be, these proceedings would probably be followed by fresh proceedings on the advent of the new tenant-in-common. That is what the parties concerned want to avoid."

14th February, 1899.

No. 18 F., DISTRICT COURT, MATARA, 1,187.

Section 538 of the Civil Procedure Code—Filing of inventory by executrix as required by this Section—Section 718 of the Code does not empower the District Judge to make an order directing the executrix to get a third person to make an inventory or valuation—The Stamp Ordinance makes provision for undervaluation of an estate.

Per BONSER, C. J.—"This is an appeal by an executrix who has proved her husband's will and has, as required by Section 538 of the Civil Procedure Code, filed an inventory of her testator's property, with a valuation of the same, verified by herself, by affirmation.

The District Judge was apparently not satisfied that the valuation was correct. He suspected that the estate was undervalued. No grounds for that suspicion are recorded by him. He merely remarks that the inventory is insufficient, but he does not say in what respects it is insufficient, and he requires a further valuation to be made by a Mr. Erskine. He professes to make that order under Section 718 of the Civil Procedure Code, which provides that where an inventory has not been filed or where the inventory filed is insufficient, the Court may, of its own motion, make order for the filing of an inventory as a further inventory as the case may be. That section does not empower the District Judge to make an order directing the executrix to get a third person to make an inventory or valuation of property.

The form of verification of inventory and valuation as given in the Code runs thus: 'I have made a careful estimate and valuation of the said property, the particulars of which are set forth and contained in the said inventory, and to the best of my judgment and belief the several sums respectively set opposite to the several items in the said inventory fully and fairly represent the present values of the items, to which they are so respectively set opposite.'

That shews quite clearly that the inventory is to be made by the executrix, and not by a third person.

I should have mentioned that on the 19th January the Court made an order requiring the executrix to deposit a sum of Rs. 100 in Court for Mr. Erskine's expenses. The Court had no power to make such order. If the property was undervalued by the executrix, the Stamp Ordinance makes provision for that case."

Per LAWRIE, J.—"I agree. I do not say that if a Court, for reasons given, disturbs the correctness of the inventory and the valuation required by section 538 it ought not to reject the inventory and call on the executor or administrator to file an amended inventory and valuation.

A Court, of course, is not obliged to accept an inventory, even though verified, which is *ex facie* incorrect and insufficient, or which the Court has reason to believe is untrue.

20th February, 1899.

NO., 3F. DISTRICT COURT, GALLE, 4,381.

"Patent ambiguity in words of donation—Resort to parol evidence—If legatee cannot identify object intended, he loses his legacy—Irregular partition decree—Question not to be left open in the decree whether a sale or a partition is to take place—Weight to be placed on the opinion of a boy of 14 years given in Court, and contempt of Court."

PER BONSER, C. J. ;—"This is an appeal against the decision of the District Judge of Galle as regards the title of the appellants to a share in the land, the subject of this particular suit. Mr. Dornhorst's clients claimed to be entitled to 3/20 of the land.

It appears that this land was once a portion of a much larger piece of land, and was in 1867 the subject of a partition suit in which it together with other lands were alloted to one Daniel Silva. In 1871, Daniel de Silva and his wife made a deed of donation in favour of their two grandsons, Andrishami and Bastian, and the subject of the donation is thus described therein :—"All the soil and trees of the lot No. 10 of Wellabodwatta situate at Degalla, and the houses standing thereon appearing in the Survey figure No. 513, dated 19th October, 1846, worth £13" . . .

The only description of the land donated is that it is lot No. 10 in the Survey figure and that it is worth £13, and, therefore, the only material description is by reference to this Survey.

When we turn to the Survey figure, we find that there are no less than 3 separate lots marked No. 10. It appears to me that there is here a "patient ambiguity" and that we must resort to "parol evidence" to find which of the 3 lots was the subject of the donation.

Mr. Dornhorst argued that all 3 lots must be taken to have been donated, but no authority was cited for such a contention. This seems to me to be very like the case of a testator bequeathing—"the black horse in my stable." Three black horses are found in the testator's stable and resort to parol evidence becomes necessary to determine which of them is the black horse intended for the legatee. He could not certainly claim all three, and if he could not identify which of them was meant, he would not get any. There is evidence in this case which shews which was the lot intended, for we find Bastian, one of the donees, shortly afterwards dealing with his share of the lot to the west of the high road to Colombo.

In these circumstances I am of opinion that the decree of the District Judge is right in holding that these appellants have no interest in the piece of land, the subject of this action.

I would add that the partition decree is not in proper form and must be amended. The decree, after stating the shares in which the parties are entitled to the land, proceeds thus :—'And it is further ordered and decreed that if a partition is impracticable, the said lot be sold and the proceeds distributed among the plaintiff and defendants in proportion to their respective shares' . . . The question ought not to be left open in the decree whether there shall be a sale or a partition. The District Judge ought to determine whether the land ought to be sold or partitioned, and enter that determination in the decree. The decree must be referred back to the District Judge to amend it in that respect.

I should like to add that I entirely agree with the observations which my brother Withers has just made and I trust that the Court will not allow the executrix the costs of this action out of the estate, but make her pay them out of her own pocket."

WITHERS, J. :—" I quite agree. The appeal struck me as being hopeless, as soon as I heard the conveyance of 1871 read, and saw the figure of survey which is referred to. That figure shews 3 distinct lots marked No. 10, and it seems to me impossible to argue that all the 3 lots were included in that deed. The authorities cited by Mr. Dornhorst do not touch the case in point. I must express my surprise that the Court should have stated that it is for the benefit of the minors that this action for a partition or sale of their interests in it should be brought. Their interest seems to be limited to the slender sum of Rs. 2 a year. That in itself satisfies me that the case ought never to have been brought. To bring a boy of 14 years into Court to say that he approved of this action amounts almost to a contempt of Court."

24th February, 1899.

NO. 26 F, DISTRICT COURT, GALLE, 4,701.

Can planter's interest be acquired by planting citronella or cinnamon ?—This doctrine entirely new and planter's interests hitherto recognised only in respect of plantations of cocoanut—Compensation for agricultural improvements—Is the planting of citronella grass an improvement to land ?

In this case the plaintiff is the owner of an undivided ¼ share of certain lands, and a portion of one of these lands is planted with citronella and cinnamon. The plaintiff, whose title to ¼ share of the lands is not disputed, alleges that his co-owners declined to allow him a share of the citronella and cinnamon, alleging that by reason of their having originally planted the cinnamon and the citronella, they were entited to the sole benefit of the produce, and had what they called a planter's interest therein. The plaintiff therefore commenced his action for a declaration of title to an undivided ¼ of the lands and trees.

Per BONSER, C. J.—"At the hearing the parties agreed that the sole dispute was as to who was entitled to the citronella and the cinnamon. Both parties seem to have agreed that the ownership of the cinnamon and the citronella depended on who had planted them. The Judge seems to have accepted that doctrine. To me the doctrine is entirely new. This court has recognised planter's interests in respect of plantations of cocoanut trees, but I am not aware that the doctrine has been extended to any other kind of cultivation.

However, the District Judge decided that the defendants were entitled to the cinnamon and the citronella, but he did not give effect to that decision by the decree. The decree declares the plaintiff entitled to an undivided ¼th of the lands and the trees thereon. To my mind this gives the plaintiff everything he asked for. If he is entitled to an undivided ¼th of the lands, he is entitled to everything growing thereon. If the other co-owners are of opinion that they are entitled to some compensation for agricultural improvements made on the lands, their proper course will be to commence an action for a partition, in which account will be taken of any improvements they may have made on the lands. A question may arise, whether the planting of citronella grass is an improvement to land, or whether it is not an impoverishing crop. On that question I offer no opinion. That will be determined, if the parties raise it, in the partition suit.

It seems to me that the plaintiff's appeal should be dimissed, because he gets every thing he is entitled to. As both parties have taken wrong views of their rights, there will be no costs, either of the action or of the appeal."

Per WITHERS, J. " I agree. It was foolish of the plaintiff to have appealed, as the decree has given him all that he is entitled to.

Up to this moment, I must say that I have never heard of those who plant cinnamon or citronella acquiring a planter's interest in such products. There has been, as I am aware, no such custom proved."

16th February, 1899.

NO. 540, COURT OF REQUESTS, COLOMBO, 6905.

Servitudes real and personal—Law of prescription of Ceylon does not recognise the acquisition by use of servitudes personal to a single individual—Right of way not acquired by single individual even after use for a third of a century—There must be a dominant tenement in respect of which the right is exercised—Right of way across an intervening field from one field to another acquired in 10 years, if continued without interruption.—

Per LAWRIE, J:—" I do not understand that the plaintiff claims this right of way as a servitude appertaining to the land in which he lives, he does not say that this is a servitude of which his land is the dominant and the defendant's land the servant tenement; I understand that he means he has acquired by use a personal right of way: the issue shews that this was the plaintiff's claim, for the issue is: 'Is plaintiff entitled by prescriptive use to a footpath over the defendant's property as shewn by line A. A. A. on plan 434.'

In my opinion our law of prescription does not recognise the acquisition by user of servitudes personal to a single individual. Even if the use by the plaintiff of this path had been proved for a third of a century, he would not have acquired right of way—there must be a 'dominant tenement' and the user by the owner must be to the advantage of that tenement.

Here the plaintiff, before 1893, had no right to use the water of the pond, which was useful to him only because he was a dhoby, he had the permission of the owner, that permission was personal to himself, it was not connected with his ownership of the house he lived in: the purchaser of that house, who was not a dhoby and had no permission should not have claimed right of way to the pond.

The position of the plaintiff became different when, in 1893, he bought the pond; then the path became the way between two lands belonging to the same proprietor.

The user of way across an intervening field from one field to another will, if continued without interruption for 10 years, become a right of way in favour of the two tenements connected by the path against the tenement over which the path passes.

In my opinion the plaintiff has not acquired the right of way claimed, and I would set aside and dismiss."

20th March, 1899.

2. CRIMINAL.

38, DISTRICT COURT, GALLE, 12,710.

Misappropriation under claim of right—Regina vs. Jaffir Naik, 3 Bombay H. C. Reports p. 133—Effect of misappropriation of a sum of money by accused which is smaller in amount than another sum of money which is owing to him by the complainant.

Per LAWRIE, A. C. J.:—"The accused wrongly appropriated to his use a small sum of money, but he did so under a claim of right, which I hold was not so shadowy and unsubstantial as to be without any 'bona fides' (Reg. *vs.* Jaffir Naik 3 Bomb. H. C., Rep. p. 133.)

The complainant said: 'The accused had to pay me altogether Rs. 4·12, I had to give accused Rs. 5. If accused had come to me before I instituted my plaint and said—I owe you Rs. 4-12, deduct this from my pay and give me the balance, I would not have given him the balance 88cts because he made use of my money and left my service.'

Under these circumstances the accused being entitled to recover from complainant a larger sum than he appropriated, and the real cause of complaint being his leaving service without notice it is my opinion that he is entitled to an acquittal, and I set aside and acquit."

27th March, 1899. "LUX."

1. CRIMINAL.

POLICE COURT, KEGALLE, No. 19,999.

Robbery.—Should be tried by District Courts—Trial of this offence by summary procedure against the Spirit of the criminal law—Preliminary investigation and commitment of trial and reference to Attorney-General desirable in the case of crimes involving greater punishment than a Police Court can give.

Per LAWRIE, A. C. J.—"I am at a loss to understand why the Police Magistrate was of opinion that this charge against four men of robbing a woman of her jewellery might properly be tried summarily. If it was a true case the accused deserved severe punishment.

It seems to me that District Judges are abandoning to Police Magistrates their proper criminal juriadiction. This, I venture to think, is against the spirit of our criminal law. Summary procedure is well adapted for the trial of comparatively trivial offences, but when accused are charged with crimes over which the District Judge alone has juriadiction, and who, if convicted, deserve a greater punishment than the Police Magistrate can give, I think that there should be a preliminary investigation and a commitment of trial and a reference to the Attorney-General. Nowadays the Attorney-General seems to be losing all control over ordinary criminal procedure; there are few references to him or commitments of trial by him except in cases fit for the Supreme Court and a jury.

14th April, 1899.

POLICE COURT, COLOMBO, No. 57,874.

Riot—Summary trial of this offence improper—Police Magistrates and their powers Under Ordinance 8 of 1896 and Section 152 of the New Criminal Procedure Code.—Section 152 to be read with Section 166.—Juriadiction of a Police Court should be confined to proper Police Court cases and to those District Court cases in which the accused consents to be tried and where the punishment is no more than a year's imprisonment.—Power of Magistrate to try without consent and to give as much as two years should be exercised only on good cause shewn.—Langnage of Ordinance 8 of 189· purposely changed from 'the District Judged to 'the District Judge having jurisdiction etcd by the New Code.—Charge of riot shoul" state the common object which made the assembly unlawful. Under what circumstances 5 persons can be charged for unlawful assembly and what additional particulars develop it into riot.—Three men only cannot be convicted of unlawful assembly or riot.—Old English Law on the subject in Hawkins's Pleas of the Crown p62.

Per LAWRIE, A. C. J.: "In his judgment the magistrate says that the offence appears to him to be a serious one and I am at a loss to understand why he came to the conclusion that the charge of riot might be properly dealt with summarily.

It seems to me that the jurisdiction in criminal cases is passing away from the District Courts and is being transferred to Police Courts and that the Attorney-General is giving up control over offences except those which have to be tried by the Supreme Court and a jury. Of course if this be the law there is no use of regretting it, but I think that magistrates have taken too much advantage of the powers given to them by Ordinance No. 8 of 1896, and by the 152nd Section of the new code. This 152nd Section must be read with Section 166, and in the Ordinary case it seems more just to confine the jurisdiction of a Police Court to proper Police Court cases and to those District Court cases in which the accused consents to be tried and where they can get no more than a year's imprisonment. The power of a Magistrate to try without consent and to give as much as two years should, I think, be exercised seldom, and only on good cause shewn.

In the present case it was objected that the 152nd Section applied only to cases where the Police Magistrate and the District Judge of the district were the same person. It is plain that the language of the Ordinance 8 of 1896 has been purposely changed from 'the District Judge' to 'the District Judge having jurisdiction, etc.' Mr. Moor having been appointed Additional District Judge of Colombo has, under the Code, power to act under section 152, sub-section 3.

It was objected that the charge under section 144 was defective. In my opinion a charge of riot should state the common object which made the assembly unlawful, but I read the charge as a whole and I hold that the 1st charge of criminal trespass sufficiently indicates the common unlawful purpose, alleged by the prosecution, viz., the intent to intimidate, insult, and annoy the complainant.

Now if 5 men together commit criminal trespass it becomes an unlawful assembly, and if force or violence is used it becomes a riot. The evidence is that a large number of persons assembled; the charge was that of that large number, six had a common unlawful object and had used force or violence, but in the course of the trial the magistrate acquitted three of these six. Those who were convicted were not of sufficient number to make an unlawful assembly, and even if they committed acts of force or violence they were not guilty of rioting. It is not sufficient to say that it is proved that there were many others present. "Non-constat" that they were more than innocent byestanders and onlookers. If the Magistrate bound that 3 of those charged had no unlawful object in common with the 3 whom he convicted how can it be assumed that others in the crowd, whose names I presume are not known, or who were not identified, had an unlawful object in common with the three convicted men. The old English law (Hawkins's Pleas of the Crown p 62) under verdict was that on an indictment for a riot against 3 or more, if a verdict acquit all but 2 and find them guilty, or on an indictment for conspiracy if the verdict acquit all but one and find him guilty, it is repugnant and void as to the 2 found guilty in the 1st case and as to the 1 found guilty in the 2nd unless the indictment charge them with having made such riot and conspiracy *simul cum aliis jur atoribus ignotis* for otherwise it appears that the defendants are found guilty of an offence whereof it is impossible that they should be guilty, for there can be no riot when there are no more persons than two.

I set aside the conviction for riot; I convict the 3 accused appellants on the 1st count of committing criminal trespass, of which there is sufficient proof. I set aside the sentence of 9 months rigorous imprisonment and in lieu (under Section 433) sentence each of the accused to 3 months' rigorous imprisonment."

14th April, 1899.

POLICE COURT, KEGALLE, No. 19,842.

Order of maintenance against a husband. Two grounds under Ordinance 19, of 1889 on which allowance can be granted viz., (1) adultery, (2) habitual cruelty.—Under any other circumstances no allowance can be granted if the husband is willing to maintain the wife.

Per WITHERS J.—"In this case the wife of the defendant has succeeded in gaining an order of maintenance against her husband. The husband says he is quite willing to maintain his wife if she will live with him: two grounds are mentioned in the Ordinance 19 of 1889, which are sufficient to entitle applicant to an allowance, notwithstanding the husband's offer to maintain his wife if she will live with him and those are adultery and habitual cruelty. Now there is no evidence that her husband was living in adultery. Is there proof of the husband's treating his wife with habitual cruelty? All that the Magistrate says is this:—"The evidence adduced by the appellant discloses a sufficient reason for her not going back to her husband the defendant. I find it difficult to believe that the applicant left the defendant of her own accord without any reason. . . .

Now the Magistrate does not expressly find that the complainant was treated with habitual cruelty. No one supports the wife's statement that she was ever ill-treated by her husband. . . In the course of 4½ years of co-habitation with the defendant she was twice assaulted by her husband. This is not evidence of habitual cruelty. It is significant that she never complained to any one of being assaulted by her husband.

The order is consequently set aside."

25th April, 1899.

II. CIVIL.

27TH INSTANT, DISTRICT COURT, GALLE. No. 5,031.

Joinder of parties in an action—11th and 12th sections of the Civil Procedure Code on the point—an act which is one and the same cause of action'—two or more co-owners may join in the same action against the wrong-doer, although each of the plaintiffs has a different title to a share of the land.

Per Withers, J:—"This is an appeal from an order deciding in effect that the plaintiffs cannot unite in this action against the defendant, and in my opinion, the appeal is entitled to succeed. The two plaintiffs and the defendant are owners in common of certain immovable properties. It is alleged that the defendant has given out the properties on lease and has appropriated the rents without accounting to the plaintiffs for their respective shares. The 1st plaintiff acquired his interest in the common property a long time before the 2nd plaintiff acquired his and as his share is the larger of the two, and as the defendant began to deal with some of the common properties before the 2nd plaintiff's interest accrued the amount claimed by 1st plaintiff is naturally much more than the amount claimed by 2nd plaintiff. It seems to me that the 11th and 12th sections of the Civil Procedure Code apply to this case and are in favour of the appellants . . . . . The right to relief is no doubt separate, but it is surely in respect of the same cause of action.

The plaintiffs and defendants have a community of interest in the rent and profits of the common property, and if the defendant who has taken these rents and profits withholds their due shares from his co-tenants, his act is one and the same cause of action.

To split this action would, I think at once offend the Code, convenience, and civil law, which permits any number of persons having a common interest to join in one action."

Per LAWRIE, J.: "I do not agree with the learned District Judge. The cause of action is that the defendant, one of several co-owners, has taken the whole rents and profits of the land of which the plaintiffs are also owners, and that he has refused to pay to his co-owners their share of the rents.

In my opinion, two or more co-owners may join in the same action against the wrong-doer, even though each of the plaintiffs has a different title to a share of the land :—a title different in date — one may be earlier than the other; different in character—one may be by inheritance, the other by purchase; different in extent—one for a large, another for a small share.

The 11th and 12th sections of the Civil Procedure Code allow the co-owners to join in one action. Set aside with costs. Remit for further procedure."

14th March, 1899.

F. 24. DISTRICT COURT, COLOMBO, NO. 7,717.

Section 17 of the Partition Ordinance.

Interpretation – Acts void and voidable—Gye *vs.* Felton, 4 Taunton, 876.

Per BONSER, C. J. :—"This case was set down for the full Court on the ground of a difference of opinion between my brother Lawrie and myself, but it turns out that the facts were not before us and upon the facts as now disclosed there is no difference of opinion at all between us.

I had some doubt as to the construction of Section 17 of the Partition Ordinance, and I find very great difficulty indeed in acceding to the argument that when the Legislature says :—It shall be unlawful for a man to do a certain thing and that if he does that thing his act shall be void, that has only a limited operation.

There is no doubt that in many cases where the Legislature has declared an act to be *void*, Courts have treated the declaration as meant merely for the protection of certain parties, and held the act not altogether void, but only voidable at the instance of the party intended to be protected. But I am not aware of any case in which, where the Legislature has declared that the act shall be *unlawful*, such a construction has been adopted. There is an old case of Gye vs. Felton, 4 Taunton, 876, where Lord Mansfield held that a particular act having been declared not only void but unlawful, could not be ground for an action.

However it appears in the present case that the conveyance dealing with the property which resulted in the plaintiff acquiring a title was not obnoxious to Section 17 of the Partition Ordinance, for there was a valid agreement to sell to the plaintiff before the institution of the Partition suit. Under these circumstances I am of opinion that the case must go back to the District Court to investigate the title of the parties. At the same time I must say that the history of the proceedings in the partition suit—1602 is a very extraordinary one and I trust that the District Judge will carefully scrutinize the titles of the parties."

LAWRIE and WITHERS, J. J. :—"Agreed."

CRIMINAL.

150, POLICE COURT, BATTICALOA,

No. 13,431.

Summary jurisdiction of Police Court under Sec. 367 of the Penal Code—Value of property stolen to be taken into consideration—A charge under Sec. 367, to be tried in the District Court, must be committed for trial, and the Attorney-General must designate the District Court as the Court for trial—Sentence of 12 months' rigorous imprisonment by Police Court for theft "ultra vires"—A charge under Sec. 394 of dishonestly receiving stolen property is alternative to a charge of theft, and therefore a man can be convicted of one only of the two alternative offences.

Per LAWRIE, A. C. J :—"No appearance." This is an ordinary Police Court case triable summarily. —A charge and conviction under Section 367,— and as the value of the property stolen was under R100 the jurisdiction of the Police Court was undoubted.

To give himself the right to sentence to 12 months' imprisonment the Police Magistrate says the case could have been tried in the District Court. Perhaps it could: I do not know that it could have been, except on commitment for trial and on the Attorney-General designating the District Court as the Court for trial. Anyhow this was from first to last a Police Court case and the sentence of twelve months' rigorous imprisonment is "*ultra vires*," and is reduced to six months.

The Police Magistrate has also convicted the accused under Section 397 an error for Section 394) for the offence of dishonestly receiving and retaining stolen property: these are alternative charges to that of theft, of which the Magistrate had already found the accused guilty.

A man cannot both steal goods and receive them from another knowing them to have been stolen; still less can a man both steal goods and receive them in innocence and afterwards retain with guilty knowledge the same goods. I set aside the conviction for retaining stolen property. I affirm the conviction for theft and sentence to six months' rigorous imprisonment."

3rd May, 1899.

145, POLICE COURT, GALLE,

No. 3,490.

Maintenance Ordinance 19 of 1889—Application (under Section 3) for maintenance must be made within twelve months from birth of illegitimate child, unless the father maintained it or paid for its maintenance within that time.

Per LAWRIE, A. C. J. :— This application for an order under Section 3 in respect of an illegitimate child was not made within twelve months from the birth of the child, and the application can succeed only if the mother has proved that the respondent had at any time within the 12 months next after the birth of the child maintained it or paid money for its maintenance."

3rd May, 1899.

152, POLICE COURT, GALLE,

No. 3,755

Lashes not to be imposed under the Knife Ordinance if the wound inflicted is only superficial.

Per LAWRIE, A. C. J. :—"The conviction and sentence of a month's rigorous imprisonment are affirmed, but in view of the Doctor's evidence that the cut was only skin deep I remit and set aside the sentence of lashes."

3rd May, 1899.

151, POLICE COURT, BATTICALOA.

No. 13,461.

Admissibility of the evidence of a complainant's wife—Wife of a complainant not in the same position as the wife of an accused, because the liberty of the latter is at stake, the liberty of the former is not—Erroneous view taken by Magistrate on the point.

Per LAWRIE, A. C. J. :—" Mr. Wendt urged me to reduce the sentence to a fine. I think it would not be right to interfere with the sentence of imprisonment. No doubt the accused thought his sister was being badly treated by her husband and interfered on her behalf, but the use of a knife was unjustifiable and must be punished.

I do not appreciate the difficulty the Magistrate had as to receiving the evidence of the complainant's wife : the wife of a complainant is not in the same position as the wife of an accused. The liberty of the latter is at stake, the liberty of the former is not.

A complainant has always been at liberty to call his wife to corroborate his evidence, how otherwise could a house-breaking be proved if the only inmates were a husband and his wife? An assault on a husband can be proved by the evidence of the wife, and so on.

Here the Police Magistrate seems to think that because the complainant and his wife were at enmity, and because the accused, who cut her husband, was acting in support of the wife, she could not give evidence because it would be against her husband; that is not the way to look at it: she was called to give evidence for her brother and her evidence was admissible. I affirm."

3rd May, 1899.

POLICE COURT, GALLE,

No. 3,861.

Point of law—Mischief by fire or explosives under section 419 of the Penal Code beyond the jurisdiction of a Police Court to try – Resultant damage caused by the mischief not an essential consideration—intention to be looked into—Evidence of an expert desirable.

Per WITHERS, J :—" The point of law raised in this case is this : If these detonators were placed in such a position as regards the complainant's dwelling-house that if exploded by a fuse in the usual way they were calculated to cause the destruction of the dwelling-house, then this is an offence of mischief which the Police Magistrate is not competent to try, being an offence punishable under Section 419 of the Penal Code, which is triable by a District Court and not a Police Court. If the explosives were calculated to destroy the dwelling-house then it does not matter whether they had that effect or not if the accused intended them to cause or knew they were likely to cause the destruction of the house.

The evidence on this point is meagre, and I should like to have further evidence taken.....

It would be advisable if the Magistrate were to call up some expert, if there is one in the town, who, being shewn the detonator and fuse and the place and the position where the detonators are said to have been found, to state what would be the ordinary result of an explosion under the circumstances.

It seems to me that if the accused had the intention and knowledge indicated in Section 419, they deserve a severe sentence than what has been passed upon them.

I should rather like the Police Magistrate to state what in his opinion was the intention of the accused upon the evidence which he has already recorded.

1st May, 1899.

POLICE COURT, TANGALLA,

No. 4,841.

The Forest Ordinance No. 10 of 1885—Clearing a land at the disposal of the Crown under chapter IV.—If a breach of a rule under this chapter be committed the rule must be indicated or specified—The land must be proved by the prosecution to be forest land under chapter IV.—Appropriate proof on this point shewn in judgment reported in 1 N.L.R. p 102.

Per WITHERS, J :—" This conviction must be set aside and the case sent back for further trial. The accused have been convicted under Sec. 42 of the Forest Ordinance of 1885, Chapter IV, which runs thus :—' The breach of any of the provisions of or regulations or rules under this Chapter, shall constitute an offence punishable by a fine not exceeding a hundred rupees, or by imprisonment which may extend to six months."

Now the Magistrate does not state in his judgment whether the accused broke some provision of this Chapter, or broke a rule under this Chapter. The evidence was read to me by defendant's counsel, and I agree with him that the proof of any offence under this Chapter is defective. I presume from such evidence as there is and from the remarks of the Magistrate that the accused cleared a land at the disposal of the Crown under Ch. IV, and in so doing broke some regulation or rule directed to the clearing of land such as the accused is alleged to have cleared. If such a rule exists it ought to be produced or indicated so that one may know what the rule is that the accused has broken.

This Chapter refers to forests at the disposal of the Crown other than a reserved or village forest. If no rule has been made under Chapter 4 of the Ordinance 10 of 1885, relating to forests in the Tangalla district, then it may be that accused has broken a provision of this Chapter by clearing forest other than reserved or village forest without license or authority. Rule broken or provision broken it must be proved by the prosecution that this is forest land under Chapter IV. and the appropriate proof on this point is shewn in a judgment of the Chief Justice reported in N. L. R. p. 102 (Nugapitiya Mohandiram *vs.* Suddayandi et al: P. C. Kegalle No. 13,750).

I observe that two witnesses for the prosecution state that they do not know Dangahakoratuwa. Surely there must be natural or artificial boundaries to the land, or how can one say what is the land at the disposal of the Crown. The case is remitted for trial on the points indicated in this judgment." 1st May, 1899.

POLICE COURT, KANDY,

No. 11,253.

Doctrine of recent theft and presumption—Possession of stolen article must be proved for doctrine to apply—Where owner and his horsekeeper have access to the stables in which stolen article is found, it cannot be stated as a legal proposition that the stolen article was in the possession of the former.

Per WITHERS, J.—"In this case the accused has been convicted of the theft of a set of pony harness belonging to the complainant. He has been convicted on the fact that this harness was found tied up in a gunny bag and concealed under some straw in his stables. The stolen harness was found at about 9 o'clock of the morning of the 7th March. The property was stolen some time on the night of the 2nd March. Now this room in which the harness was found is the room where the complainant kept his horse. He owns a horse and carriage and two sets of harness. It seems that the stable room has a door at the back and front. The door at the back cannot be fastened and opens into a compound. The front door can be closed in a way, but there is no evidence as to whether it was usually closed during night. There is a carriage way from the stables into Trincomalee Street. The plan filed in the case does not shew whether the passage is open or has a gate to it. According to the accused, who gave evidence on his own behalf and denied all knowledge of the existence of the concealed harness, he deposed that the room beyond the stables was occupied by the complainant, who had access to the premises all the day time, but did not sleep on the premises. Considering that another person, besides the owner, the defendant had at the time material to this action a right of access to the stable room where the harness was found concealed, it cannot be stated as a legal proposition that the harness was in the possession of the defendant. It is on the fact of possession alone that he has been found guilty. In my opinion the presumption of guilt in this case has no foundation.

I think the judgment ought to be set aside and the accused acquitted."

29th April, 1899.

CIVIL.

344. COURT OF REQUESTS, KURUNEGALLE. No. 5,203.

Reference to arbitration under the Civil Procedure Code—Sections 683 and 691—Interpretation of the 683rd Section in the case of Punchirala *vs.* Sudehamy, 2 N. L. R. p 38—Court can enlarge time on cause shewn when the time for making the award has expired—Warren and Powell's arbitration, 3 Law Reports Equity p 261—39th Section of the Act 3 and 4 William IV., Ch: 42, as interpreted by Sir John Smart—When parties consent to refer their disputes to an arbitrator they ought to be bound by the award unless there are any reasons which according to the Code, justify the award being remitted for correction or set aside altogether.

The material facts of this case are these :—The parties to this action referred all matters in dispute to the sole arbitration of Manapayi Korala. On the day fixed for filing the award, the arbitrator was absent and the case was laid over for another day. The Commissioner was absent on duty at Puttalam on the day fixed and the case was again laid over for the 27th May. The parties appeared in Court on this day, but the case was "laid over" for the parties to shew cause, if any, against the award. In the journal entry on this day appear the words "award filed." When the case was taken up on the 13th June, 1898, the parties appeared in Court, but the defendants only had cause to shew against the award, their one reason being that it was not filed within the period originally fixed by the Court. The objection was not discussed on this day and the matter was postponed to the 23rd June following.

The parties and the arbitrator appeared and the arbitrator accounted for his delay by his illness and by his inability to report his illness to the Court. The defendants by their proctor again said that they had no cause to shew against the award except that it was not filed on the day fixed.

Per WITHERS, J:—"This was a reference to arbitration under the Civil Procedure Code and the Sections pertinent to the case are the 683rd and 691st Sections. The 683rd Section enacts that "If from the want of the necessary evidence or information or from any other cause the arbitrators cannot complete the award within the period specified in the order, the Court may, if it think fit, either grant a further time and from time to time enlarge the period for the delivery of the award, or make an order superseding the arbitration, and in such case shall proceed with the action."

The 691st Section provides :—"No award shall be valid unless made within the period allowed by the Court."

In my opinion the defendants are estopped by their conduct from raising this objection. When they had the opportunity they made no protest against the application of the arbitrator for further time. The Court has virtually allowed that application, so that the award has been filed within the enlarged time.

In the case of Punchirala *vs.* Sudehamy, 2 N. L. R. p 38, Mr. Lawrie, A. C. J. and Mr. Browne, A. J. decided that the 683rd Section of our Code permitted the court to enlarge the time on cause shewn when the time for making the award had expired. In the case of "Warren and Powell's arbitration" reported in 3 Law Reports, Equity p 261, the parties entered into an agreement for the submission of their disputes to arbitration. This was in June 1861. The reference was made a rule of Court on or the 18th January, 1866. The deed provided that the award should be made within three calendar months next after the third of the arbitrators for the time should have been named. But the instrument contained no power to enlarge the time for making the award under it. An award was eventually made after the time limited by the deed, and for that reason one of the parties refused to be bound by the award. There was a mistake in the award admittedly of easy correction, and the parties who wished the order to stand asked the Court to enlarge the time for making the award so that it might be remitted to the arbitrators to correct the mistake.

The Vice-Chancellor Sir John Smart, had no doubt that he could enlarge the time and grant the relief asked for because in his opinion the 39th Section of the Act 3 and 4 William IV. Ch. 42 embraced the Superior Courts of Equity and by that Section it was enacted that "the Court or any Judge thereof may from time to time enlarge the term for any such arbitrator making his award."

That case is not unlike the present one. The only difficulty I feel is with reference to the journal entry of the 27th May, in which appears the words "award filed."

This journal entry was not apparently signed by the Commissioner and I consider the entry was merely a record of the fact that the arbitrator had produced his report and the connected documents on the day to which he had asked the time to be extended. When parties consent to refer their disputes to an arbitrator, they ought to

be bound by the award unless there are any reasons which according to the Code justify the award being remitted for correction or set aside altogether. Not that I impute any blame to the defendants' Proctor in this case for taking the legal objection that the award was not valid. Giving my best judgment to the case I think the award ought to be sustained. Judgment affirmed."

12th January, 1899.

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443. COURT OF REQUESTS, COLOMBO, No. 6986.

Action for repayment of loan made to husband and wife, the latter having a separate estate. When the husband confesses judgment, proxy to a Proctor to defend signed by the wife alone is valid.

PER LAWRIE, J: "Set aside and the action is remitted with instructions to receive the proxy tendered for the 1st defendent and to allow her to file answer and to proceed according to law.

The plaintiff brought action against a woman and her husband for repayment of a loan alleged to have been made to both.

The husband (2nd defendant) admitted the loan; the wife (1st defendant) denied she borrowed the money. She has an interest in denying personal liability and in avoiding a decree against her, because she has a separate estate.

The Commissioner refused to accept a proxy signed by the wife alone, requiring it to be signed by the husband also.

It is unreasonable to expect the husband to sign a proxy to defend an action, in which he has already confessed judgment.

The wife and husband have opposing interest. She certainly has right to defend the action and for that purpose she has a right to give a proxy to a Proctor to appear for her.

The Appellant is entitled to the costs of this appeal." 1st February, 1899.

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450 COURT OF REQUESTS, MATARA, No. 622

Action for partition under Ordinance 10 of 1863—Appearance of co-owners after appointment of commission to carry out order of sale, but before sale—The land being *in statu quo ante*, the co-owners so appearing should be allowed to be added as parties and to defend the suit—Section 9 of 10 of 1863—Decree for partition referred to in this section is the *final judgment* referred to in the 6th section. The decree for sale which is to be final and conclusive is the certificate under the hand of the Judge that the property has been sold under the order of the Court setting forth the purchaser's name and the fact that the purchase money has been paid—Until this certificate be signed the cause is still pending."

Per LAWRIE, J:—"I set aside and remit to the Court to add the appellants as parties and to allow them to file answer in this action.

The land which is the subject of this partition was declared to be owned in common by the plaintiff and the defendants in certain specified shares.

The Commissioner ordered the property to be sold and appointed a commission to carry out the order of sale. Before the day of sale the present appellants appeared and filed a petition and affidavit stating their claim to be co-owners of the land and praying to be allowed to be added as parties and to defend the suit.

The learned Commissioner refused, holding that their petition was too late.

In my opinion the application should be allowed. The land is *in statu quo ante*; the sale has not been carried out, and it will save further litigation if in this suit the titles of all alleging an interest in the land are investigated and adjudicated on.

No injustice can (I think) result from the application being allowed. The 9th Section of the Partition Ordinance enacts that the decree for partition or sale as herein before provided shall be good and conclusive against all persons whatever, and this Court has held that the decree for partition referred to in the 9th Section is the "final judgment" referred to in the 6th Section, and in my opinion, it follows by analogy that the decree for sale which is to be final and conclusive is the certificate under the hand of the Judge that the property has been sold under the order of the Court settingforth the purchaser's name and the fact that the purchase money has been paid.

It is this certificate which is evidence of the purchaser's title and until that he signed, the cause is still pending. It seems to me reasonable that parties claiming an interest should be allowed to appear.

In the present case the enquiry into title was perfunctory and the decree for partition was passed almost by consent."

6th February, 1899.

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470. COURT OF REQUESTS, BALAPITIYA, No. 2,277.

Cattle trespass—Defendant should be given an opportunity of optional surrender. A judgment in common law actions for trespass by cattle should give the alternatives of surrender or fine—Sections 320 321 and 322 of the Civil Procedure Code—Plaintiff who wants damages without giving option of surrender must adopt measures ordained by Ordinance 9 of 1876—Vide Silva *vs.* Silva, D.C., Galle, 4,597 decided 27th September, 1898.

Per Withers, J.—"The Court is perfectly satisfied that the defendant's two head of cattle were found trespassing on the plaintiff's property. Though the evidence, as read was not very impressive, I cannot say that the Court was wrong.

The proper judgment, however, in these common law actions for trespass by cattle is to give the defendant an opportunity of surrendering the cattle to the owner of the damaged property if he prefers to do so. The Court should therefore summon the defendant before him and ascertain if he is prepared to give up the two head of cattle tot he plaintiff by way of "noxal surrender." If he is willing to do so, the Commissioner will order him to do it within a certain time. If he is ordered to do so and fails to obey that order, then execution can be taken out under the provisions of section 320, 321 and 322 of the Civil Procedure Code.

If the person, whose property has been damaged by cattle, desires to recover damages without giving the owner of the cattle the option of surrendering the cattle he should adopt the measures ordained by the Ordinance 9 of 1876. See the case of Silva *vs.* Silva, D. C., Galle, 4597, decided on the 27th September, 1898."

7th February, 1899.

434, COURT OF REQUESTS, KALUTARA, No. 80.

Landlord and tenant—Decree by default and sale in execution—Reopening of judgment by default and dismissal of the action—Can a confirmation of the sale in execution of judgment by default be rescinded when the judgment by default is re-opened and the case dismissed—A sale regularly conducted under a subsisting decree does not become null and void on the decree being afterwards re-opened and set aside and reversed—Court has no power to confirm a sale after the decree on which execution proceeded had been set aside—1 L. R. 2 Bombay, 540—and J. L. R. 10 All : p83.

This was an action for rent brought by the plaintiff alleging he was the owner of land against the defendant who was alleged to have taken the land on lease and failed to pay the stipulated rent. Judgment by default was entered on the 11th of August 1896 and writ issued on the 15th April, 1897.

On the 30th August 97, the defendant moved (on affidavit) that judgment be re-opened. that he be allowed to file answer and that sale fixed for 3rd September be stayed. Notice on the plaintiff was ordered returnable 6th October. The property was sold in execution on the date fixed viz. the 3d September and on the 6th October judgment by default was opened by consent and the action subsequently dismissed, 7th December, 1897. On the 9th June, 1898, the purchaser at the sale applied to the Court of Requests to confirm sale and the application was granted on the 11th June. On the 22nd June the defendant moved for a notice on the purchaser to shew cause why the confirmation of the sale of the defendant's property should not be rescinded and why the purchaser should not get back the purchase money in deposit. On 12th August the purchaser appeared and objected to the sale being cancelled and the Commissioner held that he had no power to cancel or rescind the confirmation of the sale, but he intimated that he had confirmed the sale in ignorance that the decree had been re-opened and that the action had been dismissed. Against this refusal to rescind the appeal was taken.

Per LAWRIE, J.—"The 1st point taken in the petition of appeal is that when the judgment was set aside the sale became null and void. That seems to me an untenable proposition. A sale regularly conducted under a subsisting decree does not become null and void on the decree being afterwards re-opened and set aside and reversed.

The next point is that the Court had no power to confirm a sale after the decree on which execution proceeded had been set aside.

Mr. Jayawardene, for the appellant, quoted two Indian decisions which are in point, and which support this proposition. In the first of these decided in 1878 by the Bombay Court reported in I. L. R. 2 Bombay 540, Mr. Justice Melville said :—"It is well established that if a decree be reversed after a sale under it has become absolute and a certificate has been granted to the purchaser, the title of the purchaser is not affected by the reversal of the decree. But in the present case the decree was reversed while the sale was still incomplete and from that moment the Court which made the decree ceased to have jurisdiction to take any further steps to execute it."

It was added :—"Before he applies to the Court to confirm the sale and grant him a certificate the purchaser ought to ascertain that the decree under which the sale was ordered is still in existence."

In the latter case the Allahabad Court, (I. L. R. 10 All : p 83.) decided in 1887, Mr. Justice Straight followed the Bombay decision. He said :—"The Court executing the decree must be satisfied, before confirming, not only that the sale was a good sale, but that there was before him a subsisting decree with the execution of which he ought to proceed by granting confirmation....."

I think I am right to follow these decisions. I therefore sustain the appeal, and set aside the confirmation of the sale."

10th February, 1899.

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460. COURT OF REQUESTS, KEGALLE. No. 2,756.

Prescription of mortgage in 10 years unless interest be paid within this period—Or the mortgagee occupies the land as usufructuary mortgagee in lieu of interest. The privilege given by Ordinance 8 of 1863 to the priority of Registration does not apply to deeds executed before the ordinance came into operation—The fact of the mortgagee being in possession is *prima facie* evidence that the debt still subsists.—*Privity* of contract.

Per Lawrie J : "The action having been brought more than 10 years after the date of the mortgage it was not maintainable unless interest had been paid within 10 years.

The plaintiff's case is that the field mortgaged had been possessed in lieu of interest. He says his cultivators have been Wappu Lebbe, Sinna Kulanda Marikar, and Sinna Lebbe.

The Commissioner of Requests believed the evidence of plaintiff's possession as usufructuary mortgagee. An action therefore is maintainable on the mortgage bond. This action has been brought against the owner of the land, the defendant purchased from the son of the mortgagor.

His purchase was in 1871, the bond is dated 1859. The privilege given by 8 of 1863 to the priority of registration does not apply to deeds executed before the Ordinance came into operation.

In this case the defendant does not allege that the bond has been satisfied by payment. The fact that the mortgagee is in possession is *prima facie* evidence that the debt still subsists, but between the defendant (the present owner) and the mortgagee there is no *privity of contract*, and no decree for money can be passed. All that can be done is to declare the land bound by the mortgage, and to direct it to be sold on a specified day, unless prior to that date the defendant chooses to exercise his right to redeem the bond. The plaintiff is entitled to his costs."

13th February, 1899.

475. COURT OF REQUESTS, KANDY. No. 6797.

Liabilities of landlord and tenant—Landlord not responsible for criminal entry by thieves into house let by him, as there is no warranty against criminal entry—Quiet possession only warranted for.

Per LAWRIE, J. : "The only question raised in the petition of appeal is whether the liability of the defendant to pay the plaintiff rent in respect of the house in Kandy which she had taken on lease for three months, ceased on the 25th of May in consequence of the house having been on two consecutive nights broken into by thieves and property stolen.

I am not surprised that the defendant, a lady and her servants, thought the house and neighbourhood very undesirable, but it must be admitted that the plaintiff was in no way responsible. She was bound to place her tenant in quiet possession and she did so. She did not warrant against criminal entry into the house by thieves. I affirm."

13th February, 1899.

424. COURT OF REQUESTS, BADULLA. No. 21,839.

Per LAWRIE, J. : "By our law it is clear (Ordinance 8 of 1871) that property in moveables does not pass until delivery be made....."

24th February, 1899.

492. COURT OF REQUESTS, BATTICALOA, No. 5,117.

Action under Section 247 of the Civil Procedure Code—Plaint, in an action under this Section, must aver that plantiff's judgment is unsatisfied—Perera *vs.* Aberan Appu, 3 C. L. R., p. 7.

Per BONSER, C. J : "In this case the plaintiff who is the appellant, commenced an action under Section 247 of the Civil Procedure Code asking that the order allowing the claim of the defendant to certain tobacco be set aside and that the tobacco be declared liable to be sold in satisfaction of the plaintiff's judgment.

The defendant by his answer took the objection that the plaint disclosed no cause of action because the plaintiff did not therein aver that his judgment was unsatisfied : it might have been satisfied out of other assets.

Then the parties came to trial. An advocate appeared for the plaintiff and said that he thought the plaint was quite sufficient, this Court, in Perera *vs.* Aberan Appu, 3 C. L. R.. p. 7 has decided that such a plaint is not sufficient, but although this case was cited, the advocate persisted in maintaining that the plaint was sufficient, and did not make any application to the Court to amend the plaint by inserting the necessary averment and asking for an issue if the defendant disputed the fact that the decree was still unsatisfied.

I will make an order giving the plaintiff leave to make that application now. As the defendant has not appeared there is no necessity to make any order as to costs of this appeal."

27th February, 1899.

534. COURT OF REQUESTS, KANDY, No. 920.

Cheques transferable by mere delivery—Effect of loss or robbery—A '*bona fide*' holder who gets a lost or stolen cheque of this kind for value may maintain an action against the acceptor or other parties and the original holder who lost it forfeits all right of action—Chitty on Bills of Exchange—"Gross negligence is not of itself enough to destroy the title of a holder for value, but there must be proof of *mala fides* on the part of such holder in order to defeat his claim"—Vide Goodman *vs.* Harvey and Utter *vs.* Rich—Also Smith's leading cases, Miller *vs.* Race. Held here, "that property in a Bank note passes like that in cash by delivery and a party taking it *bona fide* and for value is entitled to retain it against a former holder from whom it has been stolen" —"Where a Bill is paid by an endorser and where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent endorsement and again negotiate the note."

Per LAWRIE, J.: "Chitty on Bills of Exchange says : 'If the holder of a cheque, transferable by mere delivery, lose it or be robbed of it, and before it is due it gets into the hands of a *bona fide* holder for value who was not aware of the loss or robbery, such holder, notwithstanding he derived his title to the instrument through the person who found it or stole it, may maintain an action against the acceptor or other parties, and the original holder who lost it will consequently forfeit all right of action."

The question at one time was whether the party who took the lost or stolen instrument took it under circumstances which ought to have excited suspicion of a prudent or careful man. In some cases it was laid down that nothing short of gross negligence could be a bar to the right to recover. But the case of Goodman *vs.* Harvey at length determined the rule to be 'that even gross negligence is not of itself enough to destroy the title of a holder for value, but that there must be proof of *mala fides* on the part of such holder in order to defeat his claim.'

This was adhered to in Utter *vs.* Rich, and the whole law is discussed and explained in Smith's leading cases, Miller *vs.* Race, the law being that 'property in a Bank note passes, like that in cash, by delivery, and a party taking it *bona fide* and for value is entitled to retain it against a former holder from whom it has been stolen.'

Now the facts of this case are that one of the two cheques sued for, was payable to Naacooty Kangani or order. It was endorsed in blank by the payee. The other was payable to Dugiri Appu or bearer. Both cheques were therefore transferable by delivery.

Both cheques were lost by a holder in due course —payment was stopped at the Bank. When the cheques were presented payment was refused and it was noted on the face of each cheque that payment had been stopped by drawer, and I understand that it was then that the stamp of the Bank of Madras, "not negotiable," was affixed to the face of Naacooty Kangani's cheque.

Segu Abdul Kader, who had presented the cheques back to the defendant from whom he had got them for value, the money was repaid to him by the defendant and he handed the cheques back to him.

Doubtless Segu Abdul Kader could have sued the makers and endorsers of the cheques, because he was a *bona fide* holder for value, but as he, after dishonour transferred cheque to the defendant, can the latter be held to be a holder in due course ?

'Where a bill is paid by an endorser and where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties,'—but the section goes on to say—'and he may, if he thinks fit, strike out his own and subsequent endorsement and again negotiate the note.'

Here the defendant on paying Segu Abdul Kader the amount he had received from him could not have again negotiated the cheques for they had been dishonoured, but though he could not have negotiated them, I think he was by payment remitted to his former rights, If he was remitted to his former rights, those rights were those of a *bona fide* holder. I affirm."

27th February, 1899.

557, COURT OF REQUESTS, BATTICALOA, No. 1,399.

Proving of deeds under 30 years old—A deed 30 years old can be presumed by a Court to have been duly executed and attested by the signatories How—a deed under 30 years must be proved—Notaries and notarial writings not recognised by the Evidence Ordinance 14 of 1895. The Supreme Court has held that a notary can be regarded as an attesting witness, under Section 6 of the Evidence Ordinance.

Per LAWRIE, J: "The first question dealt with by the Commissioner is whether the deed C has been proved. It is not yet thirty years old, and the Court cannot presume without proof that it was executed and attested by the persons by whom it purports to have been executed and attested. The attesting witnesses are dead; it was necessary to prove that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is the handwriting of that person.

But in the present case, the person who executed the document could not write; she made a mark only; it is impossible to prove that the mark is in her handwriting.

The only evidence adduced is that the signature of the notary is in the handwriting of the notary who purports to attest.

In my opinion it is unfortunate that the Legislature, when it adopted the Indian Evidence Ordinance, did not recognise the existence of notaries and notarial writings in Ceylon. There is nothing in the Ordinance 14 of 1895 which regulates the presumption or weight to be given to deeds which *ex facie* have been duly attested by a notary.

The later decisions of this Court regard a notary as an attesting witness and (though I am not sure that I quite agree) I am willing to hold that by proving the signature of the notary the requirements of the 69th section of the Evidence Ordinance have been fulfilled. . . . . ."

7th March, 1899.

584. COURT OF REQUESTS, MATARA, No. 4,812.

Verbal contract for use and occupation of land —lease for more than one month of immovable property must be by notarial deed—under 7 of 1840, section 2. Verbal contract for use and occupation with liability to pay a reasonable rent for more than one month can be sued under—vide Sir Edward Creasy's judgment in Perera *vs.* Fernando, No. 17,112, C. R. Kalutara, Ramanathan's Reports, 1863, p. 83.

Per LAWRIE J.: "This is an action for the payment of R30 as the reasonable amount due by the defendants for their use and occupation of the plaintiff's house from 1st January to 31st December, 1896. . . . . .The issue framed and tried was—:"Did the defendant have the use and occupation of the plaintiff's land Mahawatahena for the year 1896, on an agreement to pay a reasonable sum for such occupation? If so what is the reasonable sum for such use or occupation?" It was proved that at the end of 1895, the defendants went to the plaintiff and verbally asked him to allow them to remain in occupation for 1896 and promised to pay R 30 at the end of 1896. The plaintiff consented.

The Commissioner held that as a verbal contract for a lease for more than a month was void in law under 7 of 1840, the plaintiff could not recover for use and occupation. I am unable to agree with the Commissioner. This seems to me a case of use and occupation with liability to pay a reasonable rent. It is not said that Rs 30 is too much.

(The law applicable was fully stated by Sir Edward Creasy, in Perera *vs* Fernando, No. 17,112, C. R. Kalutara, reported in Ram. 1863, p. 83.)

The plaintiff proved the affirmative of these issues. I set aside and give judgment for plaintiff with costs."

13th March, 1899.

580. COURT OF REQUESTS, GALLE, No. 202.

Order under Section 300 of the Civil Procedure Code—Under this section a judgment-debtor may be released if from poverty or other sufficient cause he cannot pay the amount of the decree.—By the 12th section of Ordinance 12 of 1895, the 300th section is made applicable to Courts of Requests. Appeal allowable from a Courts of Requests only when the judgment is final, or has the effect of a final judgment.

Per LAWRIE, J.: "This is an Appeal against an order of the Court of Requests of Galle refusing to commit a civil debtor brought before him under a warrant of arrest. The ground stated by the Magistrate is that the debtor draws Rs. 12 50 a month, that is all he has to maintain himself and his wife with. He owns no property.

I presume the Commissioner acted under the 300th section of the Civil Procedure Code. That section is part of the 22nd chapter of the Code and by the 12th section of the Ordinance 12 of 1895 it is enacted that it applies to Courts of Requests.

This is an action regarding execution which may be treated as having the effect of a final judgment and the point raised is one of law.

I affirm the order, holding that it is right under section 300."

13th March, 1899.

361. COURT OF REQUESTS, GAMPOLA, No. 3,710.

Action on a promissory note. A promissory note cannot cannot be admitted in evidence unless duly cancelled in accordance with the 8th section of the Stamp Ordinance of 1890. Procedure under section 154 of the Civil Procedure Code.

Per WITHERS, J.: "The only point pressed in the appeal is the point taken in the 2nd paragraph of the petition of appeal, viz., that the promissory note on which the plaintiff has recovered judgment, should not have been admitted in evidence by the Commissioner on the ground that it does not purport to be duly cancelled in accordance with the 8th Section of the Stamp Ordinance 1890.

It seems to me that it is too late to take this point in appeal. . . . . .

. . . . . I would point out to the Commissioner that Section 154 of the Civil Procedure Code has not been strictly followed in this case. As soon as the promissory note was put into the hands of the plaintiff for identification and he spoke to the contents of it, the note should have been formally tendered in evidence, and marked by the Commissioner.

As the explanation of the 154 Section of the Code points out, the Commissioner would have two questions to determine before the document was admitted in evidence. One was:—Was the signature authentic? The other was:—Supposing it to be authentic, was it legally admissible in evidence?

Had the Commissioner's attention been called to the 2nd point he would have seen that it lay on the plaintiff to prove that the stamp appearing on the promissory note was affixed thereon at the time the note was signed.

The appeal fails with costs.

14th March, 1899.

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556. COURT OF REQUESTS, KANDY, No. 572.

Seizure in execution of lands of a deceased person which he had gifted on his minor children—these lands are not liable, as they do not form part of deceased's estate—Improper construction of deed of gift by Commissioner—Children (the donees) not affected by the seizure, following on a writ against the donor's estate.

Per LAWRIE, J: "The lands were purchased at a fiscal's sale by the plaintiff's intestate in 1883 on a writ against the estate of the deceased Rambukuwella Wallawwa Loku Banda.

In his life time Loku Banda executed a deed of gift of these lands in favour of his minor children and at the date of the decree and seizure and sale these lands were not part of his estate.

The learned Commissioner in his judgment says that the gift was subject to the payment of the donor's debts; I do not so construe the deed. It is an absolute gift to the children: it contains the appointment of a guardian (the children's grandfather): he is directed to protect the said "village portion" and to look after the children and to support them with all the produce of the lands and whenever any of the donor's creditors demand payment of debts due by him to the public, the guardian is directed to pay the debts with the produce of the lands or by any other means.

In my opinion this did not give the guardian right to sell the lands for payment of debts; he could do no more than pay debts out of the surplus income: the fee was vested in the donees and could not be touched. If the evidence of possession which the Commissioner relies on, be believed, the plaintiff has had the benefit for some years of the produce of the lands to applied in part payment of the debt due by the deceased.

It seems to me impossible to construe the deed of gift otherwise than as an absolute conveyance to the children so that these were not affected by seizure following on a writ against the donor's estate.

I set aside and give judgment for the defendant with costs."

16th March, 1899.

CRIMINAL.

236, POLICE COURT, COLOMBO, No. 8,137.

Criminal intimidation—sections 483 and 486 of the Penal Code—*Vide* Cassim *vs.* Muhamadu, 1 S. C. R., 254. If the threat be to cause death or grievous hurt, the offence of criminal intimidation is outside the jurisdiction of the Police Court. 'Injury,' as defined by section 43 of the Penal Code, denotes any harm whatever illegally caused to any person in body, mind, or reputation slight injury, as defined by section 88, no offence under the Code. Enhancing sentence on account of previous conviction for same offence under section 68 the Penal Code. 'If it is intended to prove previous conviction for the purpose of increasing the punishment the previous convictio must be appropriately set out in the indic ment by the new Criminal Procedure Cod section 167 (7). Section 68 of the Penal Co does not apply to the offence of criminal i timidation as this does not come under cha ter XII. or XVII. of the same Code.

Per WITHERS, J.—"The accused in this case h been convicted of the offence of criminal intimid tion under sections 483 and 486, Penal Code, and has appealed from this conviction.

The material part of the definition in t Penal Code of this offence, as regards t present case is this:—'Whoever threate another with any injury to his pers with intent to cause alarm to that person..... commits criminal intimidation'—

Now, what does the complainant, a receivi post-master, say the accused did. He says th while he was at his office, the accused came the drunk one afternoon, that he had a gun in h hands and a knife in his waist, that he wanted enter his office; that he held out threats to t witness and threatened to do him bodily inju The complainant's witness says that the accus held out threats to do the complainant bodi injury.

What does the Magistrate find? Simply th the accused threatened the complainant with i jury to his person.

In the case of case of Cassim vs. Muhamadu, N 424, P. C. Manaar, reported in 1 S. C. R. 254, held that the language of criminal intimidati cannot be too precisely charged as well as t intent with which such language is used, so th the accused may if possible be enable to contradi the one or the other.

This is obvious, because the injury threaten may be something very slight or very serious. the threat is to cause death or grievous hurt t offence is outside the jurisdiction of the Poli Court. Injury again is defined by the 43rd secti of the Penal Code to denote any harm whatev illegally caused to any person in body, mind, or r putation.

Now if the injury threatened is so slight that person of ordinary sense or temper would co plain of such injury, on offence would be co mitted at all—section 88 of the Penal Code.

Again there are common expressions in the Ea and West such as,—'I will cut out your liver,' 'break every bone in your body,' which, it is w known, mean nothing at all. It all depends on t circumstances in which such language is used.

In my opinion, the conviction is not sustained the evidence and the accused is entitled to acquittal. I observe that evidence was admitt of a previous offence of assault committed by t accused, and I have no doubt that the senten was in consequence enhanced.

This is not warranted, as far as I am aware, either the Penal or the Criminal Procedure Co Subsequent offences under Chapter XII. and XV of the Penal Code are punishable with enhanc sentences (section 68 P. C.), but if it is intended prove a previous conviction for the purpose of i creasing the punishment, the previous convicti must be appropriately set out in the indictme New Criminal Procedure Code 167 (7).

The Chapters XII. and XVII. of the Penal Co are not concerned with injuries to the person."

26th May, 1899.

228 POLICE COURT, NEGOMBO.
No. 25,270.

Keeping a gaming place and appropriate punishment for the offence. 'Crime' as defined by the Habitual Criminals Ordinance 17 of 1894 and 11 of 1897. Keeping a common gaming place is not a crime. Section 2 of 11 of 1897, on the Jurisdiction of Magistrates.

Per LAWRIE, A. C. J.:—"The conviction is affirmed. This being a first conviction for keeping a gaming place, the sentence of R500 and 3 months' imprisonment seems to me too severe. A fine of R100 is sufficient with the alternative of 2 months' rigorous imprisonment.

The previous convictions to which the Police Magistrate alludes in his judgment do not fall under section 68 of the Penal Code and cannot be tak n into consideration in awarding or enhancing punishment.

This is not a 'crime' within the meaning of the Habitual Criminals Ordinance 17 of 1894 and 11 of 1897, otherwise under section 2 of the latter Ordinance, the Police Magistrate would have had no power to try the accused summarily."

22nd May, 1899.

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222. POLICE COURT, KANDY, No. 11,540

Jurisdiction of Village Tribunals—Offences under sections 343, 408, 409, and 314, beyond their jurisdiction—Magistrates not competent to devolve on Village Tribunals the duty which the Codes have laid on them—'mischief' as defined in the Penal Code is not the same as 'malicious injury to property.'

Per LAWRIE, A. C. J:—"The complaint set forth that the accused used criminal force o'herwise than on grave and sudden provocation an offence punishable under section 343; further that they committed mischief punishable under sections 408 and 409; and thirdly, that they voluntarily caused hurt, an offence punishable under section 314.

I am unable to agree with the Magistrate that the Village Tribunal has jurisdiction to try any of these offences under the Penal Code, and that by referring to Village Tribunals, Magistrates can devolve on another Court the duty which the Codes have laid on them.

I cannot say that charges under 314 can properly be called 'petty assaults,' nor can I say that 'mischief,' as defined in the Penal Code is the same as "malicious injury to property."

I set aside and remit for trial in the Police Court."

22nd May, 1899.

POLICE COURT BADULLA-HALDUMULLA, No. 4.

Beating tom-tom without license in breach of Section 90 of the Police Ordinance 16 of 1865. Is beating a tom-tom a rite of the Buddhist religion and is it protected by the Proclamation of 21st November, 1818? *vide* P. C. Kandy No. 9,072, Tranchell *vs.* Pannekaya *et al* decided in 1877. A religious ceremony which amounts to a public nuisance is not protected by the Proclamation of 1818 *vide* also 1. N. L. R. 179. Held that a license under the Police Ordinance is no protection against proceedings under the Penal Code.

Per WITHERS, J:—"This is an appeal by two persons who have been convicted of beating tom-toms within the town of Badulla, without having obtained a licence, in breach of the 90 h section of the Police Ordinance of 1865. When first brought before the Court the accused said they had cause to shew against a conviction. However, at the trial both the accused admitted that they did beat tom-tom as alleged and that they had no licence for doing so, but they pleaded that the law did not require a licence to beat tom-tom inside a Dewala and they were allowed time to procure some record, which, they said, would support their plea.

In this Court there was no appearance for the appellants. In the petition of appeal it is stated that the defendants pleaded that they were beating tom-tom according to the custom and rites of the Buddhist religion, which were specially protected by the Proclamation of the 21st November, 1818. What they pleaded according to the record was that it was never usual to obtain permits to beat tom-toms inside a Dé wala, and that—is by no means the same thing.

The record referred to by the appellants in the course of the trial was probably a case brought in 1877 in the Police Court, Kandy, No. 9,072, Major Tranchell vs. Pannekaya and another. There two people were charged with beating tom-tom during the Perahera within the precincts of the chief temple at Kandy. Their defence was, they were engaged in a religious ceremony and their act was protected by the early Proclamations. However, the Magistrate, Mr. Moysey, in a careful judgment held as a fact that the noise they made at the time amounted to a public nuisance and that it was never intended to sanction a religious ceremony which amounted to a public nuisance. An appeal was taken from that conviction but was never pressed.

Now the Chief Justice has said very much the same thing in the case of Marshall *vs* Guneratne Unanse and another, 1 N. L. R. 179-Municipal Court, Colombo, 2062. . . "No religious body"—he observes—"whether Buddhist or Protestant or Catholic is entitled to commit a public nuisance and no licence under section 60 of the Police Ordinance of 1865 will be a protection against proceedings under the Penal Code, though it may protect them from proceedings under the Police Ordinance.

It may be, but I d cline to decide the point (without argument) that where a tom-tom is beaten in a temple as part of a religious ceremony and the noise created does not amount to a public nuisance, it may be permissible without a licence.

But the defendants did not plead or prove that they were beating tom-toms in a temple in the course of a religious ceremony. I think, therefore, the conviction is right; but as I have no doubt that the defendants were acting in the *bona fide* belief that they had a right to beat tom-toms on this occasion and had no intention of violating the law I shall alter the fine from R5 to five cents each."

16th May, 1899.

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147 POLICE COURT, TANGALLE. No. 12,994.

Robbery, beyond the jurisdiction of the Police Court to try—Exception provided for by sub-section 3 of section 152 of the new Criminal Procedure Code—Magistrate must specify that he is acting under this section—Improper acquittal amounts only to discharge.

Per LAWRIE, A. C. J:—"I. quash the acquittal of the accused on the charge of robbery, which acquittal was '*ultra vires*' of the Police Magistrate who had no power to try these men for robbery.

Possibly the Magistrate may have intended to act under section 152 and intended to have recorded his opinion that the charge though triable by the District Court, was one which could properly be tried summarily, but I find no such record. The case was treated as a Police Court case throughout.

The acquittal of the accused on the charge of robbery is no more than a discharge. I remit to the Police Court to take further proceedings with the view of the accused being tried for robbery by the District Court."

8th May, 1899.

197. POLICE COURT, KANDY. No. 11487.

Offence under the Buddhist Temporalities Ordinance—the object of this Ordinance was to protect the lands and valuable property of Viharas, but not intended to interfere with small crops raised for the maintenance of the Unanse—Offence under section 9 of 17 of 1895 is beyond the jurisdiction of a Police Court being punishable with fine of Rs. 500—the 11th section, subsection 6 of the new Criminal Procedure Code applies to this offence under 17 of 1895.

Per LAWRIE, A. C. J:—"It seems to me very natural that a Buddhist priest should say to the Trustee of his Vihare—'don't take away the crop of the Vihare field, let it be taken (as it has been taken for time immemorial) to the Pansala granary to be consumed by me and by priests visiting the Vihare.' I connot see on what grounds a trustee could resist such a request. These 21 bushels paddy would make not much more than 5 bushels of rice that is not 5 months, supply for the Incumbent and his attendant and any visiting Unanse.

It seems to me a ridiculous demand by a Trustee to remove this small amount of paddy to his own granary to be doled out month by month or week by week.

The object of the Buddhist Temporalities Ordinance was to protect the lands and valuable property of Viharas. I don't think it was intended to interfere with small crops raised for the maintenance of the Unanses.

Any-how, the offence under section 9 of 17 of 1895 is beyond the jurisdiction of a Police Court, for it is punishable with a fine not exceeding R500. The Courts Ordinance limits the jusidiction of Police Courts to the powers, anthorities, and duties given them by the Ceylon Penal Code, and the Criminal Procedure Code or any other ordinance for the time being in force.

This offence under 17 of 1895, is not an offence under the Penal Code, nor is any Court mentioned in the Buddhist Temporalities Ordinance as the Court of trial. The 11th section subsection 6 of the new Criminal Procedure Code applies:—"No Police Court shall try any such offence which is punishable with imprisonment which may exceed six months or with a fine which may exceed R100.

I don't think that an offence has been committed, but if there was, the Police Court had no jurisdiction to try it. I quash the proceedings as '*ultra vires.*'"

10th May, 1899.

42. DISTRICT COURT KEGALLE, No. 19,889.

"Summary trial of offences within the jurisdiction of a District Court. By the New Code power is given to Police Magistrates not only to try summarily, cases hitherto triable by a District Court, but to impose District Court sentences, not as District Judges, but as Police Magistrates.—section 152. 'The sentences imposed in these summary trials (being those of Police Courts) appeals lie when the sentence of imprisonment exceeds one month.

Per LAWRIE, A. C. J. :—"The Ordinance 8 of 1896, dealt with the trial of cases by a District Judge summarily without a committal for trial. That Ordinance was repeal'd by the new Criminal Procedure Code, and the 152nd section, of the Code deals with the trial of cases not only by a District Court, but by a Police Court.

Instead of giving power to the District Court to try without commitment, the law now gives power to Police Magistrates who are also District Judges, not only to try summarily cases hitherto triable by a District Court, but to impose District Court sentences, not as District Judges but as Police Magistrates.

The sentences imposed in these summary trials being those of Police Courts, appeals lie when the sentence of imprisonment exceeds one month.

The case should not have come up as from the District Court of Kegalle, but from the Police Court. We order this case to be re-listed for argument."

17th May, 1899.

CIVIL.

No. 34, F./ 1,724 DISTRICT COURT, KALUTARA.

Action for recovery of land purchased at a Fiscal's sale, which was not completed by a conveyance till the lapse of 8 years after the sale. The conveyance, although effected eight years after sale, gives a valid title. Inadequacy of consideration at a Fiscal's sale not material. Point of practice settled. In an action for recovery of land, documents relied on to evidence plaintiff's title need not be filed with the plaint. Section 50 of the Civil Procedure Code applies only to cases where the document is a document which is sued upon, *e. g.*, a promissory note, or a bond, or a deed containing a covenant. A plaintiff, who relies on documents in support of a claim to land, need only file a list of them annexed to his plaint, by section 51 of the Civil Procedure Code. The Court is enabled to inspect such documents by sections 111 and 146 of the same Code.

In an action for recovery of land :—

Held :—"That documents relied on to evidence title need not be filed with the plaint, and that section 50 of the Civil Procedure Code applies only to documents which are sued upon."

Per BONSER, C. J. :—"The plaintiffs in this case sue to recover by the strength of their title certain lands.

It appears that these lands originally belonged to a man of the name of K. V. Don Siman, and were put up for sale by the Fiscal at the instance of a judgment-creditor of the owner, and were purchased for a sum of Rs. 2·25 by one M. K. Don Siman. The Fiscal's sale was not completed by a conveyance until the year 1894, when the purchaser obtained a conveyance. The sale took place in 1886.

In October 1896, the plaintiffs commenced this action alleging that they had purchased the land from M. K. Don Siman, and that they had been ousted by the defendants.

The defendants set up a title to the lands, resting on a sale to them by the original owner, K. V. Don Siman, in 1895, and they allege that they and their vendors have had undisturbed and uninterrupted possession of these lands for 10 years before action brought.

The District Judge found, on the issue of prescription, against the defendants, and I see no reason to disturb his finding: that seems to me to make an end of the defence. The plaintiffs have proved their title; the only defence that could be raised under the circumstances was that of prescriptive possession, and the judge found that that defence was not sustainable. One would have expected that under those circumstances he would have given judgment for the plaintiffs, but for reasons which I cannot understand, he gave judgment for the defendants. One of the reasons appears to be that the plaintiffs did not obtain a conveyance for eight years; but he did obtain it and that conveyance gave him a title. He apparently also relied on the inadequacy of the consideration. for he says:—'That such a large extent (ten acres) of fertile paddy land realized the paltry sum of Rs. 2·25 of itself proves that these sales were mere sham . . .'

I must say that I fail to understand this observation of the learned Judge. It is well-known that in sales by the Fiscal properties do not fetch their full value.

. . . . . .

In these circumstances I think that judgment must be given in favour of the plaintiffs.

There was a point of practice on which the District Judge in his judgment asks for the opinion of this Court. It appears that the plaintiffs relied on certain documents to evidence their title. These documents were mentioned in the plaint. The District Judge was of opinion that the plaintiffs were bound by section 50 of the Civil Procedure Code to file copies of these documents with their plaint. He says that unless the documents relied on are produced to the Judge before the issues are settled, it is quite impossible for him to satisfactorily settle the issues. I agree with him in this, but I think he was wrong in his interpretation of section 50. That section applies only to a case where the document is a document which is sued upon, that is to say, such a document as a promissory note, or a bond, or a deed containing a covenant. The documents in the present case are dealt with by section 51 of the Code. They are documents which were relied on by the plaintiffs in support of their claim. With respect to such documents, all that is necessary for a plaintiff to do is to file a list of them annexed to his plaint.

But I consider that the Code enables the District Judge to do what he desires to do, *i. e.*, to inspect documents relied on by the plaintiff before issues are settled. Section 111 provides that parties are to bring with them and have in readiness at the hearing of the action, to be produced when called for by the Court, all the documentary evidence of every description in their possession or power, on which they intend to rely.

Section 146 deals with the framing of issues, and provides that on the day fixed for hearing, if the parties are not agreed on the issues, and the duty therefore, devolves on the Court to settle them, the Court is to examine the parties, and inspect the contents of the documents produced by either party, and on those materials to frame the issues.

Section 111 has given the Court the power before it settles the issues, of calling for the documents, so that there is no practical difficulty in carrying out what the District Judge desired to do in this case.

As regards the 3rd defendant, the Judge having found that there was no ouster, we shall not disturb his judgment so far as regards him."

LAWRIE, J.:—"Agreed." 1st March, 1899.

31/1632, DISTRICT COURT, CHILAW.

Partition suits—judgment in 2, N. L. R. 370, reconsidered. History of legislation on the subject of partition. Earliest Partition Ordinance 21 of 1844. Vide judgment reported in Ramanathan's reports, 1843-1858, p. 140 in *re* this Ordinance. Also Ramanathan, 1843-1855, p. 141. Repeal of 21 of 1844 by 11 of 1852. Judge made law over-ruling repealing Ordinance. Vide D. C. Kandy, 28,688—21, January, 1857. Common-law right to demand partition. The Civil law applicable to partitions fully stated in 2 Burge, p. 676. The Ordinance 10 of 1863, now in force, expressly gives power (section 4) to the Court to determine questions of title. The investigation and determination, as to title, "shall be in the same cause" by 10 of 1863, which expressly meets and removes the difficulty experienced in construing the older Ordinance of 1844. Animadversions on the frequent abuse of the Partition Ordinance to settle a question of title. Causes of resort to Partition Ordinance instead of to action in ejectment. "A partition decree should be more difficult to get, not less difficult to get than an ordinary decree in ejectment," and reasons why?

Held:—"That neither the fact that the title, either of plaintiff or defendant is denied, nor the fact that neither the plaintiffs nor defendants are in possession, are good objections to the maintenance of a partition suit."

Per LAWRIE, A. C J.:—"The learned District Judge has refused to allow this action to proceed as a partition suit, relying on the judgment in the case Perera *vs.* Perera, District Court, Kalutara, 1,567, pronounced by me and concurred in by my brother Withers on 27th July, 1897, reported in 2, N. L. R., p. 370.

We have been asked to reconsider that judgment and after careful consideration I recommend that this record be sent back for investigation of the titles of the parties and procedure under the Ordinance 10 of 1863.

The earliest Partition Ordinance was 21 of 1844, sections 10 18. That Ordinance enacted that when any landed property shall belong to two or more owners, it shall be competent to any one of such owners to compel a partition.

In a Galle case, D.C. Galle, 134, (reported Ram: 1843-58, p. 140) this Court in 1848 held that the sections 10, 11 and 12, of the Ordinance 21, of 1844, "made no provision for the case of a disputed ownership, nor contemplated such an event, and if such a case arises the parties must settle their rights by an action at law." In another case from Galle D. C. 152, Buller vs. Koelman, this Court more fully discussed the provisions of the Ordinance (11 October, 1848—Rep: Ram: 1843-1855, p. 141.)

It held:—"That the application for a sale must be made by one or more owners and as no one else is competent to do so the Court, therefore, is not authorised to make any order of sale when the right of ownership is denied, until the title of the parties is ascertained."

The Judges said that "in the absence of any express directions in the Ordinance as to how the respective rights and proportions of the owner should be ascertained when they are disputed in these summary applications, the Supreme Court considers that the proper course is for such contested claims to be tried in an incidental suit and the proceedings on the application to be stayed."

By 11 of 1852, the 10-18 sections of 21 of 1844 were repealed: This Court held in Duff *vs.* Crosbie (D. C., Kandy, 28,688, 21st January, 1857) that there was a common law right to demand a partition, and notwithstanding the repeal of 21 of 1844 by the Ordinance of 1852 that the course prescribed by the Ordinance 21 of 1844, 'which to a great extent accords with the common law practice in such cases, should, in applications of that kind, be followed as far as practicable.'

The Civil law applicable to partitions is fully stated in 2, Burge, p676—Burge says it is no material whether the plaintiffs' *dominium* be *directum* or *utile* or whether any or more or all the joint owners be or be not in possession of the property.

The present Ordinance 10 of 1863, section 4 expressly gave power to the Court to determine questions of title. When the defendant did not appear the Court was directed 'to hear evidence in support of the title of the plaintiffs, the extent of their shares or interests, as also the title of the defendants and the extent of their respective shares and interests in so far as may by practicable by an *ex parte* proceeding, and shall, if the plaintiffs' title be proved, give judgment by default decreeing partition or sale." Provision is also made where the defendants or any of them appear and dispute the title of the plaintiffs or shall claim larger shares or interests than the plaintiffs have stated to belong to them. or shall dispute any of the material allegations in the libel, the Court shall, in the same cause, proceed to examine the titles of all the parties interested therein, and the extent of their several shares or interests and to try and determine any of the material questions in dispute between the parties.

It seems clear that the investigation and determination as to the title 'shall be in the same cause', expressly meeting and removing the difficulty experienced in construing the older Ordinance of 1844.

But it cannot be doubted that this Court has frequently deprecated and disapproved of the use of the Partition Ordinance by a plaintiff whose title is doubtful, because it has often appeared that the object in view was not a partition but a declaration, by a final decree, of a title which was at the commencement of the action, to say the least of it, shaky.

Plaintiffs resorted to the Partition Ordinance rather than to actions in ejectment partly because a partition suit in the end gave an indefeasible title good against all the world, a result not obtainable in an ordinary action in ejectment, and partly because it was always easier to get a partition decree than an ordinary decree. There were no pleadings, the procedure was simpler.

It was easy to call as defendants only claimants who were satisfied with the shares allotted to them and to leave out the real disputants.

While I am of the opinion that a denial of the plaintiffs' title is not an objection to the partition suit, it seems very clear that, looking to the serious consequence of a partition decree, the Court should abstain from declaring any right to the land except on the best proof. A partition decree should be more difficult to get, not less difficult to get than an ordinary decree in ejectment, for in the latter, parties may settle matters between themselves, and the decree affects them only; whereas in a partition suit others are interested, and their rights are excluded by the decree.

On full consideration of the Ordinance, I am of the opinion that neither the fact that a title, either of plaintiff or defendant is denied, nor the fact that neither the plaintiff nor defendants are in possession are good objections to the maintenance of a partition suit.

The Court must in all cases carefully investigate all titles and must refuse to make title on admissions or on insufficient proof."

Per WITHERS, J. :—"The plaintiffs appeal from an order of the District Judge which virtually changes this suit under the Partition Ordinance to one for a declaration of title only.

Perera *vs.* Perera, reported in 2 N. L. R., 370, was relied on by the District Judge. Perera *vs.* Perera was, I think, rightly decided. There the plaintiff had never been in possession of the property, nor had his wife through whom, on her death he claimde an interest in the land. His alleged title was altogether denied and hotly contested. He was fortunate indeed in not being made to bring a separate action for a declaration of title.

But the judge, in refusing the present plaintiffs the benefit of proceedings under the Partition Ordinance, has relied on a passage in my brother Lawrie's judgment, which is expressed as follows: "It has often been held by this Court that a partition suit should not be brought by a man not in possession, whose title is disputed." If that is a correct statement of the law laid down by this Court we must observe the law: but it does not apply to the facts of the present case in appeal.

The plaintiffs herein set out a title which is not seriously disputed. They allege a common possession as well as a common title and this possession they say they have enjoyed for some fifteen years, during the lifetime of the defendant's father and without interruption till April 1896, when the defendants deprived them of their shares.

It is an audacious defence to use this alleged ouster as a lever with which to lift the plaintiffs out of the Partition Ordinance. The case ought to be dealt with under section 4 of the Partition Ordinance and I would remit the record with that direction."

5th May, 1899.

62, DISTRICT COURT, KALUTARA.
No. 1,764.

Suit for partition of land. A party who is a co-owner is entitled to bring it, without adducing motive for doing so. "The weakness of the title of some of the parties to a partition suit is not a good reason for refusing to give those who have good title their just shares, leaving the possession, of the rest of the land, *in statu quo*.

In an action for partition brought by a co-owner: *held*: that such co-owner is not bound to adduce his motives for doing so.

Per WITHERS, J.: "This is a suit for partition of land, which has been dismissed for two reasons; one, that it was not a *bona fide* suit; and the other that there was no necessity for bringing it.

But if a party is a co-owner of a land, he is entitled to bring an action for partition, whatever may be his motive in doing so. Fifteen defendants have been summoned to shew cause why a partition should not be made as asked for, only three of the defendants appeared to shew cause, namely: the 11th, 12th, and 13th. They disputed the plaintiff's title or rather the share which he claims to be entitled to.

Even they do not deny that the plaintiff is a co-owner to some extent in this land: what they allege is that it would be very unfair to partition this land alone out of all the lands these parties own in common. They say that if all the lands were brought into partition, everybody might get an allotment of land worth having, but that if this land alone is dealt with, it cannot be cut up amongst so many proprietors, it must be sold.

Even the District Judge does not find that the plaintiffs are not co-owners in the soil or trees to some extent; this being so it seems to me that the order of dismissal must be set aside and the case must go back for the judge to deal with it under the 4th section of the Partition Ordinance."

Per LAWRIE, A. C. J.—"In agreeing to send this case back to be proceeded with under the Ordinance, I wish to guard myself against seeming to sustain the title of any of the parties.

If the District Judge, after examination of title, be satisfied that the title of any of the parties to the suit is defective, he will abstain from allotting a share to those who have not good title.

The weakness of the title of some of the parties to a partition suit is not a good reason for refusing to give those who have good title their just shares, leaving the possession of the rest of the land *in statu quo*.

17th May, 1899.

DISTRICT COURT, COLOMBO.
No. 12,290.

Exemption from Stamp Duty of proceedings under the Partition Ordinance. The operative part of Ordinance 10 of 1897, instead of exempting all proceedings under the Partition Ordinance, as expressed in the preamble, exempts only those pleadings and documents mentioned in the 2nd part of the Schedule B,—and leaves the duties exigible under parts 1 and 4 untouched. Ordinance 10 of 1897 does not exempt partition suits from the duties in respect of service of process in District Courts.

In an action for partition, *Held*:—that there is nothing in the Ordinance 10 of 1897 which exempts partition suits from the duties in respect of the service of process in District Courts, and therefore that charges can be levied for effecting service of process.

Per LAWRIE, A. C. J.—The preamble of the Ordinance 10 of 1897 declares that it is expedient to exempt from stamp duty proceedings for the partition or sale of land, but in the operative part of the Ordinance, this intention to exempt is imperfectly carried out, for instead of exempting all proceedings in partition actions from stamp duties, the Ordinance only exempts those pleadings and documents mentioned in the 2nd part of the schedule B.

It leaves the duties exigible under parts 1 and 4 untouched so that there is nothing in the Ordinance which exempts partition suits from the duties in respect of service of process in District Courts.

I agree with the learned District Judge. I affirm."

Per WITHERS, J.—"I have no doubt that this judgment is right. The Ordinance 10 of 1897 does not touch Part IV of the Stamp Ordinance. This was probably intentional. Part IV relates to the charges for effecting service of process, and in the present case what is being imposed is not a duty charge on taking out a process but payment for serving it."

15th May, 1899.

CRIMINAL.

239, POLICE COURT, KALUTARA.

No. 7043.

Criminal trespass. Important points of law. Section 190 of the new Criminal Procedure Code. By this section a Magistrate must after taking evidence *forthwith* record a verdict of acquittal or guilty. Can a landlord commit the offence of Criminal trespass on premises possessed or occupied by his tenant. In the case of a house leased without garden on which it stands. *Held:*—That an entry by the landlord into the garden with intent to commit an offence or to intimidate, insult or annoy the tenant constitutes criminal trespass. The English common law offence of forcible entry expanded to other cases of entry upon property with criminal or wrongful intent by our code. Offence of forcible entry explained—Menton *vs* Holland, I M. and G. 644. Decided here, that a landlord might be guilty of forcible entry *after the tenant's term had expired*, both at common law and under the Statutes. Hawkins, pleas of the Crown, Book 1, chapter 64, section 33. A co-tenant can be guilty of a forcible entry on the premises leased in common because the lawfulness of the entry is no excuse for the violence. Starling's Indian Criminal Law quoted, with cases bearing on the point. Vide 6 Bengal law reports, appeal 80 and 15, W. R. C. E. P. 6. How the offence of Criminal trespass by a landlord is more serious than when committed by a stranger.

Per WITHERS, J. "— The accused in this case have been convicted of the offence of criminal trespass, and their appeal is on matters of law only.

One of the points of law taken and I think very properly not pressed in this case was that inasmuch as the magistrate had not given judgment *forthwith*, his judgment was of no force or effect. I mention the matter because it is very important that the magistrate should observe the requirements of the 190th section of the Criminal Procedure Code, 1898, which enacts that 'a magistrate shall, after taking the evidence for the prosecution and defence *forthwith* record a verdict of acquittal or guilty as he may find.' If this point had been pressed I might have had to send the case back for a re-trial, which would not have been at all satisfactory.

The other point is this:—Can a landlord commit the offence of criminal trespass on premises possessed or occupied by his tenant? The facts relating to this part of the case appear to be these: At the time of the alleged offence, the complainant was in possession of a house and its adjuncts under a notarial contract of hire and lease with the defendant; that house stands in a coconut garden which was not comprised in the lease but the complainant may well be considered an occupant of the garden round his house. Here the entry was into the garden and not into the house.

Now in that state of things I have no doubt that an entry by the landlord into the garden with intent to commit an offence, or to intimidate insult or annoy the complainant constitutes criminal trespass.

This is not the first time, of course, that I have considered the offence of criminal trespass as defined by our code, and I cannot help thinking it was intended to expand the English common law offence of forcible entry to other cases of entry upon property with criminal or wrongful intent.

Now there can be no doubt by the English law that if one who has a legal title to a land enters it by violence or by show of force when the land is in possession of another commits the offence of forcible entry.

In Menton *vs* Hollant I. M. and G. 644, the judges thought that a landlord might be guilty of forcible entry *after the tenant's term had expired*, both at common law and under the Statutes. Hawkins in his pleas of the Crown, Book 1 chapter 64 section 33, states that the possession of a joint, tenant or tenant-in-common is such a possession as may be the subject of a forcible entry by his co-tenant, for though the entry of the latter be lawful *per mi et per tout* so that he cannot in any case be punished for it in an action for trespass, yet the lawfulness of the entry is no excuse for the violence.

Here the right of the landlord to go into his garden was no excuse for him to go there to intimidate and insult the occupant. Mr. Dornhorst called my attention to a passage in Starling's Indian Criminal law, where the author states the following prepositon:—"The entrance of a member of a joint Hindu family in the family dwelling place cannot be criminal trespass, nor is the entry of a stranger with the permission and license of one of the members"—and in support of this statement the writer cites in *re* Prankishna Chandra 6 Bengal Law Reports. Appeal 80, and 15 W. R. Cr. p 6, Unfortunately I have not these reports to refer to, but I should want very strong authority to satisfy me that that is sound law.

However the circumstances are not the same. From one point of view I should regard an entry by a landlord into the premises occupied by his tenant with the intent to intimidate, insult or annoy him is a worse offence than is committed by a stranger, because the landlord is bound by his contract of lease to suffer his tenant to have free enjoyment of his premises. Affirmed."

30th May, 1899.

55, DISTRICT COURT, KEGALLE.

No. 1,104.

Disobedience of injunction and contempt of Court. By section 87, sub-section 1 of The Courts Ordinance, the Court can only grant an injunction where it *appears* in the plaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the continuance of an injurious act—or by sub-section 2 of section 87 an injunction can be granted on petition. Disobedience to injunction of a Court entails greater pains and penalties in Ceylon than it does in England section 663 of the Civil Procedure Code. Can an injunction granted without a petition for same as required by section 662 of the Civil Procedure Code be enforced by punishment as for contempt of Court ?

Held :—That an injunction granted by a competent Court must be obeyed by the party whom it affects until it is discharged and that disobedience can be punished as for a contempt of Court, notwithstanding irregularity in the procedure.

Per WITHERS, J.—"The appellants appeal from a sentence of 3 months passed upon them for disobeying an injunction of the Court below, which in effect restrains them from taking and removing plumbago from the land in dispute.

It was sought to be made out that this injunction was improperly issued in that it lacked the support of material required by the Court's Ordinance, and the Civil Procedure Code of 1889, Assume it for instance to come under section 87 sub-section 1 of the Courts Ordinance, then the Court can only grant an injunction where it appears in the plaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the continuance of an injurious act. In the plaint in this action it does not so appear.

Assume it on the other hand to come under sub-section 2 of that section—then there must be a petition for an injunction, but no petition exists here.

The injunction, having nothing to support it, is ineffectual, if not for all purposes, at least for the purpose of bringing a party who disobeys it to punishment, for such contempt of Court is punishable like an offence under the Penal Code with imprisonment of either kind or a fine. It entails greater pains and penalties here than it does in England.

Section 663 of the Procedure Code of 1889 was pressed upon me. That enacts: 'That an injunction granted by the Court on any such application, may in case of disobedience be enforced by the punishment of the offender, as for a contempt of Court.'

From this it was argued that an injunction granted by the Court without a petition could not in case of disobedience be so enforced. I have little doubt, however, that an injunction granted by a competent Court must be obeyed by the party whom it affects until it is discharged, and that disobedience can be punished as for a contempt of Court, notwithstanding irregularity in the procedure.

I must say that I think this plaint just comes within sub section 1 of section 87 of the Courts Ordinance 1889, for the action is to vindicate a land in the possession of the defendants who are charged with doing acts injurious to the plaintiff's interest, and relief by injunction is *prima facie* made out. . . . . and it is asked for in the plaint. . . . . ."

30th May, 1899.

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1. CRIMINAL.

DISTRICT COURT, NEGOMBO, No. 2137.

A. RAPIEL APPU *vs.* W. E. M. JOHN SINGHO.

Voluntarily causing grievous hurt under Section 316 of the Penal Code—If the offence does not come within the exception provided for by Section 326, it *must* be punished by imprisonment. A Court has no option in the punishment vide P. C. Chilaw, 18498, 11th February, 1887, at Regina *vs.* Chauvroon, the Bombay High Court reports, p. 4.

Held :—"That voluntarily causing grievous hurt under Section 316 must be punished with imprisonment and that a Court trying the offence cannot punish with fine only."

Per WITHERS, J :—"This is an appeal by the Attorney-General against the sentence of a fine imposed upon the accused who has been convicted of voluntarily causing grievous hurt under Section 316 of the Ceylon Penal Code. It is enacted by that section that whoever, except in cases provided for by section 326, voluntarily causes grievous hurt shall be punished with imprisonment of either description for a term of seven years, and shall also be liable to a fine.

The District Judge has not found that this case comes within that exception. That being so, he was bound to punish the offender with imprisonment. The Court has no option in the matter. It may fine the offender, but it *must* sentence him to imprisonment, either simple or rigorous.

I have no doubt on this point, and I am following an unreported decision of Burnside, C. J., Police Court, Chilaw, 18,498, 11th February, 1887, and Regina *vs.* Chauvroon, 1, Bombay High Court Reports, p. 4. I, propose to follow the procedure of the Bombay High Court. I, therefore, annul the sentence and remit the record to the judge to call up the accused and pass a legal sentence upon him.

The term of imprisonment may be of either description, and may be ever so short, and with the sentence of imprisonment may be joined a fine."

1st May, 1899.

POLICE COURT, MATARA, NO. 32854.

ROONEGE TEDARIS *vs.* 1, DADALLEGE DON BASTIAN ; 2, SUDUHINGHA APPUHAMY.

Contempt of Court—A person cannot be punished for this offence without being afforded an opportunity to shew cause why he should not be punished.

Held :—"That a person cannot be punished for contempt of Court without first being called upon to shew cause why he should not be punished."

Per WITHERS, J :" The order of the 20th March 1899, imposing a fine of Rs. 5 on the petitioner for contempt of Court is set aside in revision.

The petitioner was not asked to explain how it was he did not at once answer to his name being called. He cannot be punished without being afforded an opportunity to shew cause why he should not be punished. If his statements in this petition are true, his failure to answer to his name is well accounted for."

15th May, 1899.

POLICE COURT, KALMUNAI, No. 342.

ATARUKANDU SAVARIAMUTTU OF SUNDEMARALEN *vs.* KALENDERPODI EBERAHIMKANDU.

Maintenance Ordinance 19 of 1889.

Held :—"That the change of circumstances in the 10th section of this Ordinance referred to is a change of pecuniary circumstances."

Per WITHERS, J. : "The order of cancellation must be discharged.

The change of circumstances in the 10th section of Ordinance 19 of 1889 is a change of pecuniary circumstances."

234, POLICE COURT, BADULLA, No. 13,573

T. RADNAM *vs.* S. KANDAPPERUMAL.

Sections 315 and 325 of the Penal Code, voluntarily causing hurt on grave and sudden provocation.

Held:—"That this offence under section 325 of the Penal Code cannot be punished with lashes.

PerWITHERS, J.—"I have no doubt that the accused acted under grave and sudden provocation, and this brings the case under section 325 of the Penal Code. The offence of voluntarily causing hurt under grave and sudden provocation cannot be punished with lashes. A month's imprisonment or a fine of R50 is the maximum punishment."

II. CIVIL.

17th May, 1899.

59 DISTRICT COURT, COLOMBO.

(Int.) 10,344

Position *in judicio* of a husband and wife married without community of estate, who are sued on a joint promissory note—Procedure under Ch. 53 of the Civil Procedure Code—By section 90 of the same Code, when one of many defendants appears, no decree for default need be passed against the others—*In foro* the wife is always *in statu pupilari*—McLeod vs. Power, 67, L. J. Chancery 551—Joint debtors are entitled to be sued together as there is but one cause of action and the cause of action becomes merged in the judgment—If judgment is recovered against one of the debtors the other can plead the merger—this principle held not to apply to joint obligations outside the law merchant—In joint obligations, each debtor is liable, by our law, only for his proportion of the debt.

In an action on a joint promissory note against a husband and wife : *Held* :—'That when the husband appears and defends, judgment by default against the wife is not valid."

Held also :—"That the principle of law laid down in McLeod vs. Power, 67. L. J. Chancery 551, does not apply to joint obligations outside the law merchant.

Per LAWRIE, A. C. J.—"When (as here) a husband and wife are sued and the husband on affidavit obtains leave to appear and defend, the wife is not in default, and no judgment can be entered against her.

The decree against the wife must have been entered *per incuriam*. I agree with my brother Withers that it is not a binding decree. If it had been asked for, I would have recommended that (in revision) it be set aside : it is sufficient that we say that it has no validity.

The 1st defendant (the husband) has taken the altogether untenable position that the decree against his wife relieves him of all further liability. This plea has been rightly repelled by the learned District Judge, though I do not fully understand his reasons.

I will not enter on the general question of the disability of married women to contract, nor on the question whether a married woman be bound if she signs a promissory note along with her husband. Nor will I enter on the question of the liability of joint debtors, how they can be sued, and when the joint obligation is extinguished.

I always understood our law to be, that in joint obligations, each debtor is liable only for his proportion of the debt.

It is sufficient for the purposes of this decision to hold that the decree against the wife ought not to have been entered, that it is not *res judicata*, and that the trial must proceed on the answer filed by the 1st defendant.

His defence, if successful, will avail his wife equally with himself."

Per WITHERS, J. : "In this case a husband and wife, married, we are told, not in community of estate, have been sued on their joint promissory note by the maker. The plaintiff proceeded under Chapter 53 of the Civil Procedure Code, and took out the appropriate summons which requires the defendant to obtain leave from the Court to appear and defend the action.

Now the 1st defendant, the husband applied for leave to appear and defend. A day was fixed for the filing of the answer. Answer was filed and the trial of the case was fixed for the 23rd September, 1897. On the day the 1st defendant's answer was filed, viz., the 24th August, 1897 the journal entry contains this note:— '2nd defendant absent, time expired, enter a decree as against her,' and in pursuance of that order a formal decree was drawn up bearing date the 24th August, 1897.

Why this decree was passed I cannot understand —the plaintiff did not ask for the decree and section 90 of the Civil Procedure Code enacts that: —'In the case of an action where there are more defendants than one, the Court shall not be obliged to pass a decree for default against a defendant for failing to appear at a stage of the action provided that one defendant at least appears at that stage, against whom the action must proceed.'

In my opinion, as the husband had come forward to defend the note, the decree against his wife was not a binding one. '*In foro*' the wife is always *in statu pupilari*. It makes no difference whether she married before or after the Ordinance of 1876. For if married before 1876, she could only be brought into Court under the protection of her legal guardian, her husband, though by ante-nuptial contract she was allowed to administer her separate estate.

When the case ultimately came for trial against the 1st defendant, in February last, he raised as an issue of law between himself and the plaintiff whether the judgment already obtained against his wife did not estop the plaintiff from recovering anything against him ; in other words, he pleaded the judgment as a bar to further action against him.

The appellant sought to apply to this case the judgment in McLeod *vs.* Power, 67. L J. Chancery 551. The principle of that case I understand to be this :—Joint debtors are entitled to be sued together as there is but one cause of action, and the case of action becomes merged in the judgment. Thus if judgment is recoved against one of the debtors the other can plead the merger. The rule of law may apply here to promissory notes, but I question if it applies to joint obligations outside the law merchant.

Such a rule of law can only apply where the judgment pleaded is a binding one.

"In my opinion the decree is not binding on the wife, for her legal guardian had appeared and was defending the action when it was obtained. I would affirm the order."

1st June, 1899.

CRIMINAL.

POLICE COURT, HAMBANTOTA, No. 2,309.

P. S. DANIEL *vs* USUP CAREEM.

In Revision

In the matter of the petition of the above named accused dated the 29th April, 1899, and of the conviction and sentence and order of the Police Court of Hambantota, dated the 8th March, 1899.

Offence under the Opium and Bhang Ordinance 4 of 1878—An order of confiscation and destruction of property not warranted by any provisions in this Ordinance—Bias of magistrate—Office of Superintendent of Police incompatible with office of Police Magistrate in same person—Rode *vs.* Bawa, 1 1. N. L. R. 373. 'The administration of justice by Magistrates should be clear from all suspicion of unfairness.' 'That justice should be believed by the public as unbiassed is almost as important as that it should be in fact unbiassed.' When reasonable apprehension of bias exists.

Held here : That an order for confiscation and destruction of property under the opium and Bhang Ordinance of 1878 is "*ultra vires*."

Held also : that a police Magistrate who is also Superintendent of Police of the same district is incompetent to try a case in which the prosecutors are officers of police under him.

Per WITHERS, J. : "Having called for the P. C. case 2,309, Hambantota, P. S. Daniel *vs.* Carim Usnoof, I have to decide whether the conviction and order should be quashed. The accused was found guilty of the offence of selling opium to be consumed on the premises contrary to the terms of his license under section 10 of 4 of 1878, and he was fined a sum of Rs. 25 and in addition to that the Magistrate ordered the opium and the vessels containing the same produced in Court to be confiscated and destroyed. That order is not warranted by any provisions in the Opium and Bhang Ordinance of 1878 and that order must accordingly be quashed.

The conviction, if it is to be quashed, must be quashed for another reason altogether. This was a summary trial conducted by a Magistrate who is the Superintendent of Police in the district where this offence is said to have occurred. The complainant in the case was the Sergeant in charge of the Hambantota Station. It was he who went into the accused's premises and detained articles which he found on the premises, such as mats, pipes, pillows and lamps. He was assisted by a constable and he and the constable gave evidence for the prosecution.

I find it impossible to distinguish this case from that of Rode *vs.* Bawa, P. C. Badulla 15,009, reported in 1. N. L. R. 373. In that case the Superintendent of Police of the province of Uva, held the appointment of additional Police Magistrate of the Police Court of Badulla. He tried summarily a complaint of some street nuisance brought by a Police Officer and convicted the person charged. That case came up before the Chief Justice and Mr. Justice Lawrie, and the conviction was quashed. It transpired in that case that the Magistrate as Superintendent of Police had given orders to the members of the force under him to suppress these street nuisances then occurring in the town of Badulla.

But that was not the ground of the Chief Justice's Judgment. He applied this simple principle 'that the administration of Justice by Magistrates should be clear from all suspicion of unfairness.' He observed 'that Justice should be believed by the public as unbiassed is almost as important as that it should be in fact unbiassed.'

Now is there a reasonable apprehension of bias when a superior officer of Police summarily tries a case on the complaint of one of his subordinate officers who appears and gives evidence in support of his complaint ? The answer must be *yes* in my opinion.

Whether bias exists or not is not the question at all. No one has imputed or suggested any unfairness on the part of the Magistrate. But the head of the Police who knows his subordinates may be unconsciously biassed in a summary trial of a case in which they appear as prosecutors or witnesses.

I therefore follow the authority of Rode ve. Bawa and quash the conviction as well as the order."

23rd June, 1899. ———.

POLICE COURT, CHILAW.

No. 14,572.

W. C. SIMMONS vs. A. HEBNA AND TWO OTHERS.

Mischief under section 410 of the Penal Code within the jurisdiction both of the District Court and Police Court. Powers of the Attorney-General under the New Criminal Procedure Code, 1898. The greater power given to him by section 158 to direct a commitment for trial before the District Court and Supreme Court includes the lesser to admit a summary trial in the Police Court—Imprisonment for mischief under Section 410 unnecessary when fine imposed covers extent of damage caused.

Held :—That the power given to the Attorney-General under Section 158 (1) B of the Criminal Procedure Code 1898 includes the lesser power to direct a summary trial in the Police Court.

Per LAWRIE, A. C. J.—"This charge of committing mischief under Section 410 is an offence within the jurisdiction both of the District Court and Police Court. It was investigated by the Police Magistrate under ch: 16 as a non-summary case. After the evidence was recorded the case was sent to the Attorney-General and he directed the trial of the accused summarily in the Police Court.

The 158th Section of the Criminal Procedure Code seems to provide only for the Attorney General's directing :—(1) the discharge of the accused ; (2) the commitment for trial to the Court specified by him ; (3) new evidence to be taken.

It does not contemplate that the Attorney-General shall direct the accused to be tried in the Police Court without commitment, but I think the greater power to direct a commitment for trial before the District Court and Supreme Court includes the lesser to admit a summary trial in the Police Court.

When the case was returned the accused were informed that they would be tried summarily on the 17th May and they were warned to be ready.

On that day the particulars of the offence were read to them and they pleaded not guilty. The witnesses who had been examined at the investigation were before the Court and the evidence as recorded was read over and adhered to in the presence of the accused. The accused were given an opportunity of cross-examining and of re-examining their own witnesses.

It was objected that this was not a proper trial. I hold it was. I have not been referred to any decision or expression of opinion showing that it was not.

The accused were found guilty. The evidence of the accused is sufficient and was believed by the Magistrate who tried this case with care.

I affirm the conviction. The sentence is one of imprisonment for one month and a fine of R50. It is not, I think, necessary to send these men to jail.

I vary the sentence by deleting the sentence of imprisonment. The sentence of fine and imprisonment on failure to pay fine will stand."

255 POLICE COURT GALLE. No. 2,000.

H. BABUN *vs.* D. ARNOLIS SILVA AND OTHERS.

Summary procedure under Section 314 of the Penal Code—Powers of Attroney-General—Can an accused, discharged by the Attorney-General on a charge of robbery and hurt with a knife, be tried again on the lesser charge of hurt caused at the same time and place and on the same person? The old and new Criminal procedure codes compared—the provision as to acquittal and discharge contained in sections 242, 399 of the old code equivalent to the interpretation clause (3) of the new code—If a prosecution can be renewed as to the whole of the charge or charges for which the accused had been discharged, a prosecution can be renewed as to a part of the charge.

Held : here :—that a prosecution discontinued by the discharge of the accused on the order of the Attorney-General can be renewed as to the whole of the charge or charges for which the accused had been discharged and therefore that a prosecution can be renewed as to a part of the charge.

Per LAWRIE, A. C. J." The Attorney-General by an order signed by him filed in this record dated 25th February 1899, ordered that the accused be discharged from the matter of the charge under 380 and 315 of the Penal Code and by a letter of the same date the Attorney-General requested the Police Magistrate to proceed summarily against the accused for causing hurt under section 314. The Magistrate tried, convicted and sentenced them under section 314, hence this appeal.

It was strenuously argued that after the discharge by the Attorney-General they could not be tried for hurt caused at the same time and place and on the same person as the robbery and hurt with a knife of which they had been discharged.

This argument was supported by a passage in a minute in this case by Bonser, C.J., in which he said :—" As the order was for discharge of the accused it seems to me that that made an end of the prosecution."

The 242nd section of the old Criminal Procedure Code enacted that on a discharge by order of the Attorney-General, "all the proceedings taken upon such an enquiry shall cease and be determined."

But it is very clear that a discharge under 242 of the old Code was not equivalent to an acquittal and was no bar to a subsequent prosecution for the whole of the charge from which the accused had been discharged.

This is made clear in the old Criminal Procedur Code by an explanation to section 399 : a dismissa of a complaint, the stopping of proceedings under section 159, the discharge of an accused, or any entry made upon a charge under section 278 is not an acquittal for the purpose of this section. The Section is headed :—"Of previous acquittals or convictions."

This explanation is omitted in the New Code but the interpretation clause (3) enacts : "Discharge, with its grammatical variations and cognate expressions means the discontinuance of criminal proceedings against an accused, but does not include an acquittal."

So that from those sections if a prosecution be discontinued by the discharge of the accused it can be renewed.

If it can be renewed as to the whole of the charge or charges for which the accused had been discharged it follows I think that a prosecution can be renewed as to a part of the charge and I see no irregularity in the course which the Attorney-General requested the Magistrate to adopt and in the Magistrate's sending for the accused and informing them that they were charged with voluntarily committing hurt and then framing a charge.

The complainant was then examined and a day fixed for trial. At the trial all the, witnesses were examined '*de novo*.'

It might have been better had the summary proceedings been numbered separately; but that the record of the trial under 314 is stitched up with the non-summary proceedings has not prejudiced the accused in any way.

On the merits it was well proved that the accused beat the complainant and were guilty under 314. It does not vitiate these convictions that if the complainant be believed, the accused were guilty of robbery and theft. There is no reason to doubt the honesty of the complainant's belief that one or two of his injuries were inflicted with a knife, but the rest of the evidence shws that the complainant was mistaken and that only sticks were used.

And the complainant may be believed when he said that when he regained consciousness his waist chain, umbrella, etc, were gone. He did not know who stole them. It is reasonable to suspect that those who hurt the complainant took his waist-chain etc:, but the evidence as a whole shews that robbery was not the object of the attack and it was not proved that these things were taken by the accused.

So that, taking the whole evidence I am of am of opinion that it was right to discharge the accused from the charge of robbery and of causing hurt with a knife, and that they were regularly charged and tried, that the evidence proved the charge and that they were rightly convicted and sentenced."

20th June, 1899.

I CIVIL.

296, DISTRICT COURT, JAFFNA,

No. 1,078.

Claims to property seized—sections 241-247 of the Civil Procedure Code—These sections inapplicable when the property has already been sold—3, N. L. R. p. 257 —The soundness of the judgment in this case doubted by Bonser, C. J. —Practice of the High Court of Madras.

Held here: That when the property of a man has been wrongfully seized in execution on a writ against another, and sold, it is too late for the true owner to make a claim under section 241 of the Civil Procedure Code or to bring an action under section 247.

Per LAWRIE, A. C. J.:—"When the property of a man is wrongfully seized in execution on a writ against another, and when the property is sold, it seems to me too late for the true owner to prefer or to lead evidence in support of a claim under section 241, or to bring an action under section 247. The object of sections 241 and 247 is to have it decided whether property seised is or is not liable to be sold in execution of the decree.

If it has been already wrongly sold the remedy is not under those sections. In the case of a sale of movables the true owner cannot recover his goods, but I do not say that he has no right of action against the decree-holder. He has right to the payment of the proceeds of the sale of his property, probably to the full value.

In the case of immovable property wrongfully sold, if the true owner be dispossessed, he can recover his land by action.

I remain of the opinion expressed in the case of James and Co., *vs.* Natchiappa, reported 3 N. L. R. p 257. It seems to me idle to come into Court praying for a declaration that goods are not liable to be sold when before the institution of the action the sale has taken place.

The competency of the action was not, however, the matter in dispute between the parties. They went to trial on the merits. A judgment was given; this Court in appeal desired further evidence. The case came again in appeal. Then the objection as to the competency of the action was taken.

I understand that Bonser, C. J., doubted the soundness of the judgment in James and Co., and that the Registrar was instructed to write to the High Court of Madras as to the practice in that Court. The reply does not touch the question now before us.

On the merits I am satisfied that the plaintiff, has not proved that he was the true owner of the bags of fish seized and that the dismissal of the action was right. I affirm."

12th June, 1899.

Per BROWNE, A. J.—"In the action 972 D. C., Jaffna, plaintiff obtained decree (absolute) on the 15th January, 1897, issued his writ on 8th February, 1897, and seized 60 bags fish on 11th February, 1897. On the 17th February, 1897, plaintiff claimed the fish as his and on his motion the enquiry was fixed for the 10th March.

Possibly because that date would have been anterior to the date (27th March) on which the fish was ultimately sold, and would then, I presume, have been the day fixed for the sale, claimant's proctor did not move for any order under section 242, Civil Procedure Code, for stay of sale pending the preliminary investigation. But the enquiry was postponed from 10th March and held only on 9th and 23rd April, and meantime the Fiscal sold the fish on 27th March, deposited the proceeds, R223 10, to credit of the action on 5th April, and reported such deposit to the Court on 22nd April.

The claim was disallowed on 23rd April and plaintiff instituted this action on 6th May under section 247 Civil Procedure Code praying then that the fish might be released from seizure and delivered to the plaintiff when it had already been sold—and not praying any order on the Fiscal restraining sale pending final decree.

In the original action the writ-holder on 12th May moved for and on 19th May obtained an order for payment of the proceeds of sale, which fact defendant put foremost in his answer filed, 31st March, in the present action, and plaintiff on the 9th August on trial obtained leave to add to the prayer of his plaint as an alternative to his prayer for release from seizure, "or if the defendant is unable to do so, that he be decreed to pay plaintiff the value of the said 60 bags of fish, viz., Rs. 350."

On enquiry from the High Court of Madras we have been advised that the correct procedure would be there regarded, to apply in the section 247 action for an injunction to stay the sale of land or movables seized and if necessary to appoint a receiver, or, in the case of movables to order the property, or in the case of perishable goods the proceeds thereof to be brought into Court.

It is the invariable practice in the District Court of Colombo on filing a claim to move therewith for an order staying the sale, and this Court has already (3 N. L. R. 257) held that if the claimant fails to do so he has no cause of action thereafter under section 247, such as this action against the writ-holder.

On the facts, however, I am not prepared to hold that the plaintiff has proved that the property here belonged to him or that he was in possession thereof, and that the debtor had not such right or possession. I would affirm with costs."

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2 CRIMINAL.

POLICE COURT, KANDY. No. 11,804.

UKKU BANDA KORALA (RESPONDENT) *vs.* M. CASSIM (APPELLANT).

Offence under section 180 of the Penal Code. The criminal intention of the accused must be expressly stated in the charge. Indian cases on the point in 4 Madras, p. 241, and Starling p. 203—Vide Maine, Criminal law 354. "No offence is committed if the false information be given to some one who is under no legal obligation to take any action on it.' Answers to question not 'information' in the sense of the 180th section.—

Held : 'That in a charge under section 180 of the Penal Code it must be expressly stated that the intention was to cause the public servant to use his lawful power to the injury of some person named.'

Held also :—'That answers to questions are not *information* in the sense of the 180th section.'

PER LAWRIE, A. C. J :—The charge is defective. It sets forth no offence. It is necessary in a charge in the 1st part of section 180 to state that the intention was to cause the public servant to use his lawful power to the injury of some person named.

Here that is omitted : the intention charged is that the Korala should report to his superior.

It was decided in an Indian case, Regina *vs.* Periaman (rep. 4. Madras p. 241 ; Starling p. 203) that it is not sufficient if the public servant misinformed is only competent to pass on the information to his superior, but cannot act directly or immediately against the person informed against.

Maine throws some doubt on this decision, (Criminal Law 354), but he concedes that no offence is committed if the false information be given to some one who is under no legal obligation to take any action on it, and such I think was the position of the Korala in this case. Be that as it may, the accused did not give *information* within the meaning of section 180.

Information had been given to the Korala by Mirasa that Segutambi had killed a cow without a license ; the Korala made enquiries and this accused said it was true, and that he himself went to buy beef and saw beef, but that he would not give evidence because Segutambi was his uncle. It is clear that the statement was not volunteered but was made in answer to questions and that the intention of the accused was not to cause the Korala to use his power to the injury of Segu tambi.

The Aratchi of Kaduwela, who professed to have heard the conversation, said that the Korala asked the accused how this happened, that the accused said that beef was sold to various parties, then the Korala asked the accused if he saw the animal being killed. He said yes, but he gave no name.

Now answers to questions do not seem to me to be *information* in the sense of the 180th section, but if it was information, was that information false? . . . . . .

My opinion is first that he did not give false information within the meaning of the 180th section; second: that he did not give information with intent to cause the Korala to use his power to the injury of Segu tambi; third: that it was not proved that the statements he made to the Korala were false.

The conviction and sentence are set aside.

18th June, 1899.

POLICE COURT, TANGALLA. No. 12,976.

K. ALLIS *vs.* A. K. SAMEL APPU.

Theft—Dishonest retention of stolen goods—Retainer must know the true owner to be guilty of this, otherwise his possession is not dishonest because there is no intention to cause wrongful loss to any known person—False statement in accounting for possession of stolen article a sign of guilt.

Held here :—"That retaining property knowing or having good reason to believe that the property was stolen is not enough to constitute an offence under section 394 of the Penal Code, but that such retention must be dishonest."

Held also :—"That if the owner of a stolen article be not known, the possession of it by a retainer is not dishonest, because there is no intention to cause wrongful loss to any known person.'

Per LAWRIE, A. C. J. :—"A bull belonging to the complainant was stolen from him in 1894. In February 1899, the complainant claimed a bull in the accused's possession as the one stolen. The first question to be decided is whether the bull belongs to the complainant or to the accused. . . .

In the conflict of evidence as to the ownership and brand marks I accept the verdict of the magistrate that the bull in question is the one stolen from the complainant in 1894.

Is the accused's conduct sufficient evidence that he retained the bull with guilty knowledge that it was stolen?

He says that the bull has for more than 4 years been in his possession : if that be false, is that false statement a sign of guilt ?

He says the animal never bore the complainant's brand-marks and that they have not been altered ; if it be true that there are traces of the complainant's brand-marks and that it is certain that the brand-marks were altered, is that a sign of guilt ?.

I think these questions must be answered in the affirmative. Retaining property knowing or having good reason to believe that the property was stolen is not enough—the retention must be dishonest.

If the retainer does know the true owner, then the retention is dishonest, because the retention is with the intention of causing wrongful loss to that known owner, but if the owner be not known, the possession is not dishonest because there is no intention to cause wrongful loss to any known person.

Here the magistrate holds that the accused did know that the complainant's bull was stolen, because Appu, a relation of the accused's, was prosecuted for the theft, but the result of that prosecution was Appu's acquittal, and though it is probable that the accused knew of the prosecution it is not certain that he did.

The case is not free from doubt, but if I accept, as I do, the verdict of the Magistrate that the complainant's brand marks were obliterated when the bullwas in the accused's possession I cannot but presume that he knew whose brand-marks they were.

The knowledge and dishonest intention of the accused have, I think, been sufficiently established.

I affirm."

13th June, 1899.

CIVIL.

91, DISTRICT COURT, BATTICALOA, No. 1,751.

Sale of Goods Ordinance 1896—Generic and specific goods as distinguished in the 16th and 17th Sections of this Ordinances—Specific goods as defined by the 59th Section—'A generic thing may be a specific thing under the Ordinance'—Difference between an actual sale and an executory contract of sale—In a bargain and sale the property passes immediately to the buyer—Part II of the sale of goods Ordinance, Section 17, sub-section 1.

Held here: 'that a generic thing may be a specific thing under the Ordinance:' (if nothing more remains to be done than to collect the particular parts of the generic thing for the purposes of easy delivery that is a specific thing)

Per WITHERS, J.:—"The plaintiff in this action claims restitution from the defendant of seven carts and seven pairs of bulls which he says the defendant illegally took from his possession on the 19th of February, 1897, and has retained ever since. The plaintiff's case is that these carts and bulls formed part of what is called a cart transport establishment which the defendant had sold to the plaintiff on the month previous and had delivered to him as such purchaser on the very day of the alleged trespass, but before the commission of it.

On the 28th January, 1897, the defendant and plaintiff signed a document containing these words:—'It is agreed between D. C. Kotalawala (defendant) and C. J. R. LeMesurier (plaintiff), both of Batticaloa, that D. C. Kotalawala shall sell the whole of his cart transport establishment to C. J. R. LeMesurier at a price to be agreed upon as follows: the said C. J. R. LeMesurier shall appoint one appraiser and the said D. C. Kotalawala another, and if the two cannot agree they shall call in a third and that the price so decided upon shall be duly paid for the said cart establishment by the said C. J. R. LeMesurier. A penalty of one thousand rupees to be paid by the party breaking this agreement to the other party.'

This is the contract on which the plaintiff founds title to the carts and bulls. The first question that arises is whether this is a contract for the sale of unascertained goods or whether it is a contract for the sale of specific or ascertained goods, or to put it in another way, whether it is a contract which comes within the provisions of the 16th section of the sale of Goods Ordinance of 1896, or whether it is a contract which comes under the 17th section of the Ordinance.

'Specific goods' are defined in the 59th section of the Ordinance as:—'Goods identified and agreed upon at the time the contract of sale is made.'

For the plaintiff it was argued that the expression in the written contract:—'The whole of his cart transport establishment' imports identity of and agreement on the subject matter of the contract of purchase and sale. It does not matter, it was said, what the cart transport establishment consisted of at the time. It was sold in its entirety whatever it was. If it was not actually identified at the time of the contract the subject matter was identifiable at any given moment.

Mr. Wendt, on the other hand, argued that the expression 'cart transport establishment' was so wide and vague as to necessitate a subsequent identification of the subject-matter. It remained for the parties to ascertain what it was they had agreed to sell and purchase: the contract therefore came under section 16 of the sale of goods Ordinance of 1896.

I must say that before I heard the matter discussed it seemed to me difficult to regard such a thing as a cart transport establishment as 'specific goods'—but after hearing the matter thoroughly discussed I have changed my mind.

Though it seems strange, yet a generic thing may be a specific thing under the Ordinance: If nothing more remains to be done than to collect the particular parts of the generic thing for the purposes of easy delivery that is a specific thing. Take the present case.

The subject-matter of the contract was 'all the carts and cattle composing the defendant's transport establishment.' They might at the time have been employed in various parts of the district, and to collect them and bring them to one spot for the buyer's convenience was a mere matter of time.

The next important question is: 'What is the effect of this contract?' Did it amount to an actual sale or was it a mere executory agreement? If the contract was a bargain and sale the property in the cart transport establishment passed immediately to the buyer. Now part II. of the sale of goods Ordinance is where we must look for an answer to this question Section 17, sub-section 1 enacts:—'Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intended it to be transferred.' Sub-section 4 of that Section enacts that: 'for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.'

Of course the first place to which we must look for the intention of the parties is the contract itself. Now looking at the terms of this contract it says 'it is agreed between the parties that one shall sell to the other his cart transport establishment at a price to be fixed by two valuers appointed by the parties respectively and by an umpire called in by the two valuers if they are unable to agree.'

It seems to me that the contract was intended to be an executory one only and that it was not intended to pass the property instantly."

* * * *

BROWNE, A. J.:—Agreed.

19th June, 1899.

87. DISTRICT COURT, TANGALLA, No. 444.

Prescription of property of the nature of a *fidei-commissum* adversely against the *cestui-que-trust* of the property.

Per WITHERS, J.:—* * * * * * * * * *

Can property being of the nature of a *fidei-commissum* be held adversely against the *cestui-que-trust* of the property? I must say that I do not see why a third party having no connection with the *cestui-que-trust* could not acquire right to such property under the 3rd section of the Prescription Ordinance of 1871.

BROWNE, A. J.:—'Agreed.'

14th June, 1899.

75. DISTRICT COURT, COLOMBO. (Int.) 79,987.

Application under Section 58 of Ordinance 4 of 1897.—Repeal of this Section by Ordinance 2 of 1889, Section 3—A purchaser of property at an execution sale gains the debtor's right, title and interest at the date of the execution sale and not on the date of the Fiscal's conveyance to him—9 S. C. C. 36 and 92—a Court of first instance should decline to grant confirmation of a sale when 10 years had elapsed between sale held and application made.

Per LAWRIE, A. C. J.:—"This is an application made on the 17th March, 1899, for an order on the Fiscal to execute a conveyance of land sold in execution on the 26th April, 1880.

The application is made under Ordinance 4 of 1867, Section 58: that section was repealed by 2 of 1889, which came into operation on the 1st August, 1890.

The 3rd Section of the Ordinance 2 of 1889 directs that actions then pending shall be continued under the provisions of the new Ordinance unless on reasonable cause shewn, the Court directs that the pending action shall be continued as if the Ordinance 2 of 1889 had not been passed.

No direction by the Court for the continuance of the old procedure was made in this case.

In my opinion the District Court had no power to act under a section repealed more than 8 years ago—I would set aside the order appealed against. The defendant to have costs."

Per BROWNE, A. J.:—"Undoubtedly as a general rule lapse of time will not debar a plaintiff purchaser at a Fiscal's sale from obtaining confirmation under Ordinance 4 of 1867, of the sale and issue of title to him, and if his delay be great and there is conflicting evidence as to who has been in possession of the land for ten years past, the Court may cautiously preserve the '*status quo ante*' pending future litigation by declining to give a writ of possession. As I did in 83,773 D. C. Colombo.

But even in such a case, if defendant were to sue, having the Fiscal's conveyance to him of the right, title, and interest of the debtor, the '*onus*' of proof would in the new litigation be shifted to the debtor; and because I considered a dilatory purchaser should not be so favoured I refused in 90,085 and 82,132 D. C. Colombo, to give a purchaser this advantage by confirming the sale so that he should obtain a Fiscal's conveyance which would give him on paper the debtor's right, title, and interest certainly at the date of the execution sale (9 S. C. C. 36 and 92), and possibly (if the decree has been exigible the debtor's right etc., as a mortgagor at the date when he executed the mortgage on which the action was brought) or even an earlier date.

I consider a Court of first instance should decline accordingly to grant confirmation of a sale when 10 years had elapsed between sales held and the application made."

12th June, 1899.

80, DISTRICT COURT, BADULLA, No. 1,336.

Contract of purchase and sale of land. Does it contain an implied warranty of title? Guarantee of free and undisturbed possession only (*vacua possessio*) implied. A vendor may specially limit this guarantee.

Held here: that a contract of purchase and sale of land in Ceylon does not contain an implied warranty of title.

Per WITHERS, J.—"I am also of opinion that the judgment should be affirmed. My impression at the close of the argument was that the plaintiff had made a cheap and speculative purchase of Andalawatte. I say cheap because there is evidence that when he bought the land in 1894 it was worth five times what he gave for it, which was R100. I call it speculative because he was aware that Ramai and her husband had been in possession of the land for some 12 years before he purchased it. With the knowledge of this state of things he took a conveyance from the defendant which set out the vendor's sources of title going back no further than 1881 (to a Fiscal's transfer) and containing a special covenant that the vendor and his descendants would make no claim to the land and make no dispute.

As the plaintiff was evicted by third parties I do not see now he can succeed. It was argued that a contract of purchase and sale of land in this country contains an implied warranty of title. That in my opinion is a mistake. Every such contract implies a guarantee of free and undisturbed possession (*vacua possessio*) against all the world.

There is nothing, however, to prevent the vendor from specially limiting that guarantee. That is what the defendant has done in this case. He has said in effect.—I will only guarantee that neither I nor my descendants shall interfere with your possession and enjoyment of the land. It is true that defendant, or rather his attorney, assisted the plaintiff in his litigation with Ramai about the right to possess the land, but that was only just and fair that he should do so. But that did not amount to an acknowledgment that he was answerable for the acts of third parties."

Per LAWRIE, A. C. J.—"In my opinion the judgment should be affirmed for the reasons given by the learned District Judge."

18th June, 1899.

POLICE COURT MATARA, No. 733.

(*In revision.*)

Order for payment of Crown costs. Requirements of the 197th section of Ordinance 15 of 1898. Provisions of this section intended to be an enactment of the former requirement (3 N. L. R. 3) that complainant should be asked to shew cause why he should not be fined for institution a vexatious complaint. This question should be always put and recorded.

Held that before an order for payment of Crown costs is made under section 197 of the Criminal Procedure Code the complainant should be asked to shew cause against the making of the order. (Sub-section 3).

Per BROWNE, A. J.—"The petitioner has prayed a revision of the order wh reby he was ordered to pay a sum of R3 Crown costs.

On referring to the record I find that after hearing evidence on two occasions the Magistrate gave judgment as follows :—

'I don't believe a word of the evidence.'

'I believe the complainant's injury is self-inflioted.'

'Accused acquitted.'

'Complainant to pay R3 Crown costs.'

It appears to me that the order is erroneous and should be revised. It does not comply with the requirements of section 197, New Criminal Procedure Code in that: 1, the complaint is not declared to be frivolous or vexatious; 2, There is no record whether or not complainant urged any objections against the order being made, nor of the reasons why it was made.

Send a copy of this order to the Magistrate with notice that the case will be heard in revision on the 28th instant, when any remarks by him will be considered."

21st June, 1899.

"The provisions of section 197 (3) were very probably intended to be an enactment of the former requirement (3 N. L. R. 3) that complainant should be asked to shew cause why he should not be fined for instituting a vexatious complaint, and I consider that this question should always be put and recorded together with its results before an order for payment of Crown costs is made.

An ignorant villager may not know he has a statutory right to object to the order being made. In the absence of such enquiry of him I am not prepared to say that he may not have been prejudiced.

However much complainant may have deserved to be called upon to pay Crown costs. I therefore consider it right to revise and set aside the order even for this trivial sum of R3—to call attention to the procedure which should still obtain."

29th June, 1899.

CRIMINAL.

POLICE COURT, PUSSELLAWA, No. 27,175

G. D. BRABAZON *vs.* A. HEEN APPU.

Theft—Dishonest retention—Recent possession—What requisites must be complied with before, on evidence of recent possession, a dishonest retention can be presumed.

Held :—"That to presume a dishonest retention there must be proof of theft by another and of retention after the possessor knew that the things were stolen."

Per LAWRIE, A. C. J.: "The accused was charged with theft of tea plants, and with dishonestly retaining them. The magistrate found the accused guilty of the latter offence.

The evidence against the accused is of recent possession of stolen property. From the evidence adduced it is reasonable to presume theft rather than dishonestly receiving.

It is impossible on evidence of recent possession to presume a dishonest retention—there must be some proof of theft by another and of retention after the possessor knew that the things were stolen.

I vary the verdit to one under Secont 368 and affirm the sentence of Rs. 50 fine.

7th July, 1899.

POLICE COURT, GALLE, NO. 4,314.

T. M. Ossen, (Sergeant Major of Police, Galle), *vs.* 1, J. D. Amarasuriya ; 2, E. D. Perera.

Offence under Section 69 of the Police Ordinance 16 of 1865—A Police Magistrate has power to try this offence only if the Attorney-General certifies that he is content that the offence may be prosecuted in the Police Court—By Section 11 of the new Criminal Procedure Code, 1898, and Section 98 of the Ordinance 16 of 1865.

Per LAWRIE, A. C. J.—"This is a conviction for an offence under Section 69 of the Ordinance 16 of 1865, punishable by a fine not exceeding £20 sterling.

The Police Magistrate has power to try the offence summarily only if the Attorney General certifies that he is content that the offence may be prosecuted in the Police Court (section 11 of the Criminal Procedure Code and section 98 of the Ordinance 16 of 1865.) There is no cretificate filed in the case. The Police Court had no jurisdiction. I am obliged to quash the proceedings."

7th July, 1899.

POLICE COURT KANDY, NO. 11,856.

G. A. Ramsay *vs.* Muttayah Kangany. 2, Vanderstraaten, 85—notice to terminate an engagement—should it be computed from the day when such notice was received?—The case of the acceptance of a contract not analogous—8, S. C. C., 86.

Held.—'That notice by a Kangany to termina'n an engagement with a Superintendent of an estate must be computed from the time whee such notice reaches the Superintendent, and not from the date of its being posted."

Per BROWNE, A. P. J: "I see no reason to think that the Magistrate has come to an erroneous decision.

The Appellant Kangany's name was on the check roll and there had been no cessation of the system of employment (as in 2, Vanderstraaten's reports, 85) whereby he could earn wages for personal ervices in the field in addition to the head money for the coolies working.

No authority was submitted to me to shew that notice to terminate an engagement should be computed from the date of its being posted, and not from the date when it was received. I consider that the case of the acceptance of a contract is not analogous. In the latter case the proposer would have before him the possibility of acceptance and could provide for the fulfilment of the contract in the event of that contingency.

But the Superintendent is entitled to have a full month's time wherein to engage other labourers in place of those desiring to leave, and he would not have it if the notice were delayed in reaching him or never reached him at all, and yet it were to be held that the month should be computed from the date of its being sent off to him by post or otherwise.

I hold a contract of service was sufficiently proved—the cases in 8, S. C. C. 86, were possibly those in which the original employer was still in chief charge of the estate."

3rd July, 1899.

POLICE COURT, MATARA, No. 1,024.

C. Wilkins (Inspector of Police) vs. B. Seadoris *alias* Baby, and others. Offences under the gaming ordinance 7 of 1889—Under what circumstances a warrant of entry can be granted by a Magistrate—An affidavit only not a sufficient ground for issuing a warrant—Nomenclature of Ordinance to be followed in describing offence—What must be proved to establish a charge of 'gaming.—The provisions of the Ordinance enacted to prevent private houses being rashly entered.

Per BROWNE A. J.: "It is clear that the initiatory proceedings which were professed to be taken under section 7 of Ordinance 7 of 1889 were entirely irregular and that the house in question of the 1st accused was not duly entered with authority under the provisions of the Ordinance.

The warrant can be granted by the Magistrate only when he is satisfied by written information on oath and after any further enquiry which he may think necessary that there is good reason to believe (*i.e.* for him to believe) that a place is kept or used as a common gaming place. Such belief must be founded on facts proved to him—not as here on affidavit stating only that 'credible information has reached me that the houses (of 5 different persons by name) are used as places for common gaming.'

If the Ordinance had sanctioned the issue of warrant upon some person stating his belief such affidavit might suffice, though I consider (1) it should state the grounds of belief and (2) against each separate owner or user of the house.

But in my judgment the Magistrate must have facts laid before him and form his own belief and explicitly record that he is satisfied that the house is so kept or used. This procedure was in every way not carried out here.

Again throughout all the evidence here the word 'gamble' has been used instead of 'game' or 'gamed.'

Under these circumstances, the presumption created by Section 10 did not arise and no attention can be paid to ocurrences of a date earlier than the night in question unless those occurrences are specifically detailed. In the present instance it would have to be proved that a game was played for a stake either in any place to which the public had legal access, or even in a place which was kept or used for that purpose to which the public had access with or without payment—and for the latter purpose it would have to be proved that the acts were committed and the access existed on so many previous occasions that the habitude was reasonably inferable therefrom.

The evidence as to occurences previous to the night in question is so very vague and unspecific that this habitude has in my judgment not been established.

I cannot see that there should be any such difficulty as the Magistrate in a quasi-excusatory tone recites, in laying information and obtaining a warrant if only the warrant were promptly enforced. The provisions of the Ordinance were clearly enacted to prevent private houses being rashly entered, *i.e.*, in cases where access to the public did not '*prima facie*' exist.

I therefore set aside the conviction.

3rd July, 1899.

POLICE COURT, AVISAWELA, No. 2,820.

K. A. Sidappu vs. 1, N. Bandalahamy; 2, D. V. Samel Appu.

Analogy of Section 440, Criminal Procedure Code 1898, and Section 12 of Ordinance 9 of 1895—Case in Tambyah's reports p. 1.

Held :—"That a Magistrate investigating a charge of mischief by fire to a house is not a "Court," and cannot therefore punish summarily false evidence given in proceedings before him.

Per BROWNE, A. J. : "Set aside. Section 440, Criminal Proceduce Code (new) is expressed in the same words as Section 12 of Ordinance 9 of 1895, and I am concluded by the authority of the decision in Tambyah's reports p. 1 that 'a Police Magistrate investigating a charge of mischief by fire to a house is not a "Court" who can punish summarily false evidence given in proceedings before him."

3rd July, 1899.

I.—CRIMINAL.

DISTRICT COURT, RATNAPURA, No. 540.

Giving false evidence in a judicial proceeding—section 12 of Ordinance 9 of 1895 and section 188 of the Penal Code—'To charge the accused with false depositions in the lump is on the face of it erroneous.' Wholesale conviction of this kind never contemplated by Ordinance 9 of 1895. II., N. L. R. p. 74.

Held here :—'That punishment under section 12 (1) of 9 of 1895 should not be used in cases where there is a conflict of testimony—Kind of case for a summary trial described. Where there is a conflict of evidence, the Magistrate or Judge should send record to the Attorney-General or proceed under clause 4 of section 12 of 9 of 1895.

Held here :—'That a summary trial on a charge under section 188 of the Penal Code should not be admitted if there is a conflict of testimony. (Where there is a conflict of evidence the Magistrate or Judge should in lieu of exercising the power of inflicting summary punishment transmit the record of the proceedings to the Attorney-General, or proceed in the manner pointed out by clause 4 of section 12 of Ordinance 9 of 1895.)

Per WITHERS, J.: "In this case two witnesses for the prosecution, one being the principal witness, have been convicted by the District Judge summarily under Section 12 of Ordinance 9 of 1895 of giving false evidence in a judicial proceeding within the meaning of Section 188 of the Ceylon Penal Code. This was a criminal judicial proceeding before the District Judge. Two men had been put on their trial for house-breaking with intent to commit theft. It was during this trial that the witnesses gave the evidence which, in the opinion of the District Judge, was false within the mesning of section 188 of the Penal Code. Each witness was examined upon affirmation and was cross-examined. Their statements were not contradictory and the witnesses corroborated each other. Eventually, however, the accused were acquitted of the offence of which they had been indicted, and after the trial was over the District Judge called upon the complainant Punchiappuhamy and his witness Karamanisa " to shew cause why they should not be summarily sentenced for giving false evidence in this case, namely, *the whole of their depositions*, under section 12 of Ordinance 9 of 1895.

Now, to begin with, to charge them with false depositions in the lump is on the face of it erroneous. It cannot be supposed that every distinct statement made by either of these witnesses was false to his knowledge. For instance Punchiappuhami is affirmed and states as follows :—"I am a Sinhalese man seventeen years of age. I am a trader and live at Kanuana." These are four distinct statements contained in the deposition the *whole* of which is impeached as false. The Magistrate should have selected from the deposition of each witness the particular statement or statements which he believed to be false within the purview of section 188 of the Penal Code.

The Ordinance under which they have been convicted never contemplated a wholesale conviction of this kind. But I will assume that both these witnesses deliberately gave false evidence in their respective depositions on the facts relating to the offence of which the accused were committed for trial. That is not the kind of case which the Legislature intended that Police Magistrates and District Judges should summarily try.

The leading case on this subject is Andris *vs.* Juanis (P. C., Galle, 20 984) reported in II, N. L. R., page 74. It was there held in effect by the Full Court that punishment under clause 1 of Section 12 of Ordinance 9 of 1895 should only be used in cases where it is clear on the face of the proceedings that the witnesses have been guilty of wilfully giving false evidence, and not in cases where there is a conflict of testimony.

The kind of case for a summary trial like this is either where a statement is on the face of the witness's deposition a false one or where it is shewn to be false by a contradictory statement of the same witness in the course of a previous judicial proceeding relating to the same matter.

Where there is a conflict of evidence as in this case then the magistrate or judge should in lieu of exercising the power of inflicting summary punishment transmit the record of the proceedings to the Attorney-General or proceed in the manner pointed out by clause 4 of Section 12 of 9 of 1895. This case comes within the principle of the leading case to which I referred.

I therefore set aside the conviction of Punchiappuhami and Karamanica."

12th July, 1899.

338, POLICE COURT, KALUTARA, NO. 7,270.

Conviction on admission of accused—Section 335 (c) of the New Criminal Procedure Code —Section 188 of the same code requires the unqualified admission of guilt to be taken down in the exact words used—section 180 (2) very oppressive in the powers it confers—Importance of the provision in Section 190—judgments of Magistrates rendered nugatory if the verdict is not *forthwith* delivered.

Held here : 'that to warrant a conviction under section 188 (1) of the Criminal Procedure Code of 1898, the statement of the accused must be taken down in the words used by them.'

Per WITHERS J—"The accused in this case have been convicted of two offences (1) an offence under the Forest Ordinance, and (2) an offence of theft under the Penal Code. They have been convicted on their own admissions and sentenced to undergo 3 months' rigorous imprisonment. The case has been treated as if there was no appeal of right from the convictions, and under section 340 (2) of the Criminal Procedure Code the accused's proctor certified that there was a fit question of law for adjudication by this Court. It has been treated as a case coming under section 335 (c), which enacts as follows : 'there shall be no appeal from a conviction, where an accused has under section 188 made an unqualified admission of his guilt and been convicted by a Police Court.'

But as the appellant's counsel pointed out the accused have not been properly convicted under section 188. Sub-section 1 of section 188 enacts that 'if the accused upon being asked if he has any cause to shew why he should not be convicted makes a statement which amounts to an *unqualified admission* that he is guilty of the offence of which he is accused, *his statement shall be recorded as nearly as possible in the words used by him.*'

Now in this case the statements of the accused were not taken down in the words used by them or in words which purport to be an exact translation of what was stated by them. So it cannot be said that they made an unqualified admission of their guilt.

Mr. Loos, for the Crown, rightly pointed out that it was in the case of *unqualified* admissions only that the exact words should be taken down or recorded. He argued that the Magistrate convicted the accused on their qualified admissions *and* the evidence of the Police Officer Don Aberan. But that is not the Magistrate's finding, for these are the Magistrate's own words : 'I think that both the accused *on their own admission* are guilty of both the offences charged in the plaint, etc.'

On this point I should like to say that it is only fair to an accused to record as nearly as possible in his own words his qualified admissions, as well as his unqualified admissions.

The question of law certified to by the accuseds' counsel is not a sound one in my opinion. I refer to the point taken in the petition of appeal that it was not competent for the Assistant Government Agent to combine in one charge an offence against the Forest Ordinance and an offence under the Penal Code. But Section 180 (2) of the Criminal Procedure Code permits a person accused to be charged with and tried at one trial for more than one offence, if the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished.

I must say I think it very oppressive to unite the two offences. In India the practice of prosecuting a forest offence under the Penal Code has been more than once condemned. Here we have the two prosecutions combined and the accused run the risk of receiving double punishment.

Another point was taken in Appeal that the Magistrate's judgment was of no effect because it had not been *forthwith* recorded as required by Section 190 of the Criminal Procedure Code. This is a very important provision in the new code and Magistrates must be very careful to act up to it. For non-compliance with its Provisions renders their judgments nugatory and necessitates a new trial.

As I have observed before, it was no doubt intended that the Magistrate should not take the case home to consider. He should give his verdict on the facts the same day before leaving his Court. The sentence might be properly left for consideration in a particular case. However the Magistrate in this case seems to have called for further evidence under that same section, though his evidence was criticized as inadmissible.

I set aside the judgment and remit the case for further trial. There should be additional evidence of the property being crown property and there should be evidence of the locality from which plumbago was taken not being included in a reserved or village forest.

This last-mentioned matter relates only to the charge of a breach of the forest regulations. If this is the first offence of the kind I hope the magistrate will take that into consideration should he arrive at the same verdict at the conclusion of the 2nd trial."

13th July, 1899.

II CIVIL.

COURT OF REQUESTS, PANADURA, No. 2,619.

Contract law, Section 92 of the Evidence Ordinance.—Does this section prevent a defendant from proving that a document, *ex facie* a conveyance, has been treated as a security only. 2.—Intention of parties the chief ingredient in contracts. (Pothier section 91). Law of *Estoppel* as applied to contracts.

Per WITHERS, J: "I think that the Commissioner's judgment is right. Two Calcutta cases were cited to me as an authority that there is nothing in section 92 of our Evidence Act to prevent a defendant pleading circumstances which go to show that a document, '*ex facie*' a conveyance, has been treated by the parties to it as a security and not as an out and out sale. In these cases evidence was adduced with the object of proving that plaintiff in suing on the contract as a conveyance was guilty of fraud, for he knew that the contract was intended to operate as a security, and had acted as one fully cognisant of that intention.

I do not see how the principle of those cases applies to the present case. The contract of hire and lease purported to let to the defendants the entire land, but it is urged that the circumstances of the actual tenure of the land and of the agreement which followed within a few days of the contract, shewed that the lease was intended to operate from the first as a lease of an undivided moiety of the premises and no more, and to claim now to treat it as a lease of the entire land is a fraud on the part of the plaintiff. It is said that he is estopped by his own conduct from suing on the contract as a contract to let the whole land.

Perhaps it is more correct to say that the facts of this case are not such that the principle can be applied to them. It seems that the defendants were living in the land at the time the contract of lease was made. A few days after the contract was signed and delivered, one James Fernando protested against the defendants enjoying more than one half of the land.

What his ground of claim to one half for himself was does not clearly appear evidence was given to the effect that a relative by marriage of the plaintiff proposed to settle the dispute, that he induced the defendants to be content with half of the land and the plaintiff to be content with half the rent which had been paid in advance, and that the plaintiff to confirm this agreement handed the document of lease to this relative, who indeed produced it at the trial. Had the plaintiff admitted that he was entitled to only half of the premises and that James Fernando was entitled to the other half, much might be said for this defence by way of exception.

To admit this evidence here would, in my opinion, be to defeat the provisions of section 92 sub-section 4 of our Evidence Act. In my opinion, no case of fraud or mistake has been made out.

The defendants knew very well what they were doing and they were just as much or as little acquainted with James Fernando's pretensions as the plaintiff was. If they were not originally put into complete possession of the premises, as was urged on their behalf, it was open to them to have the contract of case cancelled. If on the other hand they were disturbed in their possession by James Fernando, it was open to them to sue James Fernando, and to obtain a judgment of eviction against him."

26th June 1899.

CIVIL.

651, COURT OF REQUESTS, MATARA. No. 719.

Administration of the estate of a deceased person —Powers and duties of administrator—An heir at law cannot, without assent of the administrator, keep a part of the estate before final distribution.

PER WITHERS, J:—"No one appeared to support the judgment in this case which, in my opinion, is erroneous."

It is idle for defendant to assert that he can hold the late Nactchia's share in Bandarewatte against the plaintiff, who is the administrator of her estate. A part of the administration of an estate consists in distributing the property among the heirs at-law after the claims against the estate have been satisfied, and the debts due to the estate have been called in. The administrator is accountable to the heirs at law for the rents and profits of the immoveable estate up to the time of final distribution, and by no possibility can one of the heirs-at-law be allowed to keep a part of the estate without the assent of the administrator.

If the time has come for distribution and the administrator does not do his duty, the heirs at law can compel him to assign to them their shares if he refuses or neglects to do so after demand duly made.

It will be declared that the plaintiff as administrator of the deceased Nactchia is entitled to the possession of the 1-6th share of Bandarawatte and the defendant must give up possession of that share. If it is true that nothing now remains, but to distribute the estate among the heirs-at-law, then the administrator's duty is at once to close the administration by assigning to the heirs-at-law their respective interests in the deceased's estate.

The judgment of the Court below must be set aside, and this judgment must take its place."

10th May, 1899.

10, COURT OF REQUESTS, NUWARA ELIYA, 1909.

Prescription of debts—3, C. L. R. 92—'Proof of the naked fact of payment of a sum of money is not proof of a part-payment'—Part-payment must be accompanied by an acknowledgment of the debt and a promise to pay the balance to prevent the operation of Ordinance 22 of 1871—V. S. C. C., 62.

Per WITHERS, J—"The Commissioner in this case has I think misconstrued the judgment of

the Acting Chief Justice in Murugupillai *vs* Muttel ngam reported in 3 C. L. R. 92. What the Acting Chief Justice said was,—' he proof of the naked fact of payment of a sum of money is not proof of a part-payment.' In another part of his judgment he says :—' Part-payment of a debt will not take the case out of the statute unless that payment is made under circumstances from which an acknowledgment of the debt and a promise to pay the balance may reasonably be implied.'

The plaintiff has proved in this case' and he has not been contradicted by the defendant, that the payments made to him by the defendant were on account of the existing debt for goods sold and delivered from time to time. The plaintiff put in his account particulars and swore to the truth of them. They were not gainsaid, and they show other payments previous to the two specifically sworn to by the plaintiff.

The present case is, I think, really governed by S. P. L. Sathappa Chetty *vs* K. P. M. Ramen Chetty, reported in 5. S. C. C. 62, in which De Wet, Acting Chief Justice, presided, and Clarence, J., sat with him. In that case Clarence, J, delivered a considered judgment in which the A. C. J. concurred. The effect of that judgment was shortly this :—' Part payment of a debt prevents the Statutory Bar from attaching under section 13 of Ordinance 22 of 1871, but it is incumbent in a case of the kind for the plaintiff to prove that the part-payment was made on account of the debt sued for.' It seems to me that the plaintiff has complied with those conditions. Judgment will therefore be set aside and judgment entered for plaintiff."

19th May, 1899.

641, COURT OF REQUESTS NUWARA ELIYA, 1790

Animals or chattels '*damage feasant*.—Right of retention restricted to animals or chattles not in the actual possession or use or under the personal care of some human being—English law on the point ruling in Ceylon.

Held here : "That the English law on the subject of animals or chattles "*damage feasant*" is also the Ceylon law on the subject."

Per LAWRIE, A. C. J. ; "In my opinion the defendant had no right to retain the cart. The right of retention of animals or chattels '*damage feasant*' is restricted to animals or chattels not in the actual possession or use or under the personal care of some human being.

Here the cart was in charge of the driver.

I take the English law on this point to be the law of Ceylon. I have not been referred to any Roman-Dutch law different from English law.

I am unable to appreciate the Commissioner's assessment of damages. I do not see why he gives R3 up to a certain date and 50 cents after that date.

I understand that the bulls and the cart were not detained, but only the cart worth at most R50. I think the damages given for the latter period were sufficient. I reduce the damages to 50 cents a day for 41 days (from 24th June to 9th August) *i. e.*, R20·50. The plaintiff to have his costs in the Court below and no costs in appeal.

15th May, 1899.

644, COURT OF REQUESTS, MATALE, 2,944.

Unprecedented claim—Action to recover from the administrator of a deceased person's estate board and lodging of children of deceased—the proper person to be sued for maintenance of deceased's children is the duly appointed guardian of the minors' persons, and the proper person to pay the maintenance is the guardian of the minors' estate.

Held : 'That an administrator of a deceased person's estate is not liable for the payment of the board and lodging of the deceased's minor children.

Per WITHERS, J. : "I do not see how this judgment can stand. The plaintiff's claim is, as far as I am aware, unprecedented. He seeks to recover from the administrator of a deceased person's estate the sum of R75 for the board and lodging of two of the minor children of the deceased person. In support of this claim the plaintiff is called. He says that these 2 children not being satisfied (I suppose with the treatment which they received from the 1st defendant) left the custody of the first defendant and came to live with the plaintiff. They were brought to his place, says the plaintiff, by their aunt. Whether or not this lady made herself responsible for their board and lodging I do not know.

Why the estate should be made to pay for their maintenance I am quite at a loss to understand. I gather from these proceedings that no one has been appointed guardian of the person of the minors or of the property which they derive from the deceased's estate. I should have thought the proper person to have asked for maintenance would be the lawful guardian of the minor's person and the proper person to pay the maintenance would be the duly appointed guardian of the minor's estate.

He has clearly no cause of action against the administrator of the deceased's estate and this judgment must be reversed and the action dismissed."

8th May, 1899.

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610. COURT OF REQUESTS MATARA 451

Distinction between a mortgagee's action under section 247 of the Civil Procedure code and his common law hypothecary action—the Supreme Court has allowed a 247 action to be treated as a hypothecary action if the plaint discloses a cause of action of the latter kind.—

Per WITHERS J : "This appeal in my opinion is entitled to succee . The additional commissioner was probably not aware of recent judgments of the court which, while recognising the difference between a mortgagee's action under section 247 of the C. P. C. and his common law hypothecary action, has allowed a 247 action to be treated as a hypothecary action if the plaint discloses a cause of action of the latter kind. Subject of course to the proof of the subsistence of the debt and of the mortgage contract and decree

The 10th para of the plaint looks as if the plaintiff was relying on his alternative right, though he omits to mention his alternative remedy.

I understand his case to be this :—Notwithstanding the defendant's conveyances my execution debtor is still the legal owner of the mortgaged premises and they are liable to be sold in satisfaction of my decree. On the other hand if the defendant is held to be the legal owner of the premises so that they cannot be reached by my decree, then I ask the Court Court to declare that I have a subsisting debt which is secured by the mortgage of the premises and I ask those premises to be sold, unless the defendant chooses to redeem them by satisfying my debt.

The case must go back for trial, as an alternative action under section 247 and a common law hypothecary action."

2nd May, 1899.

I.—CIVIL.

146. DISTRICT COURT, TANGALLA, No. 464.

Disposition by the husband of property in community by way of mortgage to secure debt contracted by him—Its effect to bind the child of the marriage—Until the children adiate the inheritance from the surviving parent, such parent may lawfully deal with the property in community—2 N. L. R. p 26. The husband has the free disposal of property in community—Distinction between special mortgage and usufructuary mortgage—Improper designation of things by District Judge.

Per LAWRIE, A. C. J.—"I understand that it is proved that during community the husband contracted debt and as security mortgaged the land in question which was in community.

The District Judge doubts whether this mortgage is availing against the defendant, who is a child of the marriage, and he remarks that the defendant was then not more than 6 or 8 years old.

The District Judge says it is not shown that the mortgage created a valid hypothec on the defendant's mother's estate, or that he since his majority tacitly acquiesced in it for the prescriptive period.

This is quite wrong, for the husband had right to mortgage the property in community, not only his own half, but the whole. The children of the marriage had no right in the property in community until the death of one or other of the parents. It is immaterial whether the defendant was 8 years old or was of full age at the date of the mortgage: his consent was not necessary. The defendant on the death of his mother succeeded to her half of the estate as it then stood encumbered by a mortgage granted by his father.

It was not necessary that he should acquiesce in the mortgage. It was a burden on the estate to which he succeeded.

The District Judge says that the purchase in 1888 was on a fiscal's 'certificate,' that the title has not been perfected by a 'proper transfer.' I do not understand this. The plaintiff filed a fiscal's conveyance in the usual form. I do not know why the judge calls it a 'certificate,' or why he denies that it is a 'proper transfer.'

The judge lays much stress on the possession of the land between the date of the mortgage in 1859 and the sale in execution on the mortgage decree in 1888. I am unable to see the importance of that; granted that the property mortgaged remained in the possession of the mortgagor and his son, it cannot be said that they prescribed against the mortgages, or that the action on the mortgage fell under the limitation of the prescription ordinance.

The reasons given by the District Judge for dismissing the action seem to me wrong.

The appellant's counsel urged that when the mortgagee brought his action in the mortgage bond after the death of the wife, he should have made the wife's heirs parties, and that as he got a decree only against the father of the mortgagor, the child of the marriage was not bound by that decree and could successfully resist possession being given to the purchaser in execution. I cannot sustain that argument. Until the children of the marriage adiate the inheritance from their mother and have a specified portion allotted to them, the property formerly in community may lawfully be dealt with by the surviving parent, to satisfy the debts contracted during the community. He does not require the consent of the children of the marriage. The decision reported in 2 N. L. R. p 26 is an illustration of this. If the surviving parent can alienate or encumber to pay debts due by the community, if he be the proper person to collect all the debts due to the community, it follows that he is the proper person to be sued on a mortgage bond executed by himself during the community over the estate then under his control and management.

In my opinion the judgment must be set aside and a decree entered for the plaintiff with costs."

Per WITHERS, J—" As we are reversing the judgment of the Court below I feel bound to add a few words.

In the first place, the District Judge seems to think that the plaintiff's paper title is not sufficient to support his claim to be declared the owner of the entire premises. He observes in his judgment that the plaintiff's purchase in 1888 was on a fiscal's certificate, and that his title has not been perfected by a proper transfer. I confess I do not understand what the District Judge means by this. The plaintiff produces his title deed. This purports to be a conveyance by the Fiscal to him in pursuance of an order of Court (see document 1819, marked letter B, p 26). I am not aware that the words 'certificate' or 'transfer' occur in the Ordinance 4 of 1867 or in the Civil Procedure Code. What the Fiscal executes is properly described as a conveyance. This is what document letter B purports to be.

In the 2nd place the District Judge seems to think that the mortgage which merged in the decree under which the premises were sold and bought by the plaintiff was not binding on the infant child of the parents in whose lifetime the mortgage was made by the father to secure a debt incurred by him. The defendant's parents were married in community and the husband had the free disposal of the common estate. His act bound his wife and *'a fortiori'* his child, who could have no interest in the estate while his parents were alive.

Then the District Judge seems to confound a special mortgage with a usufructuary mortgage. A special hypothec without any other words does not give the mortgagee the right to possess the lands in lieu of interest.

Then the District Judge seems to think hat the defendant has been in possession of his share unaffected by the mortgage decree and this was the point pressed upon us at the argument. It was urged that as the son was no party to the decree, to the moiety of which he succeeded on the death of his mother, he was not affected by that decree. But the defendant succeeded to his mother's estate subject to the debts incurred by her husband in her lifetime. This was such a debt.

Stress was laid on the fact that at the judicial sale in 1888 the defendant claimed his ¼ share before the Fiscal and the claim was allowed. The so-called allowance of claim does not seem to have interfered with the sale. What the defendant might have done perhaps was to redeem his share of the premises by paying a moiety of the judgment debt.

It was further urged that the defendant was in the same position as a third party who acquires land subject to a hypothec and that as he was in possession of his share he ought to have been made a party to the mortgage action. But at that time the common estate had not been divided, and he was not in exclusive possession of his maternal share, nor had he taken out letters of administration to his mother's estate. There was no necessity or occasion to join him (the defendant) in the mortgage action.

Judgment must be given for the plaintiff."

3rd July, 1899.

COURT OF REQUESTS, KANDY, No. 7,726.

Proceedings under section 12 of the Oaths Ordinance 9 of 1895—Giving false evidence in a judicial proceeding—2 N. L R. 74—Section 440 of Ordinance 15 of 1898 applies only to judicial proceedings in criminal cases.

Per BROWNE, A. P. J.—"In this civil action the Commissioner had power to take proceedings under section 12 of the Oaths Ordinance, No. 9 of 1895, and to charge the appellant with giving false evidence in this action specifying the words particularly and giving him an opportunity of explanation (2 N. L. R. 74). He had power to do so under section 12 of the Oaths Ordinance only and not under section 440 of the Criminal Procedure Code, which gives him like power only in any judicial proceedings under that code.

He therefore was wrong in charging him with committing an offence punishable under section 440, Criminal Procedure Code, and in enlisting the proceedings as in the Police Court.

Now the power given him so to punish for false evidence is exercisable by him when it is held to be false in the opinion of the Court before which the judicial proceeding was held, and can and should be exercised summarily by him, allowing the accused, of course, an opportunity for explanation

* * * * "

28th July, 1899.

II.—CRIMINAL.

371, POLICE COURT, BATTICALOA, No. 13,801.

Offence under section 85 of the Police Ordinance of 1865—Certificate by lawyer as to fitness of question for adjudication by Supreme Court, section 340 of the Criminal Procedure Code.

Held: That arguments in the Supreme Court (in appeal) can be adduced only on matters of law stated in the petition of appeal section) 340 Cr. P. C.(2)).

Per WITHERS, J.—"This appeal must be dismissed. The accused was convicted of an offence under section 85 of the Police Ordinance of 1865, and sentenced to pay a fine of R10. The magistrate refused leave to appeal, but the petition of appeal is signed by the accused's proctor, who certifies that the matter of law set out in the petition of appeal is a fit question for adjudication by the Supreme Court.

Mr. Tambyah for the appellant addressed me at least on one point of law which was a very fit question for adjudication, and I listened to him under the impression that it was contained in the petition of appeal. I find that it is not the case. We can only hear argument on matters of law stated in the petition of appeal. See section 340, Criminal Procedure Code.

On reading the petition of appeal I find that only one matter of law is mentioned. That was hardly strong enough to bear the weight of a formal certificate. It amounted to this:—The evidence recorded shews that the complainant was to blame rather than the accused. That is a question of fact rather than of law."

28th July, 1899.

POLICE COURT, PANADURA, No. 6,225

Effect of non-compliance with section 340 of the Criminal Code—clause 2 of this section requires the question of law appealed on to be certified by a lawyer as a fit one for adjudication by the Appeal Court.

Held here 'that in a petition of appeal a mere statement of a matter of law appealed on signed by a Proctor is not sufficient to comply with the requirement of section 340, clause 2, of the Criminal Procedure Code.'

Per WITHERS, J.—"I am unable to hear Mr. Dornhorst on behalf of the accused and appellants in this case.

The accused, who have been convicted of an offence under the code have been fined, two of them to Rs. 25 each, and others to Rs. 10 each. No leave, so far as I can find in the record, has been given by the Police Magistrate to take an appeal in this case, and though the petition of appeal purports to be signed by the accuseds' Proctor and though it contains a statement of matter of law, it is not certified by the Proctor that such matter of law is a fit question for adjudication by the Supreme Court.

The provisions of section 340 of the Code clause 2 make this necessary, and then the point of law is rather one of irregularity of procedure. It is in effect that the Magistrate tried this case without the sanction of the Attorney-General, which was necessary to give his Court jurisdiction. But such want of sanction under section 425 of the Criminal Procedure Code is not an irregularity which can be taken into account if it has not occasioned a failure of justice. Being unable to entertain this appeal, I must dismiss it."

26th July, 1899.

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347. POLICE COURT, TRINCOMALEE, No. 6,799.

Doctrine of recent theft and presumption—section 114 of the Evidence Act—'the presumption will be strong or weak according to the circumstances of each case'—The presumption can be rebutted by an accounting for possession.

Held: that a Magistrate is not *bound* to presume guilt (under section 114 of 14 of 1895) although an accused cannot account for possession of a stolen article.

Per WITHERS, J.:—"This appeal is entitled to succeed. A common old country double bullock cart without any special brandmark or plate fixed to it is stolen in January. The 1st accused buys it for more than it is worth of the 2nd accused some

day in the last week of March following. The 2nd accused swore that he bought it of one Pakeer Maideen in the same month for about its proper price, 15 shillings. At the time he bought it he says the cart was in one Sinniah's or Ponniah's compound.

Pakeer Maideen is called by the 2nd accused to corrohorate his story.

* * * *

The Magistrate is not satisfied with the account which the 2nd accused gave of how he came by the cart, and he expresses himself as sure that this was not the cart which Maideen sold him. I am not so sure myself of this. However the Magistrate acting on his belief of the case has found the 2nd accused guilty and has sentenced him to a term of rigorous imprisonment and a fine.

Now the only evidence against this accused is that he was found in possession of the cart two months after it was stolen.

The Evidence Act, section 114, illustration A, enacts that the Court *may* presume that a man who is in possession of stolen goods *soon after* the theft is either the thief or has received the goods knowing them to be stolen, *unless he can account for his possession.*

If he gives a reasonable account of his possession, there is no presumption. A person is not expected or required to account for the possession of a stolen article unless it is found in his possession soon after the theft, and if he cannot account for it the Magistrate is not *bound* to presume guilt.

The presumption will be strong or weak according to the circumstances of the case. Here a man who admittedly possesses carts and bulls gives a reasonable account of his possession of an old bullock cart which had no name or no mark on it, and which I will take it was stolen from the possession of the true owner 2 months before. I do not think this was a proper case for presuming theft.

The accused must be acquitted."

17th July, 1899.

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936. POLICE COURT, KALMUNAI, No. 908.

Section 114 of the Evidence Act—Dishonest retainer—No presumption of guilty retention from the mere fact of possession—'Guilty retention implies an innocent acquisition in the 1st place.'

Held here : 'that there can be no presumption of guilty retention from the mere fact of possession.'

Per WITHERS, J.—"The accused has been convicted of dishonestly *retaining* in his possession 13 marangi planks, 1 bar and 1 metal gauge of the value of R15, property of the Ceylon Government, having reason to believe the same to be stolen, and has been sentenced to 3 months' rigorous imprisonment.

Assuming that these articles were found in the possession of the accused on the 22nd April last and about a week later, it cannot be presumed from that fact alone that he *retained* these articles with guilty knowledge. It may be presumed from the possession of stolen articles in certain circumstances that the person in possession is either the thief or the guilty receiver. See the Evidence Act 14 of 1895, section 114 (a). But there can be no presumption of guilty retention from the mere fact of possession.

Guilty retention, it has been pointed out once and again, implies an innocent acquisition in the first place. The guilt commences from the moment that the possessor has come to know that the thing is stolen, and dishonestly decides to keep it. If there is sufficient evidence to convict the accused of theft or guilty reception I shall alter the conviction accordingly.

* * * *

The evidence in my opinion, does not justify the conviction. I set aside and acquit the accused.

26th July, 1899.

I. CIVIL.

COURT OF REQUESTS, MATARA.

No. 548.

Law of Bills of Exchange, notes, and cheques—Full Court decision on an important point of law—Can the widow and next of kin of a deceased payee without administration sue the maker to recover the amount due on the note?—the English law of contracts and of bills of exchange, notes and cheques enacted, by Ordinance 5 of 1852, to be in force in Ceylon, unless other provision be made by any Ordinance—9. S. C. C. p. 30.—Sections 519, 547, 338, 341, 394, and 642 of the Civil Procedure Code of 1889—next of kin may, without administration, maintain actions to recover debts of intestate, if value of estate be under R1,000—Animadversions on the use of promissory notes as securities in Ceylon—Only the legal representative can sue on the promissory note of a deceased payee—The provision implied in the terms of section 547 of the Civil Procedure Code cannot be regarded as "Such other provision" as the Ordinance 5 of 1852 contemplates—Legislation desirable to give relief to heirs of small estates from hardships caused by deciding, that any action on a note in favour of a deceased payee holder who has died before institution of action can be instituted only by his executor or administrator.

Held here :—"That the widow and next of kin of a deceased payee cannot (unless they be his *legal representatives*) sue the maker to recover the amount due on the note."

Held also :—"That the provision implied in the terms of section 547 of the Civil Procedure Code cannot be regarded as coming under 'such other provision' contemplated in section 2 of Ordinance 5 of 1852." ('The provision must be an express one.')

Per LAWRIE, A. C. J. : "It is the common law of Ceylon that the next of kin of a deceased who has left only a small estate may intromit and may recover by action debts due to the deceased, without administration ; but it may be that they cannot sue on bills and promissory notes because the law in Ceylon regarding these instruments is the law of England.

It was taken for granted by this Court that a widow could not sue on a promissory note in favour of her deceased husband ; consequently that such a promissory note could not be seized, sold, and conveyed by the Fiscal on a judgment against her as executrix '*de son tort*' (D. C. Kalutara. 39,936.—9. S. C. C. p 30.) It does not appear from the report whether the estate was a large or a small one.

Since then the Civil Procedure Code became law ; the 519 and 547 sections of that Code together with sections 338, 341, 394, and 642 imply that next of kin without administration may

maintain actions to recover debts due to the intestate provided the value of the estate be under R1,000.

It is reasonable to conclude that the Legislature meant to recognise the right to sue for all debts and did not mean to exclude debts constituted by bills of exchange and promissory notes. I am not influenced by any disapproval of the common use of promissory notes as securities: the custom has its advantages as well as its disadvantages. I admit that the Civil Procedure Code recognises rather than enacts, that administration in the case of small estates, but the Ordinance so distinctly recognises that to be the law, it seems to me to amount to an enactment.

When there are several next of kin having a common interest in a promissory note of which the intestate was the holder, one of them should apply under section 16 for permission to bring the action. This would obviate the inconvenience of a crowd of plaintiffs.

I am of opinion that this action is competent and that the judgment is right and should be affirmed."

Per WITHERS, J.:—"The simple question in this case is an important one, and on account of its importance I proposed to have it brought up before three Judges. The question is this:—Can the widow and next of kin who, I will assume—have adiated the estate of a deceased payee sue the maker to recover the amount alleged to be due on the note?

The Ordinance 5 of 1852 enacts that the law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes and cheques, and in respect of all matters connected with any such instrument shall be the same in respect of the said matters as would be administered in England in the like case at the corresponding period if the contracts had been entered into, or if the act in respect of which any such question shall have arisen had been done in England, unless in case any other provision is or shall be made by any Ordinance now in force in this Colony or hereinafter to be enacted.

Now this is very wide language, and to my mind clearly embraces the question who has the right to sue on the promissory note of a deceased payee. Now I think it must be admitted that only the legal representative of a payee can sue the maker for the amount due upon a note held by the deceased payee. And it must also be admitted that in Ceylon law the legal representative means either the executor of a deceased payee's will or the administrator of his estate.

It cannot on the other hand be pretended that the widow and next of kin of a deceased payee can be called his legal representatives.

Now can it be said that there is other local provision enacting that any but the true personal representative can sue upon the promissory note of a deceased person? I do not think it can be so said. It was urged, however, that such provision is implied in the terms of section 547 of the Civil Procedure Code of 1889 which enacts that no action shall be maintainable for the recovery of any property moveable or immoveable in Ceylon belonging to or included in the estate or effects of any person dying testate or intestate in or out of Ceylon where such estate or effects amount to or exceed in value the sum of R1,000—unless grant of probate or letters of administration shall first have been issued to some person or persons as executor or administrator of such testate or intestate

That is to say, it was urged that the heir at law of an intestate, who dies leaving an estate in Ceylon of a value less than R1,000, may sue to recover any immoveable or moveable property belonging to an estate, and therefore a debt due upon a promissory note.

I cannot regard that as such 'other provision' as the Ordinance 5 of 1852 contemplates. It must surely be an express provision. There are no doubt sections in the Civil Procedure Code which allow the next of kin of a deceased intestate leaving a small estate to take up an action and prosecute it judgment, or take out execution of a judgment, where the plaintiff has died '*pendente lite*.' But assuming such a plaintiff to be the holder of a promissory note who had commenced an action and died before execution, to allow his next of kin to prosecute the action or the judgment is not to legislate that the next of kin may commence an action as if they legally represented the holder of the note.

Counsel could not find any case in which such an action had been upheld by this Court. That is good ground for assuming that an action of the kind cannot be maintained, for the Civil Procedure Code of 1889 has been now nearly 10 years in operation.

I do not regret having to decide that such a case is not maintainable because I do not think that promissory notes are forms of contract which should be current among such persons as the parties to this action.

A point too was made that if any next of kin who chose to adiate a small estate was competent to sue on a bill of exchange or a promissory note of his intestate, would introduce great uncertainty in the law merchant as to the person or persons to whom the maker or endorser of a promissory note might ultimately become liable.

For these reasons I think the appellant is entitled to succeed on the point of law raised."

Per BROWNE, A. J.:—"The words in section 2 of Ordinance 5 of 1852—'unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted' do not in my judgment admit the consideration of the common law right of heirs to small estates to sue without administration.

The Civil Procedure Code has made no such provision. It has only in section 547 generally, and in sections 338, 394, and 642 for the special exigencies thereof, recognised the old common law right, but it has not specially provided it shall be applicable to actions founded upon bills of exchange. I therefore agree with my brother we are bound to require that any action on a note in favour of a payee holder who has died before institution of action can be instituted only by his executor or administrator. If it shall be considered that the hardships thereby caused to heirs of small estates should be paramount to the advantages to the law merchant of certainty of rights and procedure, it will need only some simple legislation to give relief to the former without any weakening of the latter. But when the purpose of promissory notes is so much abused as it is in Ceylon, when they are not uncommonly regarded as a 'Security,' I do not regret that we should have to so hold that only a duly-constituted representative can sue, whereby the maker of to what person there is liability is absolutely fixed."

18th July, 1899.

DISTRICT COURT, JAFFNA, NO 8.

Duties of curators and administrators.—A curator cannot draw money in deposit in Court until he satisfies the Court that he has a proper investiment for the money—7. S. C. C. p 110.

Per WITHERS, J :—"There is no appearance for the appellant in this case. I think that the Judge's order refusing to allow the minor's curator to draw the money in deposit in Court is right. The case relied on by the curator is not at all in point (7. 8. C. C. p. 110). It held 'that the Courts should not be banking places of the suitors' money.

An administrator's duty is to collect the moneys due to the estate and divide it. The curator's duty is to preserve the estate of the minor, until he has attained his majority. It will be time enough to hand over the money to the curator when he has satisfied the Court that he has a proper investment for the money."

Browne, A. J. "agreed."

14th July, 1899.

II. *CRIMINAL.*

332, POLICE COURT, TANGALLE.

No. 13,461.

Unlawful assembly and fighting—Section 138 of the Penal Code—The essence of the offence defined by this Section is the common object of the persons forming the assembly, and therefore the common object must be stated in the charge—Mayne's 'Criminal law of India'—Sabir *vs.* Regina 22, Calcutta 276—Remedial effect of Section 171 of the Criminal Procedure Code to cure irregularities—Section 167 (2) of the same code not applicable to offence under Section 138 of the Penal Code—The accused must be misled for error in charge to be material.

Per WITHERS, J :—"In this case 15 persons were tried upon a complaint by way of information which charged them with unlawfully assembling and fighting with one another.

The first 7 accused were acquitted. Six of the remaining defendants were convicted and sentenced each to pay a fine of R15, and in default to undergo one month's rigerous imprisonment.

The petition contains statements of matters of law which are certified by an advocate to be fit questions for adjudication by the Supreme Court. One matter of law is that the complaint does not set out the common object of the assembly which made it unlawful. Mr. Loos for the Crown argued that it was not necessary to set out the common object, and in support of this argument he relied on clause 2 of section 167 of the Criminal Procedure Code and on the forms in starling.

This clause enacts that: 'if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.' This is true enough, if the word, like murder, connotes one act and one intention.

But this rule is qualified by other rules in the same chapter which enact that the charge shall contain particulars sufficient to give notice of the matter with which the accused is charged. For instance, the illustration of the charge of cheating in section 169 of the Code: 'A is accused of cheating B at a given time and place. The charge

Now the essence of the offence defined by section 138 of the Penal Code is the common object of the persons forming the assembly, and I endorse the language of Mr. Mayne in his work on the criminal law of India. He observes that in a charge for the offences of unlawful assembly or rioting under the corresponding sections of the Indian Code it is necessary to state distinctly in the charge what is allged to have been the common object of the assembly, and this object must be proved and found by the jury or Court.

For this proposition he cites Sabir Reg. 22, Calcutta 276, which I have not had an opportunity of consulting.

But then section 171 of the same chapter enacts that 'no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission.'

It cannot be said that the accused were misled by the complaint, for when it charged them with unlawful assembly and fighting together, it was obvious that they were charged with assembling for the object of a fight.

A second matter of law was that the Magistrate had found that the accused had gone to enforce their rights, and a case was cited for the proposition that persons may assemble to protect their rights if threatened with violence.

But this was not the case here.

* * * *

A third point taken was that the other party had shown an intention of making their entry on the land by force, but two blacks do not make one white. However the evidence does not quite bear this view out.

The appeal fails and must be dismissed.

17th July, 1899.

CRIMINAL.

POLICE COURT, KANDY, No. 12,241.

Obstruction in execution of warrant under section 183 of the Penal Code—Requisites of search warrants fully laid down—What warrant should state when issued under section 70 of the Criminal Procedure Code—The warrant to search the house of each person accused; when there are many, should be separate—A search warrant should, in the ordinary case, be directed to the Fiscal—When warrant is to search for toddy in excess of one gallon the accused can prevent the removal of a pot holding less than a gallon.

Held here: "That when a search warrant is irregular, an accused commits no offence in obstructing it."

(The accused in this case was convicted of obstructing the complainant whilst executing search warrant No. 28,—D. J. A. and sentenced under section 183 of the Penal Code.)

Per LAWRIE, A. C. J.—It is very certain that a search warrant should disclose the cause why it was issued. When issued under section 70 of the Criminal Procedure Code, it should state that it was issued on information, and after enquiry, which gave the Court reason to believe any of the facts A. B. C. of that section. The warrant to search the house of each person accused and suspected should be separate. It is irregular to grant a warrant to search several houses

Further, the name of the house and of the occupier must be stated as fully as possible, the number of the street, (if in a town), and the name of the house, (if in the country). Lastly, the search warrant should, in the ordinary case, be directed to the Fiscal; it should not be directed to an irresponsible person interested in the prosecution.

Here the Police Magistrate does not disclose on the warrant that it was granted on information which he considered credible. He says merely that a complaint had been made. He speaks of one complaint and of one enquiry about to be made, but he issued a warrant to search the houses of five people. Where the 1st and 2nd men live does not appear; the 3rd is of Mul Gampola, the 4th and 5th of Mahaiyawa, parts of Kandy. The warrant does not mention the names of the houses nor give any description of the locality, nor are the persons identified. Koun Appu, Appuwa, Appuhammy, Sarangi, Puncha, are all common names. Lastly the warrant was addressed to a peon of the renter, who, in my opinion, should not have been selected nor entrusted with such powers.

I think Sarangi would have committed no offence if she had refused to allow the peon to enter the house; but after having the warrant read, she consented. In the course of the search, a pot of toddy was found in the house; the peon took it up and Sarangi kicked it and it broke. The size of the pot is not spoken of by the complainant nor any of the witnesses.

The search warrant was to search for toddy in excess of one gallon, and if found to produce it. Sarangi had right to prevent the removal of a pot holding less than a gallon.

If there was more than a gallon and if she had no license, she could have been prosecuted under the Arrack Ordinance, but that she is prosecuted under section 183 of the Penal Code may indicate that there is no proof of the quantity of the toddy.

I think it will do more good to set aside and to acquit than to affirm. The evil resulting from the careless issue of search-warrants is greater than a woman's possession of a pot of toddy.

For the reasons given, I set aside and acquit."

4th August, 1899.

POLICE COURT, KURUNEGALLE. 367-10,664.

Appeal from order of discharge and reference of complaint for further investigation—In a summary offence the Magistrate can issue summons forthwith without examining the informant, Section 149 (2) of the Criminal Procedure Code—"To examine an accused is the last thing a Police Officer should think of doing"—Evidence of admission of guilt, made to a Police Officer, inadmissible by the law of Ceylon—Reference to Attorney-General in a summary case under Section 192 of the Criminal Procedure Code—Chapter XVIII of the same Code.

Held.—"That an order of a Police Magistrate discharging an accused and referring the complaint to the Government Agent for further investigation is irregular" ('Our Criminal Procedure Code requires a Magistrate to enquire into a charge when it is presented to him and to bring it to a conclusion without reference to any one except the Attorney-General, and then only in the circumstances indicated in section 192 of the Criminal Procedure Code if the Magistrate is 'trying a summary offence.')

PER WITHERS, J.—This appeal is from the order of the Magistrate discharging the accused and referring the complaint to the Government Agent for further investigation.

On receiving a report from a public servant that two persons, whose names were given, were suspected of being concerned in the theft of a bull belonging to one Lapaya, the Magistrate ordered summons to issue to the persons charged with the offence. As this was a summary offence the Magistrate was competent to issue summons forthwith without examining the complainant—section 149 (2) of the Criminal Procedurd Code.

The two accused appeared to the summons and the complaiant appeared on the same day. The complainant was examined by the Magistrate, and at the close of his examination the Magistrate made the order complained of.

He prefaced his order with this observation. There is no evidence that I could believe as the accused have apparently not been examined by the headman. This discloses a mistaken idea of what the functions of a headman are. To examine an accused is the last thing a Police Officer should think of doing. It is at once objectionable and useless, for our law will not allow evidence of admission of guilt—if made to a Police Officer—to be accepted. The Magistrate seems to think that if a Police Officer report the commission of an offence his superior officer should see that there is a *prima facie* case to be tried before him. This is a natural opinion to form but our Criminal Procedore Code requires a Magistrate to enquire into a charge when it is presented to him, and to bring it to a conclusion without reference to any one except the Attorney-General, and then only in the circumstances indicated in section 192 of the Criminal Procedure Code, if the Magistrate is trying a summary offence.

The complainant did not pretend to be able to say who stole his animal He could only say that his animal had disappeared under suspicious circumstances and he gave the names of those who pretended to have seen the accused removing the animal under suspicious circumstances.

This was a case for the Magistrate to try summarily, and the should hear the complainant's evidence and try the case according to the procedure laid down in the 18th chapter of the Criminal Procedure Code, 3 a, with instructions to continue and complete the trial."

24th July, 1899.

DISTRICT COURT, KURUNEGALLE, No. 2,594.

Causing grievous hurt—It is the judge's duty to decide whether the hurt proved is grievous or not—The medical witness can only describe the nature and character of the injuries.

Per WITHERS, J.:—"The appellant's counsel failed to satisfy me that the District Judge was wrong in finding that the 1st and 2nd accused injured the complainant Kiria Heniya. What I do not think is quite supported by the evidence is his finding that the 1st accused voluntarily caused *grievous* hurt to the complainant.

It seems to me that the complainant received three clear cuts indicating the use of a sharp instrument. The worst cut was the one inflicted by the 1st accused, which is described by the surgeon as a clean cut on the root of the neck ½ an inch above the right shoulder blade, three inches long and an inch deep. This witness is made to say that only the first injury was grievous. It is not for the medical witness to say whether a hurt is grievous

or not. He has to describe the nature and character of the injuries and it is for the judge to find whether they are grievous. Witness gave no reason for calling the wound grievous.

However, as I said before, the evidence does not fully justify the finding that he intended to cause the complainant *grievous* hurt, or knew that he was likely to cause grievous hurt. At the same time I do not see why I should interfere with his sentence. Voluntarily to cause an injury with an instrument like a kattie is a serious offence.

The sentence on the 1st accused is affirmed, and the sentence on the 2nd accused is reduced to three months' rigorous imprisonment."

21st July, 1899.

390, POLICE COURT MATARA, No. 1300.

Offence under Section 54 of the Police Ordinance 16 of 1865—the officer to whom the complaint is made must be a Police Officer—An order imposing a *fine* cannot be supported as under Section 197 of the Criminal Procedure Code —A village headman not a *Police Officer* within the meaning of the Police Ordinance nor of the Criminal Procedure Code.

Per LAWRIE, A. C. J.:—"The conviction under 16 of 1865 Section 54 cannot stand, because the officer to whom the complaint was made is not a Police Officer within the meaning of the Police Ordinance nor of the Criminal Procedure Code. He is not the Inspector-General, Superintendent, Inspector, Sergeant, nor Constable of Police.

Nor can the order be supported as under section 197 of the Criminal Procedure Code, for the Magistrate has not awarded R10 as compensation to each of the accused. He has imposed a fine.

The appellant did not make a charge.

The village headman was informed by the 2nd accused that the appellant was detained drunk and disorderly in the 4th accused's house. He went to see him. He thought he was drunk. The accused said he had been robbed. He was asked who had robbed him. He said he did not know.

The report which the headman afterwards wrote is in Sinhalese, and has not been translated.

So far as appears the appellant did not know the names of the men with whom he quarrelled. When he lost some property, I think he did not mean to make a charge against anyone and it was because he remained of that mind that the accused were discharged.

I set aside the fine imposed.

4th August, 1899.

Criminal.

445, POLICE COURT, KANDY, No. 12,415

H. G. SMITH vs. H. D. V. JAYASOORIYA.

Cheating—Section 399 of the Penal Code—Elements which constitute the offence—When a false representation is made the complainant must be deceived by it and induced to part with porperty—The accused must deceive fraudulently or dishonestly—Auction sales.

Per WITHERS, J.—"The accused has been convicted of cheating under rather peculiar circumstances, and he appeals from that conviction.

In trying a charge of this kind it is of the utmost importance to bear in mind the elements which go to constitute the offence while the facts are being put in proof.

Now these facts were briefly these:—The complainant is an auctioneer, and at one of his Saturday sales last May one Ratnayake and the accused attended. Ratnayake was contemplating marriage at the time and wanted to buy some things at that particular sale. As he was pressed for time he commissioned the accused to bid for articles in his name and left R100 with the accused for that purpose. The accused bought and paid for some things and about R30 of the amount which he had received remained in his hands.

Ratnayake still required an almirah and a rattan chair, and he asked the accused to get these whenever he could and if the balance in hand was not enough he could make up the deficiency.

This is Ratnayake's account of the instructions he gave the accused when he left the auction rooms, but the accused, who gave evidence on his own behalf, swore that Ratnayake told him to buy not only an almirah and a rattan chair but any other furniture useful to a married man. He and Ratnayake were acquaintances.

The complainant had another auction sale at his rooms on Saturday, the 13th of May, and it is said that on that day and place the complainant was 'cheated' by the accused. The accused attended that sale. Four articles were knocked down to him and they were knocked down in the name of Ratnayake. Accused no doubt represented that he was authorised to bid in Ratnayake's name. The complainant said that he was induced by that representation to take his bid and allow him to remove the articles on the following Monday.

Now was that representation false? And if it was false was the complainant deceived by it and induced to deliver the articles to the accused? If that representation was not false, or if the complainant was not deceived by it and induced by it to part with his property then the offence of cheating has not been made out.

But supposing the representation was false and the complainant was so deceived by it, that is not enough. It must be proved that the accused deceived the complainant fraudulently or dishonestly.

The representation was not wholly false at any rate, for the accused had Ratnayake's authority to buy the almirah and the rattan chair. But supposing that the accused exceeded his commission in good faith and bought the bed and crust stand as "furniture" useful for a married man, the representation that he was authorised to buy these two articles for Ratnayake was not strictly true, but it was not false in a criminal sense.

Then was the complainant deceived by this representation and induced by it to let the accused remove the articles on the following Monday?

* * * *

It is not proved to my mind that either on the Saturday or Monday the accused had any fraudulent or dishonest intention, when he bid for the articles on the first day and called for them the second day.

Nor do I think that Smith was induced by anything which the accused said or did to part with the articles on the Monday. He was induced by Perera to let the accused remove them. * * * *

I set aside the conviction and acquit the accused.

28th August, 1899.

POLICE COURT, PANADURA, No. 6,549.

Inquiry into non-summary offence under section 155. (1) of the Criminal Procedure Code—An order for the payment of Crown costs or compensation cannot be made when proceeding under this section—Order under section 197 (1) restricted to cases triable summarily.

Held :—"That an order for paymant of Crown costs or compensation cannot be made in non-summary proceedings."

Per BROWNE, A. J. :—"The Magistrate was apparently proceeding to inquire into a matter which was not triable summarily by him, *i.e.* under section 155 (1) and not under section 187 (3). It would follow therefore that he had no power under section 197 (1) to make any order for the payment of Crown costs or compensation, which power is restricted to cases instituted on complaint which a Police Court has power to try. I therefore set aside the order appealed against." 6th September, 1899.

POLICE COURT, GALLE, No. 4,757.

Fine under section 34 of the Police Ordinance. —The report of a Police officer to the Court is not evidence upon which a complainant could be fined under this section—The evidence to support an order of fine must be given on oath or affirmation.

Per BROWNE, A. J.—"There is no evidence on oath or affirmation of what charge was made by the complainant to any Police officer against any person.

I do not consider that the report of the Police officer to the Court is evidence upon which the complainant could be fined under section 34 of the Police Ordinance. I therefore find that the fine was illegally imposed and I remit it. 6th September, 1899.

POLICE COURT, TANGALLE. No. 13,644

Section 382. Voluntarily causing hurt in committing robbery – Triable only by the Supreme Court—When theft by one person and hurt by another unite to constitute robbery—Improper splitting up of a grave offence into two minor offences.

Per WITHERS, J :—"In my opinion this conviction must be quashed and the magistrate must forward the proceedings to the Attorney-General for his instructions. The magistrate quite believes the case as presented by the complainant which is shortly this :—The complainant was driving a hired cart and he stopped it about dusk near the accused's boutique to rest his animals. Hearing a Jingling noose he went behind the cart and saw a man there and one of his gunny bags on the ground. The man was cutting another bag from behind. Then the complainant addressing him said—What is this? On which the 1st accused's companion hit at him with a stick which fell on his hand or arm. The blow hurt the complainant and made his wrist bleed.

If those facts are true then the man who was abetting the other accused in plundering the cart voluntarily caused hurt to the complainant in order to the commission of the theft and is guilty of the offence specified in the 382nd section of the Penal Code. Now that offence is triable only by the Supreme Court.

The magistrate's view of the law is wrong. He considers that those facts indicate only theft and hurt, but not the union of the theft and hurt so as to constitute robbery. It seems to me that he has split up a grave offence into two minor offences, and tried them summarily which he has no power to do." 30th August, 1899.

397, POLICE COURT, CHAVAKACHCHERI No 4,664.

Sections 354 and 333 of the Penal Code—A charge against one man under the 354 section and a charge against another under the 333 section cannot be tried together.

Per LAWRIE, A. C. J :—"These two charges, 1st against one man for kidnapping a young girl, an offence under section 354 and 2nd against another man for wrongful confinement under section 333 should not have been tried together.

The 1st was an offence (not) triable summarily, the proceedings were under ch: 16. The accused was discharged. It is not apparent whether there was a trial of the 2nd accused. I do not understand how the investigation of the charge of kidnapping against one man was also the trial of another man for wrongful confinement."

22nd August, 1899.

POLICE COURT, PUTTALAM, No 5,687.

Ten days limit of time to appeal—Provisions of section 340 of the Criminal Procedure Code.

Per WITHERS, J :—"When appellant's counsel began to open the appeal in this case, I pointed out to him that I was unable to entertain it 1st because the petition of appeal was not lodged within 10 days from the time of the judgment being passed, and 2nd because the petition itself was not signed by the appellant or his proctor. The provisions of section 340 are not complied with, and I have no jurisdiction to entertain this appeal."

Then I was asked to deal with the case in revision on the ground that the magistrate's verdict on the facts was a verdict against the weight of evidence. In my opinion that is not sufficient ground for dealing with this judgment in revision. The only order I can make is to dismiss the appeal

23rd August, 1899.

POLICE COURT, JAFFNA, No. 431.

Section 340 (2) of the Criminal Procedure Code—Imperative language of this Section as to certificate, where the appeal is on a matter of law —Vide P. C., Panadura, No. 6,225, 26th July, 1899, and the holding there—The requirement of a certificate applies only to places where there is more than one Advocate or Proctor.

Per WITHERS, J :—"This case is remitted to the magistrate to procure the certificate of the Advocate who signed the petition of appeal, that the matter of law contained in the petition of appeal is a fit question for adjudication by the Supreme Court.

I have ruled on a former occasion, and I adhere to that ruling that section 340 (2) of the Criminal Procedure Code requires that the petition, where the appeal is on a matter of law, shall contain a statement of the mattter of law to be argued, and shall bear a certificate by an Advocate or Proctor, that such matter of law it a fit question for adjudication by the Supreme Court. These indeed are the very words of the Code, and must be taken to mean what they say. It is not enough for the Advocate, as has been done in this case, simply to sign the petition of appeal containing the matter of law to be argued. He must certify on the petition in the words of the Code. This only applies to Courts where there is more than one Advocate or Proctor, practising in such Court." August 30th, 1899.

CIVIL.

120, DISTRICT COURT, (INT:) KANDY, No. 173.

The Hon. Allanson Bailey, plaintiff and respondent *vs.* Dona Johana Ferdinando, Executrix of the estate of W. Harmanis Soysa, defendant and appellant.

Acquisition of land for public purposes under the land acquisition Ordinance, No. 3 of 1876.—Exhaustive consideration of points of law involved—Can assessors determine questions of law?—section 2 of the Amending Ordinance No. 6 of 1877—The District Judge can decide any point before the appointment of assessors by section 46 of the Civil Procedure Code, and section 32 of 3 of 1876—'The assessors having once been appointed, is he not bound to place before them every question of law embraced in the proceedings. ?' The most important fact to be recited in the libel of reference according to C. J. Phear—Proper facts to be stated in the libel of reference which should satisfy the District Judge that the Government Agent had done what was required of him in order to put the District Court in motion—Should not the libel of reference disclose the observance of every formality which the ordinance requires before the Governor with the advice of his Council can direct the Government Agent to take order for acquisition? "Omnia rite esse acta praesumuntur"—Vide Saunders *vs.* Silva. VIII. S. C. C. p. 87—the value of landed property mainly depends upon three considerations—When land can be called a *building site*—The history of a land affords one means of assessing its value—

Held here:—"That the District Judge can decide without assessors a demurrer to a libel of reference under the land acquisition ordinance 1876."

Per WITHERS, J.—"In these proceedings consequent on a reference to the Court under the land acquisition Ordinance 1876, an appeal has been taken from the District Judge's judgment on a point of law raised before him and from the award of compensation itself.

The defendant on being served with notice requiring her to state to the Court what she claimed as compensation for her interest in the land acquired put in a combined statement of objections and claim to compensation. The legal objection was that the libel of reference was bad and insufficient in law and did not disclose sufficient materials to found jurisdiction in the District Court to enquire and determine the amount of compensation to be awarded to the defendant.

Between this legal objection and the statement of claim was introduced a statement that the land and buildings under the reference were as a matter of fact not needed for a public purpose. This statement was apparently put in on the 23rd of February last. The libel of reference was filed on the 18th of January. Between these dates the Government Agent had appointed a duly qualified assessor and had intimated the appointment to the Court. On the day that the claimant filed her statement of objections she notified her appointment of an assessor. Thus on the 23rd February the component parts of the Court judge, and assessors were constituted, and it only remained for the assessors to be called in and sworn or affirmed to co-ordinate the parts into a complete Court fit and ready for the trial [illegible]

Accordingly the case was set down for hearing on the 10th of July following, and notices were issued to the assessors to attend and be sworn or affirmed.

Meanwhile on the 10th of April the parties appeared by their proctors for some reason or another which does not appear, and the District Judge intimated to them that on the 19th of that month he would dispose of the matters of law raised by the defendant. On the 19th of April the parties appeared by their counsel. The defendant's advocate asked the Court to adjourn the hearing of the legal objections till the day fixed for determining the amount of compensation. The District Judge was prepared to hear and determine the question then and there. But as the plaintiff's proctor did not oppose the application he allowed it. On the day of trial the matter of law was taken up first and the defendant's counsel submitted that the assessors should be sworn in and assist the judge in determining the question of law. The District Judge ruled that the assessors had no voice in determining whether the libel of reference is good or not, and having heard the defendant's counsel he over-ruled the objections taken to the libel of reference.

Now this is the 1st question we have to decide:—Was the demurrer a question of law which must be tried by the District Judge and the assessors? That the assessors have to consider questions of law is clear from the 25th Section of the land acquisition Ordinance of 1876, which has been repealed and replaced by Section 2 of the Amending Ordinance No. 6 of 1877, which enacts as follows:—"In case of any difference of opinion between judge and assessors or any of them upon any question of law or practice or usage having the force of law . . . the opinion of the Judge shall prevail subject to appeal to the Supreme Court hereinafter provided."

The District Judge's reasons for holding that he was competent to decide the present question of law by himself are—that the function of the assessors is merely to assist the judge in determining the amount of compensation, and the only questions of law which they can take part in deciding are questions incidental to the inquiry into the amount of compensation and arising out of it. There can be no doubt that had the District Judge been so advised he might have rejected the libel of reference in the first instance under the provisions of the 46th Section of the Civil Procedure Code. (Vide Section 32 of the Land Acquisition Ordinance 1876).

He might in my opinion have decided the present question of law at any time before the appointment of the assessors, but the assessors having once been appointed, was he not bound to place before them every question of law embraced in these proceedings?

The provisions of the Amending Ordinance No. 6 of 1877 are very wide and appear to keep apart from one another questions of law, questions of practice or usage having the force of law, and the amount of compensation to be awarded. I must say that on this point my mind is not wholly free from doubt, but as the District Judge observes, the paramount object for which assessors are called in is to decide the amount of compensation to be awarded in cases where the Government Agent has tendered an amount to persons claiming as interested parties, and they have refused to accept the amount tendered and, as he observes, the [illegible]

tion of this Court, he alone ought to decide whatever he can entertain the reference and whether in fact any case has been made out for the appointment of assessors, and the creation of a land acquisition Court.

After much consideration, I think that even at this stage of the proceedings the District Judge was the proper authority to decide this particular question of law.

Then the next question is :—Is his decision on that matter of law a right decision? In other words, does the libel of reference not show jurisdiction in the District Court to entertain it? It recites in the first instance that the Governor with the advice of the Executive Council had directed the Government Agent to take order for the acquisition of the particular land which is the subject of reference. That, as Chief Justice Phear pointed out, is the really important fact to be recited in the libel of reference. That is the all-important fact as regards the Government-Agent's powers. Then the libel goes on to recite the following facts :—Due publication of notice; that the Government Agent proposed to take possession of the land and that claims for compensation should be made to the Government Agent; summary inquiry into the value of the land, determination of the amount of compensation and tender of the amount which, in the Government Agent's opinion should be allowed. The lib l does not expressly say that the amount determined was tendered to the defendant as the interested party who had attended in pursuance of the G.A.'s notice. But this may fairly be inferred from para 3 and para C of the libel. These were the proper facts to satisfy the District Judge that the Government Agent had done what was required of him in order to put the District Court in motion. But it was urged that something more was wanting to give the Court jurisdiction. The libel should have disclosed the observance of every formality which the Ordinance requires before the Governor, with the advice of his Council, can direct the G. A. to take order for the acquisition of any land.'

It was not enough to state, as the libel states, that the particular land was required for a public use, or even to specify that use. It should have stated that it appeared to the Governor that this particular land was needed for a public purpose; that the Governor had directed the Surveyor-General or other officer to examine such land and to report whether the same was fitted for such purpose. Lastly, that the Surveyor-General or other authorised officer, did examine the land and did report to the Governor that the possession of the land was needed for the purpose for which it appeared to the Governor likely to be needed. This last fact was pressed upon us as the most important fact because the person to judge of the *fitness* of the particular land for a particular public purpose is not the Governor or the Governor in Council, but the Surveyor-General or other proper officer who makes his report to the Governor and it looks as if the fitness of the land proposed to be acquired depended on the opinion of the Surveyor-General as expressed in his report. For the 6th section of the Land Acquisition Ordinance of 1876, enacts that—'upon the receipt of such report it shall be lawful for the Governor with the advice of the Executive Council to direct the G. A. to take order for the acquisition of the land.'

That is to say, the Governor even with the advice of the Executive Council could not give such a mandate to the G. Agent unless he had received a report of the fitness of the particular land for the particular purpose for which it had appeared to him to be needful. In other words the Governor decides on the necessity, the Surveyor-General or other officer on the fitness of the land, and then the Governor with the advice of the Executive Council, if advised to adopt the officer's opinion, has to direct the G. A. to put the matter through in the way required by law.

But in my opinion the statement in the 1st para of the libel was sufficient to give jurisdiction to the Court on the principle of the maxim : "*Omnia praesumuntur rite esse acta.*" And on this point I am adopting the opinion of Burnside, C. J, in the case of Saunders *vs.* Silva rep. S. C. C. Vol. VIII. p. 87.

Now we come to the merits of the case. It was strenuously contended by Mr. Dornhorst that the award of the District Court was not only against the weight of evidence, but was based on no intelligible principle whatever. Neither member of the Court which has decided the amount of compensation tendered to be sufficient has explained, it is said, whether he values the land as horticultural land, building land, waste land, or any sort of land. It has not been valued by Judge or assessors as anything in particular.

Now the value of landed property mainly depends upon three considerations :—(1) the situation of the property; (2) the best use to which it can be put, and (3) the use to which property immediately adjoining it is put. When these points have been considered, there may be various modes of assessing the value. The land in question is a little over 50 acres. In the immediate vicinity is land partly under tea and partly patana and scrub and chena land. The land itself is covered with lantana grass, some jak and mango trees and a sappo tree or two. There is a building on it and the site of an old store building. No one occupies the land or pays rent for it as far as I can make out. Its history is briefly this :—it was once under coffee, poor coffee which died out between 15 and 20 years ago. No attempt has been made to plant it since. During all this time to the present moment it has served and serves no profitable purpose. A neighbour offered some time ago, Rs. 20 per acre with the building thrown in, as he thought it would do to turn his cattle out to graze on—but that offer was not accepted.

The answer to the question what is the best use to which the land can be put is, according to history, no use at all, except perhaps for grazing purposes. No one has offered to buy it for tea or cocoa; and no one has offered to lease it for tea or cocoa and on one has attempted to plant tea or cocoa on it. No doubt some of the adjacent land has some good tea on it, and the land still under chena may be good for tea and perhaps cocoa as well. So the use to which the adjoining land has been put and is best, suited seems to be horticultural. But if the present land has been fit for horticultue as land in its vicinity, somebody would have acquired it for such use.

Then why should it be valued as a building site? It does not become a building site because you can put up a building or two on it.—A building site is a site where you can put up buildings which are likely to attract tenants, as other buildings do in the vicinity. Nothing in the history of this land or its neighbourhood makes it reasonable to suppose that if one put up houses on the two available sites on it he would get tenants for them.

Mere chance cannot be allowed to influence the value. The difficulty of getting water is against the land being used as a residential property.

The District Judge bases his award chiefly on the circumstance that similar land in the vicinity of the land in question has recently been acquired for the same purpose at R20 per acre. That was a circumstance properly taken into account. But Mr. Dornhorst minimised the effect of that circumstance by observing that as a large extent of Government land was acquired with land like that in question the owner was ready to throw in the poor land for a nominal price if he was offered a liberal compensation for the good land.

But I think the history of the land affords the best evidence of its value, and I regard it as proved that the best use the land can be put to is a grazing ground. No one, as I said before, has offered or tried to make a fruit garden of it or a cocoanut or tea garden of it, or to convert it into a residential property.

I think the award is strictly according to the evidence."

Per BROWNE, A. J.—"The evidence gives us no particulars as to the condition or character of the land when it was first planted with coffee-whether it was chena land and better, or only such grass land as even in the tea enterprise it has been attempted with manuring, etc., to press into the yielding area of an estate. We only know that when coffee died out this 50 acres got overgrown with lantana and that for 18 years no one in the old coffee capital has desired either to experiment with tea or cocoa on it, or to utilise it as a building site for his own pleasure or for his profit in letting to tenants. I think these hard facts of no one having desired to use it for any purpose save grazing, limits our consideration of the value to that which we would put on any grassy hillside in its vicinity, and that however it was once considered fit for plantation purposes, we should no longer so regard it.

I would express the 2nd consideration scheduled by my brother in the more restrictive wording—'the best use to which the property could properly and would probably be put, and when there had been this neglect of the land for horticulture or building purposes, I would say it showed that the public—the possible investors in such lines—regarded it as not properly suitable for either.

When Colombo is spreading Southwards I am prepared to regard the vicinity of stations on the Southern railway as possible building sites, though I do not know that Kelani, Ragama, and land in that direction should be so regarded. But was the area used for building sites in Kandy extended at all in the direction of this land in the last 20 years? I don't find proof thereof.

As to the legal questions, I would only say in addition to my brother's views that I have never regarded it to be a question for the assessors—which of two rival claimants is entitled to the compensation. In any such difficulty I would ask 'must the assessors give their opinion upon the question in order to determine the *amount* of compensation.?' regarding as I do their functions to be limited to that duty. I desire to concur entirely in all my brother has written."

28th August, 1899.

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207 DISTRICT COURT, JAFFNA, No. 1248.

Sales of land in execution of judgment decrees—A judgment-debtor cannot by a conveyance give good title to land already sold by the Fiscal vide section 289 of the Civil Procedure Code—Can the purchaser at the Fiscal's sale be estopped by his conduct from questioning the right of the debtor to sell? Vide D. C. Galle, 2479 October, 1894.

'A sale regularly conducted under a subsisting decree does not become null and void on the decree being reversed.' Tambyah's reports p6.

Per LAWRIE, A. C. J:—"Since the passing of the Ordinance 2 of 1889, a judgment-debtor whose land has been sold in execution, cannot thereafter by a conveyance give good title to the land already sold by the Fiscal. A subsequent conveyance by the execution-debtor becomes void on the execution of a conveyance by the Fiscal. The grantee is by the 289 section of the Civil Procedure Code deemed to have been vested with the legal estate from the time of the sale.

There is in this case the special circumstance that the sale in execution was confirmed by the Court after the decree had been set aside. In my opinion this was wrong—proceedings in execution of an existing decree stand on a different footing from proceedings in execution of a decree which has been set aside, but the order confirming the sale still stands, no appeal was lodged: as the subsisting order of a competent Court it must be respected.

Another question is whether the purchaser at the Fiscal's sale is estopped from questioning the right of the debtor to sell: (that was partly the ground for the decision in D. C. Galle, 2,479. 18th October, 1894).

Here the sale in execution was in July 1894, the purchaser did not sleep over his rights. He asked for confirmation of the sale on 24th November, 1894. From opposition and from an appeal the proceedings on the application for confirmation were prolonged till August 1895, when the sale was confirmed. The purchaser got the transfer on 11th May 1896. In my opinion the purchaser did not by his conduct lead the execution-creditor or the purchaser from him to believe that he had abandoned his rights under the sale in execution. He is not estopped from challenging the sale by the debtor on 13th May, 1896.

I would affirm the judgment for the plaintiff—holding that he has title and that the defendant has no title, because the conveyance he holds was granted after a Fiscal's sale, in which title passes from the owner to the purchaser provided the latter gets the sale confirmed and obtains a conveyance: if he does so the law deems him to have been the owner from the date of the sale."

BROWNE, A.J.—"Veeravan was owner of the land in claim. Decree was entered against him and in execution of the writ therein (without its being shown that the seizure under the writ was registered), this land was auctioned by the Fiscal on 20th July, 1894, to the plaintiff as the highest bidder.

Apparently that decree was set aside on the 20th September, 1894, and when the purchaser moved for an order confirming the sale to him the Commissioner on the 22nd November, 1894, refused to grant him confirmation, and referred him to a separate action to have it decided whether he was entitled thereto or not. That order was set aside by this Court on the 21st February, 1895, and the Commissioner was directed to determine that question in the original action and he subsequently on 27th August, 1895, granted the confirmation.

He did not enter into possession nor did he obtain his Fiscal's conveyance till 4th May nor register it 13th May 1896, and the original debtor was thus able on 29th April, 1896, to sell the land privately to defendant who registered his conveyance on 30th April, 1896.

Which title is therefore to prevail? We have not had placed before us the facts and circumstances under which with full knowledge of the reversal of his decree, the Commissioner deliberately granted the confirmation of the sale. This action is not one to reform the order then made and it might be possible that in any such litigation there would be parties necessary thereto other than these two purchasers with their rival titles. The plaintiff, it will be remembered, was not the execution-creditor in the C. R. action and would therefore in my judgment be entitled to the full benefit of what my lord has said in Tambyah's reports, p. 6, that a sale regularly conducted under a subsisting decree does not become null and void on the decree being reversed.

Till that order of confirmation is reformed we must take it to have been regular and valid. It was contended we should have followed the decision in 2,479 D. C. Galle 8. C. M. 18 October 1894. In that case a purchaser in execution in March, 1889, forbore to take out his Fiscal's conveyance or register it till March, 1893, and suffered the debtor to remain in possession. The latter in December 1890 convey ed the land to an assignee of a mortgage decree and the conveyance was at once registered. The facts of this case, however, differed essentially from the present in that the latter coming within the provisions of section 289, the validity of the debtor's own conveyance was always dependent upon whether the Fiscal's conveyance in favour of plaintiff would be obtained. As soon as plaintiff obtained it (and under the section title vested in him from 1894) the debtor's conveyance of 1896 was worthless. My lord has pointed out also the grounds of estoppel and superior equity in that precedent are not here applicable.

I therefore agree that the judgment be affirmed with costs. 28th August, 1899.

CIVIL.

DISTRICT COURT, KURUNEGALLE, 134/1,556.

A. C. GUNERATNE (PETITIONER) *vs.* D. M. DINGIRI BANDA AND 9 OTHERS (DEFENDANTS).

Sections 324,325 and 327 of the Civil Procedure Code—'If there is no obstruction there is no foundation for an order under the provisions of section 327'—Construction of the words 'other person' in section 324—section 325 contemplates:—(1) Resistance or obstruction to the Fiscal's officer; (2) Hindrance after delivery to the judgment-creditor taking complete and effectual possession—Resistance under (1) held not to be contempt—Vide 2 S. C. R. 145—clause (2) not in the Indian Code—Hindrance under this clause not dealt with *nomination* by sections 326 327 of our Code—'What constitutes hindrance in each case must depend on the particular circumstances of the case.'

Held:—'That 'other person' in section 324 is *ejusdem generis* with tenant of the judgment debtor?

Held also:—that an order under section 327 cannot stand if no obstruction is proved.

Per WITHERS, J.:—"This is a novel case arising out of the application of the provisions of sections 324, 325, and 327 of the Civil Procedure Code. The facts of the case appear to be these:—The plaintiff in an action to vindicate certain lands in the possession of the party defendant obtained judgment for them. This entitled him to a writ for the delivery of the possession of the lands in the form No. 63 to be be found at p. 534 in the schedule to the Civil Procedure Code. The plaintiff accordingly took out a writ in that form on the 1st August 1898. The writ was sent back to the Court with a return dated the 31st January, 1899 The return in effect stated that the plaintiff's man had been put in possession of some 9 lands, but that as to the other numerous lands the plaintiff could not be put in possession, 'as they were claimed by different parties.' The appointment of the officer entrusted with the execution of the writ was annexed to the return. This officer r por e l how he had put the plaintiff in possession of some of the lands mentioned in the writ of delivery, but as to the other lots he stated that he could not put the plaintiff in possession because 'th y were being claimed and possessed' by certain individuals under deeds of gift, mortgage and otherwise.

The writ according to an endorsement on it dated 1st March, 1899, was extended and re-issued returnable the 15th April, 1899. This was returned on the 13th April, with the appointment of the Fiscal's officer of the same date, according to which the officer had put the plaintiff into actual possession of a few more lands and into constructive possession of the rest—'by serving on the occupants as per list annexed notices in writing containing the substance of the decree in the above case, as the occupants declined to give up possession.'

The Fiscal excused himself for not having delivered the remaining lots to the plaintiff in terms of the mandate by stating that the occupants were not bound by the decree to relinquish their occupancy and that they declined to give up possession.

On the 26th April the plaintiff petitioned the Court for an interlocutory order on the persons named in the Fiscal's return to the writ appointing a day for enquiry into the matter of his petition which was that he—the petitioner—was hindered by these persons in taking complete and effectual possession of the remaining lots of land.

Though the petition is not intituled in the matter of the 325 Section of the Civil Procedure Code, it clearly refers to that section, and has been so regarded. The enquiry was held on the 29th June following and in the result the District Judge found that the petitioner had been *'obstructed"* by the parties made respondents to his petition, but as they claimed in good faith to be in possession of the lots of land on their own account, he directed the petition of complaint to be numbered and registered as a plaint between the decree-holder and the respondents with the object of investigating the respondents' claims to the lands. This order was made under the provisions of section 327. But the District Judge did not find the facts which constituted the 'obstruction,' and if there was no obstruction there was no foundation for the order appealed from.

This was the chief point taken by the appealing respondents.

Section 325 of the Civil Procedure Code contemplates (1) resistance or obstruction to the officer charged with the execution of the writ of delivery, and (2) *Hindrance* after delivery to the judgment-creditor taking complete and effectual possession. As to No. 1 neither the Fiscal nor the execution-creditor complained of such resistance or obstruction. The petitioner complains of hindrance but he does not explain how he was hindered by any of the respondents.

The respondents were treated by the Fiscal as persons on whom service of a notice in writing containing the substance of a decree for the recovery of possession was tantamount to giving delivery of the lands they occupied, and as coming within the terms of Section 324. Whether the respondents do in fact answer to the description of persons indicated in that Section may be open to doubt.

That Section (324) affects persons in occupation of immovable property, "such as a tenant *or other person entitled* to occupy the same as against the judgment-debtor and not bound by the decree to relinquish such occupancy."

I cannot help thinking that 'other person' in this Section is *ejusdem generis* with tenant and by that I mean a person who has come on to the land under the judgment-debtor by a title which has been said to 'go before' the decree. Such occupancy may carry with it full rights of possession and enjoyment, or only qualified rights of possession and enjoyment. It may be limited to a short time or may extend to a long time.

Now what constitutes hindrance in each case must depend on the particular circumstance of the case. It was argued that 'other person' in Section 324 included any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some other person than the judgment-debtor, words to be found in Section 327.

That as I said before, is a doubtful question but I need not decide the point as in my opinion there is no evidence of the nature of the hindrance alleged to have been offered by any of the respondents to the execution-creditor. In the absence of such evidence the order cannot stand.

I have less regret in discharging the order because I think the claims of the respondents should be decided by action and not by the summary procedure provided in Section 327."

Per BROWNE, A. J.—"I quite agree with my brother in his construction of Section 324, If the words 'other person, etc.' were not to be read as *ejusdem generis* with 'tenant' but entirely free from that which is attached to them—a certain relation to the judgment-debtor—we might have expected that the proviso would have been worded simply, as to so much of the property as is in the occupancy of any person not bound by the decree.'

I do not know whether this Court has yet decided whether hindrance to a creditor in taking complete and effectual possession after the officer has delivered formal possession to him would be punishable under section 326, or as a contempt of Court. It has been ruled that the primary resistance or obstruction to the officer is not punishable as contempt. (2 S.C.R. 145). This clause as to subsequent hindrance of effectual possession is not in the Indian Code and our own Code has not in sections 326-327 dealt with such hindrance *nominatum*. It may be possible therefore that when formal possession is given by the officer without such 'resistance' 'obstruction' as would necessitate immediate complaint—*i.e.*, when the writ of possession has been at the first formally submitted to—any subsequent 'hindrance' might be punishable as contempt when committed so soon after formal delivery as to be truly a disobedience after a semblance of obedience, or might, especially, when manifested only some time thereafter be but matter for a fresh cause of action.

In the present case the interval between formal delivery and possession was 13 days and therefore facts should have been clearly detailed to shew whether it was a case of contempt of Court or not. However that may be, I agree in holding here that the averment in the petition that "the petitioner is hindered by the parties on whom the Fiscal served the notice under section 324, in taking complete and effectual possession thereof" was too bald. It was not supplemented by any evidence at the enquiry into the matter of the petition and I fail to see therefore how the Court found there was any resistance or obstruction for which it should proceed under section 327.

I further consider that it was irregular to file one petition with one such averment against the persons who were according to the Fiscal's return, in occupancy of the lands in 7 parties, one of 15 lots, one of 3, one of 2, and four of one lot each respectively, and presumably in any hindrance or petition made the same each independent of the other necessitates separate enquiry thereinto, and thus avoiding the complication which the learned District Judge saw would arise.

The Fiscal's return to the writ was also defective in that he did not shew that the occupant on whom he served the notices were, or at least claimed to him to be, tenants of the judgment-debtor, or entitled, and how, to occupy the same as against him.

I agree therefore that the order under section 327 should be set aside with all costs."

11th September, 1899.

DISTRICT COURT COLOMBO, No. 90/29.

Fidei-commissa—Principles of a fidei-commissary bequest—Interpretation—'If a testator leaves the continuance of a fidei-commissum to the pleasure of his executors he cannot be said to have burdened the property with a fidei-commissum.'

Per WITHERS, J.—"In my opinion this order should be affirmed. The question of the correctness of the order depends on the construction of a clause of a will and an assignment by the executors of that will.

The clause of the will referred to is as follows:—'The testator declares to give and bequeath to his daughters Anne Morgan Ondaatjie, widow of Henry Potger, and Eliza Morgan Ondaatjie his house, garden, and field Situate at Green Street in Lascoreen's drop each in equal shares to be divided and that part of the house which stands on the west side to be taken by the said Anne Morgan Ondaatjie, and that on the east side to be taken by the said Eliza Morgan Ondaatjie without reference to more or less of land going into each share of the house, with this condition nevertheless that the said premises shall be and remain under the bond of fidei commissum and descend to their heirs provided that the continuance of the fidei-commissum shall depend on the pleasure of the testator's sons, Matthew Philip Morgan Ondaatjie and the Rev. S. D. Ondaatjie.'

After the death of the testator his said executors in and by a document which recited the words of the said clause of the will assigned to the said 'Eliza Morgan Ondaatjie, her heirs, executors, administrators, *and assigns* subject as aforesaid all that part of the (said) house which stands on the east side of the said property and the ground attached to it as aforesaid be the same more or less than the ground attached to the west side of the house, to have and to hold the said premises with their and every of their appurtenances as aforesaid to her the said . . . . as aforesaid, her heirs, executors, administrators *and assigns* for ever subject as aforesaid.'

The question debated before us was whether a valid fidei-commissum was effected by the clause of the will above recited and whether as regards the testator's sister Eliza that fidei-commissum was continued or discontinued by the executors in their assignment of the eastern half of the house and the ground on that side of it to that lady.

Various authorities were cited to us on the point at issue but they were of little service to us as the language of the documents to which they applied was not in the least like the language of the clause of Mr. Ondaatjie's will.

I think by this time we are familiar with the principles of a fidei commissary bequest there must be found words in the will or document '*inter vivos*' which clearly indicate the intention of the author of the will or other document that his estate or part of it shall not be alienated by the heir nominate, but shall be left to be enjoyed by some person or persons in an order indicated by the document, or if that is silent by the law of the land.

Now it seems to me that if a testator leaves the continuance of a fidei commissum to the pleasure of his executors he cannot be said to have burdened the property with a fidei commissum. If I am wrong in this opinion then I hold that the executors intended to convey the premises described in their conveyance to the testator's sister free from the fetter of a fidei commissum.

In conveying it to the testator's sister *and her assigns* it is clear to my mind that they intended to convey the property to her with free power of disposal.

The words 'subject as aforesaid' in the operative part of the conveyance do not control the absolute character of their disposition; they do no more than refer to the clause of the will recited by the executors in their conveyance."

BROWNE, A. J.—"I agree."

II.—*CRIMINAL.*

POLICE COURT, NEGOMBO. No. 939/25,581.

Andries Peris (Peon of the Negombo Arrack Tavern) respondent *vs.* P. Pedro Fonseka of Kochchikadde, appellant.

Illicit distillation—Section 13 of Ordinance 10 of 1844—Offence under this section beyond the jurisdiction of the Police Court—Power given to the Attorney-General by Ordinance 11 of 1868 Section 99, and continued to him by clause 2 of section 9 of 3 of 1883 has been omitted in section 9 of the new Criminal Procedure Code 15 of 1898—Section 11 of the new Code adds the criterion of fine to Police Court jurisdiction—Vide 11,487, P. C, Kandy, 10 May, 1899, in Lux's reports—numerical error pointed out in the new Code (Vide p, p. 696, 697)—Offence under section 13 of 10 1844 should be tried under section 157 (1) of the new Code 15 of 1898.

Held here:—"That an offence under section 13 of Ordinance 10 of 1844 is not triable by a Police Court."

Per BROWNE, A. J.:—"Subject to any further argument which Counsel or the Attorney-General may desire to submit to me, it seems to me that I must set aside this conviction under section 13 of Ordinance 10 of 1844 on the ground that the Police Court had no power to try the charge summarily.

Prior to the passing of the new Criminal Procedure Code such a charge would possibly have been held so triable, though the only note I have of a prosecution under this section was one before the Supreme Court at the Matara Criminal Sessions (2 B. and V. 321). But I so consider because of two matters which might have conferred jurisdiction but now no longer exist. The one was the power given to the Attorney-General by Ordinance 11 of 1868, 99, to have one offence against the Revenue tried by the Police Court. This power was continued to him by the second clause of section 9 of the Criminal Procedure Code 3 of 1883,—but that clause has been omitted in section 9 of the new Criminal Procedure Code.

The other was that under 96 of Ordinance 11 of 1868 a Police Court was given jurisdiction over offences if one of any modes of punishment, therefor was within its jurisdiction, and under section 12 (b) of the Criminal Procedure Code of 1883 the criterion of Police Court jurisdiction was whether the offence was or was not punishable with imprisonment for a term which might exceed six months. But section 96 of 11 of 1868 was not re-enacted in either of the Codes, and section 11 (b) of the new Criminal Code adds the further criterion,—'or with a fine which may exceed Rs. 1,000.'

The fines possible under section 13 of 10 of 1844 are £100 plus 5 shillings per gallon, and in my judgment therefore the magistrate had no power to try summarily—(C. F. the decision in 11,487 P. C. Kandy 8. C. M. 10 May 1899—Lux rep: p 19.)

And it would not be meet that if he were District Judge as well he should refrain from the ordinary procedure which vests in the Attorney-General the discretion before what court such a prosecution should be tried.

I would draw attention to the fact that the number of the section (12) of the old Criminal Procedure Code has been by mistake reprinted in the last column of schedule 2 of the new Code—offences against other laws,'—instead of section 11, the corresponding section of the new Code.

I will not comment now on the form of the search warrant which was issued in this case, or on the practice of the Negombo Police Court of issuing search warrants on affidavits irrespectively apparently of any complaint against any person having been made.

Appellant's counsel urged on me that I should require the production of the affidavit on which the warrant was signed in order that the merits of the original complaint might be scrutinized, and as I allow the request was in reason I will now in remitting the case for proper procedure request the magistrate to have it—or a copy of it, if it is filed elsewhere—filed in these proceedings.

I therefore set aside the conviction and sentence and remit the proceedings to the magistrate in order that he may conclude the inquiry and deal with the record under section 157 (1). As I consider he had no jurisdiction to try summarily, section 192 (1) would not in my opinion apply."

12th September, 1899.

POLICE COURT, KURUNNGALLE, 469/10,859.

Offence under the Labour Ordinance 11 of 1865. Quitting service without notice or reasonable cause—Section 11 of 11 1865—Is a nurse domestic servant?—Non-payment of wages a reasonable cause for quitting service—Non compliance of requirements of Section 306 of the Criminal Procedure Code by the Magistrate.

Held 'here that a woman employed to suckle a child—as long as she has milk at the breast—does not come under the provisions of the Labour Ordinance.'

Per WITHERS, J:—"The judgment in this case must be set aside and the accused acquitted.

The proceedings are very irregular, because this woman was charged with no offence either under the Code or any local Ordinance, nor was she convicted of any such offence as section 306 of the Criminal Procedure Code requires. 'Every judgment'—this section enacts—*shall specify the offence* in any, *and the section of the law under which the accused is convicted.* I take it that the charge and conviction were intended to relate to an offence under Ordinance 11 of 1865, in that the accused, being a servant of the complainant, quitted the service of her employer without leave or reasonable cause before the end of her term of service or previous warning.

Now if the evidence clearly supported a conviction under section 11 of the Labour Ordinance of 1865, I might amend the judgment in conformity to that evidence. But the Magistrate has not found what the nature of the contract of service between the complainant and the accused was.

The complainant deposed that he engaged the accused to nurse his little grand-daughter as long as she was able to give the child milk. This is a very indeterminate contract. It is true that the complainant also allged that the accused was to recive Rs. 2 a month and clothing and rice for herself and a child of her own—a half-weaned child. This she was to receive only as long as she was in a condition to give milk to the complainant's grand-daughter.

A nurse may or may not be a domestic servant but as at present advised, I do not think that a woman employed to suckle a child as long as she has milk at the breast comes under the provisions of the Labour Ordinance.

But apart from that I am almost convinced that the nurse had not been paid regularly before she left service, and that she had good excuse for leaving without notice." * * *

8th September 1899

CRIMINAL.

POLICE COURT, BATTICALOA, No. 13,915.

Virakuddi Selappu—(complainant.) *vs.* Tillarampalam Kandararem—(accused)

1. Kattar Paman
2. Vairavi Sinnakuddi

} Witnesses } appellant.

Giving false evidence under section 188 of the Penal Code—Is it punishable as contempt of Court?—Section 440 of the New Criminal Procedure Code—Section 12 of the Oaths' Ordinance identical with this section—Vide judgment of the Privy Council in *re* Pollard, 2 S. C. C. p. 8—Vide also 2 N. L. R. p. 74.

Held here:—'That the judgment of the Privy Council in *re* Pollard (2 S. C. C. 8) govern section 440 of the Criminal Procedure Code 15 of 1898, as well as section 12 of the Oaths, Ordinance No. 9 of 1895.'

Held also:—'That a Magistrate cannot summarily punish as for contempt under section 440 without first giving the accused information of the facts constituting the offence and an opportunity of explanation.'

Per LAWRIE, A. C. J.:—"The Police Magistrate sentenced two witnesses to fines for contempt of Court in that they gave false evidence within the meaning of the 188th section of the Penal Code, an offence he described as punishable under section 440 of the New Criminal Procedure Code. That section is identical with the 12th section of the Ordinance 9 of 1895.

I do not know why the section was put into the Procedure Code, and why when put in, the section of the older Ordinance was not repealed.

The procedure necessary before conviction under section 12 of 9 of 1895 is equally necessary before conviction under section 440 of the Criminal Procedure Code.

The judgment of the Privy Council in *re* Pollard, quoted and relied on by Phear, C. J., in deciding D. C., Kegalle, 3,781½ more than twenty-one years ago, reported in 2 Supreme Court Circular p 8 governs both the sections.

The comparatively recent case P. C., Galle, 20,984 reported in 2 N. L. R. p 74 clearly stated that such an order as the Magistrate made in this case "cannot possibly stand"—the judgment of the Chief Justice, Bonser, and of my brother Withers are conclusive.

I quash the order."

29th September, 1899.

POLICE COURT, PUTTALAM, No. 5,826.

D. J. Franciscus, appellant *vs.* Mariamma, respondent.

Frivolous or vexatious complaints—Crown costs and compensation—Section 197 of the New Criminal Procedure Code 15 of 1898, sub-section 3.

By this sub-section, 'before making an order under section 197 the magistrate shall record and consider any objection which the complainant may urge against the making of the order, and if he makes such order he shall record his reasons for making the same.'

Per LAWRIE, A. C. J:—"The order is quashed because the magistrate did not follow the procedure required by the 3rd sub-section of the 197th section of the Criminal Procedure Code."

29th September, 1899.

DISTRICT COURT, GALLE, NO. 12,746.

The Queen—(appellant), vs. J. P. Weerasinghe—(respondent).

Offence under the Notaries' Ordinance 2 of 1877—Sub-section 14 of section 26 of this Ordinance—Neglecting to endeavour to ascertain whether any prior deed affecting the land has been registered—Vide 3. N.L.R.P 206—Duties of a notary under sub-section 14 of section 26 laid down by Bonser, C. J., in this case.

Held: 'that if a notary ascertains that a prior deed has been registered and if he inserts the registration number on his deed, he does all that the Ordinance (section 26, sub-section 14) requires him to do.'

Per LAWRIE, A. C. J. :—"I understand the facts to be that in April, 1899, A. P. Jeronis de Vas Goonewardene went to the office of the appellant, a Notary Public, and showed a Crown grant in his favour dated 23rd July, registered 21st August, 1890. At the request of Goonewardene the Notary Public drew up and attested a mortgage over that land in favour of Charles de Silva and he inserted at the head of the mortgage deed attested by him the number of the registration volume and the page of the folio in which the registration of the Crown grant had been entered.

The notary was afterwards tried in the District Court of Galle on an indictment charging him with having neglected to endeavour to ascertain whether any prior deed affecting the land had been registered, and had thereby committed an offence punishable under sub-section 14 of section 26 of the Notaries' Ordinance 2 of 1877.

The learned District Judge acquitted the accused notary, holding that he had committed no offence.

The Attorney-General appealed.

I agree with the District Judge. District Court, Galle, 12,610, reported 3, N.L.R. p 206 differed in essential particulars from the present case. There a notary was satisfied with the assurance of the man who came to execute a deed, that he was entitled to land by inheritance. The notary there made no endeavour to ascertain whether any prior deed affecting the land had been registered, and Bonser, C.J., held that the notary had committed a breach of the 14th sub-section of section 26 of the Notaries' Ordinance.

The Chief Justice said there :—"Unless a notary has personal knowledge (which in some cases he may have) of the state of the title it is his duty either to attend the Registrar's Office in person to search the register, or to employ some one else to do it for him."

Here the notary had personal knowledge of the title, because he had before him a registered Crown grant which was sufficient proof that in 1890 the land belonged to the proposed mortgagor.

It seems to me that he obeyed the 14th sub-section when he inserted at the head of the deed attested by him the number of the registration volume, and page of the folio in which the registration of such prior deed had been entered.

I agree with the Chief Justice in the advice he gives in his judgment, which ought to be followed by all notaries. But I cannot set aside this acquittal and find the notary guilty unless the statutory offence has been committed. In my opinion, as the Ordinance stands, if a notary ascertains that a prior deed has been registered and if he inserts the registration number on his deed, he does all that the Ordinance requires him to do."

3rd October, 1899.

POLICE COURT PANADURA, 510/6.535.

Weerasinghe Mudelige Nonna of Wekadu, respondent vs. S. L. Mohamdu Lebbe and 2 others, 1st accused appellant.

Disposal of property the subject of offences—Chapter XL. of the Criminal Procedure Code—Section 413.

Held here:—That it is beyond a Magistrate's power to make order as to the disposal of property unless an offence has been committed regarding it.

Per LAWRIE, A. C. J.: When the Magistrate disbelieved the charge of theft and discharged the accused no more remained to be done.

If a Civil action is contemplated it is right to leave the door-frame in the same place and in possession of the same parties as it was when the cause of action arose.

Indeed it is beyond a Magistrate's power to make order as to the disposal of property unless an offence has been committed regarding it, and here the Magistrate holds that only a Civil action lies; and this property was not produced in Court.

It will save the Magistrate trouble if the existing state of possession is maintained. I set aside the order to bring the door-frame into Court."

4th October, 1899.

POLICE COURT, KANDY, NO. 12,736.

Don Juan Appu (renter's peon)-respondent vs Lucy Hamy—appellant.

Possessing more than one gallon of toddy—Section 42 of Ordinance 10 of 1844—Uses of *Hal* bark to check fermentation of toddy—Improper issue of search warrants—To whom a search warrant should be directed and to whom not—Vide P. C. Kandy No. 12,241, 4th August, 1899, Lux rep :—

Held here :—'that possession of toddy in excess of one gallon found in a house where husband and wife reside must be presumed to be the husband's possession although the wife alone is in the house at the time of search—'

Per LAWRIE A. C. J.:—"The charge is for possessing more than a gallon of fermented toddy. The toddy was found in the house occupied by the accused and her husband.

Prima facie, the possession was the husband's possession and that presumption has not been disturbed by any evidence of peculiar possession by the wife. The Magistrate is mistaken when he says that the person who was in the house at the moment when the renter's peon arrived must be held to be the possessor.

Here it is plain that the man and not the woman was the responsible possessor.

The two witnesses seem to think that the bark in the pot showed that the toddy was fermented. I always understood that hal bark was put into sweet toddy to prevent (or at least to check) fermentation.

I am not sure that it was sufficiently proved that it was fermented toddy.

I ventured in a recent case to doubt the propriety of issuing search warrants to renter's peons. I see that it was done in this case. In my opinion a search warrant ought to be directed to the Fiscal or to an officer the Police, not to a complainant or other private person."

3rd October, 1899.

2 S. C. C. 8 :—"No person should be punished for contempt of Court which is a Criminal offence unless the specific offence charged against him be distinctly stated and an opportunity of answering it given him (Re Pollard L. R. 210 C. 106)

Before calling on a person to answer even a properly specified charge of contempt the court must state a *prima facie* case of facts essential to the substance of the charge and the materials on which they are arrived at.

A Police Magistrate has no jurisdiction to punish perjury summarily as a contempt of Court.

2, N. L. R. 74:—"Clause 1 of 812 of Ordinance 9 of 1895 gives power to Courts if they are of opinion that false evidence within the meaning of section 188 of the Penal Code has been giving by any witness, to summarily punish him as for a contempt of Court.

But this power must be exercised in accordance with established legal principles, and a witness before he is punished under the section must be informed of the facts constituting the offence and given an opportunity of explanation.

BONSER, C. J.—Clause 1 of section 12 of 9 of 1895 should be exercised only when it is clear on the face of the proceedings that witnesses have been guilty of giving false evidence—not in cases involving a conflict of testimony.

In the latter class Magistrates would do wisely to exercise one of the alternatives open to them under section 12.

Inexpediency of the change in the law observed.

I. CRIMINAL.

572. POLICE COURT, MATARA, No. 1,690.

Offence under section 185 of the Penal Code—Sanction of the Attorney-General—section 147 of the Criminal Procedure Code——For a conviction under section 185 of the Penal Code the disobedience must cause obstruction, annoyance or injury to any person lawfully employed—"When a Magistrate has granted permission to a man to tom-tom all night he is entitled to do so unless he violates the clear words of that permission, or misconducts himself to the annoyance of those in authority."

Held.—"That when a complaint is made by or at the instance of a private person under section 185 of the Penal Code, the sanction of the Attorney-General is necessary under the 147th section of the Criminal Procedure Code to give the Court power to entertain it.

Per LAWRIE, J.—This is an appeal against a conviction for disobeying an order promulgated by the Police Magistrate that the accused should stop beating tom-tom directly the Police ordered him to do so.

The sentence is a fine of Rs. 20. The appeal rests on a point of law, that the sanction of Attorney-General was not obtained as is required by the 147th section of the Criminal Procedure Code.

The complainant is a Police Sergeant. The complaint is good if that Police Sergeant was the public servant concerned, or if it was on the complaint of some public servant to whom he is subordinate.

Now the public servants concerned whose orders were disobeyed seem to have been two Police constables acting on the instructions of Boteju, Reserve Sergeant, who again acted on the complaint of Mr. Bailley.

The Police constables of the Reserve Sergeant were I think the public servants concerned. I do not know what the complainant Silva Sergeant had to do with it.

The accused presented a petition to the Acting Police Magistrate asking for permission to beat tom-tom from 6 p.m. to 6 a.m. The magistrate wrote on the petition—'allowed on the usual conditions.'

The reserve sergeant says that the usual way in which licenses are granted is that parties applying must put a stop to it directly the police order it. But surely the permission of the magistrate is not to be negatived without good cause.

It must be assumed that the permission was not granted without some enquiry or at least without some knowledge of the locality where the tom-tom is to be beaten.

One of the requirements of a conviction under section 185 is that the disobedience caused obstruction annoyance or injury to any person lawfully employed.

It is not suggested that such was caused. It is said that a private person, Mr. Bailley, was annoyed, but Mr. Bailley has not come forward to say so; if the complaint be virtually at his instance, it should have had the sanction of the Attorney-General.

It seems to me that when a magistrate has granted permission to a man to tom-tom all night long, he is entitled to do so unless he violates the clear words of that permission or misconducts himself to the annoyance of those in authority.

I set aside and acquit."

3rd November, 1899.

489 POLICE COURT, KALUTARA.

No. 7,620.

Proceedings under Ch: XVI of the Criminal Procedure Code—Causing grievous hurt, and causing hurt in committing robbery.—Sections 317 and 382 of the Penal Code—Can evidence be given by the accused on their own behalf in investigations under Ch: XVI? Section 156, sub-sections 1, 2, 3, 4, 5 and 6 of the Criminal Procedure Code.

Held here:—'That the accused cannot give evidence on their own behalf in an investigation under Ch: XVI.'

Held also:—'That when an accused has been charged with a grave offence, it is irregular to convict him of a lesser offence, with which he had not been charged, and not having been discharged of the graver offence.'

Held, further:—'That it is unusual for a charge under section 382 standing alone, dissociated from section 380.'

Per LAWRIE, J:—"I do not see any other way of putting this case in order than by quashing the proceedings taken after the close of the case for the prosecution, and remitting to the Police Court to proceed according to law.

The magistrate had before him two men charged with having caused grievous hurt under section 317, and with having caused hurt in committing a robbery under section 382. The case was not triable summarily by the Police Court.

The investigation under Ch. XVI. went on regularly until the close of the case for the prosecution, and then the magistrate seems to have forgotten that he was investigating, for he allowed the accused to give evidence on affirmation on their own behalf, which can only be done in a trial, and after hearing more evidence he convicted the accused of offences under sections 314 and 315.

This was irregular because the accused had not been discharged of the graver offences; they had not been charged with nor tried for the lesser offences.

When the case goes back the magistrate will consider whether he ought not to add a charge of robbery under section 380. I have never seen a charge under section 382 standing alone, dissociated from section 380.

The magistrate will then consider whether he will discharge the accused under section 156 (sub-section 2), or whether he will examine the accused and take evidence under section 156 (sub-sections 3, 4, 5, 6).

At the close of the enquiry if he is of opinion that there are not sufficient grounds for committing the accused for trial he will discharge them; if there are grounds for committing then he will send the case to the Attorney-General as is provided by section 157.

If the magistrate discharges the accused of the graver offences he can then charge them with any lesser offence which the evidence recorded leads him to believe they have committed, and he can put the accused on their trial.

In the present case it seems to me that it would be very difficult to convict of the lesser offence on evidence which the magistrate has found untrustworthy and untrue in so many important particulars.

If this was a true charge of highway robbery of a cart and bull, and hurt with a knife in the course of committing the robb ry, it is a case for a jury, if there was no highway robbery, if the hurt was not caused in the way described by the complainant, if it was not an accident in the way described by the accused, it will be difficult for the magistrate to find evidence which he believes and trusts and which would justify a conviction for the lesser offence.

I quash and set aside the proceedings, since the close of the complainant's case, and I remit for further proceedings according to law."

18th September, 1899.

POLICE COURT, AVISAWELA, No. 3,187

(In revision).

Crown costs and compensation—I. N. L. R. 326—Section 148 (a) of the Criminal Procedure Code.

Held : 'That an order for the payment of Crown costs and compensation cannot be made in proceedings initiated by a report in writing by some officer, and not by a complaint, under section 148 (a) Criminal Procedure Code.'

Per BROWNE, A. J :—"I revise the proceedings in this case in regard to the imposition of Crown costs and compensation, which order I set aside. It has been already decided in the I N. L. R. p 326 that such orders cannot be made in proceedings which like these have been initiated by a report in writing by some officer and not by a complaint under section 148 (a) of the Criminal Procedure Code." 14th September, 1899.

II. CIVIL.

406. COURT OF REQUESTS, KURUNEGALLE No. 6,074.

Kandyan law—Claims of illegitimate children—Sawyers on Kandyan law the best authority—Austen, p. 148—Marshall's judgments.—The Niti Nighandua on the rights of illegitimate children—Vide Armour's Grammar of the Kandyan law—Comparative weight of opinion of Armour and Sawyers—Vide the holding of Justice Temple in D. C. Kandy 19,306, November 1847—Vide also D. C. Kandy 23,067, rep. Austen, p. 147, and Lorenaz Vol. I. p. 189—D. C. Kandy, No. 66,981.—Is property acquired by gift to a son from a father the son's acquired property?—Vide 5, S. C. C. 46—Definition of "Paraveni"—'The opposite of paraveni is not acquired land, but land held as in "Moru Wena—'Praveni Pangu'" as defined by Ordinance 4 of 1870—Vide appendix, Niti Nighandua p. 119—

Held here :—'That among Kandyans illegitimate children have no claim to land which their father *inherited*."

Held also :—'That illegitimates have a right to property *acquired* by the father, whether by purchase or gift.'

Held further:—"That property acquired by gift to a son from a father is the son's acquired property."

("I am unable to draw a distinction between property inherited by a father and gifted to his son, and property purchased by a father and gifted to his son. In the former case as in the latter I say that the son 'acquired' the property")

Held also: "That there is no distinction between "Acquired" and "Paraveni" property.

("What is opposed to "Paraveni" is not acquired land, but land held as in Moru Wena")

Per LAWRIE, J:— "I understand the law to be that among Kandyans illegitimate children have no claim to land which their father inherited.

I regard Mr. Sawyers as the best authority on Kandyan law. He was Judicial Commissioner of Kandy from 17th August, 1821, until he retired on pension on 3rd July, 1827.

In his notes (page 7) he says:— "The issue of the low-caste wife can inherit the lands acquired by their father whether by purchase or by gift from strangers, but cannot inherit any part of the property which has descended to him from his ancestors while a descendant of one of the pure blood of the ancestors, however remote, remains to inherit."

Austen, p. 148, notes a decision dated 13 December, 1824, where Mr. Sawyers and the chiefs held that the children of an irregular connection were entitled to inherit the father's purchased property.

Sir Charles Marshall's notes on Kandyan law are copied from Sawyers and the passage on page 7 of Sawyers is repeated on p. 336 of Marshall.

The Niti Nighandua, which, in my opinion, was written between 1830 and 1840, p. 14, says :—"Children of a concubine will not be entitled to maintenance from the ancestral estate though in some instances his acquired property, moveable and and immovable, will become their property."

Armour's Grammar of the Kandyan law (first published in the Ceylon Miscellany in 1842) is mainly a translation of the Niti Nighandua but the paragraph (p 135 of Armour), headed, "Illegitimate issue is, (so far as I have ascertained), not to be found in the Niti Nighandua. I do not know where Armour took it from. It is printed in Perera's Armour p 34, section 2: "Duty of parents towards illegitimate children." There Armour limits the property to which such illegitimate children can succeed to the father's purchased lands, or "landed property which he has acquired by purchase."

Mr. Armour's opinion has not the same weight as Mr. Sawyer's, for he was not a judge; he was appointed interpreter to the Judicial Commissioner in October 1819; afterwards he was Secretary to the Judicial Commissioner's Court, an office which he held when Mr. Sawyers was the Commissioner.

In D. C., Kandy, 19,306 (20 November, 1847) reported in Austen, p. 108, Mr. Justice Temple assumed that a concubine of a deceased Kandyan would be entitled to "acquired" property.

In D.C., Kandy, 23,067, the District Court of Kandy, held that illegitimate children were entitled to lands which were the "acquired" property of the father and this was afterwards affirmed on 22nd September, 1856. The case is reported both by Austen p. 147, and by Lorenz Vol. I, p. 189.

In 66,981, D.C., Kandy, I sustained the right of illegitimate children to acquired property.

The question remains whether property acquired by gift to a son from a father is the son's acquired property. This Court in D.C., Kandy, 88,284, reported in 5 Sup. Ct. Circular, p 46, held that land purchased by a father and afterwards gifted to a son was the son's acquired property.

Here it is conceded that the illegitimate children have right to one land purchased by Kirihami and gifted to Kiri Banda.

I am unable to draw a distinction between property inherited by a father and gifted to his son and property purchased by a father and gifted to his son. In the former case as in the latter, I say that the son "acquired" the property.

In this careful and able judgment Mr. MacLeod draws a distinction between "acquired" and "paraveni" property. I do not understand that there is such a distinction. "Paraveni" means lands held by a man in his own right, over which he has disposing power, and which on his death intestate will pass to his heirs.

What is opposed to "paraveni" is not acquired land, but land held as in Moru Wena, that is by a tenancy at will, or land held by a man in virtue of his office, such as the endowment of a vihare by a priest or the lands held of old by Diswas and other high officials during their tenure of office.

The interpretation clause of the Ordinance 4 of 1870 defines Praveni Pangu to mean—"an allotment or share of land in a temple or Nindagama village held in 'perpetuity,'" and Sir John Doyley said :—"Paraveni land is that which is the private property of an individual proprietor, land long possessed by his family, but so called also, if recently acquired in 'fee simple.'"

See the Glossary publised on 23rd June, 1869, and also the appendix of the Niti Nighandua p. 119.

In the present case I hold that the lands were the acquired property of the deceased by gift from his father. He would have inherited only an undivided share of these lands, by gift he acquired the whole.

16th October, 1899.

I. CRIMINAL.

483, POLICE COURT, KURUNEGALLE, No. 10,764.

Frivolous or vexatious complaints—Order for Crown costs and compensation—Section 197, Criminal Procedure Code—Procedure which must be followed before an order is made under this section.

Held here : 'That a court may acquit after hearing the leading witness only.

Held also : 'That before a complainant can be made to pay Crown costs he must be allowed to adduce *all* his evidence.'

Per LAWRIE J. :—"In this appeal against an acquittal sanctioned by the Attorney-General, I was assured that the complainant had more witnesses and that the trial was prematurely stopped by the Magistrate.

It is clear that before a complainant can be made to pay Crown costs, he must be allowed to adduce all his evidence and the Magistrate must then find that the complaint was frivolous and vexatious, then he must give the complainant an opportunity of stating objections to the order to pay Crown costs, and must record his reasons for making it.

That was not done here and the order as to Crown costs is quashed. See Section 197 of the Criminal Procedure Code, which must be followed.

But though the order as to Crown costs was premature and irregular, a Court may acquit after hearing the leading witness only for if that witness be not believed it may be waste of time to hear more evidence.

Here the Magistrate heard the evidence of the complainant and of the principal witness at great length and obviously with patience, and I see no good reason for setting aside the acquittal, as I presume it is founded on a disbelief of the evidence of Bilenis."

25th September, 1899.

499. POLICE COURT, KANDY, No. 12,848.

Maintenance—Kandyan marriage law—*Binna* marriage.

Held :—'That the fact that two Kandyans were married in *Binna* does not imply that the wife has independent means.'

Per LAWRIE, J.—"Remit for further investigation. The Police Magistrate has not recorded any evidence to the effect that the applicant has sufficient means of her own to support herself.

The fact that the applicant and respondent were married in *Binna* does not necessarily imply that she has independent means. A very poor couple may be married in Binna and indeed the ordinary meaning of a Binna marriage is that the husband has gone to live in the house of his wife's parents.

I must remit for further evidence and consideration.

In the formal order to be finally pronounced the magistrate will do well to name the children to whom he finds maintenance due and to fix the sum to be paid for each."

25th September, 1899.

523, POLICE COURT, CHAVAKACHCHERI, No. 4774.

Sections 470 and 471 of the Penal Code—Using false property mark— Branding stolen cattle.

Held : That the branding of stolen cattle by a person to whom they do not belong is punishable under sections 470 and 471 of the Penal Code.'

Per LAWRIE, J :—"This is the first case in which I have seen the 470 and 471 sections of the Penal Code made use of to punish those who put their own brand-marks on stolen cattle which do not belong to them. I think the Police Magistrate is right and that the section applies.'

Section 470 enacts :—'Whoever marks any movable property, etc, with the intention of causing it to be believed that the property so marked belonged to a person to whom it does not belong, is said to use a false property-mark.'

I affirm."

17th October, 1899.

542. POLICE COURT PUTTALAM, NO. 5,795

Effects of the new Criminal Procedure code 1898—Investigations under chapter XVI with their attendant advantages superseded by summary trials at discretion of Magistrate who is also a District Judge—Sections

369 and 443 of the Penal Code—Sections 148 (*a*) and 197 of the Criminal Procedure Code—Crown costs and compensation—Rules laid down which must be observed before an order under section 197 is made.

Per LAWRIE, J :—"The Magistrate had before him 5 men accused of house breaking by nigh. and of theft of a considerable amount of property from a dwelling house.

Before the Magistrate was in a position to judge whether it was a serious offence he chose to try the men summarily. He can hardly be said to have been of the opinion that the offence might properly be tried summarily for there were before him no materials on which to form an opinion.

This is an example of How, the control of prosecutions for serious offences is slipping away from the Attorney-General, how the safeguards afforded by an investigation under chapter XVI, consideration by Crown-Counsel, and commitment and trial on indictment before the District Court or Supreme Court, have been swept away by the Criminal Procedure Code.

It is vain to do more than deplore this change in Criminal Procedure, for the ordinance gives complete power to any Magistrate, who is also a District Judge, to try summarily any offence triable by the District Court, even if they be (as this case was) punishable with 12 years' rigorous imprisonment, (7 years under section 369 and 5 years under section 443.)

Here I think justice has not been done. The Magistrate tried this serious case hastily.

I say that the Magistrate ought to have taken preliminary proceedings under Chapter XVI and to have submitted the record to the Attorney-General, who would have considered the case and either ordered a discharge or a committal for trial.

I must quash the order as to Crown costs and compensation.

1st. Because this was not a case instituted on complaint under section 148 1. (a).

2nd. It was not a case which originally a Police Magistrate had power to try.

3rd. It was not a case in which the Magistrate declared the complaint to have been frivolous and vexatious: the Magistrate calls it an utterly false and vexatious case.

The objections urged by the complainant against the magistrate making the order for Crown costs and compensation was I think a good objection. The complainant said :—"You have not heard all my witnesses." The magistrate replied : "One of the witnesses you mean to call is a Duraya boy and the other is a Tamil like yourself."

I do not appreciate the relevancy of the magistrate's reply. If Duraya boys, and Tamils be present when crimes are committed they are able to give evidence.

Altogether this is an unsatisfactory case; if it had ended in a conviction I think I would have set it aside and ordered an investigation under Chapter XVI ; but it has ended in an acquittal. I presume the Attorney-General is satisfied, for he has not appealed, and without an appeal this Court cannot (or at least does not) interfere with acquittals.

I quash the order as to Crown costs and compensation."

16th October, 1899.

II. *CIVIL.*

DISTRICT COURT, COLOMBO.

160/12,315.

Double costs—Ordinance 10 of 1897—Section 4 of this Ordinance intended as a check to the abuse or misuse of the Partition Ordinance 10 of 1863. Interpretation—Can a will creating a *fideicommissum* dated prior to 1840, and which has not been registered under the Ordinance 6 of 1866, be received in evidence?—Can purchasers of life interests in property demand a partition?—3 N. L. R., 200.

Held:—'That the mere dismissal of an action for partition is not proof conclusive that such action should not have been brought.

Held also:—'That the penal provision of section 4 of Ordinance 10 of 1897, does not apply to a person who, in good faith brings an unsuccessful action under the Partition Ordinance.'

Held further:—"That the sale of land held under a *fideicommissium* does not give the purchaser title to demand a partition decree, because the vendors had no right to sell more than their life interest.

Per BONSER, C. J. :—"It cannot be maintained in this case,—a point which Mr. Dornhorst hardly contested,—that the words of this will do not create a valid *fidei commissum*.

The decided cases are too strong to be ignored and I am, therefore, of opinion that the learned District Judge was right in holding that this property was burdened with a *fidei commissum* to the 4th generation. I am also of opinion that the District Judge was right in dismissing the action. It seems to me quite clear that the plaintiff in this case was not entitled to proceed under the Partition Ordinance to obtain either a partition or sale of the property.

Another question has been raised in these proceedings as to whether the plaintiff, whose action has been dismissed, should be condemned to pay double stamp duty under the provisions of section 4 of Ordinance 10 of 1897. That section exempts from stamp duty proceedings under the Partition Ordinance, on the ground that it is to the interest of the community that such actions should be brought therefore, every encouragement given to persons to bring proper cases.

But to meet cases in which the Partition Ordinances is sought to be used for collateral purposes, such as establishing the title of owners or claimants, and also to meet cases which, I am sorry to say, are not of infrequent occurrence, in which one of the co-owners has been inclined to snatch a partition decree behind the back of other co-owners—to meet all these cases of abuse or misuse of the Ordinance, this penalty of double stamp duty was provided, and section 4 provides that—"if it should appear to the Court before which any action or proceeding for the partition or sale of land has been instituted that such action or proceeding is one which should not have been instituted under the provisions of the Ordinance 10 of 1863, or that it was instituted in order to deprive any person not named in the plaintiff's application to such court of his interest in the said land, or in order improperly to take advantage of the exemption from stamp duty by this Ordinance created, such court shall in disposing of such action or proceeding order the plaintiff to pay double the amount of stamp duty * * *"

Now some difficulty is created by the generality of the words—"*such action or proceeding should* not *have been instituted, etc.*"

It may be said that if an action is dismissed that is proof conclusive that it should not have been instituted. I am inclined to think that that was not what the Legislature intended, that they did not intend to penalise a person who in good faith brought an unsuccessful action under the Partition Ordinance.

In the present case there is no reason for thinking that the plaintiff was acting otherwise than in good faith in bringing this action and therefore, I am of opinion that the penal provisions of the Ordinance do not apply."

Per LAWRIE, J:—"The question whether a will creating a *fidei commissum* dated prior to 1840, and which has not been registered under the Ordinance of 1866, can be received in evidence was not raised in the District Court. It is said that the will was proved in testamentary proceedings. It was read in evidence in this case without objection.

The will being in evidence I am of opinion that it creates a *fide commissum* and that Don Johannis got the whole land and his descendants after him succeeded to equal shares burdened with the condition that they should not alienate, etc.

I am of opinion that the sale of their shares by some of these descendants to the plaintiff does not give him title to demand a partition because the vendors had no right to sell more than their life-interest.

On the death of the vendors it may be that the sales will not be impugned by the substitutes in the *fidei commissum*; the possession of the plaintiff probably will never be disturbed, but as the title now stands, I cannot say that the plaintiff is so completely the owner of the shares purchased by him as to give him a right to demand a sale or partition.

I will not say that a land or house subject to a *fidei commissum* may not be sold and the money re-invested under the same conditions and restrictions, nor will I say that such a land held in *fidei commissum* may not be partitioned. The decree for partition could be so expressed that the shares in severally would be held under the same conditions as the undivided shares were held.

The learned District Judge indicates his opinion to be that the decision reported in 3 N. L. R. 200 is wrong. I do not think it is, I adhere to it.

I agree to affirm the dismissal of the action, deleting, however, the order as to payment of double the amount of stamp duty for the reasons given by the Chief Justice."

17th October 1899.

I. CRIMINAL.

DISTRICT COURT, CHILAW, No. 2,59

Causing grievous hurt—Section 317 of the Penal Code—Trial on indictment signed by the Attorney-General—Can the Court designated by the Attorney-General refuse to try the case on the ground that the evidence discloses the commission of a more serious offence than the accused is charged with?

Held:—'That the District Judge is bound to try the case as presented to him.'

Per LAWRIE, J.:—"After prolonged proceedings the accused was committed for trial by the Police Magistrate on a charge of causing grievous hurt, punishable under section 317. The Attorney-General designated the District Court of Chilaw as the Court of trial. An indiotment signed by the Attorney-General was presented, and the accused pleaded not guilty.

The trial began, two witnesses were examined, when the District Judge refused to proceed further and sent the man back to jail and wrote to the Attorney-General asking that the accused be committed for trial before the Supreme Court on a charge of attempting to commit murder.

Against the refusal to continue the trial the Attorney-General has appealed. I do not know whether an appeal lies, but dealing with this, either in revision, or as a friendly adviser of the District Judge, I remit the record to him with instructions to try the accused on the indictment presented, and to find the accused guilty or not guilty according to law.

The Legislature has laid on the Attorney-General the responsibility of determining on what charge and in what Court accused shall be tried.

The District Judge may safely try all cases in which an indictment signed by the Attorney-General is presented to him. If occasionally there be a mistake, if the case ought to have been tried by a higher or by a lower Court, that is not a matter for which the District Judge is responsible.

In the present case the District Judge might have kept in mind that he had heard only the evidence of the Doctor and of the complainant, whereas the Attorney-General had considered all the evidence recorded by the Police Magistrate and probably also a confidential report.

It is most probable that the charge of causing grievous hurt is the proper charge, and that a charge of attempting to cause murder would have been wrong. Anyhow, the Attorney-General took the more lenient view of the accused's conduct and the District Judge was bound to try the case as presented to him."

14th November, 1899.

DISTRICT COURT-KEGALLE. 108 1968.

Grievous hurt—Section 316 of the Penal Code—A conviction under this section must be followed by a sentence of imprisonment.

Per LAWRIE, J.—"I must affirm the conviction. I cannot reduce the sentence to one of fine only, because a conviction under section 316 must be followed by a sentence of imprisonment.

Under the circumstances I think the sentence may be reduced to six weeks' rigorous imprisonment, and I so order."

14th November, 1899.

597. POLICE COURT, GALLE, No. 4,949-5,159.

Breach of Municipal bye-laws—Selling fish in places other than the markets provided by the Council—Before a Court can decide whether there be any penalty provided for an offence or for a breach of bye-laws, it is necessary that it do find by its verdict that the accused has committed the offence or the breach.'

Per LAWRIE, J.—"I must set aside this acquittal and remit to the Police Court to resume the trial on the merits

Before a Court can decide whether there be any penalty provided for an offence or for a breach of bye-laws, it is necessary that it do find by its verdict that the accused has committed the offence or the breach.

It is an academic question for a debating society and not for a Court of law to assume that a man sold fish in another place than markets provided by the Council, and to ask can such a man be punished? If so, with what punishment?

Even if I hold that there was a punishment provided I could not now convict the accused, because he has not been called on for his defence.

I refuse before a conviction, to give any opinion as to the proper mode of dealing with a convicted man.

Let there be a conviction first, and then the Court will consider what its punitive powers are.

19th November 1899.

II. CIVIL.

DISTRICT COURT, KEGALLE. 133/1,090.

Kandyan law.—"Deega" and "Binna" marriages· Order of devolution of property.—Armour—Vide 2, N.L.R., 92—Does this decision overrule the older case of 1856.

The question in this case was whether, when a a woman dies possessed of landed property which she had inherited from her father leaving a son and a daughter, the latter married out in "deega," the son does not take the whole of that landed property to the exclusion of the daughter.

Held: "That the son takes the whole property to the exclusion of the "deega" married daughter."

Per BONSER, C. J.:—"The only question which arises in this action is one of law, and that is, whether, when a woman dies possessed of landed property which she had inherited from her father, leaving a son and a daughter, the latter married out in "Deega," whether the son does not take the whole of that landed property to the exclusion of the daughter. The case is covered by the authority of Armour, which has been approved by a decision of the Collective Court as far back as 1856. A case recently decided by this Court, reported in 2, N. L. R., p. 92, was cited to us as having over ruled that case, but on looking at the report, it will be seen that this Court did not profess to over-rule that case, but held it to be good law, but distinguishable as regards the facts.

The facts of the present case are on all fours with the other case to which I have just referred. That being so, the Acting District Judge was wrong in deciding as he did. In my opinion the decision must be reversed."

Per WITHERS, J.:—"I agree. The facts of this case are clearly covered by the judgment of this Court reported in Austin, and I am sure that if it had been cited to the District Judge he would have decided accordingly.

As to the case relied on by Mr. Sampayo, I took part in that judgment. We were dealing with a state of circumstances which distinguished it from the cases reported in Austin.

In this later case the question related to a *deega* married daughter's right to share with her brother in the estate of their mother, which was not derived by the mother's succession to her father's estate. The mother owned part in her own right, and the rest under a deed *inter vivos* from her father. In that state of things we thought it right to hold that the *deega* married daughter was not to be held to forfeit her right to the immovable property, as such forfeiture was not clearly made out by Kandyan law."

November 8th, 1899.

I.—CIVIL.

DISTRICT COURT, GALLE, FINAL. 180/5,282.

The law of maintenance and champerty—The English law held not to apply—The Roman-Dutch law, being the common law of Ceylon, is the law on the subject.

Is a security given for the repayment of money advanced for the purposes of an action illegal?—Grotius Book III, ch. 1, section 41—Vide Anderson *vs.* Radcliffe, 27, Law Journal, Queen's Bench, p. 32.

Held: "That the law of Ceylon on the subject of maintenance and champerty is the Roman-Dutch law and not the English law."

Held also:—"That a security given for the repayment of money advanced for the purposes of an action is not illegal.

Per BONSER, C. J:—"The only question raised in this case is whether a security given by the defendant in this action to secure the repayment of money to be advanced for the purposes of an action in which the defendant was plaintiff was illegal or not.

Mr. Pieris argued that it was illegal, and suggested that the question must be decided by the English law of maintenance and champerty. In my opinion, it must be decided by the Roman. Dutch law, which is the common law of the island. No authority was cited to us to show that such an agreement was void by the Roman-Dutch law. The only authority cited was from Grotius Institutes, Book III, ch. 1, section 41, in which it is stated that an obligation for the purposes of acquiring a share in a lawsuit is illegal; but it is quite clear that that authority does not strike at the present transaction, and it would seem that, according to English law, a transaction of this kind will not be illegal.

In the case of Anderson vs. Radcliffe, 27, L. J. Q. B. p 32, Justice Erle said:—"It would make the law oppressive in the opposite extreme if a person were prevented from charging the subject-matter of the suit in order to obtain means to prosecute it."

This was what was done in the present case. The *onus* lay on the defendant to show that this transaction was illegal, and they have failed to discharge that *onus*."

WITHERS, J:—"I agree, for the simple reason that no authority has been shown us that the contract is illegal according to the Roman-Dutch law."

7th November, 1899.

DISTRICT COURT, BATTICALOA. 178-2069

Summary procedure on liquid claims—Chapter 53 of the Civil Procedure Code—A defendant can appear and defend only with leave of Court—Cases in which a defence to an action under section 703 of the Civil Procedure Code would be useless, and where the proper remedy is by a cross action—Vide 8. S. C. C. p 148

Per BONSER, C. J:—"This appeal must be dismissed. The defendant, in being allowed to defend on condition of paying money into Court has got more than he was entitled to. It is rather an embarrassing gift for the defendant on the part of the District Judge, because the case in 8. S.C .C. 148 shews that the facts which he has got leave to prove will be of no use to him in this case, and that his only remedy is by a cross action."

Per WITHERS, J:—"I agree in dismissing the appeal. In actions brought under chapter LIII of the Civil Procedure Code a defendant can only appear and *defend* with leave of the Court.

This is not a defence."

1st November, 1899.

DISTRICT COURT, COLOMBO, FINAL

284/9956.

Possessory actions—Vide Ordinance 22 of 1871, section 4—No questions of title should be gone into—Only two questions arise in a possessory action: (1) Had plaintiff a year and a day's possession before ouster, or (2) Had plaintiff sought his remedy within a year of ouster—"This class of case turns on the two facts of possession and dispossession"—

Per BONSER, C. J:—"The appellant in this case was defendant in a possessory action. The plaintiff was the lessee of certain property under a lease which ended on the 28th day of February 1897. The defendant claims to be the assignee of the lessor.

On the 26th October 1896, the defendant with a large force of men went and turned plaintiff out of possession—on the 30th of April 1897, the plaintiff instituted this action claiming to be restored into possession. In his plaint he sets out the lease under which he had got into possession, which apparently, on the face of it, expired on February 28, 1897. The defendant took the objection that the action could not be maintained, on the ground that at the date when it was brought the right of the plaintiff to possess had determined, and that therefore no order could be made to restore him to possession.

The District Judge overruled this contention, and in my opinion rightly stated the law to be that such a defence was not available in a possessory action,—that the only two questions which arose in such an action were either that the plaintiff had not a year and a day's possession before the ouster or that the plaintiff had not sought his remedy within a year of such ouster.

It seems to me that it is not competent for parties to raise a question of title in a case of this kind, either directly or indirectly. The defendant in this case seeks to raise the question indirectly by saying that he is the assignee of the plaintiff's lessor.

The judgment must be affirmed."

Per WITHERS, J:—"I agree in affirming the judgment, which in my opinion contains a correct statement of the law on the subject. This class of case turns on the two facts of possession and dispossession.

If a man has been in possession for a certain time and is dispossessed without process of law, and he comes into Court within a certain time and asks to be restored to possession, he can be put back without any question of title or legal right being gone into at all."

1st November, 1899.

DISTRICT COURT, NEGOMBO. 302/2933.

Breach of promise of marraige—Damages—Marriage contracts against public policy—Distinction between damages and penalty—Origin of stipulations for penalties—Voet Book XLV, title I, section 13—Justinian, Institutes Book III, title XV, section 7—When the Court should enter into the question of the *quantum* of the damages—the *poena* should be shown to be *ingens* or *immens*.—The world *penal* has not the same force in the Roman-Dutch law of contracts as it has in the English law.

Held:—That a contract to marry with a penal stipulation in case of failure to marry entered into between Sinhalese is not "*contra bonos mores*."

Held also that when the amount of the penalty is fixed in the contract the Court should not enter into the question of the *quantum* of damages unless it is shown that the *poena* is *ingens*.

Per BONSER, C. J.:—"In this case the father of an unmarried girl under age entered, on her behalf, into a notarial contract with an unmarried young man providing that he would give her in marriage to this young man. The young man on his part agreed to marry her within a stipulated time, and the parties agreed that in case either of them should break the contract,—the father or the intended bridegroom—, the person in default should pay to the other R2,000 as a penalty. The father purported to enter into this contract on behalf of his daughter. The intended bridegroom broke the contract by marrying another lady, the father and daughter thereupon commenced this action to recover the stipulated penalty of Rs. 2000.

The defendant raised certain objections of law and of fact. He objected that it was not competent for the daughter to sue as she was not a party to the contract. He objected that the contract was against public policy and could not therefore be enforced, and he stated that he was made to enter into the contract by force and was not a free agent

All these objections were over-ruled at the trial. The Judge found that the contract was not made under coercion, and it has not been sought in this appeal to induce us to reverse that finding.

Mr. Sampayo argued the objection of law that the daughter could not sue, not having been a party to the contract. It seems to me that it was quite competent for her to adopt a contract made for her benefit, and I see no reason why a contract of this kind should be held by this Court to be against public policy. The parties are Sinhalese, and such a contract is one entirely in accordance with Sinhalese customs and feeling.

Then Mr. Sampayo contended that this R2,000 was a penalty, and that no damage having been proved, the utmost that could be given was nominal damages.

Now these stipulations for penalties, originated in the difficulty of proving damages Voet B. 45, title 1, section 13, states that where damages had to be determined by a Court there was considerable difficulty in the way of the plaintiff, owing to the natural difficulty of proof, and also to the rule in case of

doubt to give the benefit of the doubt to the defendant He states that in consequence of these difficulties the practice arose of the parties agreeing to a fixed penalty which would obviate the necessity of the Court entering into an enquiry as to the *quantum* of damages.

Justinian in his institutes recommends the parties to agreements to this course : (Book III. tit : XV. section 7) :—"Non solum res in stipulatum deduci possunt, sed etiam facta, ut si stipulemur aliquid fieri vel non fieri, et in hujus modi stipulationibus optimum erit poenam subjicere, ne quantitas stipulationis in incerto sit, ac necesse sit actori probare quid ejus interesit ; itaque si quis ut fiat aliquid stipuletur, ita adjici poena debet :— si ita factum non erit, tunc poenae nomine decem aureos dare spondes ? Sed si quaedam fieri, quaedam non fieri, una eademque conceptione stipuletur, clausula hujus modi erit adjicienda :— si adversus ea factum erit, sive quid ita factum non erit, tunc poenae nomine decem aureos dare spondes ?"

But Voet, in the same title to which I have referred states this :—"Demique moribus hodiernis volunt, ingente poena conventioni opposita, non totam poenam adjudicandam esse, sed magis arbitrio judicis eam ita oportere mitigari ut ad id prope reducatur ac restringatur, quanti probabiliter actoris interesse potest."

In other words, where the amount of the penalty is out of all proportion to the damages likely to be caused by the breach of the contract, in such a case the equitable course is not to give judgment for the whole amount of the penalty, but to reduce the amount to something more like the real loss incurred by the parties. That however is no authority for the proposition that wherever a penalty is fixed it is the duty of the Court to enter into the question of the "quantum" of the damages. It must be shown that the "poena" is, as Voet describes it, "ingens", or, as other writers call it, "immanesis" or "immensis".

In this case I see no reason for thinking that the penalty agreed upon by the parties comes under any of these categories, or it is so disproportionate to the circumstances, that it would be inequitable for the Court to enforce this claim."

Per WITHERS, J. :—I agree.

As to the objection raised to this contract in the first instance that the young lady had no right to sue, and in the next place that the contract was a contract *contra bonos mores*, I am unable to see any force in these objections.

As to the question of reducing the damages I agree in all that has fallen from the Chief Justice. I have gone at length in a former judgment into the question of penal stipulations and I cited the passage from Justinian referred to by my lord. The word 'penal' has not the same force in Roman-Dutch law in this connection as it has in English law.

There is nothing in the use of the word penal in contracts governed by Roman-Dutch law to prevent the stipulation being enforced."

6th November, 1899.

CIVIL.

DISTRICT COURT, JAFFNA, FINAL 314/1,360.

Validity of deeds—When it can be impugned—Grounds on which a deed can be held invalid —4 S. C. C. p 119—When the doctrine 'omnia praesumuntur rite esse acta' can be rebutted.

Held : "That a deed *'prima facie'* regular should not be set aside on the statement of one of the witnesses that the formalities were not observed."

Per BONSER, C. J. :—"The question raised by this appeal is as to the validity of a deed purporting to have been executed by the 2nd plaintiff on the 11th January, 1891. The deed is attested by a notary and three witnesses, and the attestation clause is in the ordinary form. It states, amongst other things, that the witnesses subscribed to it in the presence of the grantor and each other. The 2nd plaintiff denied the execution of the deed. The notary is dead ; but the three attesting witnesses were called, one of whom denied his signature. The other two witnesses admitted their signatures, but they stated that when they respectively signed they did not see the other witnesses present The District Judge believed that the deed was a genuine deed, and was actually signed by the 2nd plaintiff ; but he was of opinion that the evidence of the attesting witnesses showed that they had not signed it in each other's presence, and accordingly, he held the deed was invalid, following a decision of this Court, Punchi Baba and others *vs.* David Ekanayake, 4 S. C. C. p 119.

Now it seems to me a very dangerous doctrine that a deed, on the face of it regular, and executed before a notary who is a public officer, and bearing his attestation that everything was done in due form, should be set aside on the statement of one of the witnesses that the formalities were not observed. The presumption of law is that the requirements of the law were complied with. Of course that presumption may be rebutted, but in my opinion only by very cogent evidence, especially when, as in this case, the deed has been acted upon, as the District Judge finds, for seven or eight years. If this deed be held invalid on the evidence in this case, hardly any deed will be safe.

In my opinion it is safer to assume that the memory of the witness was defective. The evidence that the requirements of the law were not complied with in the present case is not sufficiently strong to rebut the presumption of the regularity of the deed."

WITHERS, J :—'I agree for the same reasons and have nothing further to add.

14th November, 1899.

DISTRICT COURT, CHILAW, FINAL 291/1681.

Breach of promise of marriage—Prescription Ordinance 22 of 1871—Can a claim for damages for seduction be prescribed under section 10 of this Ordinance ?—8 S. C. C. p. 165.—An action for seduction is an action for damages—Vide section 30 of Ordinance 6 of 1847—Pleadings—What a plaint should always state.

Held:—"That an action for damages for seduction comes within the purview of section 10 of the prescription Ordinance."

Held: also—"That a plaint should clearly disclose that the case has been brought within the time allowed by the statute."

Per WITHERS, J.:—"In this case a woman of the name of Lusa Fernando sues the defendant for damages on two causes of action. The first cause of action is that about two years ago he promised to marry the plaintiff within a reasonable time, that that time had elapsed, and notwithstanding his promise he refused to marry the plaintiff. On that ground she claims the sum of R150.

The second cause of action is that about two years ago the defendant seduced the plaintiff and induced her thereafter by false promises to live with him as his wife until some six months before action brought, and that then, the plaintiff becoming pregnant, the defendant then viciously abandoned her. On that cause of action the claim is for R300.

The case proceeded to trial, when the plaintiff's proctor admitted that he was unable to prove the breach of promise which constituted the first cause of action, and the trial proceeded on the issue of seduction. In the course of the trial the defendant's proctor called the Court's attention to the fact that the seduction complained of occurred "about 2 years ago," and he argued that the claim for damages was in consequence prescribed. I do not find that the proctor mentioned the clause in the Ordinance 22 of 1871 on which he relied. I take it he must have had in his mind the 10th section, which runs as follows:—"No action shall be maintainable for any loss, injury, or damage, unless the same shall be commenced within two years from the time when the cause of action shall have arisen."

In the case of William vs. Buller and others reported in 8 S. C. C. p. 165, Acting Chief Justice Dias, and Justice Lawrie held that damages for the unlawful conversion of property came within the terms of that section, and according as section 30 of Ordinance 6 of 1847 treats an action for seduction as an action for damages, it seems to me that this case comes within the provisions of section 10 of the prescription Ordinance.

The District Judge, however, over-ruled that objection. He considered that the expression "about two years ago," was ambiguous, and might be considered to mean within two years as well as more than two years ago, and on that ground declared that the trial should proceed. The trial was accordingly continued, and in the result, the plaintiff's action was dismissed with costs.

In the opinion of the judge, he considered the plaintiff's story incredible.

I am unable to support the judgment for the reasons given by the judge. I must say for my part that in my opinion the case ought to have been dismissed on the ground that it was prescribed. This Court has laid down more than once that a plaint should clearly disclose that the case has been brought within the time allowed by the statute. No date was mentioned in the plaint, and no date was supplied by the evidence. So when the plaint alleges that the consideration occurred two years ago, I think it must be taken against the plaintiff, that it occurred more than 2 years ago. For this reason I propose to affirm the judgment."

BONSER, C. J.—"I agree". 7th November, 1899.

II. *CRIMINAL.*

POLICE COURT, KALUTARA, No. 7977.

The law of evidence—Is the wife of a complainant a competent witness?—The wives of accused persons only are under some disabilities as witnesses—Vide section 120, Evidence Ordinance.

Per LAWRIE, J.:—"I do not understand how so experienced a lawyer as the District Judge of Kalutara could hold that the wife of the injured man was not a competent witness as to how and by whom her husband was injured.

At no stage of the history of the law was the wife of an injured man incapable of giving evidence. The husbands and wives of accused persons were formerly under some disabilities as witnesses, but never the husbands or wives of complainants.

The magistrate, must, times without number, have recorded the evidence of both a husband and wife in the same case, describing a house-breaking, or theft, or robbery, or assault, or other crime, in which one of them was complainant and the other had seen the crime committed.

From the refusal of the magistrate to allow the complainant's wife to give evidence, the case was starved, but as the magistrate was satisfied with the evidence recorded I need not send the case back for re-trial. I affirm.

25th November, 1899.

POLICE COURT, KALUTARA. No. 7,935.

Selling arrack without license—Ordinance 13 of 1891—Possession of more than two quarts of arrack without permit—Ordinance 10 of 1844—Spirit distilled from the produce of the cocoanut or other palm—The prohibition against selling or possessing absolute, and not confined to ordinary arrack—Vide 3 S.C.C. p. 44; also 8 S. C. C. 139—These decisions followed in P. C. Balapitiya, 1476. 6th February 1896.

Held:—"That the prohibition against selling and possessing spirits in the Ordinances of 1844 and 1891 is absolute and not confined to ordinary arrack."

Per LAWRIE J.—"The charges against the accused were (1) selling arrack by retail without a license, punishable under 13 of 1891, section 9, and (2) keeping in his possession more than two quarts of arrack without a permit, punishable under 10 of 1844, section 32.

It is well proved that the liquor sold by the accused was spirit distilled from the produce of the cocoanut or other palm, in which there was a considerable quantity of aromatic matter which made the liquor suitable to be taken as a medicine. It was, I understand, stronger than the ordinary arrack of taverns.

I affirm the conviction. The prohibition against selling and possessing spirits distilled from the produce of the cocoanut and other description of palm is absolute. It is not a prohibition only against selling or possessing ordinary arack, a liquor intended to cause intoxication; the prohibition is effective against selling or possessing a spirit which is so strong that it cannot be drunk, or a spirit which is unpalatable, or which can be drunk only in small quantities as a medicine.

That was decided by Cayley, C. J., in P. C, Kalutara, 62,334 reported in 3 S. C. C. p 44, and by me in P. C., Panadura, 4,966, reported in 8 S. C. C. p 139. I have a note that the latter decision was followed in P. C., Balapitiya, 1,476, decided on 6 February 1896."

27th November, 1899.

DISTRICT COURT CHILAW (CRIMINAL) NO. 2599.

Robbery—its component parts theft and hurt—3 S. C. R. p 27.

Held: "that under an indictment for robbery only, a verdict of voluntarily causing hurt cannot be recorded."

Per LAWRIE J.—"The learned District Judge says that the complainant and his witnesses gave their evidence in an unsatisfactory way. He did not believe that the complainant was robbed. He calls it a false charge.

If the charge of robbery was false, the evidence that the accused caused hurt is probably false. The hurt was slight, for the only mark of violence which the Mohandiram saw was "red eye."

The District Judge found that the accused was not guilty of the crime of robbery, the offence of which he was charged in the indictment. No other charge was added; the accused was entitled to an acquittal. I retain the opinion I expressed in the case reported in 3. S. C. R. p 27, that under an indictment for robbey only, a verdict of voluntarily causing hurt cannot be recorded. I set aside and acquit." 25th November,

I. CRIMINAL.

POLICE COURT, ANURADHAPURA, No. 20,219.

Admissibility of evidence—Right of cross examination—Admissions. Rights of master and servant—Section 98 of the Penal Code—Vide section 188 of the Criminal Procedure Code."

Per LAWRIE J.:—"The statement of the complainant taken on affirmation in the absence of the accused before summons was issued cannot be read as evidence against the accused; it was not read to him; he had no opportunity of cross-examination.

The conviction rests only on the statement of the accused, which the magistrate treated as an unqualified admission that the accused was guilty of the offence of which he was accused.

It is plain that Mr. Drieberg did not make an unqualified admission that he was guilty. His story was that the complainant was his servant and forgot to put water in a guest's room and spoke insolently when he was asked why he had not done so; that the punishment for this neglect of duty and insolence was some slaps and a blow with the hand which did the complainant no harm.

If that be true, the harm was so slight that no servant of ordinary sense and temper would complain of it. (See section 98 of the Penal code).

If the facts have been truly stated, the complaint was trivial and vexatious. But there was no trial. The complainant was not heard. The evidence of Mr. Macbride was not taken, and this conviction which has no sufficient ground must be set aside.

27th November, 1899.

POLICE COURT CHILAW, 628—15,519.

Investigations under chapter XVI of the Criminal Procedure Code—Does an appeal lie against an order discharging an accused under this chapter?—The old and new codes compared—Vide S. C. C. p136 and 2 C. L. R. p 1—Powers of the Supreme Court in Police Court Appeals—Vide section 338.

Held:—'That there is no longer an appeal from Police Courts, except in the case of judgments and final orders.'

Held:—'That according to the 338th section of the Criminal Procedure Code there is no Appeal from an order of discharge.'

Per LAWRIE, J:—"Mr. Bawa argued this appeal on the merits, on the assumption that an appeal lies against an order by a Magistrate discharging an accused in an investigation under Chapter XVI.

In my opinion, the right of appeal has been taken away by the amended Criminal Procedure Code.

The Criminal Procedure Code passed in 1883 gave a right of appeal to any one dissatisfied with any judgment, sentence, or order pronounced by any Police Court, except in the cases referred to in sections 403,404,405, (see S.C.C. p136 and 2. C.L.R. Rep: p.1).

The amended Criminal Procedure Code restricts the large jurisdiction conferred by the Courts Ordinance, because, instead of the correction of all errors in fact or in law, the power of this Court in appeal in Police Courts is limited by section 338 to the case of judgments and final orders, and by the explanation to that section it, is declared that "an order committing or discharging a prisoner made under section 157 is not a judgment or final order."

In my opinion, there is no longer any appeal from Police Courts except in the case of judgments and final orders, and orders of discharge are expressly declared not to be of that character.

I must dismiss this appeal".

23rd November, 1899.

II CIVIL.

DISTRICT COURT, GALLE.

Final 280, 4903.

Prescription — Can one co-owner prescribe against other co-owners? — Is a plaintiff, who has brought an action on the ground that his possession had been interfered with entitled to a declaration of title when the alleged ouster had not taken place?—Vide 1. S. C. C. p. 12 and 1. S. C. C. p. 26—these, decisions of no force since the passing of the Civil Procedure Code.—Prior to 1889 the parties were tied down strictly to their pleadings. But under the Code the pleadings form only a part of the materials. by which the Judge is to ascertain the issues.

Held: That one co-owner can prescribe against his co-owner

Held also that the decisions reported in 1 S.C.C. p. 12 and I.S.C.C. p. 26 are of no force since the coming into operation of the Civil Procedure Code."

Per BONSER, C. J.:—"This case raise two questions, one of fact, and one so law, which were argued before us in this appeal

The question of fact is, whether the plaintiff has had adverse possession for the prescriptive period, of one-third of the land, which, it is admitted by all parties, was held in common by the plaintiffs and defendants.

It appears, that in 1870, the 1st plaintiff married the youngest daughter of the former owner of the land, who had died leaving six children, 4 sons and 2 daughters; at that date one only of the sons had attained majority. The other daughter was already married. On the occasion of the marriage of the 1st plaintiff a dowry-deed or Kaduttam was, according to the customs of the Moors, executed by the eldest son and the husband of the married daughter, by which one-third of the land was mortgaged to be given as dowry to the 1st plaintiff and his wife. The other 3 sons did not join in the transaction. At that period they were infants. This Kaduttam was notnotarially executed and therefore did not pass any legal title to the shares. The evidence, which was believed by the District Judge, was that 1st plaintiff and his wife entered into possession of one-third share of this land in accordance with the terms of the Kaduttam.

I see no reason to doubt the propriety of the conclusion of fact drawn by the District Judge. It seems to me that the probabilities of the case were strongly in favour of that conclusion.

Then a question of law arose, which was this: Mr. Jayawardene argued for the defendants that even if the facts were as found by the District Judge, there was a rule of law that one co-owner could under no circumstances prescribe against his co-owners, and that therefore this possession from 1870 by the plaintiff in accordance with the Kadutham could give him no right to the shares so possessed by him. No doubt it is true as a general principle that the possession of a co-owner is the possession of all; but if one co-owner by some overt act claims to possess more than the shares to which he is entitled, and does in fact so possess, then I think that from that assertion of right time begins to run in his favour, and he can after 10 years be able to plead the benefit of the prescription ordinance.

In the present case the execution of the Kadutham as regards the adult members of the family must be treated as the period from which the title by prescription began to run in favour of the plaintiff. The Kadutham did not bind the co-owners who were infants at the time of its execution, but bound each of them as he attained majority. It is quite clear from the circumstances in the case that the infant co-owners must have attained majority at least 10 years before action was brought, and therefore Mr. Jayawardene properly declined to have the case sent back to ascertain the dates of the respective attainments by the infant co-owners of their majority, since the inquiry could not result in any benefit to his clients.

I am therefore of opinion that both the question of fact and the question of law must be answered in favour of the plaintiff.

Then Mr. Jayawardene raised another point. He said that this action ought to have been dismissed altogether, because it was shown that the plain had no cause of action. It was proved that the plaintiff's possession had not been disturbed, but that the defendants had begun to dispute the plaintiff's right to one-third which he had hitherto enjoyed. He brought his action alleging that he had been disturbed by the defendants. The defendants did not answer by pleading that they had never disturbed the plaintiff and that therefore he had no cause of action the defendants accepted the challenge of the plaintiff to battle, and put in an answer denying plaintiff's right to one-third, and at the trial an issue was agreed upon by the parties, namely, whether the plaintiff had acquired a prescriptive title to the one-third share claimed by him. I think it was too late after taking the chance of succeeding upon that issue and being defeated. for the defendant to turn round and say that that issue ought not to have been tried.

Mr. Jayewardene relied upon two cases decided by this Court. The case of Fonseka *vs* Hamim, 1. S. C. C. page 12; the other the Queen's Advocate *vs.* Kankanage Appuhamy reported in page 26 of the same volume of the circular. There this Court held that a plaintiff having brought an action on the ground that his possession had been interfered with, and it having been proved that the alleged ouster had not taken place was not entitled to a declaration of title. No dout these decisions were in accordance with the then existing practice of the Courts; but the practice of the Courts is now governed by the Civil Procedure Code. Before that Ordinance parties were tied down strictly to their pleadings but under the Procedure Code, the pleadings form only a part of the materials by which the judge is to ascertain the real issues

In the present case the issue was whether the plaintiff was entitled to this one-third share or not, and in my opinion this issue was rightly tried and rightly decided."

Per WITHERS, J. :—" I agree. I am convinced, as far as one can be convinced, that the District Judge has taken a right view of the case. The Kadutham was a solemn act among the parties to it, and the probabilities are that it was acted upon by its authors and those who came after them.

As to the question of law, whether one co-owner can prescribe against another for a share or part of the common property or the whole, that has been recognised as possible ever since 1845, if not before.

On the other point I am quite at one with the Chief Justice in his remarks about the Procedure Code having altered circumstances since the law laid down by Chief Justice Phear in the decision cited by Mr. Jayewardene.

The cases relied on by Mr. Jayewardene are not applicable to our present procedure. Had the defendants chosen to plead that they had not disturbed the plaintiff and to confine their defence to that plea, the case would have been dismissed at the trial. But it is clear that they wanted the question of the Kadutham and the tenure under it decided by the Court, and they must abide by that decision."

2nd November, 1899

CRIMINAL.

No. 19,719, POLICE COURT, ANURADHAPURA.

Ordinance 8 of 1848.—Repeal by the Public Thoroughfares Ordinance 10 of 1861.—Public Servant within the meaning of section 181 of the Penal Code.

(Per Lawrie, J.):—In the record is a licenses issued by Mr. Byrde to the complainant to seize cattle "by virtue of the powers vested in him by the 58th Clause of the Ordinance 8 of 1848."

That Ordinance was repealed 38 years ago by the Ordinance 10 of 1861.—Even if the complainant had an authority from the Chairman of the Provincial or District Committee under Section 94 of the Cattle Ordinance, it is by no means clear that the person so authorised is a public servant within the meaning of the 181st Section of the Penal Code.

2nd February, 1899.

No. 18,399, POLICE COURT, BALAPITIYA.

Mischief—triable summarily—Section 224 of the Criminal Procedure Code—discharge and acquittal.

(Per Lawrie, J.):—The complaint was for mischief, an offence triable summarily.

After several witnesses had been examined, the Magistrate exercised the powers conferred on him by 224th Section of the Code.

By an error the Magistrate *'discharged'* the accused, but a discharge was not the proper order. The Magistrate had power to *'acquit'* and that I hold he virtually did. Vide the judgment of Withers, J., in 1 N. L. R., p. 339 —No appeal lies at the instance of the complainant.

3rd February, 1899.

No. 12,931, POLICE COURT, BADULLA-HALDUMULLA.

Cattle trespass.—When trespassing animals can be killed or maimed—case for fine, not imprisonment.

(Per Lawrie, J.):—It is I think a well-established law that to kill or maim an animal when it is trespassing is not wrongful, if there be no other way of preventing the destruction of property, but that the mere fact that a beast is trespassing does not justify the killing of it. It must be proved that it was doing harm, and that there was no other way of getting rid of it. It seems to me that it would be mischief to shoot a valuable horse which had strayed into a pasture field, for even though it might be difficult to catch and secure it, it was in fact doing no harm or only a harm which could be assessed at a small sum.

Here though the buffaloes were trespassing and damaging the field, there was no attempt made to drive them away. Therefore, I think, the case falls within the law as stated by Burnside, C. J., in 7, S. C. C., p. 151, and the latter part of Sir Ed. Creasy's judgment reported in p. 70 of Ramanathan's Reports for 1863, and my own judgment reported in 3, C. L. R., p. 4.

This decision is not inconsistent with the judgments of Clarence J. in 9, S. C. C., p. 109, and Withers J. in 2 N. L. R., p. 162. The Cattle Trespass Ordinance of 1876, Section 14, seems to me to support the view I take.

The punishment of 6 months' rigorous imprisonment on each of the accused seems to me to be very excessive—It is not a case for imprisonment at all—a fine is sufficient.

3rd February, 1899.

No. 2272, POLICE COURT, HAMBANTOTA.

Theft.—Dishonestly retaining stolen goods with guilty knowledge—requisites for conviction on this charge—recent theft and presumption—Government stamp on stolen article not sufficient proof of guilty knowledge.

(Per Lawrie, J.): The complainant lost the bill book seven months before it was found in the possession of the accused; therefore, if it was stolen, the theft was not recent, and there arises no presumption that the possessor was the thief or that he had received it with guilty knowledge

Before a man can be convicted of dishonestly retaining stolen goods with guilty knowledge it must be proved:—1st That the goods were stolen. (The complainant in this case says that he lost the bill book, but it is not proved that it was taken from his possession by a thief.) 2nd. Facts must be proved from which it is reasonable to infer that the accused honestly received the stolen article, but retained it dishonestly; and, lastly, it must be proved that the accused had reason to believe that the article was stolen. (The only fact from which that guilty knowledge can be inferred here is that the bill book was stamped with the Government mark "C. A." 3 stars and a head. I understand that C. A. stands for Crown Agents),

I am not able to say that the fact that a man has in his possession an article which has the Government stamp on it is sufficient proof that he had reason to believe it was stolen.

3rd February, 1899.

No. 13,104, POLICE COURT, BATTICALOA.

Murder—preliminary investigation by Magistrate under Chapter 16—how far evidence taken here can support a conviction for an offence triable summarily.

(Per Lawrie, J.):—The appellant was the 1st accused on a charge of murder. A preliminary investigation was held by the Magistrate under Chapter 16.

Under instructions from the Solicitor-General, the accused was discharged, and was informed that he would be tried summarily under sections 437 and 367. This seems to have been a mistake, because the offence punishable under section 437 is not triable summarily.

The accused was tried under section 433 only, the evidence adduced was all one way, that he did not commit the offence, but the Magistrate convicted him on evidence taken in the murder case, holding that the witnesses there spoke the truth and that they had subsequently been tempered with.

In my opinion the conviction cannot stand. What the witnesses said against the accused in the investigation of the murder case is not evidence here. No doubt the depositions of the witnesses in the murder case could be read to discredit (or even to support) the evidence given at the later trial, but a conviction must rest or some evidence which the Magistrate believed to be true, adduced at the trial on which the conviction followed.

6th February, 1899.

No. 14,226, POLICE COURT, CHILAW.

Discharge of accused in non-summary case on instructions from Crown Counsel—Appeal lies, but interference with discretion of Attorney-General undesirable—Can irregular proceedings by Magistrate affect the latter's powers?

(Per Lawrie, J.) :—This is an appeal against a discharge of certain accused in a non-summary case. The order is that they were discharged on instructions from Crown Counsel. It has frequently been observed by this Court that though an appeal lies against such an order it is undesirable (except in very special circumstances) to interfere with the discretion vested in the Attorney-General by the 242nd section of the Criminal Procedure Code, and to order a discharge when he is of the opinion that no further proceedings should be taken in the case.

That section is consistent with the 262nd and 278th sections, which give the Attorney-General power to withdraw or discontinue the prosecution either in the District Court or the Supreme Court.

It seems to me impossible to hold that the Attorney-General can exercise the discretion only if the Police Magistrate has transmitted the proceedings to him at a certain stage.

A mistake in the proceedings by the P. M. cannot affect the Attorney-General's powers nor the relation in which this Court stands to him.

Cases may arise in which the reason for ordering a discharge is not doubt as to the accused's guilt, but because the procedure has been so hopelessly wrong that nothing but a discharge and a commencement of the proceedings "de novo" can put the case right.

There does not seem to be any reason why I should interfere and should order a commitment and trial of the accused who have been discharged by the responsible Crown Officer.

6th February, 1899.

No, 32,591, POLICE COURT, MATARA.

Gemming Ordinance—imprisonment without the alternative of fine—improper splitting of one offence into two.

(Per Lawrie, J.):—It seems excessive to impose three months rigorous imprisonment without the alternative of a fine for gemming contrary to the Ordinance.

In this case, in my opinion, it is not right to split the offence into two: 1st entry on a land, 2nd gemming.

It is sufficient to punish the gemming.

6th February, 1899.

No 6,357. POLICE COURT, KALUTARA.

False evidence—general charge not sufficent.

(Per Bonser, C. J.):—In this case the appellant, who gave evidence for the persecution, was at the conclusion of the case informed by the Magistrate that he and the other witnesses who had given evidence had, each of them, in the course of their examination given false evidence, and called upon to shew cause against their conviction.

The accused said: "I did my duty." He was thereupon convicted and fined R10.

It seems to me that this conviction cannot stand. The appellant was not informed, as he should have been, what the portion of the evidence, in the opinion of the Magistrate, was false; he was simply told that he had given false evidence. This was not sufficient information to the appellant of the matter of which he was accused.

8th February, 1899.

No. 32,397, POLICE COURT, MATARA.

Maintenance Ordinance 10 of 1889.

(Per Bonser, C. J.):—It may fairly be inferred from the fact (that the petitioner and the appellant were living together as husband and wife) that he was maintaining the child.

8th February, 1899.

No. 236/12,797, DISTRICT COURT, TANGALLE.

Causing grievous hurt:—where sentence of lashes is "ultra vires" Section 316 of the Penal Code.

(Per Lawrie, J.):—The conviction and sentence of imprisonment are affirmed: the sentence of lashes is set aside as "ulter vires."

Under section 316 lashes can be inflicted only if the person to whom grievous hurt is caused is a woman or child.

6th February, 1899.

CIVIL

No. 5, Interlocutory.

4,389, DISTRICT COURT, GALLE.

Sale in execution of money decree—incorrect notice of sale—how far material—the very foundation of the jurisdiction of Court to order sale.

(Per Bonser, C. J.):—This is an appeal to set aside a sale in execution of a money decree.

The petitioner objected to the sale on several grounds, the principal one was that the notice which was issued under Section 237 of the Civil Procedure Code seizing the property, contained only part of the property which was afterwards sold, that what was seized and what was described in the notice was a garden and *one* house of five cubits, whereas what was sold was a garden and *two* houses of five cubits. The District Judge held that that was immaterial, but to my mind it was very material, because this notice is the very foundation of the jurisdiction of the Court to order the sale, and I agree with the judgment of the full bench of Allahabad, in the case of "Mahadu Dubey *vs.* Bhola Nath Dichit," 5 Indian Law Reports, Allahabad Series 86, where they held that "a regularly prefected attachment is an essential preliminary to sales in execution of simple decrees for money, and where there has been no such attachment any sale that may have taken place is not simply voidable but 'de facto' void."

(Withers, J.):—I agree: I concur in the authority mentioned by the Chief Justice.

3rd February, 1899.

POLICE COURTS.

153. Police Court, Matara.

Committing mischief—excessive sentence—riot—'antrefois convict.'

(Per Lawrie, J.):—The sentence on two men of three months' rigorous imprisonment each for breaking a hackery worth only Rs. 18, seems to me excessive, and I rednce the sentence to a fine of R25 each with the alternative of three Weeks' rigorous imprisonment. R18 to be paid to the complainant as compensation.

If the accused are afterwards tried for the same offence under the name of 'riot,' they can plead 'antrefois convict.'

20th January, 1899.

No. 56850. Police Court, Colombo.

um mary jurisdiction of Magistrate—when accused's consent should be obtained.

Held (Per Withers, J.):—That an accused's consent to be tried should be asked for after the complaint has been entertained, if the Police Magistrate is of opinion that a criminal offence has been disclosed. (This 'dictum' is not quite in accord with 9. S. C. C. p 176).

20th January, 1899.

No. 12792. Police Court, Malakan.

Infliction of lashes.

(Per Withers, J.):—Lashes should be nflicted where hurt is caused—under §315 and the following §§ of the Penal Code—in a brutal or cruel way, or without provocation.

25th January, 1899.

No. 32429. Police Court, Matara.

Waste Lands Ordinance:—acts *mala in se* and *mala quia prohibita*—

(Per Withers, J.):—§22 of Ordinance 1 of 1897 makes acts which are in themselves perfectly lawful, offences, punishable by fine or imprisonment. It must therefore be strictly, though of course, reasonably construed. Now the dominant idea of the § is to prohibit any one from acquiring a right of property in a land proclaimed under the Ordinance, or to attempt to exercise any right of property on that land.

The language of the § seems to me clearly to express that idea: the words "enter therein or thereon" cannot be withdrawn from the context so as to include a mere casual entry.....If those words mean a casual entry on the land, all that follows would be redundant and unnecessary.

27th January, 1899.

No. 12296. Police Court, Batticaloa.

Batticaloa Procedure.

Held (Per Bonser, C. J.):—That the rule laid down in 3 S. C. R. 109 is that in default of the defendant within a reasonable time asserting his right, the Magistrate is to proceed.

27th January, 1899.

No. 17054. Police Court, Balapitiya.

Mintenance Ordinance 19 of 1889.

(Per Bonser, C. J.):—If a man of bad character seduces a girl he could not escape all responsibility for the maintenance of his child because the father (of the girl) refuses to commit the welfare of his child into unworthy hands. The judgment of Clarence, J. in 1 C. L. Rp86 that proceedings under this Ordinance are of a civil nature is to be preferred. Vide Voet. Liber XXV. tit. III. § 5 and Van Leenwen Censura Forensis B. K. I. Ch. X. § I.

The foundation of the jurisdiction of a Police Court in matters of maintenance is the civil liability already existing.

31st January, 1899.

No. 3052. Police Court, Galle.

Oaths' Ordinance—perjury—definition of 'Court' when Police Magistrate is not a 'Court'—

(Per Lawrie, J.):—The 12th § of the Oaths' Ordinance which gives power to punish summarily perjury committed in open Court seems to me clearly to give that power of punishment only to Courts and not to give it to persons having by law authority to receive evidence recognised in §§ 4,5 and 11 of the Ordinance.

The question then is whether a Police Magistrate when investigating a charge which he cannot try summarily, is a 'Court.' I am of opinion that he is not. Court is defined by the Courts Ordinance 1 of 1889 to be a "Judge empowered

by law to act judicially alone or a body of Judges empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially

It is enacted by the 17th clause of the Penal Code that a Police Magistrate exercising jurisdiction in respect of a charge which he has power only to commit for trial to another Court is not a Judge.

If he is not a Judge he is not a Court, and not being a Court, he cannot punish under § 12 of Ordinance 9 of 1895.

27th February, 1899.

DISTRICT COURTS.

No. 2559, District Court (criminal) Chilaw.

Offences under § 315 of the Penal Code—District Courts not competent to try them by Ordinance 15 of 1896. § 17. Effect of the New Procedure Code (criminal.)

(Per Withers, J.):—The District Court is no longer competent to try persons charged with offences coming under § 315 of the Penal Code.

By § 17 of 15 of 1890 it is provided that in the 7th column of Schedule II of the Criminal Procedure Code, the words 'Police Court' shall be inserted for words 'District Court' as applying to § 315. By this clause the jurisdiction of the District Court was altogether taken away. (Happily the New Procedure Code will cure what was perhaps only an inadvertent error). . . .

6th January, 1899.

No. 12976. District Court, Batticaloa.

Volnntarily causing grievous hurt—District Judges who are also Police Magistrates.

(Per Withers, J.):—A District Judge who is Police Magistrate as well is competent to try a charge of voluntarily causing grevious hurt under Ordinance 8 of 1896 although the original complaint came before the Additional Police Magistrate. 24th January, 1899.

No. 12692. District Court, Galle.

Attempting to commit house-breaking—theft—voluntarily causing grievous hurt—jurisdiction of District Court.

(Per Bonser, C. J.):—The appellants have been found guilty of attempting to commit housebreaking by night in order to commit theft and also of theft, and one of them has also been convicted of voluntarily causing grievous hurt at the same time and he has been punished separately for the theft and the hurt under § 382 of the Penal Code. The two offences are together a much more serious offence, *i. e.*, hurt in committing robbery, an offence not triable by a District Court. 27th January, 1899.

No. 4376. District Court, Badulla.

Threats—criminal force.

(Per Bonser, C. J.):—§ 486 of the Penal Code refers to threats either by writing or by word of mouth. Pointing a gun at a man is a gesturt which would cause a person to apprehend thae the person making that gesture is about to use criminal force against him—Punisbable by § 343.

31st January, 1899.

CIVIL.

DISTRICT COURT, GALLE.

Execution of judgment decrees—application made to execute decree made before enactment of the Code not an application. Under Ch XXII. of the Code, and therefore section 337 no bar to a subsequent application made before the coming into operation of the Code—under the old practice decrees allowed to be revived as a matter of course, no explanation necessary for delay in making application—3, Lorenz 210.

Per BONSER, C. J.—"The case raises an important point as to the execution of judgment decrees. It appears that the original decree was dated 10th September, 1884. Execution was taken out upon that decree, but the whole amount was not realised. In 1886, the decree was revived, and execution was taken out again in September, 1887, but the full amount of the decree was not realised.

The matter then slept until August, 1897. Before the 10 years had elapsed from the last issue of execution an application was made that the heirs of the judgment-debtor, who had died in the meantime, should be substituted on the record in lieu of the judgment-debtor, to enable the plaintiff to make an application for executing the decree.

The District Judge made an order allowing notices to be served on the heirs, but it stated that he said that it was unnecessary that an application should be made for a formal order to revive the judgment, but that it would be quite sufficient if an application were made to substitute the heirs on the record and for execution to issue against them.

That application was accordingly made, and was resisted by the heirs on the ground that there was no explanation of the delay in making application and that the application was stale.

It is admitted that it was not prescribed by law. The District Judge held that no cause was shewn against the application, and allowed execution to issue.

In my opinion that order was right. I should have been glad to find any reason for holding that the application was too late, but I have been unable to do so. The case does not come under Sec. 337 of our Procedure Code. The application must therefore be dealt with under the old practice. It has been decided by this Court, unfortunately I think, that an application to execute a decree made before the coming into operation of the Code is not an application under Ch. XXII. of the Code, and therefore that Sec. 337 is no bar to a subsequent application made after the coming into operation of the Code. It appears that decrees under the old practice were allowed to be revived as a matter of course. It was necessary to cite the debtors, but that was only for the purpose of giving them an opportunity to shew if they could that the debt had been paid or otherwise satisfied. It would appear that it was not necessary for the plaintiff to give any explanation of his delay. The case reported in 3,

Lorenz 210, seems to be clear on this point. That being so, the petitioner in this case is entitled to issue his writ.

Withers, J.—Agreed.

3rd February, 1899.

No. 962, District Court, Puttalam.

In an appeal taken against an order of the District Court "that a notice do issue be allowed."

Held (per Bonser, C. J.):—That there is nothing to appeal from : "the only order that has been made is an order that a motion, that a notice do issue, be allowed. There is no determinaton of the rights of the parties."

Withers, J., agreeing.

9th February, 1899.

No. 1866, District Court, Colombo.

Arrest of insolvent by Fiscal on incorrect warrant—unlawful amendment of incorrect warrant by District Judge does not cure defect.

In this case the appellant, who is an insolvent, was arrested by a Fiscal on a warrant stating that the debt for which he was arrested was R10,381·56. When he was brought up before the District Judge it was discovered that this warrant was incorrect —that owing to the carelessness of the Proctors who had applied for the warrant a sum of R 10,381·56 had been substituted for a sum of R3,381·56, which was the proper amount. The District Judge thereupon, being of opinion that the error was immaterial, amended the warrant there and then.

Held (per Bonser, C. J., *et* Withers, J.):—That this warrant was bad, and the subsequent amendment did not cure the defect and render the previous arrest lawful. The debtor could only be arrested for the amount of his debt and ought to be discharged, as his warrant was taken out for three times the amount of h s debt.

9th February, 1899.

No. 2,789, District Court, Negombo.

Liability of husband for wife's acts—is he liable when he joins with his wife in filing answer? *Obiter Dictum.*

In this case a father, mother and son are sued under the following circumstances :—The father was possessed of a garden which he had leased to the plaintiffs for four years, the plaintiffs allege that the family, father, mother and son, one day came and plucked the nuts from this garden and refused to allow the plaintiffs to enjoy the produce. The District Judge did not believe that the father, the 1st defendant, had anything to do with the plucking, but held that, inasmuch as he had joined with his wife in filing an answer he was jointly liable.

Held (per Bonser, C. J.):—That the husband is not jointly liable simply because he has joined with his wife in filing answer.

Per Bonser, C. J. (*Obiter Dictum*):—"An interesting question was raised in the course of the argument as to the liability of a husband for the delicts of his wife. Under the circumstances of the case it is not necessary to decide that point, but my present opinion is that the husband is liable for any injury occasioned by his wife to a third person, not amounting to a serious crime, at all events to the extent of the wife's half of the joint property or of any dowry which he may have received with her."

The judgment of the District Court was supported on the evidence.

Withers, J., agreeing.

10th February, 1899.

No. 2,067, District Court, Matara.

Motion for amendment—proper course in regard to amendments—Section 146 of the Civil Procedure Code, framing of issues after examination of parties.

In this case the Judge made an order disallowing an amendment which the plaintiff asked leave to make, because the plaintiff had not complied the conditions on which that amendment had at first been allowed. The plaintiff appealed against that order.

Per Bonser, C. J. :—"It seems to me that the motion for amendment ought not to have been allowed whether with or without any conditions, and that it was afterwards disallowed under an equally mistaken idea of procedure.

It has more than once been pointed out by this Court that the proper course to be adopted in regard to amendments was that laid down in Section 146 of the Civil Procedure Code, which has been altogether ignored in this case.

It is the duty of the Court, if the parties are not agreed as to the questions of fact or law to be decided between them, to ascertain by examination as may appear necessary, upon what material propositions of fact or of law the parties are at variance, and the Court shall then proceed to record the issues on which the right decision of the case appears to depend. The Court will then, if necessary, amend the pleadings to bring the issues and the pleadings into conformity.

Withers, J.—Agreed.

10th February, 1899.

No. 739, District Court, Ratnapura.

Donation of lands in Kandyan Provinces to temples without license from Government unlawful—proclamation of 1819 still in force—lands given without license to pass to nearest heir of donor if he sues for them within 12 months of gift, otherwise to become property of the Crown. prescription against Crown.

The facts of the case are these : On the 23rd May, 1868, a Kandyan Chief by deed dedicated and offered as a gift, "certain shares of land to the Bogoda Pansala in consideration of the faith and love he entertained towards the establishment, and for welfare to be acquired in the other world," and the deed provides that—"the Therunanse of the said Bogoda Pansala or any successor to the said Therunanse may inherit, and possess the same for ever." The present incumbent of the vihara at Bogoda is suing in this action for a declaration of title and for recovery of possession as against the present defendants, who, he alleges, are disputing his title and are keeping him out of possession. The defendants set up a defence (1) that the deed is a forgery; and (2) that they have had prescriptive possession for over 10 years.

The District Judge found that the deed was not a forgery, but he found in favour of the defendants on the 2nd issue. The plaintiff appealed.

Per Bonser, C. J.—" It seems to me that the plaintiff is not entitled to succeed in this action. These lands are situated in the Kandyan Provinces and the donor was an inhabitant of these Provinces. A proclamation of 1819, which is still in force, makes unlawful any donation of land in these Provinces to any temple without a license first obtained from Government for that purpose, and enacts that if any land is given without a license, it shall pass to the nearest heir of the donor if he sues for it within 12 months of the date of the gift, or if he does not do this, the land is to be forfeited to the Crown. In this case no license was obtained and the heir put in no claim and the result was that the land vested in the Crown. Sufficient time has not elapsed for any person to obtain prescriptive title by possession against the Crown. Under these circumstances the plaintiff's action must be dismissed.

7th February, 1899.

No. 1,243, District Court, Jaffna.

Partition action—effect of objection raised that plaintiff has no title—evidence to be taken before objection can hold.—3 N. L. R., p. 12.

In this case, an action for partition, the District Judge relying on 3 N. L. R., p. 12, dismissed the plaintiff's action upholding the objection raised that plaintiff could not succeed inasmuch as the defendants had denied her title to the land altogether.

Held (Per Bonser, C. J., *et* Withers, J.): That in partition actions, when objection to title is raised, the objection of itself is not sufficient ground for dismissing the action, but evidence must be taken, and if it was found that plaintiff was trying to have a question about his title settled by a partition action, then the action should be dismissed.

(3 N. L. R. 12 :—" The primary object of partition proceedings is not to try and determine contested questions of title, and a contest as to title should not be made the subject of such proceedings. They are really meant for those whose shares in the land are admitted, at least to some extent.")

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FINIS.