Ceylon. Supreme Court

THE

SUPREME COURT REPORTS

BEING

Reports of Cases Decided

— BY —

THE SUPREME COURT OF CEYLON,

WITH A

DIGEST,

EDITED BY

CHAS. M. FERNANDO, HERMANN A. LOOS,

AND

H. A. JAYEWARDENE,

ADVOCATES.

Volume II.--1893.

Colombo:

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1894.

Rec. July 8, 1903.

DIGEST.

VOLUME II.—(1893.)

2—Judgment—Appealable Order—Civil Procedure Code, Sects. 508, and 754—Courts Ordinance, section 39.

The plaintiff, a Nindagama proprietor, sued the defendants as paraweni tenants of the Nindagama for services alleged to be due but not performed by them. The defendants filed answer objecting, as a matter of law, that the plaint disclosed no cause of action. The District Judge upheld the claim, and decreed a sum of Rs. 121.25 to the plaintiff, reserving for further adjudication the proportion payable by each. The defendants appealed.

Held, (WITHERS. J. dissenting) that the order was an appealable one.

D. C., Kegalla, No. 224. SIATU *v.* SADUWA 123

3—*See* REVISION.

ARRACK.

Arrack—Possession—Removal—"A gallon or thereabouts," Ordinance No. 10 of 1844, section 33.

Section 33 of Ordinance 10 of 1844 enacts that "no spirit distilled from the produce of the cocoanut or other description of palm, or of the sugar cane, in any quantity exceeding two quarts, shall be removed without a permit accompanying the same....."; —

Held, that, under this section, it was not an offence to be in possession of more than two quarts of arrack without a permit.

The accused was charged with "having been in possession of one gallon of arrack or thereabouts without a permit.

Held, that the charge was bad, inasmuch as a gallon or thereabouts may be less than two quarts.

P. C., Kandy, No. 17,130. DISSANAYEKE *v.* APPUHAMI ... 151

BOLTING HORSE, ACCIDENT CAUSED BY.

See NEGLIGENCE

BONA FIDE BELIEF OF ACCUSED THAT THE PROPERTY IS HIS OWN.

See CRIMINAL LAW, 6.

BURDEN OF PROOF OF NEGLIGENCE.

See NEGLIGENCE.

CHARGE.

1—Charge—Warrant of Commitment—Jurisdiction of Police Court—Escape or rescue under sections 219 and 220 of the Ceylon Penal Code.

The charge in a prosecution before a Police Court for escape or rescue under sections 219 and 220 of the Ceylon Penal Code must disclose the nature of the offence for which the prisoner escaping or rescued had been taken into custody, it being competent to a Police Magistrate to try such a charge where the escape or rescue was from custody in which the prisoner was lawfully detained for an offence with which he was charged, or of which he had been convicted, only when such offence was itself cognisable by a Police Court.

The warrant of commitment in the present case not disclosing the Magistrate's jurisdiction to try the charge on which the prisoners had been convicted, the Supreme Court held that, even if warrants of commitment were open to amendment, the present one could not be cured in consequence of the defective nature of the charge in the case.

P. C., Badulla, No. 10,944. RAMBUKPOTHA *v.* MENICA ... 73

Ordinance No. 12 of 1890 enacts that a Police Court "lawfully established in any division shall be holden by and before the Police Magistrate appointed thereto, at any convenient spot, within the limits of such division":—*semble* per LAWRIE, A. C. J., that it is desirable that, in the case of Police Courts held at different places, as permitted by this Ordinance, the Police Magistrate shou'd state, as a matter of record, that the place at which he holds his Court is within his division, and that it is at a convenient spot for the trial, and that he had given due notice that he would sit there.

Observations on the inconvenience and hardships to which suitors and witnesses having to attend the Police Court, to which the present case belongs, are exposed.

On a charge, under section 394 of the Ceylon Penal Code, of dishonestly retaining stolen property, knowing or having reason to believe the same to be stolen, it is necessary that the prosecution should prove facts from which it could reasonably be inferred that the possession by the accused was dishonest.

2.—Contempt of Court — Jurisdiction — Penal Code, Sect. 223.

Accused were convicted, by the Commissioner of the Court of Requests of Kurunegalle, of contempt of Court, in that they interrupted the business of the Court by conducting, close to it, a noisy procession.

Held, that the conviction was wrong, inasmuch as the commissioner was not competent to try an alleged offence of contempt not committed in the presence of his Court, and not committed in the course of any act or proceeding in his Court and declared by any law to be punishable as contempt of Court.

If the conduct of accused amounted to an offence at all, it was that described by Section 223 of the Penal Code, and triable only by another and competent court. Moreover, the charge should have specified the judicial proceeding in which the Court was engaged when interrupted.

3.—Ordinance No. 14 of 1878, Sections 5 and 7—Repeal—Weights and Measures — Striker — Penal Code, Sect. 289.

Section 5 of the Weights and Measures Ordinance No. 14 of 1878 specially provides against the use of a measuring striker which is not round and straight and of the same diameter from end to end.

Held, that this section has not been affected by the repeal of section 7 of the same Ordinance, which makes the use of a striker not in conformity with the terms of this section, an offence punishable with fine or imprisonment, and that the provision of this section now comes within the provision of section 289 of the Penal Code, which enacts as follows :—

"Whoever wilfully neglects or omits to perform any duty imposed upon him by, or wilfully disobeys or infringes, any provision of any Ordinance or statute heretofore or hereafter to be enacted, for which neglect, omission, disobedience or infringement, no punishment is or shall be, by this Code, or any other Ordinance or statute otherwise specially provided, shall be punished with a fine."

4—Contempt of Court—making of false statement in affidavit of service of process — Penal Code, Sect. 223—Civil Procedure Code, Sects. 372 and 797.

The making of a false statement of fact in an affidavit is not a contempt of Court, but the making of a false statement of fact by an Officer charged with the execution of process in his affidavit of service of process is an offence, which is punishable, as contempt of Court, under Sect. 372 of the Civil Procedure Code.

CRIMINAL PROCEDURE CODE.

Section 34.

See CRIMINAL LAW, 7.

Chapter V.

See GAMING, 3.

CRIMINAL TRESPASS.

See CRIMINAL LAW, 5.

CROSS DECREES.

Cross decrees set off—Civil Procedure Code, Sect. 45.

A decree obtained against the husband alone, cannot be set off against a decree obtained by the husband and wife against the decree holder.

A decree obtained against a person as administrator, cannot be set off against a decree obtained by him personally.

D. C. Matara, No. 35,936. MISSY NONA and her husband *v.* JAYASOORIA and another 79

CROWN GRANT.

Crown Grant—Presumption of title—Rebuttable—Sect. 6 of Ordinance No. 12 of 1840.

The statutory presumption created by section 6 of Ordinance 12 of 1840, that all "Chenas and other lands which can only be cultivated after intervals of several years, shall be deemed to be forest or waste lands" and therefore the property of the Crown, is a rebuttable presumption.

LEWIS *v.* KIRI APOO 5 S. C. C. 194 followed.

Per WITHERS, J.—The presumption of title thus created attaches to the land after it has passed from the Crown to a private subject.

D. C. Matara, No. 230. WEERESEKERE *v.* SEELAWANKA. 12

DECREE.

Decree—Execution for part of Debt—Waiver—Civil Procedure Code, Sect. 337.

A judgment creditor may not issue execution for a part of the debt, unless he waives his right to recover the rest, and each of several joint judgment creditors may not issue separate writs to recover a fractional share of the debt due to them jointly.

D. C. Matara, No. 34,620. IBRAHIM *v.* TILLEKERATNE. ... 67

DECREE, EXECUTION OF.

Execution of decree—Refusal to yield up possession—Contempt of Court—Civil Procedure Code, Sects. 326, and 800.

Refusal to yield possession of lands under a decree of Court does not amount to a contempt of Court.

D. C. Criminal, Chilaw, No. 26,193. FERNANDO *v.* FERNANDO. 145

DECREE-HOLDER, ACTION BY.

Decree-holder—Sale in execution—Unsatisfied decree—Necessary averments in plaint—Civil procedure Code, Sect. 247.

In an action by the decree-holder under section 247 of the Civil Procedure Code, to have it declared that certain properties are liable to be sold in satisfaction of the decree in his favour, it must be alleged and proved that at the date of the institution of the action the decree was unsatisfied.

D. C. Kalutara, No. 640. PERERA *v.* ABERAN. ... 119

Per BROWNE, J.—An heir is liable to the extent of the property of the deceased which has come into his possession, and a decree could be entered against the estate of the deceased.

D. C., Negombo, No. 559, PULLE *v.* PULLE 105

INJUNCTION.

See MANDATORY INJUNCTION.

INTERRUPTION OF TENANT'S ENJOYMENT OF LEASED PREMISES.

See LANDLORD AND TENANT 2.

ITINERATING POLICE COURT.

See CRIMINAL LAW, 1.

JOURNEYMAN ARTIFICER.

Journeyman Artificer — Machine-ruler — Ordinance No. 11 of 1865, Sections 3, 6, 7 and 11—Charge—Alteration of.

A Machine-ruler, who has entered into a contract of monthly service, is a "Journeyman Artificer" within the meaning of Ordinance No. 11 of 1865.

P. C., Colombo, No. 26,803. CAVE *v.* WILLIAM... ... 157

JUDGMENT.

1.—Judgment—Revival of—Adjustment—Certificate under section 349 Civil Procedure Code.

Under section 349 of the Civil Procedure Code, "if any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, he shall certify such payment or adjustment to the Court whose duty it is to execute the decree. The judgment debtor may also by petition inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified."

Held, that, notwithstanding the revival of judgment, the Court may record as certified on the petition of the judgment debtor any adjustment or payment made before such revival.

D. C., Kalutara, No. 39,788. SILVA *v.* PODISINNO, ... 18

See APPEALABLE ORDER, 2.

JUDGMENT BY DEFAULT.

Judgment by default—Notice, want of—Setting aside judgment—Claim in reconvention.

A judgment by default, having been set aside, the second defendant was allowed to defend the action on the grounds that he had no notice of the proceedings, and that he disclosed the substantial defence of payment.

The second defendant pleaded payment, and also made a claim in reconvention for damages, accrued since issue of summons in plaintiffs action by reason of alleged illegal acts done by the plaintiff.

Held, that the defence of payment and counter claim could not be pleaded together.

D. C. Galle, No. 54,611. CORNELIS *v.* DE SILVA. ... 83

2.—Landlord and Tenant—Liability of landlord to put tenant in possession of premises let—Interruption by landlord or strangers of Tenant's enjoyment of the premises.

Per WITHERS, J.—In an action for rent by landlord against tenant it is a good defence that the landlord did not implement the contract of letting by putting the tenant in possession of the property let, and if the tenant had advanced money by way of rent for the use of the premises of which the landlord had failed to put him in possession, he might recover the money so paid as money had and received by the landlord for the use of the tenant.

Interruption by the landlord, or any one under him, of the tenant's enjoyment of the premises let, is no answer to a claim for rent due and payable before such interruption, but it is ground for a tenant's claim to have the contract of lease cancelled and for recovery of damages consequent on the interruption.

Interruption of a tenant by strangers after the tenant has been put in possession by the landlord is no answer to a claim for rent, unless such interruption was followed by eviction in due course of law, and it is then only an answer to a claim for rent that has become due after such interruption.

Such interruption is no ground for a claim to damages or cancellation of the lease, unless it was followed by eviction in law and due notice had been given to the landlord, in the proceedings terminating in execution, to warrant and defend the defendant's title.

D. C., Chilaw, No. 433. SAIBO *v.* APPUHAMI ... 126

LAST WILL.

Last Will—Incidental proof—Inconvenience—Probate.

A Court may, in its discretion, allow a Will to be proved incidentally in the course of an action; but it would be highly inconvenient to do so.

Where a Will is sought to be so proved the Court would be well-advised if it adjourns the case, to enable the parties to prove the Will in independent proceedings.

D. C., Negombo, No. 16,443. FERNANDO *v.* FERNANDO ... 150

LEASE.

1.—Lease—Covenant to pay rent—Breach of—Forfeiture and Re-entry—Equitable relief.

A Court has power, in the exercise of its equitable jurisdiction, to grant relief—where the circumstances warrant such relief—to a lessee against a clause of forfeiture and re-entry for breach of covenant to pay rent.

The terms of an indenture of lease can only be altered by an independent contract satisfying the statute of Frauds.

Per LAWRIE, A.C.J.—In equity the construction put on a clause of forfeiture of a lease on nonpayment of rent is that it is a mere security for the payment of rent, and as the breach of that covenant is capable of a just compensation, a Court of equity may award the compensation and abstain from enforcing the forfeiture.

D. C., Kandy, No. 5,470. SANDFORD *v.* DON PETER ... 35

2.—Lease—Breach of covenant for quiet possession—Action against lessor—Damages.

Plaintiffs, and 5th defendant, got a lease from the first four defendants. At the date of lease, the land demised was under lease to lessees, of whom the 5th defendant was one. These lessees having refused to give up possession, the plaintiffs sued for damages consequent on the breach of covenant for quiet possession.

Held, (*per* BURNSIDE, C J. and WITHERS, J.) that some co tenants cannot sue a landlord for the breach of a covenant to let them into premises at a day fixed under a demise for a term of years, when one of them has been let in, and enjoys the benefits of the lease made jointly to him and those whom he has tortiously excluded from the premises.

Per LAWRIE, J.—If under a lease the lessor impliedly contracts to give the lessee possession at the commencement of the term, and if he fails to do so by reason of a previous tenant wrongfully holding over, the lessee may recover damages, and is not driven to bring ejectment against the previous tenants.

LIABILITY OF LANDLORD TO PUT TENANT IN POSSESSION OF PREMISES LET

See LANDLORD AND TENANT, 2.

LOAN

Loan—Hire—Destruction of thing lent or hired—Liability of bailee.

Where a person borrows or hires a thing, he is bound to return it, unless he is prevented from doing so by something for which he was not responsible.

In an action for damages for non-return of a bull loaned to the defendant, he pleaded that it was killed by a leopard while in his possession.

Held, a bad plea, unless it could be shown that the defendant had taken the utmost care of the animal, or that it was at the time of the accident under the care of the plaintiff's servant.

MANDATORY INJUNCTION.

Mandatory injunction—Erection of Wall—Exclusion of light and air—Prescription—Laches.

In an action for an injunction restraining the defendant from erecting buildings, so as to prevent free access of light and air to plaintiff's house, and also for a mandatory injunction ordering the defendant to remove a building already erected.

Held, that the plaintiff was entitled to an order restraining the defendant from constructing any further building so as to prevent free access of light and air to plaintiff's house.

Held, also, that the plaintiff was not entitled to a mandatory injunction ordering the defendant to remove the building already constructed, she having been guilty of laches in having allowed 3 or 4 years to elapse before applying for such remedy.

contended that no binding contract or mortgage over the timber was made out, but taking that as proved, it was further contended that the right under the contract was not a right that could defeat execution under defendant's writ.

Held, that it never was the law before the Civil Procedure Code that mortgaged property could not be seized and sold under a writ of *fi fa* for the levy of a money judgment, and that the law is still unaltered.

Held, also, that if a claimant has goods of the debtor under a writ of lien, the judgment creditor must first satisfy the lien before he takes the property in execution.

Held, also, that an unsuccessful claimant has no right, under the circumstances to bring an action under section 247.

Observations by BROWNE, J. on the current of authorities.

D. C., Ratnapura, No. 225. WIJEWARDENE *v.* MAITLAND 90

NEGLIGENCE.

Negligence—Bolting horse—Burden of proof—Evidence.

The mere happening of an accident does not throw on the defendant the onus of disproving negligence, nor does the mere fact of a horse bolting raise a *prima facie* presumption of negligence.

D. C., Galle, No. 1,391. SILVA *v.* PATE 71

NONSUMMARY CHARGE.

See PRELIMINARY INQUIRY.

OBSTRUCTION OF PERSON EXECUTING THE LAWFUL ORDER OF A PUBLIC SERVANT.

Obstruction of person executing the lawful order of a public servant—Penal Code, Sect. 183.

In order to support a conviction under Sect. 183 of the Penal Code for obstructing a person executing the lawful order of a public servant, the order must be one which it was competent to the public servant to make.

P. C., Chilaw, No. 5,225. TELESINGHE *v.* ANTHONY ... 129

ORDINANCES.

No. 12 of 1840, Section 6.

See CROWN GRANT.

No. 10 of 1844, Section 33.

See ARRACK.

No. 11 of 1865, Sections 3, 6, 7 and 11.

See JOURNEYMAN ARTIFICER.

No. 11 of 1865, Section 11.

See LABOURER.

No. 16 of 1865, Section 16.

See TOM-TOM.

No. 22 of 1866.

See APPEALABLE ORDER, 1.

No. 14 of 1867, Section 7.

See TOLL.

7.—Defective plaint—Fresh action—Period of prescription and limitation—Civil Procedure Code, Sects. 247, 406 and 407.

On a plea of non-joinder an action under Sect. 247 of the Civil Procedure Code was withdrawn and a fresh action brought.

Held, that Sect. 407 of the Civil Procedure Code applied, and that the plaintiff was bound by the period of limitation of fourteen days as recited in Sect. 247, as if the first action had not been brought.

2.—Plaint—Prolixity—Summons—Issue and Service—Irregularity—Waiver—Civil Procedure Code, Sections. 55, 92, 356 and 756.

Where a plaint is so prolix and embarrassing as to be oppressive, it is the duty of the defendant, who is summoned to answer it, to apply to the Court, at the earliest opportunity, to have the plaint taken off the file.

Where the defendants appeared in obedience to summons and applied for, and obtained, 14 days' time to file answer, and on the day before the answer was due moved to have the plaint taken off the file as embarrassing and unintelligible.

Held, that the motion was made too late, and that the defendants having obtained time to file answer must be considered to have waived all objections to the plaint and the summons.

Per WITHERS and BROWNE, J.J. Issue of summons unauthorized by the Judge's signature and entry of date is irregular.

Per WITHERS, J.—Where summons has not been duly served in accordance with the provisions of section 55 of the Civil Procedure Code, the defendant is not bound to appear and no judgment by default can be entered against him. If he appears he cures the irregularity.

Per BROWNE, J.—Notice of appeal under section 756 of the Civil Procedure Code must be served by the Fiscal.

PLEADINGS, AMENDMENT OF.

Pleadings— Amendment—Notice—Postponement—Costs —Civil Procedure Code, section 93.

On the day of trial the Court, in the presence of the parties, allowed the plaint to be amended by the addition of certain words. The amendment not being a material one in that it did not alter the issues in the case :—

Held, that the defendant was not entitled to a postponement of the case.

Per WITHERS, J.—An order allowing an amendment should direct the delivery of the amended pleading within a given time to the opposite party.

POSSESSION OF ARRACK.

See ARRACK.

PRELIMINARY INQUIRY.

Preliminary inquiry—Non-summary charge—Discharge by Police Magistrate—Appeal.

A Magistrate holding a preliminary inquiry into a non-summary charge has the discretion of deciding whether there are sufficient grounds for committing the accused for trial.

It is the duty of the Magistrate in such a case to ascertain whether there are grounds for putting the accused to the ignominy and expense of a trial; and the Magistrate would fail in his duty, if he send up a case for trial where he considered the prosecution was utterly unreliable, and that there was no possibility of a conviction.

P. C., Negombo. 16,101, Mendis *v.* Appuhami ... 148

PRESUMPTION OF TITLE.

See CROWN GRANT.

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See LEASE, 1.

REFUSAL TO YIELD UP POSSESSION.

See EXECUTION OF DECREE.

REMOVAL OF ARRACK.

See ARRACK.

RESTITUO IN INTEGRUM.

See LANDLORD AND TENANT, 1.

REVISION.

Revision—Appealable order—Decree signed by Judge after he has become "functus officio."

An order ending thus—"It is ordered that the libel be rejected as it has not been amended as directed by the Court. The plaintiff will pay the defendant his costs of the action"—is an order complete in itself and not requiring to be followed by a formal order, and is a final order against which an appeal lies.

A person, who has ceased to hold office as District Judge, has no power to sign the formal decree consequent on a judgment delivered by him when in office.

As a general rule, the Supreme Court will not, except in very exceptional cases, review an order from which an appeal might have been, but has not been, taken.

D. C., Kegalle, No. 335, DAVIDSON *v.* SILVA 10

REVIVAL OF JUDGMENT.

See JUDGMENT, 1.

In a prosecution under section 90 of Ordinance 16 of 1865, it is not incumbent on the complainant to allege and prove that beating a tom-tom was calculated to frighten horses, or that it was done by night so as to disturb the repose of the inhabitants. It is enough to allege and prove that the accused, not being under Military Regulations, beat a tom-tom, within a town, without a licence.

M. C., Colombo, No. 7,707, VAN HOUTEN *v.* SOOTA ... 160

TORT.

Tort—Actio personalis moritur cum persona—3 and 4 Will IV. C. 42—Wrong done by deceased—Liability of legal representative.

Per LAWRIE, J.—The law in Ceylon in regard to the liability of the legal representative of a deceased for any wrong committed by him in his life time is governed by the Act 3, Will IV., C. 42. The legal representative must, however, under the Act be sued within six months of his taking upon himself the administration of the estate.

D. C., Galle, No. 1,014, WEERASIRI *v.* SANCHIHAMY ... 6

UDAYAR'S SCHEDULE.

See THESAWALAME.

WAIVER OF IRREGULARITIES.

See PLAINT. 2.

WARRANT OF COMMITMENT.

See CHARGE, 1.

WEIGHTS AND MEASURES.

See CRIMINAL LAW. 3.

WRIT AGAINST PERSON.

Writ against person — Rupees two hundred — Partial recovery—Action for realisation of mortgage—Form of Writ—More than one judgment debtor—Separate Writ—Civil Procedure Code, Sections 298 and 396.

On the return to a Writ of Execution against property, in satisfaction of a decree awarding a sum of Rs. 200 and over, that property of a judgment debtor has been levied as a part of the sum so decreed, and that the Fiscal can find no further property of the debtor out of which to levy the unsatisfied balance, the Court may issue a warrant for the arrest of the judgement-debtor.

D. C., Colombo, 2,670, DE SILVA *v.* SELLA UMMA. 153

TABLE OF CASES REPORTED.

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BY THE

SUPREME COURT OF CEYLON.

Edited by CHAS. M. FERNANDO, *Advocate.*

BEFORE *Lawrie*, A. C. J. AND *Withers*, J.

May 9 and 16, 1893.

STORK *v.* ORCHARD and another,

[*The Comillah Estate Case.*]

[No. C. 2,533 D. C., COLOMBO.]

Landlord and Tenant—Misdescription of property leased—Abatement of Rent—Roman Dutch Law—Restitutio in integrum—Notabilis error.—

Per LAWRIE, A. C. J.—In the absence of fraud on the part of the lessor, when lands are leased and there is no dispute as to the lessee having received the whole estate, which he meant to take on lease, he is not entitled to abate the rent from the price on account of a mere error in setting forth the property by way of description, as consisting of so many acres, or yielding such an amount of rental.

The remedy of *Restitutio in integrum* is available in all cases where the contract can be shewn to have proceeded in total misconception.

Per WITHERS J.—Where the lessor has made out the property to be much larger than it is actually found o be—*i. e.*, where the misdescription in regard to the quantity is a notable one, the lessee is entitled to have the rent reduced in proportion to the small extent of ground.

The following judgment, delivered by the learned District Judge [Browne] on October 17, 1892, fully set out the facts of the case:—

STORK
v.
ORCHARD.

[THE COMILLAH ESTATE CASE.]

In this action plaintiff sues the defendants to recover from them Rs. 1,500 arrears of rent for the period from 1st June, 1891, to the 28th February, 1892, due on a lease by him to them of the Comillah Estate, which he and they entered into on the 7th March, 1890, and he prays also a cancellation of the lease. The defendants deny that they have committed any breach of the lease, for that, at the execution of the lease, plaintiff represented to them that the extent of tea under cultivation was eighty acres, and the rent was by them calculated on the faith of such representation, whereas the true acreage was under 48 acres, and that they on discovery of the discrepancy claimed refund of past overpayments and reduction of future instalments of rent to the amount of Rs. 200 a quarter. The plaintiff, in reply denied that he had made any such representation but that before the agreement for the lease he had put the defendants on enquiry as to the areas within the estate of tea, cocoanut and paddy cultivation, and that they had inspected the estate and satisfied themselves thereof before the agreement of lease had been entered into. About the middle of January, 1890, the estate in question was advertised for sale or lease, and whether with or without the plaintiff's authority, it was therein described as of certain acreage in these different cultivations among which was 80 acres of tea. Negotiations for its lease were entered into at first between plaintiff and second defendant (who has not given any evidence thereof,) and afterwards between plaintiff and 1st defendant. Both of these gentlemen have been examined, and in many respects in their recollections of what then passed as to acreage, they are entirely at variance with one another. 1st defendant asserts that in at least two interviews plaintiff informed him there were fully 80 acres of tea on the estate, while plaintiff asserts that, when 1st defendant once questioned him, he said he had no survey and could not give him the acreage. So far as it is necessary to come to a conclusion thereon, my finding is that acreages were mentioned and were given approximately, but without any assurance of their certainty or accuracy. It is but only reasonable to assume as probable that the tea

planter would desire this information and that the intending lessor would inform him but without any positive pledge thereof. In the conflict of recollection I am guided to this conclution, chiefly by the two letters of that time, A and B, of 27th February and 1st March. When these were written the lease had actually been partially drafted, and the parties had conferred over its terms in the Notary's Office. There was nothing then in it respecting acreage. But 1st defendant, on his return home, wrote to the Notary, "There is one thing I want you to put in the lease deed, a clause with the acreage stated something like the following:—

Cocoanuts so many acres cultivated
Tea do do
Paddy do do."

He did not quote therein any figures as having been given to him by the plaintiff. And after conferring with plaintiff Mr. Staples, the Notary, in reply, wrote "Dr. Stork has given me the approximate extent of the several plantations on the estate, as he is not in possession of a general plan shewing the exact extent of each plantation. The extents given, he assures me, are as nearly accurate as possible." There is no reference here to any previous express disclaimer of knowledge or responsibility or to the incident of which plaintiff has deposed of 1st defendant asking, and being given, these figures purely to assist him to strike the average of cost of manufacture. I do not feel I can rely on the recollection of either gentleman as being thoroughly accurate. But to my thinking the rights and liabilities of the parties have to be decided upon the application of the law bearing on the question to the agreement of lease itself and to the representation contained therein ; for the result of the correspondence A & B was that thereafter, at first defendant's instance and plaintiff's consent, the premises demised by that agreement were therein described to be "all that cocoanut and tea plantation comprising twelve allotments—now forming one property called and known as the Comillah Estate, containing in extent 310 acres more or less, and consisting of about 180 acres under cocoanut cultivation, 80 acres under tea, about 20 acres of paddy land, about

STORK v. ORCHARD. [THE COMILLAH ESTATE CASE.]

15 acres reserve forest, and about 15 acres chena land," of which the several 12 allotments with their several metes and bounds, were then particularized. This is a representation by the plaintiff, who, as the 1st defendant has already been informed, has assured the notary that it is as nearly as accurate as possible—and as to this there is no question of inaccuracy of recollection. What is the effect of such a representation, even when the first defendant has been at pains himself to visit the estate and inform himself of all particulars thereof? Plaintiff might have declined to state any particulars at all when he received letter A or to do more than lease the estate as a corpus; or he might have in reply and in the agreement given particulars to the best of his knowledge, but have stipulated that the lessor was not to be responsible for the quantity stated. But he has suffered the representation to appear on the face of the agreement as an absolute statement by himself, and under the law as laid down in Voet xix. 2.26, with which must be read xviii. 1.7, is clear that he having represented the extent of this cultivation to be much greater than what was in fact delivered to the lessee to enjoy, the rent must be diminished in proportion to the deficiency in quantity, which I hold to have been 30 acres out of 80, as I do not consider it clearly proved that defendants are responsible for any abandonment. That the plaintiff is not relieved from his responsibility for the statement by the 1st defendant's inspection of the land will be seen from Smith vs. Land and House Property Corporation, 51 Law Times 718, when a sale rescinded by reason of a description having been given of the property which it would not bear, although the purchaser's agent had before purchase inspected the property and reported unfavourably upon it. As to the time from which the defendants are entitled to have a reduction of their rent made, I hold upon the evidence that they were put upon inquiry when at the end of their first year's working they surmised by the loss sustained that the acreage must be deficient, and they then made prompt ascertainment of the fact by survey and claim for refund and reduction. Though in the absence of all averment or proof of fraud on the erroneous representation,

they cannot recover damages from plaintiff, they are yet entitled to a refund or (in this case) a credit for all overpayments and against the contention in the 4th paragraph of the replication, I hold they are entitled to be credited with a refund of excess payments in the past, and were entitled to withhold payment of rent so long as the payments already made covered what would be due for rent computed on the reduced rental. The amount of reduction would be 3/8 of so much of the rent as may be calculated to have been paid by them for the tea portion of the estate. The gross yield of the other productive parts of the estate has been proved to be 30,000 coconuts @ Rs. 27 = Rs. 810 and 4 bushels paddy. Apportioning Rs. 600 as the rental therefore for all save the tea land, would leave Rs. 1,500 as the rental for the tea land, and 3/8 thereof would reduce the rental by Rs. 523 a year, *i.e.*, to one of Rs. 1,475. The accounts between the parties would, therefore, stand thus :—

Rent from 1st March, 1890 to 28th Feb. 1892.		
2 years at Rs. 1,475 =	Rs.	2,950
Rent paid by defendants	,,	3,000
Overpaid by defendants	Rs.	50

At the institution of this action the defendants, therefore, had fully paid all the rent due by them, under this finding, and I cannot hold that they have forefeited their rights under the lease.

I dismiss plaintiff's action and enter judgment for defendants for Rs. 50 and costs of suit.

The plaintiff appealed.

Layard, *A.-G.* (*Morgan* with him) for plaintiff appellant, *Dornhorst* (*Grenier* with him) for defendant respondent.

Cur. adv. vult.

On May 16, 1893, the following judgments were delivered:—

LAWRIE, A. C. J.—I take the law to be that in the absence of fraud on the part of the lessor, where lands are leased and there is no dispute as to the lessee having received the whole estate which he meant to take on lease, he is not entitled to abatement from the price on account of a mere error in setting forth the property by way of description, as consisting of so many acres or yielding such an amount of

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rental. On the other hand when the lessee does not get the whole estate, he may either claim a deduction in respect of the part of the subject thus withheld whereever it is so distinct that its value may be separated, or insist on the ground of error *in essentialibus* upon a *restitutio in integrum*. The latter remedy is available in all cases where the contract can be shewn to have proceeded in total misconception, and is available to the lessor equally with the lessee. I am of opinion that the lessees here got the whole estate which they meant to take on lease. They had seen it more than once, it lay within a ring fence; they got all the land they expected to get. If there was an error in the description the doctrine of *caveat emptor* applies; but I think that there was not an error *in essentialibus*, and the error in setting forth, by way of description, the manner in which the land was planted, the extent under one crop, the extent under another, the quantity of woodland, did not give them a right to abatement as to *restitutio in integrum*, I would, therefore, give judgment for plantiff with costs.

WITHERS, J.—By an indenture made between him and the defendants on the 9th day of March, 1890, the plantiff demised and leased to the defendants what is described in the plaint as "all that coconut and tea plantation called and known as Comillah Estate" for a term of 5 years from the 1st of March, 1890, at a yearly rent of Rs. 2,000 payable quarterly on the 1st day of March, June, September and December in each and every year. The payment of rent as aforesaid was covenanted for by the defendants. There is a stipulation in the instrument of demise that, if the rents thereby reserved shall be behind and unpaid for 30 days after any of the days or dates on which the same shall become due and payable, it shall be lawful for the lessor to cancel and determine the lease, and to re-enter and take posession of the premises, and to recover the arrears of rent.

The plaintiff under this stipulation claims to recover the premises as well as arrears of rent which were behind and unpaid for thirty days on three successive quarters, *i.e.*, the 1st of September, and then 1st of December 1891, and the 1st of March 1892, the breach of convenant to pay rent in terms of the de-

mise being plaintiff's cause of action. The answer to this claim commences with an admission of the plaintiff's legal right to have what he is here suing for, and is followed by what is intended as an equitable defence. The second paragraph of the answer contains the case of the defence, the nature of which is not, to my mind, very clear. However I take it to be this,—"You, the plaintiff represented that the estate you let to us for a term of years comprised within its boundaries a block of 80 acres in tea which induced us to offer to you the rent appearing in the executed lease; as a matter of fact, there was deficiency of more than 30 acres as regards the block of tea, and we are entitled to have the rent reduced proportionately, and when what we have overpaid you is set off against the reduced rents admittedly in arrear, it will be found that we owe you nothing on account of rent, and you are therefore not entitled to eject us."

What is not quite clear to me is whether the defendants intend to allege in the second paragraph of their answer, that the calculation of rent was with the knowledge of the lessor principally and mainly based on the extent of land under tea, and that the sum eventually offered, and accepted, was settled by and because of the representation that as much as 80 acres of the land demised, was under tea. If this is what is meant by the defence, I will dispose of it at once by saying, as the learned District Judge finds, that the facts proved do not support the suggestion, to put it briefly, that the Comillah Estate was let and hired as a tea Estate and little or nothing more. If it is meant, as I should construe it, viz: "our offer of rent was as high as it was because of the representation that 80 acres were in tea, and we must have our rent reduced proportionately, as 30 acres and odd were not under tea" that is another matter. What was demised according to the instrument of demise was "all that coconut and tea plantation and estate comprising twelve allotments of land all lying contiguous to each other and now forming one property called and known as the Comillah Estate . . . containing in extent about 310 acres more or less and in the schedule hereto more particularly described," a schedule to which in compliance with the request of the defendants during the negotiations

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for the lease, the following particulars were added, "and consisting of about 180 acres under coconut cultivation, *about 80 acres under tea*, about 20 acres of paddy land, about 15 acres of reserved forest, and about 15 acres of chena land."

It is admitted that the plaintiff's misrepresentation as to the acreage under tea was quite innocent, so that no question of deceit is here raised. It was contended, but I think unsuccessfully, that as this was a lease of premises *ad corpus*, fraud must be alleged and proved against the lessor before the price could be reduced on account of a diminished extent short of *enormis laesio* and the authority was cited of Voet Lib. xviii. *Tit* 1 S. 7. On the contrary, this very chapter of Voet is an authority for the statement that this contract of lease was at least as much *ad quantitatem* as *ad corpus* and the discrepancy being a "*notable*" one the price should be proportionately reduced—see the same chapter. Purchase and sales, are there being discussed, but letting and hiring was in this respect governed on the same principles. See the authority cited to us in Voet xix. 11. 26. "If the lessor has made out the property to be much larger than it is actually found to be, the rent must also be reduced in proportion to the smaller extent of ground." The vendee in the one case had his relief under the *actio empti* and the lessee under the *actio locati*. I conceive then that in the circumstances, the defendants were entitled to a diminution of rent in view of the deficiency of the acreage under tea; but the question remains, to what relief, if any, does this defence set up by the defendants entitle them? It appears to me that the equitable defence set up grows out of a right of counterclaim and exists only because of the right in the defendants to claim a diminution of the rent past, present, and future, a reform of the instrument of demise as to the quantity of land under tea, and as to the amount of rent payable thereunder in consequence of the diminution they prove themselves entitled to. They must, in my opinion, successfully establish this affirmative demand, to justify the judgment herein, dismissing the plaintiff's claim with costs. On the lease as it stands unreformed, they have no defence to the claim for re-

entry, or the payment of arrears of rent. They do not allege their readiness to hold to the lease, with a rent diminished by the amount found in their favor. It was, be it remembered, open to the defendants, on discovery of the difference of extent of land under tea, to have brought an *actio locati* to have the lease reformed, the rent diminished proportionally, and a declaration that the excess overpaid should go in reduction of the rents accrued due. They did not do so; they held to the land, and refused to pay the arrears of rent; they tendered nothing in the way of rent; they have brought nothing into Court in satisfaction of rent accrued due; and no doubt they justify this to themselves on the ground that, so far from their having anything to pay, they are entitled at the date of action brought to recover something from the plaintiff. To my mind, the only defence which could extinguish plaintiff's right of action as herein instituted would be a counter claim of the nature of the claim I have just indicated. I consider the defence a mutilated one, so to speak, and of no avail against plaintiff's legal rights. And for this reason, I would set aside the judgment, and give plaintiff judgment as prayed for with costs.

My inclination would have been to follow the law relating to the *actio redhibitoria et quanti minoris* for the rescision of contracts of sale or a diminution of the price on account of defects (*vitia*) in the subject matter which did not avail the buyer who had every opportunity, as these defendants had before lease executed, of discovering the defects before buying the article, if I could have found an authority for doing so, but according to Voet XXI I-II neither remedy applied to the contract of letting and hiring. I cannot help expressing an opinion that the learned Judge, in the Court below, has found his estimate of the diminished rent on an erroneous basis. We are not informed what the 30 odd acres consisted of—whether of soil under jungle, or paddy or chena, or bare soil, but I take it, the difference would have to be found in the letting value of the estate with the soil of 30 odd acres under jungle or paddy or chena or bare soil, as the case may be, and 30 odd acres under tea.

BEFORE *Laurie*, A. C. J. AND *Withers*, J.

June 2 and 6, 1893.

DAVIDSON *v.* SILVA.

[No. 335, D. C., KEGALLA.]

Revision—Appealable Order—Decree signed by Judge after he has become "functus officio."

An order ending thus—"It is ordered that the libel be rejected as it has not been amended as directed by the Court. The plaintiff will pay the defendant his costs of the action"—is an order complete in itself and not requiring to be followed by a formal decree, and is a final order against which an appeal lies.

A person who has ceased to hold office as District Judge has no power to sign the formal decree consequent on a judgment delivered by him when in office.

As a general rule the Supreme Court will not, except in very exceptional cases, review an order from which an appeal might have been, but has not been, taken.

Plaintiff, an Assistant Government Agent, not being able to agree with defendant as to the amount of compensation to be allowed for certain land of defendant acquired by Government under the provisions of "The Land Acquisition Ordinance 1876," filed in Court a libel of reference in terms of section 11 of the Ordinance, and notices were thereupon issued, in terms of section 14, first, on defendant, requiring him to state to the Court the amount which he claims as compensation for his interest in the land, and secondly, on both plaintiff and defendant, requiring them to appoint assessors to aid the Judge in determining the amount of compensation. Defendant appeared in Court and nominated an assessor, but before one was nominated by plaintiff, one Natchiappa Chetty claiming to be a mortgagee of the land and to have appeared before the Assistant Government Agent at his inquiry under section 8 of the Ordinance for ascertainment of the value of the land, moved to be added as a party to the case. Plaintiff's proctor had no objection to this motion, and himself moved to amend the plaint in certain respects, and the District Judge made order that the plaint be returned to plaintiff for amendment as set out in the order, and it was accordingly returned. An amended plaint was thereafter tendered, but the District Judge rejected it by an order concluding thus—"It is

ordered that the libel be rejected as it has not been amended as directed by the Court. The plaintiff will pay the defendant his costs of the action." Before a formal decree was drawn up in terms of this order, the District Judge, by reason of transfer to another station, ceased to hold office as such, and the formal decree bearing the same date as the above order was in fact signed after the District Judge became *functus officio* and after the lapse of the appealable time from the date of such order.

On the motion of *Layard, A. G.* for revision, the case was sent for by the Supreme Court, and with notice to defendant and Natchiappa the question of reviewing the proceedings was, on June 2, discussed.

Layard, A. G. for plaintiff.

Pereira for defendant and Natchiappa Chetty.

Cur. adv. vult.

On June 6, the following judgment of the Court was delivered by

LAWRIE, A. C. J.—On carefully considering the proceedings in this Land Acquisition Case we have not ascertained what it was that prevented the Assistant Government Agent from appealing against the order signed by Mr. Dunlop, the District Judge of Kegalla, on the 30th of March.

The order was complete in itself: it ended, "It is ordered that the libel be rejected as it has not been amended as directed by the Court. The plaintiff will pay the defendant his costs of the action."

Under the mistaken notion that the order was imperfect, and that it required to be followed by a formal decree, one was prepared and was sent to Mr. Dunlop, and was signed by him in Colombo after he had ceased to be District Judge of Kegalle.

If a formal decree was necessary, Mr. Dunlop certainly could not sign it after he had ceased to hold the office of District Judge.

The decree to be found on the last page of the record must be disregarded as *pro non scripto*.

But the signature of the 30th March remains. We have been asked to set it aside in revision.

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I cannot say that it seems other than a good and reasonable order, but assuming that it is not right, it certainly is a final order against which an appeal lay, and we abide by the rule that except in very exceptional cases we shall not revise where an appeal might have been, but has not been, taken.

We are of opinion that we must refuse to interfere.

BEFORE *Lawrie* AND *Withers*, J. J.

Feburary 10 and 14, 1893.

WEERESEKERE *v.* SEELAWANKA.

[No. 230, D. C., MATARA.]

Crown Grant—Presumption of Title—Rebuttable—Sect. 6 of Ordinance 12 of 1840.

The statutory presumption created by section 6 of Ordinance 12 of 1840 that all "Chenas and other lands which can only be cultivated after intervals of several years, shall be deemed to be forest or waste lands" and therefore the property of the Crown, is a rebuttable presumption (Lewis *v.* Kiriappu 5 S. C. C. p. 194 followed.)

Per WITHERS, J.—The presumption of title thus created attaches to the land after it has passed from the Crown to a private subject.

The plaintiff in this action sought to eject the defendant the incumbent of a Vihara, from a certain chena called Wandurudenia on the strength of a Crown grant dated February 4, 1891, claiming for himself the benefit of the presumption created by Ordinance 12 of 1840 in favour of the Crown in respect of chenas or forest lands. The defendant at the hearing of the case produced two conveyances of 1829 and 1832 in favour of the Pansala and also proved cultivation by him of the land with cocoannts for 8 or 9 years previous to the institution of the action.

The learned District Judge held that the presumption in favour of the Crown had not been sufficiently rebutted and gave judgment for the plaintiff.

The defendant appealed,

Dornhorst for defendant-appellant.

The presumption on which the District Judge has founded his judgment has been sufficiently met. The presumption in favour of the Crown should not be extended to private parties. The

Ordinance is meant to apply only to particular cases. The land is not forest land. It has been cultivated for the last 8 or 9 years with cocoanuts.

Grenier for plaintiff-respondent.

The presumption in favour of the Crown has not been met and a grant by the Crown is *prima facie* evidence of title in the Crown. (8 S. C. C. p. 58 5 S. C. C. p. 194.)

Dornhorst in reply.

Cur. adv. vult.

On February 14, the following judgments were delivered:—

LAWRIE, J.—The presumption in favour of the Crown is (as has been often held by this Court) a rebuttable presumption, and here it seems to me the presumption has been rebutted.

First—The defendants hold a title to the land, a title not of recent date, not concocted to defeat the right of the Crown, but a title obtained between 60 and 70 years ago.

I hold it proved that the land conveyed by the transfers produced by the defendants is the same land as that now claimed by the plaintiff.

Second—The defendants are now in possession, and so far as appears they and their predecessors in the incumbency of the Vihara have been in continuous possesion for the last sixty years. There is no trace of any one else possessing.

Thirdly—Their possession might not avail against the Crown if it had been merely a possession by authority.

The Ordinance seems to disregard quiet possesion as a proof of title, presuming that to Chena even at the most regular intervals is not a possession from which ownership must be presumed.

Accepting that view still there have been acts of possession of a different kind, possession by planting cocoanut trees.

It is true that these trees are planted only on the Eastern side next to the Pansala, but planting of a part of the land is an overt act of possession of the whole.

This is a case in which I think the presumption in favour of the Crown has been amply met and upset by the evidence adduced by the defendant.

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I would dismiss the action.

WITHERS, J.—Under cover of the Crown grant the plaintiff claims a parcel of land called Wandurudeniahena from which he seeks to eject the defendants.

The defendant claims under the Kahugama Wandurudenia Pansal to which they say the land plaintiff seeks to eject them from belongs.

The Pansala is in possession of a land of that name, was so at the date of the grant, and has had a part of it in cocoanut cultivation for the last 8 or 9 years.

This being so the plaintiff had to prove two things, *viz.* that the land in defendant's possession on the Pansala's behalf is within his grant and that his title to the land is superior to that of the Pansala's.

I am far from satisfied that he has established the fact of the identity of the land in the defendants' possession with that in his grant. But assuming it to be so, has he proved a superior title. He has recovered judgment on the ground that he land being once wholly and still partially chena land is to be deemed forest or waste land and as such property of the Crown.

I think this Court can hardly go back on the proposition to be found implied, if not expressed in its decisions—but contested by Mr. Dornhorst with much plausibility, that the presumption attaches so to speak to the land after it has passed from the Crown to a private subject.

In this case however the statutable presumption of the Ordinance 12 of 1840 is surely and clearly rebutted by the partial cultivation of the land for the last 8 or 9 years with cocoanuts, the production of conveyances of 1829 and 1832 the Pansala of the land herein claimed from it, the cultivation subsequent to those conveyances at intervals at least up to 1857 with grain and payment of title to Government as by private individuals, and the onus was shifted back upon the plaintiff to satisfy the Court that apart from statutable presumption the land he seeks to take from the Pansala did indeed and in fact belong to the Crown.

This onus he has not discharged and in my opinion the judgment of the Court below should be set aside and the plaintiff's action dismissed with costs.

BEFORE *Lawrie* AND *Withers*, J. J.

February 14 and 21, 1893.

THE ATTORNEY-GENERAL *v.* APPUHAMY and another

[No. 153, D. C. KEGALLA.]

Pleadings—Amendment—Notice—Postponement—Costs—Section 93 Civil Procedure Code.

On the day of trial the Court, in the presence of the parties, allowed the plaint to be amended by the addition of certain words. The amendment not being a material one, in that it did not alter the issues in the case.

Held that the defendant was not entitled to a postponement of the case.

Per *Withers*, J.—An order allowing an amendment should direct the delivery of the amended pleading within a given time to the opposite party.

On the day of hearing of an action brought by the Attorney-General on behalf of the Crown the defendant's counsel drew the attention of the Judge of the Court below to an addition to the plaint inserted at the end of the first paragraph in these words "That the said Welikada Mukalana is a forest land" and submitted that its presence was unauthorized as it had not been initialled by the Judge as required by section 93 of the Civil Code. The Court then initialled the additional matter.

The counsel for the defence still contesting the legality of the amendment applied for an adjournment and the costs of the day in order to plead over to the new matter if so advised.

The learned Judge refused the application and the defendant appealed.

Dornhorst for defendant-appellant.

The motion to amend was not made in Court and the amendment is consequently irregular. The District Judge having allowed the amendment, ought to have granted application of the defendant for a postponement and costs.

Ramanathan, S.-G. for the Crown.

The only objection in the court below was that the amendment had not been initialled. The Judge says that the amend.

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ment was not objected to. The defect arising from the want of initials of the District Judge was subsequently cured by the addition of the initials.

Cur. adv: vult.

On February 21, the following judgments were delivered:—

LAWRIE, J.—On the day fixed for the trial of this case the counsel for the defendant moved that the hearing be postponed. The cause shown by him was in the opinion of the District Judge insufficient cause and the motion was disallowed.

I am of opinion that the District Judge was right. The reason given by the defendant's counsel for a postponement was not only insufficient but was trivial.

WITHERS, J.—According to the petition of appeal to this Court the appeal was taken from an order of the District Judge dated the 29th of July, 1892, refusing a postponement applied for at the hearing of the action.

There is no record of a formal application on defendant's behalf for an adjournment for any particular reason or of a formal order therein.

From what is recorded and from what counsel told us at the discussion of the appeal, I understand that defendant's counsel in the Court below drew the learned Judge's attention to an addition to the plaint introduced at the end of the first paragraph in these words "That the said Welikada Mukalana is a forest land," and submitted that its presence was unauthorized for this reason if no other—that it had not been initialled by the learned Judge as required by the 93rd section of the Civil Procedure Code.

After apparently a discussion as to the propriety of this so called amendment, the learned Judge proceeded to cure the defect by putting his initials and the date of the day (29-7-92) against this additional matter and as the parties were before him and he had initialled the amendment in their presence he held it to be in order.

Counsel still protesting against the legality of the so called amendment applied for an adjournment and the costs of the day in order to plead over to the new matter if so advised.

The learned Judge refused this application and hence this

appeal.

On the 30th of May, 1892, a day was fixed for the hearing of the action, viz., the 29th of July, 1892.

On the 5th of July, a motion in writing was put in for the Crown and application made for notice on the defendants and their Proctors to the effect that the Court would be moved on the 11th July, 1892, to amend the plaint by introducing in it at the end of the first paragraph the words previously recited.

On the 11th of July, the learned Judge allowed the motion having satisfied himself that the other side had been sufficiently secured with notice of the motion, who made the amendment by introducing the added matter and when it was made does not appear.

There it was on the day of hearing but the matter was not well added because of the absence of the Judge's sanction as certified by his initials, and it only became an amendment properly speaking after the Judge had initialled it.

I should have thought it scarcely open to question, that a Judge, in making an order on a motion of the kind, whether opposed or not, allowing an amendment, would naturally direct the delivery of the amended pleading within a given time from the date of the order with directions limiting the time for the other party to meet it, if so advised, and make some order as to costs, for an amendment cannot be made at the expense of the opposite party who is entitled to be indemnified for all additional expense involved in such amendment. Why the amendment was ever applied for, or why it was allowed, I am unable to imagine.

But after all is said and done the simple question for us to decide is whether the learned Judge exercised or not a proper discretion in refusing a postponement of the trial because of the amendment so made on the day of hearing.

If the amendment had been a material one his order could not be justified for a moment.

It was no good reason to refuse a postponement because the defendants had had notice of the motion for leave to amend the plaint in the manner I mentioned.

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They had no reason to suppose that the amendment had been made.

But can the defendants be seriously said to have been prejudiced by the order complained of? The parties were or should have been prepared to go to trial on the 29th of July.

Did this addition really change the aspect of the case or alter the patent issues in the action? It was a statement that might have been taken out of a dictionary—it was partly explanatory, partly argumentative, but quite immaterial seeing what the issues were.

The course taken by the defendants' advisers was in the nature of a resort against the want of principle in the learned Judge's method of sanctioning amendments. It was a course taken at their own wish.

I cannot say, I think, the judge was wrong in refusing a postponement, and in my opinion the order should be affirmed, but I would give no costs in appeal.

BEFORE *Lawrie* AND *Withers*, J. J.

February 10 and 14, 1893.

SILVA and another *v.* PODISINHO and another.

[No. 39,788, D. C. KALUTARA.]

Judgment—Revival of—Adjustment—Certificate under Sect. 349 Civil Procedure Code.

Under section 349 of the Civil Procedure Code "if any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, he shall certify such payment or adjustment to the Court whose duty it is to execute the decree. The judgment-debtor may also by petition inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified."

Held, that notwithstanding the revival of a judgment, the Court may record as certified on the petition of the judgment-debtor any adjustment or payment made before such revival.

The action was to recover a debt due on a mortgage bond, and judgment was entered on December 9, 1888, which the plaintiff allowed to lie dormant until its revival on June 19, 1890. On November 3, 1892, the present plaintiffs, who had been substituted in place of the original plaintiff deceased,

applied for and obtained leave to execute the revived judgment, and while this order was out, the first defendant applied by way of summary procedure for an order recording as certified certain payments.

The District Judge (De Livera) rejected this application on the ground that he could not go behind the revived judgment of June 19, 1890.

The first defendant appealed.

Seneviratne for appellant.

Revival of judgment does not imply an acknowledgment of the whole debt. The application for reviving judgment makes no mention of the payments made by appellant. The appellant is still entitled to a certificate under § 349 of the Civil Procedure Code.

Dornhorst for respondent.

The operative judgment is the revived judgment. The defendant had notice of plaintiffs' application to revive judgment but he did not appear then and ask for a certificate; and he cannot now go behind the revived judgment in which he has actually acquiesced.

Cur. adv. vult.

On February 14, 1893, the following judgment agreed to by LAWRIE, J., was delivered:—

WITHERS, J.—A very simple action to recover a money debt secured by a mortgage has swollen into outrageous proportions and it is almost impossible to pick one's way through the growth of petitions, affidavits, orders, precepts, processes and other kinds of documentary matter with which it is encrusted.

It is one thing to listen to discussions on orders complained of, and another thing to discover the orders and construct a consecutive history of the proceedings which lead up to those orders.

On the 31st August, 1888, the rule issued to the defendants to show cause why a money and mortgage decree should not be entered up in default of appearance to summons served, was made absolute and on the 10th day of December, 1888, a decree was formulated that plaintiff do recover from the defendants the

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sum of Rs. 231 with interest thereon at 25 per cent. per annum from the 22nd September, 1885, till payment in full and costs, and that the premises described in the plaint as security therefor be declared specially bound and executable for the said judgment debt.

No execution appears to have been taken out of that decree and on the 11th February, 1890, the plaintiff moved for a rule on the defendants to show cause why the judgment should not be revived and writ issued.

That rule was not expressly made absolute, but on 19th June, 1890, it was ordered that the judgment entered on the 10th December, 1888, be revived and writ do issue against the defendants.

Plaintiffs' costs in the action were taxed at Rs. 78·50 and on the 28th June, 1890, plaintiff applied for writs against person and property of the defendants. What the writ went out for does not appear and as far as I can make out no writs with returns to them have travelled back to this record.

A return to writ issued against property on the 4th of July, by the Deputy Fiscal of Kalutara is the subject of a minute of the 9th July, 1890, which does not make much sense of the return.

Writs were then issued on the 14th of July, 1890, for service in the District of Galle, to which the return, according to a minute of 20th January, 1891, was that the defendants had neither paid the money nor surrendered property which being situate at Kalutara was not easily to be surrendered at Galle.

On the 6th of February, 1891, writs were reissued somewhere or another, and the quaint return made to them on the 11th March, 1891, by the Deputy Fiscal was that the plaintiff was dead.

On the 21st of August, 1891, the substituted plaintiffs applied by way of summary procedure to have their names entered of record in the room of the orginal plaintiff deceased, and for leave to proceed in the action and reissue the writ and order was allowed to go, though it should have been confined to that part of the application under § 395 of the

Civil Procedure Code (see case reported in II. C. L., R. 77) which relates to the entry of names in the room of the deceased plaintiff.

On the 8th of September, 1891, one of the defendants appeared to the notice of the order *nisi*, evidently with the intention of resisting that part of the application on behalf of the parties to be added which related to reissue of writ in execution of judgment, for the minute on his appearance is "the 1st respondent" (to the petition on summary procedure) says he paid Rs. 440" *i. e.* on account of judgment recovered and has got receipt" signed by the judge "I give defendant time to prove payment" signed by the judge. Of the validity of this order, the judge in the following month expressed a doubt in as much as the petitioners' names had not been entered of record, but he left the order standing.

On 4th October, 1891, the respondents to the petition under the said section 395 were advised unfortunately to resist the application of the petitioner to have their names entered in the record in place of the deceased plaintiff, and though they gained a temporary success in the Court below they were ultimately defeated in this Court and the order was made absolute, though I think it was only intended to make it absolute as to the entry of the petitioners' names on the record.

Indeed it was competent to the petitioners as soon as their names were entered on the record to proceed with the action, if unconcluded. Nor could they do so till their names were duly entered.

The formalities required by the judgment in appeal were executed and the order *nisi* of the 30th October, 1891, was declared absolute in conformity with the decree of this Court, and the terms of it are to be found on page 17.

The successful appellant's costs below and in appeal were thereafter taxed at an aggregate of Rs. 141-75 and the substituted plaintiffs on the 16th July, 1892, applied to have the amount added to the writ which on the 20th July, was accordingly issued. I suppose the writ went out for the amount of the judgment with the new and old costs on it, but I cannot find either writ. How this writ came to be issued on *ex parte*

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motion, when more than a year had elapsed since the last return to the writ on the 11th March, 1891, I do not quite understand. It was returned un-executed on the 1st September, 1892, and allowed to re-issue on the 2nd September, 1892.

Thereafter on the 11th October, 1892, an application was made by way of summary procedure on behalf of the 1st defendant to have the writ dated the 4th July, 1896, (sic) recalled and execution stayed, the affidavit in support of which is to be found at page 71, and in the affidavit appears the reason for the application, viz., that the writ had been irregularly issued without notice, more than a year having elapsed between the date of the decree and the last application for its execution.

This was not a true ground but was apparently accepted as such for on the 19th October, 1892, plaintiffs' proctor moved to have the writ recalled as having been irregularly issued, and the writ was returned on the 24th October, 1892.

Then on the 3rd November, 1892, the Plaintiffs' Proctor moved by way of summary procedure for leave to execute the judgment, which was allowed, and while this order was out the 1st defendant appplied by way of summary procedure for an order recording as certified certain payments or adjustments of items of money paid on account of judgment debt and costs taxed in this action.

Order *nisi* was made on this application and the matters of the contestants petitions were eventually heard and determined with the effect that execution should be allowed for a balance sum excluding some of the items which had been admittedly paid, including the principal sum of Rs. 300 which the learned judge refused to admit proof of on the ground that the judgment debtor could not go behind the revived judgment of the 19th June, 1890, see page 27. It is from this order that the judgment debtor appeals.

Mr. Dornhorst contended that the revived judgment was the operative judgment and because it was the judgment which is deemed to be satisfied after 10 years have elapsed from the date on which it was pronounced, the judgment debtor could not go behind it and attempt to show that the original judg-

ment of December, 1888, had been satisfied in part as that would be tantamount to allowing the debtor to plead, if the occasion had arisen, that the old and not the revived judgment had been satisfied, which would be an abuse of privilege. I am afraid I am not fully alive to the force of this contention notwithstanding the truth of the observation that the new judgment starts the period of limitation; but it seems to me it might work serious injustice, if a plaintiff, after letting a judgment lie dormant, could, by the mere step of reviving it, shut out all transactions in the nature of payments which take place in the interval. It is, of course, a matter for comment if a judgment-debtor does not come forward as soon as possible after the delivery of a writ in execution of judgment and ask for an order limiting the execution to a sum less than that which it carries on the face of it on account of payments made, error of computation, or some good reason.

At the same time it is conceivable that the means of proof are not ready to hand at the date of delivery. On consideration I think the order appealed from should be set aside and the case remitted to the lower court for a day to be fixed for determining whether a payment of Rs. 300 in part satisfaction of the judgment should be recorded as certified. It is worthy of notice that on the day the appellant's application was discussed the plaintifis' proctor admitted all the payments mentioned in the judgment debtors' affidavit except that of the said item of Rs. 300. The payments admitted were made according to the affidavit on three occasions including an item of Rs. 20 on the 25th day of March, 1889, and aggregating a sum of Rs. 140, and as far as I can discover credit was never given for these payments till the application of the 26th October, 1892. In the application of the 2nd September, 1892, the remarks made in the column, headed "adjustment made if any" was *no*.

It is true that in the application of the 26th October, 1892, credit is not given for the item referred to in appellants' affidavit of Rs. 20. On the 23rd March, 1892, but the record (p. 27 A) states that plaintiffs' proctor admitted *all* the pay-

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ments mentioned in the affidavit except that of the item of Rs. 300 on the 23rd March, 1889.

The appellant is entitled to his costs of appeal.

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

January 24 and February 10, 1893.

WEERARATNA *v.* SILVA.

[No. 676, D. C., GALLE.]

Ejectment—Mortgage—Sale by mortgagor—Subsequent sale under mortgage decree.

A mortgaged a land to W and subsequently sold it to S for the purpose of paying off some mortgages that had existed before that of W. W subsequently sold it under a mortgage decree, and having bought it himself obtained a Fiscal's conveyance.

Held, that W had no right to eject S as at the time of W's purchase A had no right, title or interest for the Fiscal to seize or convey.

This was an action in ejectment. The original owner of the land in dispute, one Alwis, mortgaged it on October 18, 1887, to plaintiff, which mortgage was duly registered. On this mortgage the plaintiff obtained the usual mortgage decree, sold the land under it and purchased it himself and obtained a Fiscal's conveyance therefor on November 11, 1890, which he registered on December 17, of the same year.

Previous to the mortgage under which plaintiff claimed Alwis had mortgaged the same land by duly registered mortgages to other persons, and on February 2, 1888, he transferred it to the defendant by duly executed conveyances dated February 24, 1888, and registered on March 19, of the same year and paid off the mortgages that had existed before that of the plaintiff, and the defendant entered into possession. The plaintiff on the strength of the Fiscal's conveyance sought to eject the defendant.

The District Judge dismissed the plaintiff's action.

The plaintiff appealed.

Dornhorst for plaintiff-appellant.—Alwis' conveyance to defendant is subject to all prior encumbrances. He could not defeat his mortgagee's rights by transferring the property by private conveyance. It does not make any difference that prior

mortgages have been paid off.

Grenier for defendant-respondent.—The action is altogether misconceived. The defendant is not bound by the mortgage decree, he not having been a party to it. The proper course would have been to call upon the defendant to pay off the mortgage (Dicklande Case). My client stands in the shoes of he prior mortgagee, whose debts have been paid off by the sale.

Dornhorst in reply.

Cur. adv. vult.

On February 10, 1893, the following judgments were delivered:—

BURNSIDE, C. J.—No question of priority under the Registration Ordinance arises in this case. That being so, it is clear to me that the plaintiff has no right to maintain this action, and the judgment of the District Judge should be affirmed with costs.

The action is in ejectment. The defendant is in the actual possession, and the plaintiff has never had possession. The admitted facts are shortly these:—

The original owner, one Alwis, mortgaged the land on October 18, 1887, and on the 21st the mortgage was registered. On this mortgage the plaintiff obtained the usual mortgage decree, sold the land under it and purchased it himself and obtained a Fiscal's conveyance therefor on November 11, 1890, which he registered on December 17, of the same year.

On this paper title the plaintiff rests his right of action to eject the defendant.

Previous to the mortgage under which plaintiff claims, Alwis had mortgaged the same land by duly registered mortgages to other persons, and on February 2, 1888, he transferred it to the defendant by duly executed conveyances, dated February 24, 1888, and registered on March 19, of the same year, having paid off the mortgages that had existed before that of plaintiff, and the defendant entered into possession and has remained in possession.

This is the defendant's title. The District Judge has given judgment for the defendant, and the plaintiff appeals.

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The judgment is undoubtedly right. The legal estate in the property is in the defendant. It was quite competent for Alwis to sell the property to the defendant who thereupon took title to it, and when the plaintiff purchased subsequently Alwis had no right, title or interest for the Fiscal to seize or convey.

It is not for us to point out any difference of position which the plaintiff might have occupied had the defendant been made a party to the mortgage suit against Alwis, or if there were a suit by plaintiff to render his purchase under the mortgage decree available as against the land in the plaintiff's possession. The action is in ejectment in which the plaintiff must recover by strength of his title, and he has really no title against defendant.

LAWRIE, J.—I agree.

WITHERS, J.—I confess I do not see what pretence of right the plaintiff has to eject the defendant. The action seems to me to be totally misconceived. The property had already been sold by the owner to the defendant, when the plaintiff purchased it at a judicial sale.

The judgment-debtor's estate had gone out of him, and there was nothing of his for the Fiscal to sell. Plaintiff's title is surely a worthless piece of paper.

Plaintiff may or may not have a claim to have the property sold in satisfaction of the late owner's mortgage debt to him, but that must be determined in the usual hypothecary action.

BEFORE *Lawrie* A. C J. AND *Withers*, J.

June 9 and 13, 1893.

THE SINGER MANUFACTURING COMPANY

v.

THE SEWING MACHINE COMPANY.

[*The Sewing Machine Case.*]

[No. 3,762, D. C., COLOMBO.]

Appealable Order—Recognised Agent—Proxy—Corporation Aggregate—Seal—Recognised Agent—Civil Procedure Code Sects. 755, 24, 27 and 470—Ordinance No. 22 of 1866.

The plaintiff Company having obtained an *interim* injunction against the defendant Company, the latter purported to present a petition to the Court applying for a discharge of the injunction. The petition purported to be signed by F. L., proctor for the petitioning Company, and one J. K. After argument the District Judge made order disallowing the application as made by F. L, as proctor of the Company, on the ground that the Company had no status to make such an application through F. L.

Held, (1) that this was an appealable order. (2) that as the application and proxy had been taken off the Court's file, and the petition of appeal was signed by F. L. the requirements of Sect. 755 of the Civil Procedure Code as to signing of the petition of appeal have been complied with.

A Joint Stock Co. is a corporation aggregate, which cannot appear in an action, and is consequently outside the provisions of Sect. 24 of the Civil Procedure Code.

Except as provided by special enactment, a corporation aggregate can only appear to an action by an Attorney made under its seal, or by Attorney appointed in writing by an agent, and empowered under the Company's seal to bring an action, or defend one (see O. B. C vs. Corbet, 4 S. C. C. p 158.)

The plaintiffs, an American Company, carrying on business in Colombo, sought to restrain the defendants, a Joint Stock Company Registered and Incorporated in India and also carrying on business in Colombo, by a perpetual injunction from continuing to use and maintain on their premises in Colombo a sign board, which, they alleged, would deceive persons into the belief that the defendant Company are authorized Agents in Colombo of the plaintiff Company to sell Sewing Machines, manufactured by the plaintiff Company. Soon after plaint was filed, plaintiff Company applied for and obtained, an *interim* injunction against the defendant Company requiring them, their Agents and workmen to remove the sign board complained of. On March 9, the defendant Company purported to present

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a petition to the Court, applying for a discharge of the *interim* injunction. The petition purported to be signed by F. Liesching, Proctor for the petitioning Company and one J. K. Hormusjee. After hearing counsel for the two Companies, the District Judge (*Browne*) disallowed the application as made by Mr. Liesching as attorney of the Company, on the ground that the Company had no status to make such an application through Mr. Liesching. The defendant Company appealed from that order.

Layard, A.-G. (with him *Dornhorst, Wendt,* and *De Saram*) for respondents objected to the appeal being heard. The proctor signing a petition of appeal must be the proctor on the record. The District Judge having found that the defendant Company as regards the application referred to, was not properly represented by a proctor in Mr. Liesching, it cannot be said that there is any proctor on the record, and the petition of appeal in consequence cannot be received, as not satisfying the requirements under Sect. 775 of the Civil Procedure Code (Assauw *v.* Pestonjee 1 S. C. R. p. 221.) It is also urged that the order complained of is not an appealable order.

Grenier (with him *de Sampayo* & *Bawa*) for appellant.

The preliminary objections taken by the Attorney General really affect the merits. The appeal is properly before the Court, in that Mr. Liesching has signed the petition of appeal as proctor of the defendant Company and his name appears on the record as such proctor. Whether he could represent the defendant Company in law is the very question that is expressly raised in this appeal, which has not yet been opened to the Court. (WITHERS, J. We will hear your appeal.) Hormusjee as the recognised agent of the defendant Company was entitled to appoint a proctor to represent the defendant Company under Sec. 24 of the Civil Procedure Code, a Company being a "party to an action" within the meaning of this section. As a matter of fact the summons and injuction were both served on Hormusjee as the recognised agent of the Company, and Hormusjee's affidavit establishes that he is in fact such recognised agent. Section 470 of the Civil Pro-

cedure Code does not apply to an application like the present one, but relates exclusively to two distinct stages in an action, plaint and answer.

Dornhorst for respondents. Chapter V of the Civil Procedure Code relating to recognised agents and proctors does not apply to Joint Stock Companies, inasmuch as Company Law is governed by Ordinance 22 of 1866, except where provision is expressly made by local law on the subject (O. B. C. vs. Corbet 4, S. C. C. p 158.) Even if this chapter did apply, Hormusjee's affidavit is insufficient as it fails to set out that there is no other person in Ceylon expressly authorised by the defendant Company to make such appearance and application on their behalf. There is, further, no proof of Hormusjee's appointment as agent at Colombo of the defendant Company.

Grenier in reply—Hormusjee's affidavit is sufficient proof of his sole agency for the defendant Company. The case cited O. B. C. vs. Corbet, has no application at present, in that it was decided at a time when the law knew no such status as that of recognised agent, which was created by the Civil Procedure Code.

Cur. Adv. Vult.

On June 13, 1893, the following judgment agreed to by LAWRIE, A. C. J. was delivered:—

WITHERS, J.—This is an action by an American Company carrying on business in Colombo, against a Joint Stock Company registered and incorporated in India and also carrying on business in Colombo, in which it is sought to restrain the defendant Company by a perpetual injunction from continuing to use and maintain, on their premises in Colombo, a sign board which, it is alleged, is calculated to deceive persons desirous of purchasing sewing machines manufactured by the plaintiff Company into the belief that the defendant Company are authorised Agents of the plaintiff Company to sell such machines in Colombo. It appears that, soon after the plaint was filed, the plaintiff Company applied for, and obtained, an *interim* injunction against the defendant Company, requiring the Company its agents, and workmen, to remove the sign-board complained of. On March 9 last, the defendant Company purported to present a petition to the

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Court applying for a discharge of the *interim* injunction. This petition purports to be signed by F. Liesching, Proctor for the petitioning Company and one J. K. Hormusjee. After hearing Counsel for the two companies, the learned Distrtct Judge disallowed the application as made by Mr. Liesching as Attorney of the Company, on the ground that the Company had no status to make such an application through Mr. Liesching.

The Company appeal from that order. At the hearing of the appeal, a preliminary objection was taken to the appeal by Respondent's Counsel on the ground that the requirements of the 751st section of the Code have not been complied with.

It was also urged that the order complained of was not an appealable order.

As to the second point I may as well say at once that I think the order was an appealable one. The question before the Court was once and for all terminated by the decision of the Court, that the defendant Company as represented by Mr. Liesching has no *locus standi*.

As regards the other point, the attention of appellants' Counsel was invited to the fact that the petition of appeal from the order complained of purports to be drawn and signed by a Proctor, and so fulfils the requirements of section 755 of the Civil Procedure Code. This difficulty was met in this way. This Court, it was urged, has laid it down that a petition of appeal must be signed by a Proctor on the record. The Judge having found that the Company, as regards the application referred to, was not properly represented by an Attorney in Mr. Liesching, it could not be said there was any Proctor on the record and the petition of appeal in consequence could not be received. There is, however, herein filed of record, a proxy by which the defendant Company purports to empower Mr. Liesching to make the application to dissolve the injunction and to appeal from any order of the Court thereon. The learned Judge did not think fit to take the application and the proxy off the Court's file. For the purpose then of this contention, I take it, we must consider the appointment of Mr. Liesching as Proctor, to be in force in view of the provisions of section 27 of

the Code. Hence this objection, likewise, in my opinion fails.

As to the merits, it was strenuously contended by Mr. Grenier that the proxy which vouched the defendant Company's application to dissolve the injunction was a good proxy to Mr. Liesching for that purpose, because it was signed by Hormusjee (the person before referred to) as the recognised Agent of the defendant Company. It was contended that both in law and in fact, Hormusjee was the recognised Agent of the Company, and as such Agent was empowered to appoint Mr. Liesching, the Company's Proctor, for the purpose of the application. For his capacity in law, Mr. Grenier relied on section 24 of the Civil Procedure Code, and for his capacity in fact he relied on the affidavit of Hormusjee to be found at page 71 of the record, and more particularly in the first paragraph thereof in which Hormusjee deposes as follows:—

"I am the only Agent in Ceylon of the Sewing Machine Co., Ltd., the defendant in this case, and have been so since its formation, and I am carrying on business for, and in the name of, the said Company which was formed about February 13, 1893, and whose Registered Office is at Bombay."

It was contended on the other side that Chap. V of the Civil Procedure Code relating to recognised Agents and Proctors does not apply to Joint Stock Companies, inasmuch as Company law is governed by Ordinance 22 of 1866, except where provision is expressly made by local law on the subject, and instances of such provisons in the Civil Procedure Code, to which I shall presently refer, were mentioned to us.

It was also argued that, even if Chap. V of the Civil Procedure Code did apply to this case, Hormusjee could not be considered in law and fact the recognised Agent for the defendant Company for the purposes of this application, inasmuch as it is nowhere stated in Hormusjee's affidavit that there was no person in Ceylon expressly authorized by the defendant Company to make such appearance and application herein as the law required or authorised to be made or done by a party to an action in the Court below—the absence or presence of such a condition of things being peculiarly within the knowledge of Hormusjee. Further, there is no proof of the said J. K.

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Hormusjee's appointment as Agent, at Colombo, of the defendant Company.

In my opinion, the contention of respondent's counsel must prevail. A Joint Stock Company is a corporation aggregate, which cannot appear in an action, and is, consequently, outside the provisions of section 24 of the Civil Procedure Code.

Its very composition renders its appearance in person as an ordinary party to an action, impossible. To obviate difficulties occasioned by its constitution, the law has provided, for instance, that a Joint Stock Company may be compelled to answer to interrogatories by a member or officer of such Company—section 97 of the Civil Procedure Code. The law thereby creates a mouth-piece for it.

Section 470 of the Code creates a hand for it by allowing the plaint or answer to be subscribed on behalf of the Company by any member, Director, Secretary, Manager or other principal officer thereof, who is able to depose to the facts of the case.

By section 471, it provides for a particular mode of service on the Company, and for compelling the Secretary or other principal officer of the Company to appear and answer any material question relating to the action, if so required, by summons or special order of the Court.

By section 655 where an action has been instituted by a Company it permits the principal officer of a Company to make affidavit in support of the motion for the arrest of the defendant's person or the sequestration of his property before judgment.

Even if section 24 or 25 of the Civil Procedure Code does apply to the case of a Joint Stock Company, which I have taken leave to doubt, I think, J. K. Hormusjee's affidavit is insufficient, on the positive side, as to his being the duly appointed Agent in Ceylon of the defendant Company, and on the negative side, as to there being no other person in Ceylon competent to appear and make application for the Company in a civil suit. I take the law to be, now as before, that, except as specially provided—and I know of no such provision—a corporation aggregate, like the Defendant Company, can only appear to an action by an Attorney under its seal or

(see case cited in iv. *Supreme Court Circular* p. 158) by an Attorney appointed in writing, by an Agent empowered under the Company's seal to bring an action or defend one. For this reason I would affirm the learned Judge's order disallowing the application on behalf of the Company by Mr. Liesching to dissolve the *interim* injunction granted to the Plaintiff Company. No costs.

BEFORE *Lawrie*, J.

March 2 and 7, 1893.

PERERA *v.* HARMANIS.

[No. 472, Ad. P. C., COLOMBO.]

Itinerating Police Court—Ordinance No. 12 of 1890—Evidence—Dishonestly retaining stolen property.

Ordinance No. 12 of 1890 enacts that a Police Court "lawfully established in any division shall be holden by and before the Police Magistrate appointed thereto, at any convenient spot within the limits of such division"—

Semble per LAWRIE, A. C. J., that it is desirable that, in the case of Police Courts held at different places as permitted by this Ordinance, the Police Magistrate should state as a matter of record that the place at which he holds his Court is within his division, and that it is at a convenient spot for the trial, and that he had given due notice that he would sit there.

Observations on the inconvenience and hardship to which suitors and witnesses having to attend the Police Court, to which the present case belongs, are exposed.

On a charge under section 394 of the Ceylon Penal Code of dishonestly retaining stolen property knowing or having reason to believe the same to be stolen, it is necessary that the prosecution should prove facts from which it could reasonably be inferred that the possession by the accused was dishonest.

The facts sufficiently appear in the judgment.

Dornhorst, for accused-appellant.

Cur. adv. vult.

On March 7, the following judgment was delivered.

LAWRIE, J.—The proceedings are headed in the "Itinerant Police Court of Colombo"—a court which is unknown to me. However, on page 3 I find that the Court which tried the case was the Additional Police Court of Colombo held at Welisara on February 16, 1893. On reference to a map I see that there is a Welisara on the road from Colombo to Jaela. It is possibly a small place, because I do not find it mentioned in any of the Government Itineraries. It may,

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however, be a "convenient spot," and the Police Magistrate is permitted by 12 of 1890 to hold his Court at any "convenient spot" within the limits of his division.

I should like the Police Magistrate, in future, to state as a matter of record that the place he holds his court in is within his division, and that it is at a convenient spot for the trial, and that he had given due notice that he would sit there.

I have observed in other cases which come before me from this Police Court that it is really "itinerating"—here to-day and away to-morrow. The Magistrate is followed by complainants and accused and witnesses but not by counsel, for the time of counsel and proctors is too valuable to permit them to follow this peripatetic court, which sits when the Magistrate pleases, in public places and in private houses, at any hour, from sunrise to sunset, with, I should imagine, immense inconvenience to everyone, particularly to the witnesses and to the accused, who are without legal advice.

Here the Magistrate charged the accused with having on September, 22, 1892, dishonestly retained a stolen cow, the property of Haramanis, knowing or having reason to believe the same to be stolen, an offence punnishable under section 394 of the Penal Code. He convicted the accused in the same terms as the charge. The charge and conviction are bad in law, because the Magistrate had no jurisdiction to try the offence summarily, unless the value of the stolen property, dishonestly retained, was under Rs. 100. The value of the property is not stated in the complaint, nor in the charge, nor in the conviction.

On the merits, there is no evidence of the accused's dishonesty or of his knowledge or of his having reason to believe the cow was stolen.

Haramanis lost a cow on February, 1890. Two and a half years afterwards, on September 22, 1892, the cow was seized as a trespasser on another man's land, and both the accused and Haramanis, claimed it as their own.

Haramanis undoubtedly had not been in possession for the 2½ years. The accused had been in possession for a part of that time.

It may be that the cow formerly belonged to Haramanis, but it was necessary to prove facts from which it would reasonably be inferred that the possession by the accused was dishonest. I invite the attention of the Magistrate to the statements of the accused in the petition of appeal. I have not relied on these but they deserve attention.

The accused is acquitted and discharged.

BEFORE *Laurie* A. C. J. AND *Withers*, J.

May 5 and 12, 1893.

SANDFORD and another *v.* DON PETER.

[No. 5,470 D. C., KANDY.]

Lease—Covenant to pay rent—Breach of Forfeiture and Re-entry—Equitable relief.

A Court has power in the exercise of its equitable jurisdiction, to grant relief—where the circumstances warrant such relief—to a lessee against a clause of forfeiture and re entry for breach of covenant to pay rent.

The terms of an indenture of lease can only be altered by an independent contract satisfying the statute of Frauds.

Per LAWRIE, A. C. J.—In equity the construction put on a clause of forfeiture of a lease on non-payment of rent is that it is a mere security for the payment of rent, and as the breach of that covenant is capable of a just compensation, a Court of equity may award the compensation and abstain from enforcing the forfeiture.

The action was in ejectment.

The facts sufficiently appear in the judgments:—

Layard, A. G. (*Wendt* with him) for defendant-appellant.

Dornhorst for plaintiffs-respondents.

On May 12, the following judgments were delivered:—

LAWRIE, A. C. J.—The cause of action is the defendant's failure to pay rent for the months from April 1, 1891, till February 1, 1892.

The action was instituted on February 16, 1892. The defendant admits the non-payment. The issue is whether the admitted non-payment was, or was not, due to the neglect or default on defendant's part. By the lease the rent was payable monthly on the 15th of each month.

The plaintiffs consented to the defendant paying rent

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quarterly instead of monthly. I take it such quarterly payments were to be made not in advance, but at the end of each quarter.

It is proved that the plaintiffs gave notice to the defendant's manager that they desired a resumption of the monthly payments, but that notice was not given to the defendant himself. It is my opinion that the plaintiffs were bound to give special notice to the defendant that they intended to require monthly payments and that, on failure to pay monthly, the clause of forfeiture and re-entry would be enforced.

Until such notice was given the defendant was in time if he paid each quarter's rent within three months of the date it fell due.

The rent for the first quarter of 1891 was paid. The rent for the second quarter fell due on June 30. It was not then paid; the forfeiture for non-payment was not exigible until the rent had been three months in arrear, viz:, on September 30.

On September 24, 1891, within the three months, the defendants tendered the rent. They thereby purged their default; they were no longer in arrear.

The next quarter rent fell due on 30th September. The defendant was in arrear if he did not pay or tender before December 31.

Unfortunately the defendant did not within that time tender the rent. He made the mistake of setting off a private debt alleged to be due by the 1st plaintiff to the firm of which the defendant is a member, and he tendered only a balance.

This position was untenable. The debt which the 1st plaintiff owed to a firm could not be set off against a debt due to both plaintiffs by the defendant.

Undoubtedly on January 1, 1892, the defendant was more than three months in arrear of the rent, and the clause in the lease forfeiting his interest and giving to the lessors power to re-enter became enforceable in strict law.

But as a Court of Equity I think we are bound to interpose,

In equity the construction put on a clause of forfeiture of a lease on non-payment of rent is that it is a mere security for the payment of rent, and that as the breach of that covenant is capable of a just compensation, a Court of equity may award the compensation and abstain from enforcing the forfeiture.

Applying this principle and asserting this equity jurisdiction I would give to the defendant an opportunity of fully purging his default by paying the rent due up to date.

I would defer giving judgment on this appeal until the 4th day of July, and if on or before that day the defendant pay to the plaintiffs the rent up to the end of March of this year with interest at 9 per cent on arrears and also the costs of the cause, then I would set aside the judgment and dismiss this action; but if the payment be not made then or in July, 1893, I would affirm the judgment with costs.

WITHERS J.—I think there can be no doubt that the defendant has broken his covenant to pay rent at the time stipulated in the indenture of the lease whereby a right of re-entry has accrued to his landlords who in consequence bring this action in ejectment.

Taking the last, and I think the best, point pressed upon us by the Attorney-General this state of things suggests two questions. (1) Has this court jurisdiction to relieve against what is called for feiture for non-payment of rent? (2) Is this a proper case for such relief?

In the text books on Roman-Dutch Law I have not been able to lay my hand on any authority for such an equitable jurisdiction. At the same time I am under the impression that relief against ejectment for breach of such a covenant has been not unfrequently granted in our Courts. Although I must say that I have only been able to find one case since the argument, and that is reported in Beven and Siebel's reports for 1875 page 43.

There this Court constituted by Sir RICHARD CAYLEY, C. J. and H. DIAS, J. affirmed the Judgment of my brother LAWRIE, C. J. who granted relief to a lessee against forfeiture for non-payment

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of rent in a case, which came before him in the District Court of Kandy.

I am on the whole disposed to think that we have jurisdiction to relieve, if in other respects the circumstances justify the exercise of this jurisdiction. Having regard to that provision in the lease which gave liberty to the defendant to erect a certain class of building on the parcel of land demised to him, and to the fact that the defendant laid a considerable sum of money out in the erection of buildings, having regard to the extension of time from monthly to quarterly payments, and the absence of any notice, after a course of dealing between the parties on the footing of this indulgent extension of time, that the right of re-entry would be strictly insisted upon if the defendant did not resume punctual monthly payments in terms of his covenant, considering that the 1st quarter's payment for 1891 was offered and accepted, that the 2nd quarter's payment was tendered within three months after it became due and was refused, and that the 3rd quarter's payment less deducted sum, in view of certain antecedent transactions by the defendant, without legal justification, but not without some show of reason, was offered within three months of its becoming due and payable but refused, I am of opinion (which is not a very confident one) that this is a proper case for the relief proposed by the Chief Justice.

The agreement to extend the time from monthly to quarterly payments was not a binding agreement on the lessors, as the terms for the time of payment could not be altered without an independent contract satisfying the statute of Frauds.

The agreement to take quarterly payment was nothing more than a voluntary forbearance by the lessor, and would not be an answer to this action, the actual acceptance of a quarterly payment amounting only to a waiver of breaches prior thereto. The contention pressed upon us by the Attorney-General in opening his appeal, that the plaint disclosed no cause of action in the present plaintiffs, on the ground briefly put that the lessors sold only a reversion in the land after the expiration of the lease and not any interest in the lease itself, cannot, I think, be listened to for the simple rea-

son that the plaintiffs distinctly stated the effect of the transfers from two of the original lessors to the present plaintiffs to be, inter alia, an assignment of all the rights and benefits reserved by the said lease, and the defendant admitted the correctness of those statements.

The 7th paragraph of the answer on which the Attorney-General relied is a traverse of an inferential averment in paragraph 9 of the plaint, and says merely that nothing in that paragraph entitles the plaintiffs to eject them.

It does not say that as a matter of law the plaint discloses no right of action in the plaintiffs.

I therefore agree in the order proposed by my brother LAWRIE, C. J.

BEFORE *Withers*, J.

June 29 and July 3, 1893.

In the matter of a charge of contempt of Court against Perera and others.

[No. $\frac{1,646}{1,492}$, C. R., KURUNEGALLE.]

Contempt of Court—Jurisdiction—Section 223 of the Penal Code.

Accused were convicted by the Commissioner of the Court of Requests of Kurunegalle of contempt of Court in that they interrupted the business of the Court by conducting, close to it, a noisy procession—*Held* that the conviction was wrong, inasmuch as the Commissioner was not competent to try an alleged offence of contempt not committed in the presence of his Court and not committed in the course of any act or proceeding in his court and declared by any law to be punishable as contempt of Court.

If the conduct of accused amounted to an offence at all, it was that described by section 223 of the Penal Code, and triable only by another and competent Court. Moreover, the charge should have specified the judicial proceeding in which the Court was engaged when interrupted.

The Commissioner having taken evidence that, on June 7, 1893, when the Court was sitting, the appellants conducted along the public road close to the Court a procession composed of people shouting, beating tom-toms, discharging fire-arms, &c. and thus interrupted the business of the Court, found the appellants guilty, and passed sentence on them in these terms—"The 1st, 2nd, 3rd, 4th and 6th accused are

In the matter of a charge of contempt of Court against Perera and others.

guilty, and are sentenced to pay a fine of Rs. 10 each, or in default of payment to-day, to rigorous imprisonment for fourteen days.

In appeal,

Pereira for appellants—A Commissioner has no jurisdiction to try for contempts committed *ex facie* of the Court, except where he is specially empowered to do so by the legislature. In such a case as the present, there is no special authority conferred on Commissioners. The Commissioner acted, apparently, under Chapter LXV of the Civil Procedure Code, but he has not made out the conviction in the form referred to in section 797. The accused intended no contempt. They stopped the tom-toms when asked to do so, but were practically powerless to stop the vociferations of the crowd.

Cur. adv. vult.

On July 3, the following judgment was delivered by

WITHERS, J.—I feel bound to set aside this conviction, because I do not think that the Commissioner was competent to try an alleged offence of contempt which was not committed in the presence of his Court of Requests, and was not committed in the course of any act or proceeding in his Court, and declared by any law to be punishable as contempt of Court.

If the conduct of the accused amounted to an offence at all, it was that described by section 223 of the Penal Code as intentionally causing an interruption to a public servant, while such public servant is sitting in a stage of a judicial proceeding. That offence could be tried only by another and competent Court. Moreover the charge should have specified the judicial proceeding in which the Commissioner was engaged at the time he was interrupted by the noisy procession near his Court in which the accused took part.

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

January 24 and Feburary 28, 1893.

SUBEHAMI and others *v.* BASNAYEKE and others.

[No. 240, D. C., MATARA.]

Lease—Breach of Covenant for quiet possession—Action against lessor—Damages.

Plaintiffs and 5th defendant got a lease from the first four defendants. At the date of lease, the land demised was under lease to lessees, of whom the 5th defendant was one. These lessees having refused to give up possession, the plaintiffs sued for damages consequent upon the breach of covenant for quiet possession.

Held (per BURNSIDE C. J. and WITHERS J.) that some co-tenants cannot sue a landlord for the breach of a covenant to let them into premises at a day fixed under a demise for a term of years, when one of them has been let in, and enjoys the benefits of the lease made jointly to him and those whom he has tortiously excluded from the premises.

Per LAWRIE, J.—If under a lease the lessor impliedly contracts to give the lessee possession at the commencement of the term, and if he fails to do so by reason of a previous tenant wrongfully holding over, the lessee may recover damages, and is not driven to bring ejectment against the previous tenants.

The plaintiffs and the 5th defendant got a lease from the first four defendants. At the date of the lease the land was demised to lessees, one of whom was the fifth defendant. The lessees then in possession, did not give up possession, and consequently plaintiffs did not get possession. The plaintiffs brought the present action to recover damages consequent on the failure of the defendants to let them into the premises demised.

The plaintiffs appealed.

Seneviratne for plaintiffs.

Dornhorst (*Wendt* with him) for 1st, 2nd, 3rd and 4th defendants.

Grenier for 5th defendant.

Cur. adv. vult.

BURNSIDE, C. J.—This action is altogether misconceived and assuming that there has been a breach of covenant for quiet enjoyment, which, I do not see my way to admit, the plaintiffs cannot recover even against the 5th and 6th defendants who must necessarily be dismissed from the suit.

I think it best to affirm the judgment and leave the plaintiffs to bring a fresh action in effect perhaps a little more

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expensive, but certainly more satisfactory than proceeding on encumbered by the debris of this, even if he undertake to amend the pleadings.

LAWRIE, J.—The plaintiffs and the 5th defendant got a lease from the first four defendants. At the date of lease the land demised was under an unexpired lease to lessees of whom the 5th defendant was one. These lessees did not give up and consequently the plaintiffs did not get possession. The failure of the lessors to give possession entitled the lessees to damages. There are not many cases reported on this point, I refer however to I Lorenz p 191 and Ramanathan (1877) p. 117.

I am of opinion that the wrongdoers in this case are the lessors and not the 5th defendant. He did no wrong. He had an existing lease under which he was in possession which he was entitled to hold to. By joining in the new lease he did not covenant to his co-lessees for entry or quiet possession.

It was the duty of the lessors before granting the second lease to have made such arrangement with the 5th defendant and the other lessees as would hvae enabled the lessors to give possession on the day of entry,

It has been settled in a series of cases (cited by Woodfall p. 696) that if under a lease the lessor impliedly contracts to give the lessee possession at the commencement of the term, and if he fails to do so by reason of a previous tenant wrongfully holding over, the lessee may recover damages and is not driven to bring ejectment against the previous tenant Coe *v.* Clay 5 Bing p. 440. Jinks *v.* Edwards 11 Exch p. 775. Ludwell *v.* Newman 6 T. R. p. 458.

The present is a stronger case against the lessor than these. In the English cases the previous tenants were wrongdoers holding over without title. But here the previous lease still existed. The first four defendants in leasing to a second set of tenants knew what their obligation was and that they would be liable in damages if they failed to make such arrangement as would enable them to give the

new tenant possession on the first day of the new lease.

I agree that the 6th defendant ought not to have been joined as defendant. I would amend the plaint by striking out the words "falsely" and "unlawfully" in the 5th paragraph. When so amended the allegations are in conformity with the facts proved.

I would set aside the judgment, and dismiss the action as against the 6th defendant with costs, and give judgment against the, 1st, 2nd, 3rd and 4 defendants for the damages prayed for up to August 1, 1892, when the plaintiffs got possession, with costs against them. I find no costs due to or by the 5th defendant.

WITHERS, J.—I think the judgment should be affirmed with costs and that 6th defendant is entitled to his costs in appeal. The evidence is so far at variance with the plaint as to show that the present action cannot be maintained.

It was the 5th defendant, a co-lessee with the plaintiff under a joint lease from the 4th defendant, who united with the 6th defendant in preventing the plaintiff from having the use and enjoyment of the premises from the commencement of their lease in August 1890.

I fail to see how some co-tenants can sue a landlord for the breach of a covenant to let them into premises at a day fixed under a demise of a term of years, when one of them has been let in and enjoys the benefits of the lease made jointly to him and those whom he has tortiously excluded from the premises.

I think the action has been misconcieved.

BEFORE *Withers*, J.

June 29 and July 3, 1893.

[No. 12,940, P. C., HATTON.]

HARMAN *v.* MUTTIAH and others.

Ordinance 14 of 1878—Sections 5 and 7—Repeal—Weights and Measures—Striker—Section 289 Penal Code.

Sect. 5 of the Weights and Measures Ordinance No. 14 of 1878 specially provides against the use of a measuring striker which is not round and straight, and of the same diameter from end to end.

Held, that this Section has not been affected by the repeal of Section 7 of the same Ordinance, which makes the use of a striker not in conformity with the terms of this Section, an offence punishable with fine or imprisonment, and that the provision of this Section now comes within the provision of Section 289 of the Penal Code which enacts as follows:—

"Whoever wilfully neglects or omits to perform any duty imposed upon him by, or wilfully disobeys or infringes any provision of any Ordinance or statute heretofore, or hereafter to be enacted, for which neglect, omission, disobedience, or infringement, no punishment is or shall be, by this Code, or any other Ordinance or statute, otherwise specially provided, shall be punished with a fine.

The facts material to this report appear in the judgment:—

Dornhorst (*Grenier and Wendt* with him) for appellants.

No counsel for respondent.

Cur. adv. vult.

On July 3, the following judgment was delivered:—

WITHERS, J.—The first offence of which the 1st accused has been convicted in these proceedings as principal and the other accused as aiding and abetting is the offence of wilfully strking a measure of capacity with a stick not being round and straight and of the same diameter from end to end as required by Sect. 5 of Ordinance 14 of 1878, and Ordinance "to amend the Weights and Measures Ordinance 1876" in violation of the provisions of Sect. 289 of the Penal Code which enacts as follows:—

"Whoever wilfully neglects or omits to perform any duty imposed upon him by, or wilfully disobeys or infringes any provision of any ordinance or statute heretofore, or hereafter to be enacted, for which neglect, omission, disobedience, or infringement, no punishment is or shall be, by this Code, or any other ordinance or statute, otherwise specially provided, shall be punished with a fine."

As to this conviction it was argued by appellants' counsel that it was contrary to law and against the weight of evidence.

It was urged in the first place that considering the position in the Code of the 289th Sect. this section can only apply to wilful infringement of provisions of Ordinances for which no punishment has been ordained, which deal with matters of the same kind as those which are made punishable as offences in Chapter XIV of the Code; but, to my mind, the language of this 289th section is too wide to have that limitation put upon it, while its position is not so strange as at first sight appears. It is found at the end of a Chapter which declares various kinds of conduct on the border line of crimes proper to be offences and punishable as such It was then urged that this section cannot apply to the 5th section of Ordinance 14 of 1878 because this section should be regarded as attendant on a subsequent section of the same Ordinance, viz, the 7th section, which makes the use or possession under special circumstances of a striker not in conformity with the terms of the 5th section an offence punishable with fine or imprisonment, and as the 7th section has been repealed, the 5th section must be taken to have been repealed with it. In my opinion there is not such a vital connection between the two sections as this argument would imply.

The repeal of the 7th section as a matter of fact, leaves untouched the 5th section of Ordinance 14 of 1878 which specially provides against the use of a measuring striker which is not round and straight and of uniform diameter from end to end. No punishment being now provided in this Ordinance for non-compliance with this provision I think this provision comes within the purview of Sect. 289 of the Penal Code.

As to this conviction being against the weight of evidence I have come to the conclusion that it is not so, though I am not surprised that it was so contended. There is much that is unsatisfactory about the evidence of one Shuni, the only witness for the prosecution, who deposes to having seen the 1st accused use the grooved striker in levelling the rice measured for sale. But the very fact of such a striker being found on the occasion in question in the boutique where the accused

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were employed in recording, measuring and delivering the rice sold by the 1st accused to the coolies of Drayton Estate, and the fact of the deficiency in a quantity of rice sold by measure to one of the coolies confirm his testimony.

I have given this part of the case my best consideration and I cannot say that the Magistrate has come to a wrong conclusion.

Admit the wilful use by the 1st accused of the grooved striker in levelling the rice and I think it cannot be gainsaid that all the other accused abetted the use of it, so I affirm the conviction on this charge.

The conviction on the 2nd charge of cheating must be quashed. The charge of cheating is not an alteration of the former charge. It is a charge of a new and distinct offence.

A charge which changes the nature of an offence in the original charge cannot be said to be an alteration of that charge. Even the sustained charge was defective by the ommission of the word "wilfully," but I do not think the accused can be said to have been prejudiced by the ommission of that word in view of the circumstances disclosed by the case for the prosecution. The judgment contains this important word.

"Wilfully" is not defined in our Code, but I think it may be taken to mean knowingly and with evil intent, and there is little doubt in my mind that the grooved striker was used by the 1st accused on this occasion with intent to defraud, and (as I said before) that the other accused wilfully abetted him.

BEFORE *Laurie*, J.

June 22 and 27, 1893.

THE QUEEN *v.* FERNANDO.

[No. 1,030, D. C., Crim., NEGOMBO.]

Contempt of Court—making of false statement in affidavit of service of process—Penal Code Sects. 223—Civil Procedure Code Sects. 372 and 797.

The making of a false statement of fact in an affidavit is not a contempt of court, but the making of a false statement of fact by an officer charged with the execution of process in his affidavit of service of process is an offence, which is punishable as contempt of court under Sect. 372 of the Civil Procedure Code.

The accused Davit Fernando was convicted of having committed a contempt of court, in that he, on the 16th of January, 1893, did make a false statement of fact in the affidavit made by him on the 15th of January 1893, on the summons on the defendant, in District Court Negombo, No. 1030, by falsely stating that he had served the said summons on the defendant, when, in fact, he had not served it.

Seneviratne for accused-appellant.

The conviction should recite the the materials on which it is founded (see Sect. 793 Civi Procedure Code). The materials given in the conviction do not disclose the offence of contempt of Court (Sect. 223 Penal Code). If the accused has committed any offence, it is the offence defined in Sect. 372 of the Civil Procedure Code, which is not contempt of Court, but only punishable as such, but in the materials recited in the conviction, there is nothing to show that the statement made in the affidavit was false.

Dias, C. C. for the Crown. The definition of contempt of Court has been enlarged by Sect. 137, 713 and 717 of the Civil Procedure Code in a manner which would include the present case.

Cur. adv. vult.

On June 27, the following judgment was delivered:—

LAWRIE, A. C. J.—This is an appeal against a conviction for contempt of Court.

The District Judge stated in the conviction that the accused was Davit Fernando, of Negombo, and that he had committed a contempt of Court in that he, on the 16th day of January 1893, did make a false statement of fact in the affidavit made by him on the 16th January, 1893, on the summons on the defendant in District Court, Negombo, case No. 1,030, by falsely stating that he had served the said summons on the defendant, when, in fact, he had not served it.

This did not disclose the offence of contempt of Court.

A contempt of Court is defined in section 223 of the Penal Code. It consists in intentionally offering any insult or causing any interruption to any public servant while

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such public servant is sitting in any stage of a judicial proceeding.

This definition is enlarged by the 137, 713 and 717 and other sections of the Civil Procedure Code, but I have not been referred to any section of either Code which makes the making a false statement of fact in an affidavit a contempt of Court, for, observe, that in this conviction, it is not stated that the accused was an officer of the Court, nor that the affidavit was presented when the District Judge was sitting.

Further, it seems to me that the charge is defective in that it is not said the affidavit contained a statement which the accused knew or believed to be false or did not believe to be true.

I am inclined to the opinion that the proper course would have been to have presented a complaint to the Police Magistrate charging the accused under section 179 of the Penal Code. However, it was open to the District Judge to proceed under section 372 of the Civil Procedure Code, though under that section it was necessary to state that the affidavit was false to the knowledge of the accused, and the charge should have been, not for contempt, but for the separate offence of making a false affidavit, &c. which by section 372 is not said to be contempt of Court, but, to be an offence punishable as such.

Another requirement of section 797, and of the form 134, is that the conviction shall recite the materials on which it is founded, and shall adjudicate upon the material facts of the accused's behaviour and language with so much of the surrounding circumstances as caused them to constitute the offence of contempt of Court.

The latter adjudication was, here, impossible because the act which constituted the offence was not done *in facie curiæ*.

The materials on which the conviction was founded are said to be the affidavit of the defendant dated 2nd May 1893, and the evidence of the plaintiff taken on the 25th May 1893, the day before the accused was charged with this offence. In my opinion neither of these materials was admissible evidence.

If the evidence of the defendant and of the plaintiff in District Court Case 1,030 was material in the summary trial of this offence, such evidence could only be given in Court *viva voce* in presence of the accused and subject to his right to cross-examine. These materials have no probative value aud are not evidence on which the District Court could convict and sentence.

The Court had, however, other and better evidence before it than it recited in the conviction.

The defendant in 1,030 was examined in the course of the summary trial of the accused and gave evidence that the accused did not serve the summons on him, and he was cross examined for the accused.

I do not say that the District Judge would not have been justified in convicting on this defendant's evidence alone, though I think it would he a somewhat slender foundation for a conviction being oath against oath.

But, as the District Judge himself records that he convicted on other evidence, which I have shown was inadmissible, I am unable to amend the conviction by striking out the reference to the inadmissible, and by inserting a reference to the admissible, evidence. For all these reasons, I hold that the conviction must be set aside, and the accused acquitted.

BEFORE *Lawrie*, A. C. J.

July 7 and 13, 1893.

ANDREE *v.* COORAY.

[No. 490, Ad. P. C., COLOMBO.]

Criminal Trespass—Charge—Mischief Ceylon Penal Code, Sects. 427 and 408.

Accused was charged with criminal trespass in that he "entered upon land in the possession of H. A. with intent to commit an offence."

Held, that in such a charge it is essential that the offence intended to be committed by the accused after entry should be stated, and that the above charge was bad for want of such statement. The evidence shewing that accused entered upon the land to intimidate, insult and annoy the complainant, the Supreme Court, however, altered the charge accordingly, and convicted accused thereupon.

ANDREE v. COORAY.

Plucking coconuts, mature or immature, and jack, from trees is not causing such destruction of, or change in property as constitutes the offence of mischief.

The facts of the case sufficiently appear in the judgment.

Pereira for accused, appellant.

Dornhorst for complainant, respondent.

On July 13, the following judgment was delivered by

LAWRIE, A, C. J.—The Police Magistrate has given leave to appeal against the conviction and sentence. The charge framed by the Magistrate was that the accused "did commit criminal trespass by entering upon land Kalupallalewatte, then in the possession of Hugh Andree, with intent to commit an offence and that you have thereby commited an offence punishable under section 433 of the Ceylon Penal Code."

This was a bad charge because it did not set forth what was the offence the accused intended to commit.

Section 38 of the Penal Code enacts that the word "offence" in section 427 which defines Criminal Tresspass means, not only a thing punishable by the Penal Code, but also a thing punishable under any law other than the Code, with imprisonment for a term of six months or upwards, whether with or without fine; section 435 and the subsequent section of the Penal Code show that the punishment of criminal house trespass varies according as the accused is convicted of intending to commit one crime or another.

I think it is essential that the charge should state what offence the complainant charged the accused with intending to commit. If the intended crime was murder or any crime punishable by long imprisonment, the Police Magistrate would not have jurisdiction to try the charge of criminal trespass; apart from a question of jusisdiction the charge should give the accused reasonably sufficient notice of the matter with which he is charged.

In this respect I hold the charge of criminal trespass was defective.

The second charge is "that you did commit mischief to wit, by forcibly plucking and removing 75 king cocoanuts and eight green cocoanuts and two jack fruits, value Rs. 9, fruits of the trees standing on the land Kalupellalawatte

in the possession of Hugh Andree, knowing it to be likely that you would cause wrongful loss to the said Hugh Andree, and have thereby committed an offence punishable under section 409 of the Ceylon Penal Code."

If this charges discloses and sets forth any offence, which I doubt, it certainly does not set forth the offence of mischief.

Taking cocoanuts or jack from trees is not a destruction of property, or any snch change in the property, or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously. Neither the tree nor the fruits were destroyed, nor by the removal was the value or utility diminished, nor were they injuriously affected. The circumstances with which the removal occurred did not reasonably give rise to the belief that the accused committed theft. I find in the evidence sufficient material upon which to amend the first count of the charge by deleting the words "to commit an offence" and by substituting the words "to intimidate, insult and annoy the said Hugh Andree."

I find the accused guilty on the 1st count and sentence him to one month's rigorous imprisonment. I set aside the conviction on the second count and acquit the accused of the offence of mischief.

BEFORE *Burnside*, C. J.

Feburary 9 and 17, 1887.

PAMMODARAMPILLAI *v.* PANGAMUTTUPILLAI

[No. 24,194, D. C., BATTICALOA.]

Agreement by a mother to give her daughter in marriage—how to be construed and how far binding.—

Plaintiff in his libel averred that he proposed and agreed to and with defendant that he should marry defendant's daughter and that defendant's daughter being then a minor, defendant, who according to custom had control and authority over her to enable her to give her in marriage, agreed that her daughter should marry plaintiff within a reasonable time. Plaintiff further averred that defendant failed to perform her part of the agreement in that she proposed that her daughter should marry another man.

Held, that the agreement on defendant's part amounted simply to one that plaintiff would have her consent to marry her daughter, and, as such, was a valid agreement for breach of which plaintiff was entitled to damages.

Held, further that the fact that defendant proposed that her daughter should marry another man did not constitute a breach by her of her part of the agreement.

PAMMODA-RAMPILLAI v. PANGA-MUTTUPILLAI

The defendant demurred to the plaintiff's claim summarised above on three grounds, 1st, because there was no allegation that the defendant's daughter was a consenting party to the agreement between the plaintiff and the defendant, or that she was ever ready and willing to marry the plaintiff, 2ndly that the alleged custom enabling a mother to have the power of donation in respect of her minor daughter, so as to entitle her to dispose of her in marriage without her consent was illegal and no contract founded on it could be enforced, and 3rdly that there was no allegation that the defendant was not ready and willing that the plaintiff should marry her minor daughter, or that the defendant in any way used her influence over her daughter to prevent her marrying the plaintiff, or that the marriage fell through owing to any act on the part of the defendant.

The District Judge overruled the demurrer, and entered judgment for the plaintiff.

The defendant appealed.

Layard (*Withers* with him) for defendant, appelant.

Ramanathan (*Dornhorst* with him) for plaintiff, respondent.

On February 17, 1887 the following judgment was delivered by

BURNSIDE, C. J.—This case, divested of all the irrelevant matters as to Tamil and European customs with regard to marriage and the right to donate a young girl in marriage, resolves itself into a simple question of contract. The plaintiff alleges that he agreed to marry the defendant's daughter and the defendant in consideration thereof, then agreed that her daughter should marry him, and he alleges that the defendant has refused to perform her part of the agreement in as much as she has agreed that her daughter should marry somebody else, and he claims damages. The defendant has demurred to the plaintiff's libel on several grounds, 1st that it is not alleged that the young lady herself was ready and willing to marry, 2nd that any custom enabling a mother to donate her daughter is illegal and no contract founded on such a custom can be enforced, 3rd that it is not alleged that it was in consequence of any act of the defendant that the plaintiff could not marry the defendant's daughter.

The learned District Judge has given us the very interesting result of his research into Roman Law, and the opinions of the eminent jurists on the point whether a contract can be made for a third party without his consent so as to bind him, but I find no difficulty in saying that however interesting it has nothing to do with the point before us. It is idle now a days to insist that matrimony is merely a contract. In Ceylon the law does not sanction the marriage of any female without her consent. Mutual consent is of the very essence of the matrimonial, as well as of every, contract, and without it there can be no marriage.

As I read it, the libel in no way controvences that principle. It simply alleges that in consideration that the plaintiff had agreed to marry the defendant's daughter, the defendant, her mother, agreed that she should marry him or in other words, that he would have the defendants consent to the marriage. I see nothing immoral or illegal or startling in such an agreement, there is much wordly visdom in it. The plaintiff sought to secure the consent of his future mother-in-law before he married her daughter, and if the plaintiff had alleged a sufficient breach, the libel would in my opinion have been as good as any other libel on contract, but I cannot find that the libel does allege any sufficient breach. It says the defendant refused and neglected to perform her part of the agreement because she has proposed that her daughter should marry another young man.

This does not seem to be a breach, *non constat*, that the other young man will marry the young woman or that in that proposal the defendant had intended to withdraw her consent to the marriage with the plaintiff, she might have agreed to consent to the marriage of her daughter with either of the young men and not broken her contract because her daughter elected to marry one and rejected the other, or it may be the other young man and not the plaintiff, will be the victim of defendant's perfidy. It was the duty of the plaintiff, upon the contract on which he has declared, to allege that by something the defendant has done, he has been prevented from marrying the young lady who, he says, had agreed to marry him, or to show that he married her, notwithstanding, that the

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defendant contrary to her agreement to consent had endeavoured to prevent him, in either of which cases he would be entitled to such damages only as he had incurred by the defendant's opposition. In the latter case it would be difficult to imagine what damage he could sustain beyond the pain which he could feel at being compelled to marry without his mother-in-law's consent, a source of anguish, however, which might be diminished even if he recovered damages against her.

The libel is, therefore, in my opinion, bad for want of a sufficient allegation of breach of the contract declared on, and the judgment of the District Court must be set aside and judgment entered for defendant on the demurrer with costs.

BEFORE *Laurie*, A. C. J. AND *Withers*, J.

July 7 and 11, 1893.

PERERA *v.* FERNANDO.

[No. 3,085, D. C., COLOMBO.]

Administrator—Right to be sued by creditor of deceased intestate—Chapters XXXVIII and LV Civil Procedure Code—Judicial settlement.

The right of suing the administrator of a deceased intestate accrues to the creditors of the deceased immediately upon the grant of letters of administration.

The Civil Procedure Code nowhere prohibits a creditor from suing an administrator or executor of a deceased, till one year has expired from the date of probate or grant of letters of administration.

Observations by WITHERS, J., upon the object and effect of the judicial settlement of an estate under Chapter LV, of the Civil Procedure Code.

The facts material to this report sufficiently appear in the judgment of WITHERS, J.

Wendt for plaintiff-appellant.

Dornhorst (*VanLangenberg* with him) for defendant-respondent.

Cur. adv. vult.

On July 11, the following judgments were delivered :—

LAWRIE, A. C. J.—When a debtor dies intestate those of his creditors whose cause of action survives await with anxiety the grant of letters of administration.

The day after these are issued the creditors are entitled to sue the administrator in the same way as they would have sued the debtor had he lived.

The plea that the law protects an administrator from actions to constitute and to enforce debts due by the intestate, that the law permits administrators to defy the creditors for a year is supported neither by common sense nor by common law.

If there be indication in our Code of such a protection these sections shall be strictly construed, but none of them apply to this case

I would set aside the judgment and would give judgment for the plaintiff with costs as suggested by my brother Withers.

WITHERS, J.—For the first time, I imagine, has been raised on behalf of an administrator, in resistance to an admittedly just claim by a creditor against the estate of a deceased debtor, which is sought to be enforced by action, this very curious plea.

"My year has not yet run out and you must not worry me with your claim until that year has expired."

Whether the plea was a serious one or not it has been seriously upheld by the court below.

Mr. Dornhorst in support of the judgment contended that the provisions of our Civil Procedure Code with regard to testamentary matters read as a whole, constitute a law prohibiting a creditor from suing an administrator or executor for a debt due by the deceased till one year has expired from the date of probate or grant of letters, or he argued at all events that a Court is competent and is required by these provisions, if read aright, to stay all proceedings in an action of the kind pending the year of grace.

I cannot hold with this contention for a single moment. I require to see some law expressed in the clearest possible terms which destroys the creditors undoubted right to sue an administrator or executor within a year from the date of probate or grant of letters for a debt, which the deceased owed him when he died. As this objection, however, has been taken I feel bound to say a few words with regard to the provisions

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of the Code which are supposed to legislate to this effect by way of implication.

Chapter XXXVIII of the Civil Procedure Code may be said to enact rules of procedure for the probate side of our District Court.

It provides more particulary for the production and proof of wills, applications for probate and letters of administration, grants of probate and letters of administration revocation of probate or letters, the duties of executors and administrators compensation for service rendered by them, and the time when their accounts are to be filed.

An executor or administrator has one year allowed him from the date of his grant to administer a dead man's estate, by or before which time he must file a true account of his administration. Chapter LV provides for compelling intermediate accounts before the year has expired and compelling final accounts, now called judicial settlements, after the year has expired, or after the revocation of grant or cessation of a grant-tees functions; an executor or administrator may on his part after his year is out apply for a judicial settlement of his accounts. The object of the judicial settlement is to bring the administration to a close and the effect of it is to conclude all parties cited to attend the proceedings and their privies in estate with regard to certain facts connected with the administration, *e. g.*, the correctness of items allowed to the accounting party for payments made by him (*N. B.*) to Creditors legatees, heirs, and next of kin also items allowed for necessary expenses incurred by him, and for services rendered by him, for interest charged against him, for money collected by him for allowances made for decrease or increase of wasting or productive assets.

Hence a judicial settlement is of great advantage to an executor or administrator. It further enables him to prove and retain debts which the deceased incurred to him.

It is further a mutual advantage to the estate and the executor or administrator in that as regards mutual debts, that is, debts due from him to the estate or *vice versa*, the operation of the statute of limitation is suspended between the date of the

death of the deceased and that of the first judicial settlement —see Sect. 737 Civil Procedure Code.

The counsel's contention really amounts to this—that a creditor whose debt an executor or administrator refuses to pay has no remedy open to him except to press for a judicial settlement, or defer his claim by action till a year from probate or grant has expired, when meanwhile he may have lost his remedy by the statute of limitation.

It is, as it ever was, the duty of an executor or administrator to pay a creditor's admitted claim the moment it is demanded, if he has the wherewithal to pay it, and no preferential claim stands in the way.

Indeed, if he can do so, and does not do so within his year, he his liable by our Civil Procedure Code section 554 to pay interest out of his own funds for all sums which he shall retain in his own hands after that period, unless he can show good and sufficient cause for such detention.

I would set aside the judgment and give judgment to plaintiff against the administrator for the sum claimed, with costs to be levied against the administrator personally in the event of their being insufficient assets of the deceased C. Mathew out of which to levy them.

BEFORE *Lawrie*, A. C. J.

June 1 and 8, 1893.

ARUNAKAM *v.* TAMPAIYA.

[No. 723, C. R., TRINCOMALIE.]

Fishing in the high seas—Disturbance of right to—Damages.

A party enclosing a shoal of fish within a net in the high seas, although he has not actually captured them, has sufficient possession of them to entitle him to maintain trespass against one, who forcibly, prevents him from drawing his net and securing the said shoal of fish.

The plaintiff had cast a net in the high seas, and enclosed a shoal of fish, when the defendant forcibly and with intent to cause damage, assaulted the plaintiff and some of his men, and prevented the plaintiff from drawing his net, and securing the fish he had enclosed therein. Plaintiff also

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averred the breach of a custom regulating fishing, and prayed for damages.

Wendt for plaintiff-appellant.

Sampayo for defendant-respondent.

Cur. adv. vult.

On June 8th the following judgment was delivered by.

LAWRIE, A. C. J.—In my opinion the case does not turn on the alleged custom regulating fishing, but on the averment in the 3rd paragraph of the plaint that the plaintiff's net had been cast and a shoal of fish had been enclosed, when the defendant unjustly and forcibly and with intent to cause plaintiff wrongful loss and damage, assaulted the plaintiff and some of his men and prevented the plaintiff from drawing his net and securing the said shoal of fish to the plaintiff's damage of 98 rupees.

The law applicable is that laid down in Young *vs.* Hichens, 6 Q. B. 606.

If a fisherman goes to fish in the high seas and another fisherman comes and fishes beside him and with tempting baits * * * draws away the fish from the lines and nets of the first comer with a view of catching them himself, damage may be done, but there is no tort or wrong, for the one had as much right to fish and to use fair and reasonable means to catch fish as the other.

But if the rival fisherman lays hold of the nets of the first comer, or violently disturbs the water, and drives away the fish, and prevents the latter by force and violence from exercising his occupation and calling, there is then a wrong done to him, and he is entitled to compensation in damages.

In a case reported in 2. Lorensz, p. 115, it was decided that a fisherman, who had enclosed fish in a Madella, has sufficient possession to entitle him to maintain trespass against one who entered within the circle of the net and disturbed the fish.

The decision in Vanderstraaten, p. 247, is to the same effect. Here the learned Commissioner has not given any opinion or judgment on the evidence on the third and fourth issues whether plaintiff had enclosed any fish within his net, and whether the

defendant wrongfully prevented the plaintiff from drawing his net and securing and landing the fish.

The evidence on this point is very conflicting. The plaintiff and several of his witnesses swear that the plaintiff's net was cast and had enclosed a large shoal of fish, the defendants and their witnesses say that the quarrel took place before the plaintiff had cast his net, and that he did not either cast it or enclose any fish that day.

On carefully considering the evidence I hold that the plaintiff has not proved that he was prevented by the defendant from drawing the net and securing any fish therein and I affirm the judgment with costs.

BEFORE *Lawrie*, A. C. J. AND *Withers*, J.

July 7 and 11, 1893.

PILLAI *v.* TAMBI.

[No. 197, D. C., TRINCOMALIE.]

Mandatory injunction—Erection of wall—Exclusion of light and air—Prescription—Laches.

In an action for an injunction restraining the defendant from erecting buildings, so as to prevent free access of light and air to plaintiff's house, and also for a mandatory injunction ordering the defendant to remove a building already erected.

Held, that the plaintiff was entitled to an injunction restraining the defendant from constructing any further building, so as to prevent free access of light and air to plaintiff's house.

Held also that the plaintiff was not entitled to a mandatory injunction ordering the defendant to remove the building already constructed, she having been guilty of laches in having allowed 3 or 4 years to elapse before applying for such remedy.

The facts sufficiently appear in the judgment of WITHERS, J.

Wendt for Defendant-appellant.

Dornhorst for Plaintiff-respondent.

Cur. adv. vult.

On July 11, the following judgments were delivered:—

LAWRIE, A. C. J.—I agree to the judgment proposed by my brother WITHERS.

Without a plan and without title deeds from which the boundaries of the plaintiff's and defendant's land can be ascertained, I have not been able to form a clear idea of what

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the plaintiff complains.

I agree that we may enjoin the plaintiff to erect no further building on the wall in question.

I agree that we ought not to order the removal of any building existing at the commencement of this action.

The learned District Judge thought he saw exactly what alterations were needed to restrict the building to its proper dimensions and site, but I do not understand his order. I should be sorry to be the Fiscal entrusted with the execution of this decree.

WITHERS, J.—This is an action by the resident owner of a land separated by a wall and fence from a land occupied by the owner to recover damages, and to obtain injunctions mandatory and otherwise against the defendant on the following causes of action, the extension of the roof of a house built against the wall on the defendant's side of it so as to project over the plaintiff's land and cause rain water falling on the projecting roof to drop upon her land and injure it. The act complained of sounds in damages in two ways. The projecting roof is a trespass to plaintiff's property and the water dripping from it into her land is another trespass to property.

The other cause of action is the erection of certain buildings on the wall referred to, which the plaintiff alleges is owned by her, and the defendants in common so as to exclude from the plaintiff's house both light and air which would otherwise come to it.

She does not complain that anything done by the defendant has injured the party-wall or is likely to injure it.

No issue was settled, nor could one well have been as to this latter cause of action. Plaintiff does not say in her plaint that she has acquired an easement for the free access of light by grant or prescription, nor does she particularise what part of her house has suffered from loss of light.

It seems, however, that this obstruction of light and air complained of has been removed and properly removed by the defendant.

As to the first cause of action the learned judge has preferred to believe the evidence led by the plaintiff.

According to the plaintiff the defendant in 1889, or, according to another witness, in 1887 put up a new building against the wall of partition raising the wall and apparently the new building with it, and so constructed the roof on plaintiff's side of the wall, that the eaves projected over her land. This is the continuing trespass for which she has brought her action in time, and for which she has recovered Rs. 1 by way of damages, an award from which she has not appealed.

She has obtained an injunction restraining the defendant from building on the wall, and a mandatory injunction ordering the defendant to remove the new building so as to leave the wall of partition free, so that the roof shall not discharge rainwater on to the plaintiff's land. I asked Mr. Dornhorst if he could show me any authority for such an injunction as the latter one being granted in a case where a plaintiff has allowed 3 or 4 years to go by before coming to Court for relief.

No doubt the Court can, and will where a plaintiff has neither acquiesced in the construction of a building injurious to his right of property, nor has been guilty of laches, grant a mandatory injunction, though the work complained of may have been completed before the filing of the Bill. See Goodson *v.* Richardson, 43 L. J., Chan. 790, and Larant *v.* Horton, 59 L. J., ch. 441.

True it is that the plaintiff did not acquiesce in the mode of construction of this new building, but her laches in applying to the Court for a remedy by injunction quite disentitle her to this mode of relief. That part of the judgment cannot therefore stand.

As to the wall itself the defendant to my mind has quite failed to prove that it was built within the limits of his land.

I gather from the evidence that the wall stands on the limit line of the two adjoining lands, and a wall placed on the boundary line by either of two adjoining landowners becomes property common to both of them by Roman Dutch Law—See Hubert Grotious, page 207—which neither can injure or open without common assent, much more can neither

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build on it so as to violate any right of his neighbour either in the wall itself, or in the land on the other side of it.

I would affirm that part of the order which enjoins the defendant not to construct any further building upon the party wall, vary the judgment by striking that part out of it which enjoins the defendant to remove the new building attached to the wall so as to leave the wall free and so as to prevent the roof of the new building from projecting over the party-wall.

I would give no costs in either court.

BEFORE *Lawrie*, A. C. J.

July 13 and 15, 1893.

PUHAITAMBY *v.* KAROLIS and others.

[No. 15,032 P. C. ANURADHAPURA.]

Gaming—Ordinance No. 17 of 1889—Effect of——Stake.

The essence of the offence of gaming, as defined by the Ordinance No. 17 of 1889, is the existence of a stake for which the parties game; the Ordinance does not prohibit an assemblage of people to play games of chance, provided there be no stake.

The accused appealed from a conviction on a charge of gaming under section 4 of Ordinance No. 17 of 1889.

Dornhorst for appellants.

No council appeared for the respondents.

Cur. adv. vult.

On July 15, the following judgment was delivered:—

LAWRIE, A. C. J.—It seems necessary to remind almost every Police Magistrate in the Island that the old law which made gaming, or playing at any game (or pretended game) of chance, has been repealed.

It is now lawful to play games of chance. The legislature has changed its view of what is unlawful and worthy to be repressed and punished. It no longer prohibits games of chance but it prohibits playing a game for a stake. In the former law it did not matter whether money was lost or won; now it is of the essence of the offence not only that money shall be lost or won, but that money shall be staked before the game is played. As I understand the

present Ordinance men may play even for money provided it is not staked. They may play for money on credit, as it were.

The essence of the offence as defined by the present Ordinance is the existence of a stake for which the gamers game.

Here there is no proof of gaming for a stake. The accused are not proved to have broken the law which, as it now stands, by no means prohibits an assemblage of people to play games of chance, provided, as I said before, there be no stake.

All the accused are acquitted.

I must add that the Police Magistrate recorded evidence of previous convictions before he convicted—a course which he cannot but know is contrary to law.

The procedure by which the seventh accused was convicted without trial, or charge, or plea, was an astonishing act of rapid injustice. He, too, is acquitted.

BEFORE *Withers*, J.

June 29 and July 6, 1893.

WALKER *v.* PALANIYANDI.

[No. 7,563, P. C., NUWARA ELIYA.]

Labourer—Ordinances No. 11 of 1865 and No. 13 of 1889—Entry in Checkroll—Notice to quit.

In a prosecution under Section 11 of Ordinance No. 11 of 1865, of a labourer for quitting prosecutor's service without leave or reasonable cause or previous warning, although there was no evidence that the name of the accused had been entered in the Check-roll of the estate, there was evidence that he had received rice from the prosecutor, who was the superintendent of the estate, and it appeared that the accused had given notice to the prosecutor that he would quit the prosecutor's service and leave the estate on the ground that his wages were due and unpaid for over sixty days from the expiration of the month, during which such wages had been earned.—

Held that this was sufficient evidence of the fact that accused regarded himself as a labourer on the estate within the meaning of the Ordinance.

The facts material to this report appear in the judgment.

Dornhorst for accused-appellant.

The respondent was not represented by counsel.

Cur. adv. vult.

Only July 6, the following judgment was delivered by

WITHERS, J.—The accused has been convicted of quitting the prosecutor's service without leave, or reasonable cause, or previous warning in breach of section 11 of Ordinance No. 11 of 1865.

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The prosecutor deposes that the accused was employed on North Pundaloya estate under him as a monthly paid labourer. When this contract was made, what was the nature of the service, or the hire, does not appear. What the evidence does show is, that the accused, Palaniandy Kangany, was employed on that estate in other than domestic labour before he left it.

There is no proof that his name was entered in the Checkroll of the estate. There is evidence that he had received rice from the prosecutor, who is presently the superintendent of that estate.

Looking, however, to the notice received by the prosecutor from the accused that he would quit the prosecutor's service and leave the estate on the 26th of May, on the ground that wages for six days for the months of January to May, both inclusive, were due and unpaid on the 22nd of May, it cannot at least be denied that the accused regarded himself as a labourer on the estate at that time.

Assuming him to be a labourer within Ordinance 11 of 1865 or Ordinance 13 of 1889, was this a reasonable cause for quitting service?

No labourer shall be liable to punishment under these Ordinances and No. 7 of 1890, if the monthly wages earned by him shall not have been paid in full within sixty days from th expiration of the month during which such wages shall have been earned.

Now, according to the notice, the accused did not complain of any wages being owed to him previous to January, 1893. If he claimed wages in January and February, and they were not paid when he left on the 26th May, it is clear he had reasonable cause for leaving service.

The prosecutor admits that the accused has not been paid wages since January, but at the same time says that nothing was due to the accused, when he left, by way of wages.

I cannot quite reconcile this with a statement of the prosecutor's which I shall presently cite. Again, not knowing the terms of the contract of service between the accused and his employer, I do not even see how it is possible to find that accused did in fact earn no wages in January and February.

If he was paid a lump sum per month, so long as the service was not determined by due notice on either side, he was entitled to be paid his monthly wages whether he worked or not.

If, as is more likely, his wages were payable at a daily rate, they were to be computed, says the Ordinance, according to the number of days on which the labourer is able and willing to work, whether provided with work or not by his employer.

The prosecutor deposes thus:—"Accused did no work as a labourer, he drew rice but never asked for work. Head money was due to him though he did no work." This is not quite the same thing as saying that he was able but unwilling to work according to his contract.

Again he deposes thus:—4 months and 26 days wages would have been due to the accused, if I had not been ordered by the Court to retain them."

I must infer the months referred to be January, Feburary, March, April, and the first 26 days of May. The 26th being the day the accused left the estate. That means, if anything, that though the accused did not work, he had earned wages during those months, but owing to an order of the Court, the prosecutor considered himself restrained from paying them to the accused.

But the order referred to was received on the 9th of November, 1892, and only affected a sum which the accused was at that date entitled to receive. It did not prohibit his receipt of wages thereafter earned.

A sum of Rs. 226·51, then due and payable by the manager or superintendent of the estate to the accused was not to be paid to or received until further order.

That was all the order prohibited. In these circumstances I feel bound to hold that the accused had reasonable cause for leaving the estate on the 26th of May last, and to set aside the judgment.

The accused is acquitted and discharged.

BEFORE *Withers*, J.

June 29 and July 3, 1893.

FERNANDO *v.* BEMAPPU and another.

[No. 8,999, P. C., PANADURA.]

Mischief—Sect. 409. Penal Code—Bona fide belief of accused that the property is his own.

The accused really believing that they had a right of way over the prosecutor's land, cut down a portion of a fence which he had put up to prevent their entering his land, in order to assert their supposed right of way.

Held, that the accused were not guilty of mischief, as no person can be convicted of mischief who deals injuriously with property in the *bona fide* belief that it is his own.

The facts sufficiently appear in the judgment.

Wendt for the appellants.

Dornhorst for respondent.

Cur. adv. vult.

On July 3 the following judgment was delivered by

WITHERS, J.—The judgment of the Police Magistrate does not specify the offence of which, and the section of the Code under which, the accused have been sentenced to pay a fine of Rs. 1 each. This is a very necessary and proper requirement of the 372nd section of the Criminal Procedure Code.

That part of a judgment which complies with this section should always precede the rest which contains the point for determination, the decision and the reasons for the decision. I will take it, however, for the purpose of my judgment, that the accused have been convicted of the offence of mischief under section 409 of the Penal Code, in that they, with the intent to cause the prosecutor wrongful loss or damage on some day in May last, cut down two cubits of a fence which the prosecutor had put up as the dividing boundary between his and the contiguous land of the accused. The appeal is taken on a point of law, which is, that the facts found by the magistrate do not constitute the offence of mischief as defined by section 408 of the Penal Code.

I think the appeal succeeds.

The magistrate has found it to be clear that the defendants really believed that they had a right of way over the prose-

cutor's land at the point where they cut down the fence, which he had put up to prevent their entering his land, and that in doing the act complained of they were simply asserting the right of way which they honestly believed they enjoyed. On this finding I think the magistrate ought to have acquitted the accused. The magistrate went a little too far in laying down the proposition that it is not enough for a person charged with mischief to satisfy the Court that he had a *bona fide* belief he was exercising a right to do what he did do, but that as a matter of fact he should satisfy the Court that he was entitled to do what he honestly thought he had a right to do.

I prefer to follow the principle laid down by the High Court of Allahabad, that a person cannot be convicted of committing mischief who deals injuriously with property in the *bona fide* belief that it is his own—See. Empress of India vs. Budh Singh 2 Allah. 101.

Here the accused are found to have honestly believed that they had a right of way over the prosecutor's land, and they removed the obstruction put up by the prosecutor to prevent them from exercising that asserted right of way. The same Court had decided—and if I may venture to say so—rightly that the mere assertion of the right is not a sufficient answer to the charge.—See also judgment of Justice Clarence of 8th March, 1889, in case 7,192, P. C. Chilaw.

BEFORE *Laurie*, AND *Withers*, J. J.

February 24 and 28, 1893.

IBRAHIM and Another *v.* TILLEKERATNE.

[No. 34,620, D. C. MATARA.]

Decree—Execution for part of debt—Waiver—Sect. 337 Civil Procedure Code.

A judgment creditor may not issue execution for a part of the debt, unless he waives his right to recover the rest, and each of several joint judgment creditors may not issue separate writs to recover a fractional share of the debt due to them jointly.

The material facts appear in the judgment of LAWRIE, J.

IBRAHIM v. TILLEKERATNE.

Wendt for appellant

Dornhorst for respondent.

Cur. adv. vult.

On February 28 the following judgment was delivered:—

LAWRIE, J.—The policy of the law is to restrain judgment creditors from harassing their debtors by repeated seizures and sales of property.

Section 337 provides that when an application to execute a decree has been made and granted, no subsequent application to execute the same decree be granted unles the Court is satisfied that at the last preceding application due diligence was used to procure complete satisfaction of the decree. It is contrary to the spirit and letter of our law to permit a judgment-creditor to issue execution for only part of the debt, unless he waives his right to recover the rest; and it is even more irregular to permit each of several joint judgment creditors to issue separate writs to recover a fractional share of the debt due to them jointly.

Here the Proctor who held a proxy for both plaintiffs appears now for the 2nd plaintiff only, because the other plaintiff has assigned his right to some one else.

The second plaintiff does not pretend to have right to waive part of the claim. The motion for execution is made on the footing that some one else at some other time may come forward and get execution issued for the other half.

In my opinion the application should have been refused. I would set aside the order of 16th December with costs.

Withers J.—I agree.

BEFORE *Lawrie*, AND *Withers* J. J.

December 20 and 29, 1892.

WEERASIRI *v.* SANCHIHAMY.

[No. 1014, D. C. Galle.]

Tort—Actio personalis moritur cum persona—3 and 4 Will IV c 42—Wrong done by deceased—Liability of legal representative.

Per LAWRIE J.—The law in Ceylon in regard to the liability of the legal representative of a deceased for any wrong committed by him in his lifetime is governed by the Act 3 Will IV c. 42. The legal representative must, however, under the Act be sued within six months of his taking upon himself the administration of the estate.

Plaintiff sued the administratix of a wrong doer for damage alleging that the deceased "notwithstanding the protestations of plaintiff wrongfully deprived the plaintiff of the lateral support to the plaintiff's land and the building constructed thereon by wrongfully cutting almost perpendicularly the solid sloping ground immediately adjoining the plaintiff's land without leaving proper and sufficient support for the plaintiff's premises.

Wendt for defendant appellant.

Dornhorst for plaintiff respondent.

Cur adv. vult.

On December 29 the following judgments were delivered :—

LAWRIE, J.—The plaintiff alleges that he had right to lateral support for his land by the deceased intestate's land and also that he had gained by prescriptive possession an easement of support for buildings.

It was urged that the plaintiff had not proved that he had acquired this easement by prescription. It seems to me that the plaintiff proved that a wall and flight of steps on his land were in existence for at least 15 years prior to the committing of the wrong complained of, and I am of opinion that the plaintiff acquired the prescriptive right alleged.

But this is an action in tort. The plaintiff distinctly so puts it. He sues the administratrix of a wrongdoer for damage alleging that the deceased "notwithstanding the protestations of plaintiff wrongfully deprived the plaintiff of the lateral support to the plaintiff's land, and the building constructed there-

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on by wrongfully cutting almost perpendicularly the solid sloping ground immediately adjoining the plaintiff's land without leaving proper and sufficient support for the plaintiff's premises."

This is an action which at English common law did not lie against a personal representative of a deceased wrongdoer.

It is of the same class of wrongs as diverting a watercourse or obstructing lights which are expressly mentioned in the text books as torts to which the rule *actio personalis moritur cum persona* applies.

As the English Law of Administrators and Executors has been introduced into Ceylon, I take it that the Act 3 and 4 Will IV c. 42 Sect. is law in Ceylon, but though that Act provides that an action of trespass can be maintained against the executor or administrator of any person deceased for any wrong committed by him in his life time in respect of his property; and that the damages to be recovered shall be payable by the administrator in order of administration as the simple contract debt of such person, the Act limits the liability of the administrator to be sued to within 6 months of their taking upon themselves the administration.

Here the deceased wrongdoer died in February, 1890, and the action was not instituted until January, 1892. There exists here the peculiarity that the cause of action, the actual damage, did not arise either in the lifetime of the wrongdoer or within 6 months of the taking of administration of his Estate, but it is clear the Act of Will iv. does not give relief to the plaintiff, and that at common law the action does not lie.

I would on these grounds set aside the judgment and dismiss the action with costs.

WITHERS, J.—I agree in thinking that the judgment of the Court below should be set aside, and the plaintiff's action dismissed with costs, but I prefer to rest my opinion on the other point pressed upon us by Mr. Wendt, viz that plaintiff has not proved what he averred, that he had acquired a prescriptive right to the lateral support of the wall which according to the learned judge fell in consequence of the intestate's dealing with the adjacent soil of his own property.

BEFORE *Laurie*, A. C. J., AND *Withers*, J.

June 6 and 9, 1893.

SILVA *v.* PATE.

[No. 1,391, D. C., GALLE.]

Negligence—Bolting horse—Burden of proof—Evidence.

The mere happening of an accident does not throw on the defendant the onus of disproving negligence, nor does the mere fact of a horse bolting raise a *prima facie* presumption of negligence.

The facts sufficiently appear in the judgment ef LAWRIE, A. C. J.

Dharmaratne for plaintiff-appellant.

Dornhorst for defendant-respondent.

On June 9, the following judgments were delivered:—

LAWRIE A. C. J.,—It is well fixed law in England that a plaintiff in a case like this must give some affirmative evidence of negligence on the part of the defendant.

In Hammack vs. White (31 L. J., C. P. 129) Erle, C. J. went so far as to say, "I entirely dissent from the doctrine that the mere happening of an accident throws on the defendant the onus of disproving negligence."

In Manzoni vs. Douglas (6 Q. B. D. 145) decided in 1880 Lindley J. said that it cannot be said that the mere fact of bolting arises a *prima facie* presumption of negligence. Horses run away for all sorts of reasons and no such inference can be drawn from the mere fact of bolting.

And in these cases and in Cotton vs. Wood (29 L. J., C. P. 333) it was decided that if the cause of the accident be obscure, if the evidence adduced to prove negligence be equally consistent with no negligence, there is not enough to leave to the jury.

Here in my opinion the plaintiff made out a *prima facie* case of negligence. His house was injured by the collision of the defendant's mail coach with his verandah posts, the coach was driven off the road, the defendant's coachman being on the box holding the reins.

It is proved that the horses had not bolted. The coachman says the moment of the collision they were not going fast. Why,

SILVA v. PATE.

then did he come to collision. The defence is that the coachman had lost control of the horses.

The learned District Judge's view of the evidence is that one of the horses took fright at something, apparently the crowd of people in the market, and becoming unmanageable both the horses got beyond control and ran off.

I think this view of the evidence is too favourable to the defence. The coachman lost control, but I find no evidence that the horses were unmanageable, nor is there proof that they ran off the road in the sense that they ran off or bolted.

The horses became restive at the sight of what it might have been expected they would see, a crowd in the market, and what happened was just what would happen if a child or an inexperienced man, who could not drive, was on the box. The coachman had neither strength of hand or head to fit him for an emergency so likely to happen, and instead of keeping the horses in hand and on the road, he guided them and suffered them to take him and the coach off the road, and to knock down a bit of the plaintiff's house.

It is an accident but an accident which could have been prevented had the driver had skill. The plaintiff took advantage of the comparatively slight damage done to get his house thoroughly repaired. He must bear part of that expense himself.

He gets enough if we assess the damage at Rs. 100 with costs of suit.

WITHERS, J.—I agree in thinking that the judgment ought to be set aside. With every deference to the learned District Judge who tried this case in the Court below, the facts disclose one of two states of things both of which make against the defendant.

Either the driver improperly excited the horses to such an extent that he was unable to control them, or he was incompetent to drive the horses.

The strong impression I must say left in my mind by the evidence is that he flogged the horses into a gallop which took them with such a violent swerve in the direction of plaintiff's boutique that he lost all control over them.

However, the driver's version of the story is that these horses had never before shown any alarm at a crowd of people in the market place, and that this was the first time they were frightened at a crowd.

If they were so frightened as to spring off with a sudden swerve and at a great pace so that no ordinary skilful driver could have pulled them up within the distance between where they started from fright and the plaintiff's boutique, I think that state of things would excuse the defendant.

But in cross-examination the driver admits that the horses were not going fast when the tent of the coach came in contact with the roof of the plaintiff's boutique. That is inconsistent with his statement that they became unmanageable and beyond his control. If they were not going fast why did he not pull them up? This surely indicates incompetency.

BEFORE *Lawrie*, A. C. J., AND *Withers*, J.

July 11 and 28, 1893.

RAMBUKPOTA *v.* MENIKA and others.

[No, 10,944, P. C., BADULLA.]

Charge—Warrant of Commitment—Jurisdiction of Police Court—Escape or rescue under Sects. 219 and 220 of the Ceylon Penal Code.

The charge in a prosecution before a Police Court for escape or rescue under Sections 219 and 220 of the Ceylon Penal Code must disclose the nature of the offence for which the prisoner escaping or rescued had been taken into custody, it being competent to a Police Magistrate to try such a charge where the escape or rescue was from custody in which the prisoner was lawfully detained for an offence with which he was charged, or of which he had been convicted, only when such offence was itself cognisable by a Police Court.

The warrant of commitment in the present case not disclosing the Magistrate's jurisdiction to try the charge on which the prisoners had be convicted, the Supreme Court held that even if warrants of commitment were open to amendment, the present one could not be cured in consequence of the defective nature of the charge in the case.

Ramanathan, S.-G., moved the Court to exercise its power of review under section 426 of the Criminal Procedure Code.

Cur. adv. vult.

On July 28, the following judgment of the Court was delivered by

RAMBUKPOTA v. MANIKA.

WITHERS, J.—The Solicitor-General applied to us to send for the Police Court Badulla Case No. 10,944 in revision on the ground that the warrants of commitment of the prisoners convicted and sentenced to pay fines, or in default to undergo terms of rigorous imprisonment are bad on the face of them by reason of the fact that they do not disclose the Magistrate's jurisdiction to try the charge on which they have been committed.

A copy of the warrant of commitment of the 1st prisoner was handed to us by the Solicitor who gave us to understand that the warrant of commitment of the other prisoners ran in the same way.

It appears on the face of this warrant of commitment that the prisoner was convicted of the offence of escaping from lawful custody under section 219 of the Ceylon Penal Code.

Now it is competent for a Police Magistrate to try a charge of escape or rescue where the escape or rescue is from custody in which the person escaping or rescued was lawfully detained for an offence with which he is charged, or of which he has been convicted, only when such an offence is itself cognisable by a Police Court.

The charge in the case under revision does not disclose the nature of the offence for which the 1st prisoner was taken into custody, so that even if a warrant of commitment is open to amendment, these warrants cannot be cured in this case in consequence of the defective nature of the charge on which all the prisoners were tried.

Hence the conviction of the 1st prisoner from escaping from custody and the convictions of the other prisoners for rescuing the 1st prisoner from custody, must be quashed, and all the prisoners released from custody.

The Magistrate must take care to carry this order into effect with the least possible delay.

BEFORE *Lawrie*, A. C. J.

July 6 and 13, 1893.

PERERA *v.* SADIRAPPU.

[No. 8,816, P. C., PANADURE.]

Gaming—Stake—Ordinance No. 17 of 1889.

Under Ordinance No. 17 of 1889, the playing of games of chance is lawful, provided there be no stake.

Observations by Lawrie, A. C. J. on the history of the gaming laws of Ceylon.

Accused were found in a house throwing dice. There was no evidence that they were playing for a stake. The appeal was from convictions of gaming, and of keeping a common gaming house.

There was no appearance of counsel.

Cur. adv. vult.

Only July 13, the following judgment was delivered by

LAWRIE, A. C. J.—The conviction in this case shows that it is again necessary to explain what games the Legislature in Ceylon has declared illegal. Before referring to the ordinances passed on this subject, it may be worth while to remember what the Common Law of England is as to gaming. 1 Russell on Crimes, p 608, states—"By the English Common Law the playing at cards, dice, etc., when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful or punishable as any sort of offence."

I do not know if by Roman-Dutch Law, there was any punishment attached to gaming in Ceylon prior to the passing of the Ordinance 3 of 1834, but by that Ordinance the Legislature prohibited the playing at any game of chance, and the Ordinances 3 of 1840 and 4 of 1841 prohibitedgaming with any table, dice, cards, or any other instrument of gaming at any game or pretended game of chance.

For the ensuing fifty years the law prohibited merely playing at games of chance, it said nothing about the losing and winning of money. That was not the essence of the offence. Chance was what made a game unlawful.

In 1889 the Legislature abandoned the theory that playing a game of chance was wrong; and in lieu it prohibited playing a game for a stake.

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Where this idea came from I do not know; it was not derived from India, because in the Indian Gaming Act of 1867 it was enacted that it should not be necessary in order to convict any person for keeping a common gaming house, etc., to prove that any person playing at any game, was playing for any "money wager or stake." Notwithstanding the change made by the Ordinance 17 of 1889 there still lingers in the minds of most Police Magistrates the belief that the law prohibits games of chance and what needs to be proved is only that cards or dice were used by those playing the game; but that is an erroneous belief.

The law now is, that games of chance are lawful. It is permitted to throw the dice and to play a game of chance provided there be no stake. Playing for a stake, the possession of which is to depend on the throw of the dice as the result of the game, is alone prohibited.

Here in the case before me the accused were found throwing dice; there is no evidence that there was any stake. They are, therefore, not proved to have broken the law. The convictions of gaming and of keeping a common gaming house are set aside and the accused are acquitted.

BEFORE *Lawrie*, A. C. J.

July 13 and 15, 1892.

MURUGASEN *v.* PERERA.

[No. 5,361, P. C., CHILAW.]

Ordinance No. 14 of 1867—Exemption from payment of toll.

A certificate signed by a District Engineer "that the accompanying conveyance of A. B. is employed this day (January 14) and until December 31, 1893, in the service of the Public Works Department, Chilaw, within 10 miles of the toll station of Madampe" is not a sufficient certificate of exemption from payment of toll under Sect. 7 of Ordinance No. 14 of 1867.

The facts sufficiently appear in the judgmenf.

There was no appearance of counsel.

Cur. adv. vult.

On July 15 the following judgment was delivered by

LAWRIE, A. C. J.—It was *ultra vires* of the District Engineer

to sign a certificate that the "accompanying conveyance of Mr. V. Murukasen is employed this day (14 January) and until the 31st December, 1893, in the service of the Public Works Department, Chilaw, within 10 miles of the toll station of Madampe."

First, it was necessary to identify the conveyance by a description by which it could be distinguished from others. This certificate was worded as if it were intended to exempt every carriage which Mr. Murukasen might use throughout the year. Such a general exemption could not legally be granted.

Second, the District Engineer could not exempt a conveyance on the ground that it was employed in the service of the Public Works Department. The Ordinance exempts vehicles only if they be employed in the construction of a road, bridge, canal or ferry; and there is here no evidence that this conveyance ever had been employed in the construction or repair of the canal of which Mr. Murukasen was supervising officer.

Third, there is no proof that the canal was then being constructed or repaired; unless it was, there was no exemption.

But if I treat this certificate as one granted to Mr. Murukasen personally, he could not use it to pass a cart-load of other people who held no certificate of personal exemption.

Again, this is not a case of a road officer who is bound to pass over his road repeatedly and who is fairly exempt from toll. It is not apparent how Mr. Murukasen can claim to drive along roads on duty. His duties lie in the canal.

It is not proved that duty took him or his companions through the Madampe toll on the 25th April. If cannot be assumed that every supervising officer of the Public Works Department is entitled to drive with his friends though every toll within ten miles of any part of his work, whatever that work is, and whether the officer be on pleasure or on duty, I refer the Magistrate to Vanderstraaten p. 179; Grenier 1874 p. 48; I. S. C. C. p. 13; II S. C. C. p. 78.

Holding that the certificate exempted neither the cart, nor Mr. Murukasen, nor his companions, I acquit the accused.

BEFORE *Lawrie*, A. C. J.

July 13 and 20, 1893.

JAYEN *v.* ALLOESINNO.

[No 9,148, P. C., PANADURE.]

Resistance to arrest—Police—sections 156 & 219 Ceylon Penal Code—Section 34 Criminal Procedure Code.

A Police Officer has no power under section 34 of the Criminal Procedure Code to arrest without a warrant parties engaged in committing an affray as defined in section 156 of the Penal Code.

The facts sufficiently appear in the judgment.

Dornhorst (*Pieris* with him) for accused-appellant.

Ramanathan, *S-G.*, for respondent.

Cur. adv. vult.

On July 20, the following judgment was delivered by

LAWRIE, A. C. J.—To make a man liable under section 219 of the Penal Code for resisting his apprehension, he must have been charged with an offence or have attempted to escape from lawful detention. In this case the 1st accused was fighting with two or three other men. He and they seem to have committed an affray as defined in section 156 and punishable under section 157 of the Penal Code.

The men were known to the Police. The provisions of section 34 of the Criminal Procedure Code do not apply. Committing an affray is a non-cognisable offence and the Police may not arrest without a warrant.

The offence under Ordinance 4 of 1841 of behaving in a riotous and disorderly manner in a public street is obsolete. It was superseded by the Penal Code.

I am of opinion that the 1st accused was justified in resisting his apprehension. He did little more than run away. He is not charged with causing hurt; if he had been, the case would, of course, have been different. I acquit him of the charge laid under section 219.

It necessarily follows that the 2nd accused must be acquitted of the charge under section 220.

BEFORE *Lawrie* AND *Withers*, J. J.

February 14 and 28, 1893.

MISSY NONA and her husband *v.* JAYESOORIA and another.

[No. 35,936, D. C. MATARA.]

Cross—decrees—set off—Civil Pro. Code Sect. 345.

A decree obtained against the husband alone cannot be set-off against a decree obtained by the husband and wife against the decree-holder.

A decree obtained against a person as administrator cannot be set-off against a decree obtained by him personally.

In case No. 35,936 Missy Nona and her husband had obtained a decree against Bastian Jayesooria and Charles Jayesooria. In case No. 35,010 Bastian Jayesooria the first defendant had obtained a decree against Gregoris de Silva, the husband as administrator and claimed to set off this decree against the decree obtained in case No. 35,936.

The District Judge refused to allow the decree in 35,010 to be set off against the decree in 35,936.

The defendants appealed.

Wendt for appellants—A debtor cannot claim to set-off the debt due from him to two creditors against a debt due to him from one of them. But the case is different where there are two debtors. The debt due from both of them may be set off against a debt due to one of them. Civil Procedure Code Sect. 246; I. Cal. 379.

Although the plaintiff in 35,936 are the husband and the wife, the husband is absolutely entitled to the proceeds of the decree (Sect. 19, Ordinance 15 of 1876); so that the parties are the same.

Dornhorst (*Peiris* with him) for respondents.

The decrees cannot be set off. The decree obtained by Gregoris Silva is in his personal capacity, the one obtained against him is as administrator. The plaintiffs in 35,936 are not the defendants in 35,010.

Cur. adv. vult.

On February 28th following judgment agreed to by WITHERS and was delivered by

LAWRIE, J.—In this case 35,936 Missy Nona and her

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husband Gregoris de Silva held a judgment against Bastian Jayesooriya and Charles Jayesooriya. In the case 35,010 Bastian Jayesooriya *qua* administrator of the intestate estate of Don Davit Dirasuriya holds a judgment against Gregoris de Silva. These decrees are not cross-decrees. Only one of the decree-holders in 35,936 is the judgment-debtor in 35,010. The illustration (*b*) of section 345 is exactly in point.

It was argued that because the two judgment-creditors in 35,936 are husband and wife, the decree must be considered as one in favour of the husband only, that it is absolutely vested in the husband.

It is true that any money recovered under the judgment would belong absolutely to the husband, but *qua* the debtor against whom judgment was obtained the wife was and is the judgment-creditor.

Further, the judgment-creditor in 35,010 does not fill the same character in that action as he does in the action 35,936. In the former he is an administrator entitled to recover the assets of his intestate; in the latter he individually is liable. (Explanation (*a*) of the same section 345 applies.)

The order of the District Judge was in my opinion right. I am inclined to think that the appeal was premature. The learned District Judge rather expressed an opinion than pronounced judgment but no point was made of that in appeal.

WITHERS, J.—I agree.

BEFORE *Lawrie*, A. C. J. and WITHERS, J.

June 30 and July 4, 1893.

DEEN *v.* PULLE.

[No. 160, D. C., KEGALLA.]

Minor—Guardian ad litem—Claim to property seized in execution—Sections 247, 481 and 582 of the Civil Procedure Code.

A claim to property seized by the Fiscal in execution of a decree was made, on behalf of a minor, by his uncle who, however, had not been appointed his guardian. The claim was reported by the Fiscal to the Court, which after investigation, disallowed it.

Held, that the minor was not a party to such investigation, and was not entitled to institute an action under Section 247 of the Civil Procedure Code to have the seizure released.

Semble per LAWRIE, A. C. J.—

(1) Where the mother of a minor without being appointed his guardian *ad litem* files a plaint on behalf of the minor, and is afterwards appointed such guardian, the date of such appointment is the date of the institution of the case.

(2) The order of a District Judge allowing a party to sue as guardian *ad litem* must disclose his jurisdiction to make such order.

The material facts appear in the judgement of LAWRIE, A. C. J.

Wendt for plaintiff-appellant.

Bawa (*Senathiraja* with him) for defendant-respondent.

Cur. adv. vult.

On July 4, the following judgments were delivered:—

LAWRIE A. C. J.—This case raises more than one question of interest in the law applicable to curators and to guardians *ad litem* and to next friends.

Thoug'i the defendant who supports the judgment has not objected to this part of it, I take leave to say that the ruling of the District Judge that the action was brought within 14 days of the rejection of claim is doubtful. This is an action at the instance of a minor by his guardian *ad litem*. The plaint was filed on 27th October but the appointment of the guardian was not allowed until the 2nd November. The mother of the minors confident of the success of the application she intended to make, gave a proxy and filed a libel as guardian, some days before she came before the District Judge to be clothed with authority. The date when she was appointed guardian *ad litem*, when her plaint was accepted, when the

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District Judge allowed summons to issue, seems to me to be the date of the institution of the action, and, if so, it was out of time. The order of the learned District Judge allowing Jayanambu Umma to sue as guardian does not disclose his jurisdiction.

It was an order not made under section 481 and requires a petition by way of summary procedure and an affidavit. And even if it had been under section 481 it would seem as if the 582 section prevents a next friend appointed under 481 from suing until he gets a certificate. Again the order of the District Judge was not one made under the 1st part of section 582, because there it is enacted that no person shall be entitled to institute or defend any action connected with the estate for a minor until he has got a certificate of curatorship.

But I presume that the District Judge allowed the appointment under the latter part of section 582, which enacts that on proof that the property is of less value than Rs. 1,000 or for any other sufficient reason any Court having jurisdiction may allow any relative of a minor to institute an action on his behalf although a certificate of curatorship has not been granted to such relative.

But this order of the 2nd November does not recite that on enquiry the District Judge found that the property was under Rs. 1,000 and that he had any other sufficient reason for making the order.

Next, as to the merits of the case property belonging to a minor was seized in execution on a judgment against a stranger. The minor himself plainly had no status to claim or object.

His uncle who had not been appointed his guardian by any Court and who was not his natural guardian, for his mother was alive, made a claim on his behalf and that claim was rejected.

It is clear that an officious friend or any close relative acting as an amateur guardian cannot bind a minor. His success may benefit but his failure cannot harm him. Here the claim of the uncle was disallowed and fearing lest the order should be held to be conclusive against the minor, this action was instituted in his (the minor's,) name. I affirm the judgment dismissing the action because the minor was not a

party to the claim proceedings. If he was not a party he was not bound and concluded by the order passed, and it is only on the footing that he would have been concluded after 14 days that the action is tenable, and as I hold that the minor would not have been bound, I hold that he had no cause of action against the defendants who are entitled to be relieved of an action brought by one whom they had frightened but not hurt.

The action is dismissed. The costs of the defendant should be paid by the guardian.

WITHRS, J.—I agree with the decision of the Chief Justice dismissing the action with costs and ordering the guardian *ad litem* to pay those costs.

The minor in whose behalf this action is instituted cannot be said to be the party against whom the order on the claim was made under the 244th section of the Civil Procedure Code, nor can the Court's allowance of the institution of this action by the guardian *ad litem* or the application of the minor's mother to be appointed a guardian *ad litem* for the purpose of bringing this action be said to confirm the uncle's authority to make the claim on the child's behalf in the former proceedings, and thereby to constitute the child a party against whom the order referred to was made.

BEFORE *Laurie*, A. C. J., AND *Withers*, J.

March 17 and 22, 1893.

CORNELIS *v.* DE SILVA and another.

[No. 54,611, D. C., GALLE.]

Judgment by default—Notice, want of—Setting aside Judgment—Defence—Claim in Reconvention.

A judgment by default having been set aside, the second defendant was allowed to defend the action on the grounds that he had no notice of the proceedings and that he disclosed the substantial defence of payment.

The second defendant pleaded payment and also made a claim in reconvention for damages accrued since issue of summons in plaintiff's action by reason of alleged illegal acts done by the plaintiff.

Held, that the defence of payment and counterclaim could not be pleaded together.

CORNELIS v. DE SILVA.

This was an action on a mortgage bond. The action was instituted in 1888 and judgment by default passed against the defendant on September 27, 1893.

The second defendant, filed an affidavit setting forth that he had been absent from the Island and had had no notice of the proceedings and disclosing the substantial defence of payment. He was allowed to defend the action, the judgment by default being set aside.

The second defendant in his answer pleaded payment and also made a claim in reconvention for damages for alleged illegal acts done by the plaintiff.

The District Judge gave judgment for the plaintiff but did not adjudicate upon the claim in reconvention.

The defendant appealed.

Wendt for appellant.

Dornhorst for respondent.

Cur. adv. vult.

On March 22, the following judgments were delivered:—

LAWRIE, J.—This action on a mortgage bond was instituted in 1888. Judgment by default was entered on September 27, 1889. Writs issued and property was sold.

In 1892 the 2nd defendant filed an affidavit setting forth that he had been absent from the Island and had had no notice of the proceedings and he disclosed the substantial defence of payment.

The judgment by default was set aside and the 2nd defendant was allowed to defend.

In his answer he pleaded payment of the bond and he also made a claim in reconvention for damages for alleged illegal acts done by the plaintiff since the judgment by default.

At the trial the defendant's proctor acknowledged that he had no evidence to prove the alleged payment. The defendant then led evidence in support of his claim in reconvention.

The learned District Judge in giving judgment for the plaintiff says he does not decide the claim in reconvention. And no notice of that claim is made in the formal decree, though this is inconsistent with an express finding in the earlier part of the

judgment that the defendant had not shewn his right to damages.

If the plaintiff had appealed he might have succeeded in getting the claim in reconvention dismissed, but as the plaintiff is content with the judgment in his favour it is not necessary to say more than that the District Judge exercised a sound discretion in refusing to give judgment in reconvention.

The judgment is affirmed with costs as suggested by my brother WITHERS, J.

WITHERS, J.—The defendant was by this Court considered to have purged his default and let in to defend the action on the mortgage bond.

He has not only put in a defence but a claim in reconvention for damages accrued since issue of summons in plaintiff's action.

This I consider he had no right to do. A case where a defence and counterclaim could not justly be separated is quite conceivable, as for instance where a creditor has received more money than is necessary to liquidate his claim, and withhold, the balance from the debtor.

The circumstances of this case however are quite different. As a matter of fact the defendant had no defence whatever to make.

I would affirm the judgment giving plaintiff, however, in the Court below no more than the costs incidental to his action. He should in my opinion have moved the Court to strike out of the defendant's answer so much as related to the claim in reconvention.

He will have his costs in appeal.

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

January 24 and February 3, 1893.

FRANCINA *v.* NICHOLAS and others.

[No. 1,084, D. C., GALLE.]

Fraudulent Conveyance—Deed held void in one suit—Validity.

A deed held to be fraudulent in a suit does not *ipso facto* become void as against those who were no parties to the suit.

This was an action in ejectment to recover from the defendants

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a certain land called "Punchywatte." The plaintiff based her title to the land on a conveyance by the Fiscal dated October 27, 1891. The judgment in execution of which this property was sold was pronounced in June 18, 1868. Prior to this date viz. in 1857 the execution-debtor had sold this garden to one Gunatilleke Mohandiram who in 1871 gave it to the first and second defendants the nephews of the execution-detor, who prevented the plaintiff from taking possession of the land under the Fiscal's conveyance.

The plaintiff impeached the conveyance of 1857 to Gunatilleke Mohandiram as fraudulent and brought the present action to gain possession of the land.

The District Judge held that that conveyance was not in fraud of creditors and dismissed the plaintiff's action.

The plaintiff appealed.

Dornhort for plaintiff-appellant. The deed of conveyance of 1857 is fraudulent. So it was held in a previous suit. The object of the execution debtor was to defraud his creditors.

Seneviratne for first and second defendants. The deed cannot be fraudulent as regards this particular creditor for the debt on which this action was founded was not in existence at the time of the conveyance to Gunatilleke Mohandirum. The mere fact that in a previous suit this deed of 1857 was held invalid to pass certain property does not *ipso facto* make it utterly null and void.

Wendt for third defendant, lessee of the first and second defendants, rested his case on the grounds urged by Mr. Seneviratne.

Dornhorst in reply. A deed once held to be void can have no effect whatever.

Cur. adv. vult.

BURNSIDE, C. J.—This appeal should be dismissed. There is no room for the contention made at the bar that because the deed of 1857 was impeached in one suit, it therefore was void against the plaintiff, who was no party to that suit; but apart from this it seems to me sufficiently proved that defendants had acquired a prescriptive possession by occupation.

WITHERS, J.—This is an action in ejectment to recover

from the defendant with damages a certain land called "Punchy-watte."

The plaintiff does not say she was placed by the Fiscal in possession of the land at any time after purchase and, notwithstanding the usual claim put in by her to a prescriptive title, I take it that she herself has never had possession of the premises.

Plaintiff has to prove that B. Don Carolis De Silva was owner of the premises at the date of the judicial sale which occured in January 1891. She leases the title to the premises on a conveyance by the Fiscal dated 27th October, 1891, she having bought them at a judicial sale in execution of a judgment against one B. Don Cornelis De Silva pronounced so far back as the 18th June, 1868, in favor of the plaintiff's husband. who appears to have died in 1889 in which year the plaintiff was allowed to come in as execution creditor in the place of her husband deceased.

B. Cornelis De Silva sold this garden in August 1857, to one Philip Wijesinghe Gunatilleke Mohandiram who in July 1871 gave it to his nephews including the first two defendants.

Between 1857 and 1871 in execution of a judgment against the said B. Cornelis De Silva a dwelling house was sold and bought by first defendant herein. This the parties according to the judge's note admit was included in the conveyance to Gunatilleke of August 1857, from Cornelis De Silva, a sale that was impeached and set aside in July 1871 on the ground that the conveyance of 1857 was in fraud of the creditors of the vendor Cornelis De Silva.

This house was not included in the deed of gift from Gunatileke to the first and second defendant.

I do not see how the impeachment of that particular sale effects the premises in question. The parties to that suit were a judgment creditor of Cornelis De Silva, his vendee under the conveyance of 1857 the said Philip Gunatileeke and the 1st defendant, whose title deed of July 1871, recites that impeached deed of 1857.

If that had been a creditor's suit to have that conveyance set aside as a fraudulent one and the property declared available for the creditors of Cornelis De Silva, who could

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come in at any time and prove in bankruptcy, this might have availed the plaintiff whose husband was an execution-creditor of Cornelis De Silva, when that conveyance was impeached in a contest with the defendants who claim as assignees of Philip Gunatileeke.

As it is the result of that isolated action by an individual creditor in his own interest it cannot enure to plaintiff.

But I am quite content to affirm the judgment on the ground that the first and second defendants being some of the donees under the deed of 1877, have shown themselves entitled to a decree of prescriptive title to the premises gained by them from that date.

Affirmed with costs.

LAWRIE, J. I agree.

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

January 24 and February 10, 1893.

FERNANDO *v.* JAMEL and others.

[No. 215, D. C., CHILAW.]

Defective plaint—Fresh action—Period of prescription and limitation—Civil Procedure Code Sects. 247, 406, 407.

On a plea of non-joinder an action underr Sect. 247 of the Civil Procedure Code was withdrawn and a fresh action brought.

Held that Sect. 407 of the Civil Procedure Code applied and that the plaintiff was bound by the period of limitation of fourteen days as recited in Sect. 247 as if the first action had not been brought.

The plaintiff whose claim to property seized had been disallowed, brought an action against two defendants, viz., the 3rd and 4th of the present suit to have the order in the claim case set aside. The defendants having pleaded non-joinder the District Judge under section 406 of the Civil Procedure Code allowed the plaintiff to withdraw that action and to bring a fresh one against the original defendants and five others. But the fresh action was not brought within fourteen days of the decree disallowing the claim as required by section 247 of the Civil Procedure Code.

On objection taken by the 1st, 2nd, 5th, 6th, 7th defendants the Court dismissed the plaintiff's action.

The plaintiff appealed.

Wendt for appellant.

The original action having been brought within fourteen days and this, being as it were, a mere continuation of the former one, must be held to have been instituted within fourteen days.

Dornhorst, for respondents, referred to section 407 of the Civil Procedure Code, according to which section, when a fresh action is brought, the plaintiff is bound by the law of prescription and limitation as if the first action had not been brought.

Cur. adv. vult.

On February 10, the folllowing judgment, agreed to by BURNSIDE, C. J. and WITHES, J. was delivered by

LAWRIE, J.—Though the Court on October 8, 1891, allowed the plaintiff to amend the plaint, the real nature of the order was to allow him to withdraw that plaint and to substitute another. The District Judge could do so under section 406 of the Procedure Code if on the application of the plaintiff the Court was satisfied that the action must fail by reason of a formal defect, and what the District Judge then did was virtually to allow the plaintiff to withdraw the action against two original defendants with liberty to bring a fresh action against those and other five defendants for the subject-matter of the action.

That the plaintiff and the Court regarded this as the true nature of the order is apparent from the fact that there was a fresh plaint filed on a new stamp, on which summons issued which were served on all the defendants, and that answer and replication are thereafter filed.

Section 407 of the Procedure Code enacts that in any fresh action the plaintiff shall be bound by the law of prescription and limitation in the same manner as if the first action had not been brought.

The judgment dismissing this action must therefore be affirmed with this variation, that the words "but he is at liberty to

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bring another action in ejectment for the land" be deleted.

If these words are intended to give a right which the plaintiff would not have had without them, the order is *ultra vires* of the Court, if the right is one which the plaintiff has independent of the reservation, the words are unnecessary.

BEFORE *Lawrie*, A C. J., *Withers* AND *Browne*, J. J.,

August 11 and 15, 1893.

WIJEYWARDANE *v.* MAITLAND.

[No. 225 D. C., RATNEPURA.]

Claim in Execution—Seizure of mortgaged property—Claimant's Lien—Civil Procedure Code, Sects., 232, 243, 246 and 352.

The Plaintiff, against whom an order under Section 244 had been passed, brought his action as mortgagee of certain timber, without possession, to have it declared that the said timber was not liable for seizure and sale under defendant's writ.

It was argued on behalf of the plaintiff-appellant that, as mortgagee of the timber, he was entitled to his prayer. For the defendant itwas contended that no binding contract of mortgage over the timber was made out, but taking that as proved, it was further contended that the right under the contract was not a right that could defeat execution under defendant's writ.

Held, that it never was the law before the Civil Procedure Code that mortgaged property could *not* be seized and sold under a writ of *fi fa* for the levy of a money judgment, and that the law is still unaltered.

Held also, that if a claimant has goods of the debtor under a right of lien, the judgment-creditor must first satisfy the lien before he takes the property in execution.

Held, also that an unsuccessful claimant has no right, under the circumstances, to bring an action under Section 247.

Observations by BROWNE, J. on the current of authorities.

Dornhorst, (*Morgan* and *Wendt* with him) for plaintiff appellant.

Sampayo for defendant-respondent.

Cur. adv. vult.

On August 15, the following judgments were delivered

LAWRIE, A C. J.—I assume that the plaintiff holds a valid mortgage over the ebony.

Following the decision of this Court reported in Ramanathan, 1872, p. 23, I am of opinion that the mortgagee has no right to prevent a sale in execution on a judgment against the mortgagor.

I am humbly of opinion that the injunction in Whittall's case ought not to have been granted (IV. S. C. C. p. 23 and Wendt p. 217.)

There is no provision in the Civil Procedure Code which gives a mortgagee right to prevent a sale in execution of the mortgagor's right, title and interest in the property mortgaged. In this matter no distinction is drawn between mortgages of moveable and mortgages of immoveable property.

We cannot be influenced by considerations whether the mortgagee will have a preference on the proceeds of the sale. It may be that as the plaintiff holds no judgment on his mortgage the 232nd section of the Code has taken away the right which the law, as expounded in the judgment in Wendt p. 217, IX. S. C. C., p. 109, allowed to him.

I give no opinion whether the mortgagee could have obtained or could even now obtain an order under section 246.

He has not asked that the seizure should be continued and the property sold subject to his mortgage: when such a motion is made the Court will consider it.

I would set aside the judgment including the order that the seizure be released. The action must be dismissed with costs.

WITHERS, J.—What is the right to the property in dispute claimed by the plaintiff in this action and what was the right claimed to the property when first seized, which was the subject of the adverse order giving rise to the present action. These are questions I find difficult to answer. No right is specified in the plaint as the subject of determination in this action, and as to the right referred to the Fiscal and referred by him to the Court, we know no more about it than what is said in the 7th paragraph of the plaint in somewhat ambiguous language. I have no doubt that under the 247th section of the Civil Procedure Code a claimant or objector can only seek to establish in the action thereby permitted to him the very same right to the property under seizure as was the subject of the adverse order within 14 days of which he his compelled to take the action allowed him.

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The case was argued as if the right claimed in this action was the right of a mortgagee of the timber without possession. By the other side it was contended that no binding contract of mortgage over the timber under seizure was made out by the plaintiff, but, taking that as proved, it was further contended that the right under the contract was not a right that could defeat execution under defendant's writ.

What is meant by the words right to property in the 247th section of the Civil Procedure Code? For the meaning we must go to the 243rd section which declares that a claimant or objector must adduce evidence to show that at the date of seizure he had some interest in, or was possessed of the property seized. Now the plaintiff was clearly not in possession of the property seized. Was then his interest in it such as to defeat execution? It surely never was the law before the Civil Procedure Code that mortgaged property could not be seized and sold under a writ of *fi fa* for the levy of a money judgment.

Has it been altered by the Code?

It was contended before us, that it was, if not explicitly, at all events implicitly altered by the provisions of the 246th section of the Civil Procedure Code, in view more particularly of the decision of the Court, that a mortgagee cannot follow moveables which have passed to a third person under a valid title and that it is only a decree holder with a writ out for levy of an unsatisfied judgment who can claim concurrence in the proceeds of the levy under a third person's writ.

The 246th section enacts that if the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession and thinks fit to continue the sequestration or seizure, it may do so subject to such mortgage or lien. From these words we are asked to draw the inference that a Court is bound to release mortgaged property rather than continue the seizure. I admit that the language fairly suggests that contention, but I cannot admit that a radical change in the law can be made giving a new and unheard of advantage to the conventional mortgagee of property,

except by express language or by language which cannot possibly admit of any other construction.

Having regard to the provisions of the two prior sections, 244 and 245 what must guide the Court in considering whether it shall or shall not release property seized at the instance of an objector or claimant is the fact of possession at the date of seizure.

If property is in possession of the debtor himself as his own or in a third party's possession on account of the debtor the Court shall disallow the claim under section 245.

If the property is not in the possession of the debtor or of some one for him as trustee, tenant, or other person paying rent to the debtor, or if the property is in the possession of the debtor but not on his own account or as his own property, but on account of or in trust for some other person or partly one and partly the other, for the reason stated in the claim or objection, a reason, that is "by way of some interest" in the property under seizure, then the Court shall release the property from seizure in whole or in part as the case may be (section 244.)

The claimant's interest in or possession of property must be surely such as takes the property out of a writ of *fi fa*. For example, if a claimant has goods of the debtor under a right of lien, the debtors interest cannot be seized or sold as long as the claimants right to keep possession of the goods remains. The judgment-creditor must first satisfy the lien before he takes the property in execution.

I apprehend the section 246 to mean that in certain special circumstances, which must be considered when they arise, a Court may allow the seizure to remain subject to a mortgage or lien in cases when the claimant is not in actual possession of the property, because he may not have lost his right to possession.

I cannot bring myself to think that the Code authorises a Court to release property seized at the instance of a mortgagee who has no right to have the goods mortgaged in his possession.

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This being my opinion, it becomes unnecessary to consider the points argued as to ordinary mortgagee's remedies or the question whether plaintiff had any mortgage right at all.

As the removal of the seizure was a remedy consequent only on the plaintiff's establishment of a right to the property, which has failed, the learned Judge was wrong to direct the removal of the seizure and this part of his judgment must be expunged. With this modification I would affirm the judgment with costs.

BROWNE, J.—The current of authority in precedents as respects the right of a mortgagee to interfere in the sale of the mortgage by an unsecured creditor runs thus. After the decision in Ledward's case (1 Moore P. C N. S. 386) that the mortgagee had prior right of payment out of proceeds, the Collective Court (Ramanathan 1872, 24) held that the mortgagee had no right to demand the stoppage of the sale by the execution creditor. Nine years thereafter CLARENCE J. sitting alone (4 S. C. C. 23) allowed an injunction to restrain the sale of coffee crop when asked to do so by a mortgagee to whom it had been also covenanted by the debtor that crops should be given to him to be cured and shipped; and in the next year (Wendt 217) CLARENCE A. C. J. and DIAS J. held that the order was right. It does not appear from the reports whether the judgment reported in Ramanathan *(ut sup)* was cited in argument, but no doubt the ruling was then made in cases in which there was, as I have said, something more than the mere hypothec granted by the mortgagor. In 1890 (9,S.C. C., 111) CLARENCE J, while upholding the right of the mortgagee to the proceeds after sales, again held "the mortgagee has the right to prevent the goods from being sold away from him" though the goods having been already sold, the right was not then in question. The decisions in 9 S. C. C. 127 and 1 S. C. R. 213 were pronouuced in cases in which the mortgagor had sold the moveable property before the mortgagee took any action, and leave untouched the question which on the argument seemingly now arises for decision.

I agree with my brother WITHERS, however, that on the relief asked by the plaint the question does not arise. The prayer is

that the property be declared not liable for seizure and be released from seizure, and I fail to see that plaintiff has made out any right in law to have the prayer granted. Had he prayed an injunction restraining the sale, until, say, he could have a hypothecary decree entered in his favour so as to bring himself within the protection of section 352 Civil Procedure Code as interpreted in 9 S. C. C. 203, or had he for such or any other cogent reason, at the time of preferring his claim, moved the Court under section 246 to make in his favour the order thereby contemplated, it is possible that under the previous precedents of CLARENCE J's decisions, he would have succeeded therein, unless it should be held that section 232 protected a mortgagee without decree from the rigid rule of section 352.

His right is to be paid and paid the first out of the proceeds sale, and, as explained in the decisions in a measure, to control the time of sale till this can be done; but it does not destroy the right of the unsecured creditor to be paid out of the surplus sale, and to seize and sequester for that purpose.

BEFORE *Withers* J.

August 1 and 7 1893.

JONKLAAS, *v.* PERERA.

[No. 4821 ADD. P. C. COLOMBO.]

Gaming—Ordinance No. 17 of 1889 Sects. 7, 8 and 10—Criminal Procedure Code Chap. V.—Instruments for Gaming—Arrest of Accused—Presumption under the Ordinance.

If instruments for gaming are seized in a house, admittedly a private house, it is incumbent on the prosecution to prove that the house was a common gaming place.

The discovery by the Police witnesses of instruments for gaming inside the house, and the escape therefrom of persons seen therein do not constitute a presumption under the Gaming Ordinance. Such presumption can only arise when persons or instruments for gaming are found in a place visited by the Police Magistrate himself, under section 8 or by a Police Officer under a warrant in terms of Sect. 7.

A Police Magistrate can visit a house or issue his warrant to a Police Officer only in the circumstances mentioned in the 7th and 8th sections.

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Ramanathan, S.-G., for appellant.
Seneveratne for respondent.

Cur. adv. vult.

On August 7, the following judgment was delivered:—

WITHERS, J.—The accused have been acquitted of an offence charged against them under the Gaming Ordinance, No. 17 of 1889. Mr. Solicitor-General appeals from that acquittal.

The house in which certain instruments for gaming were seized and in which the accused were arrested for unlawfully gaming there, being admittedly a private house, it was incumbent on the prosecution to prove that the house was a common gaming place. It was argued by Mr. Solicitor-General that reading the Ordinance, 17 of 1889, in connection with chapter V. of the Criminal Procedure Code, the discovery by the Police witnesses of instruments for gaming inside the house and the escape therefrom of persons found and seen therein on the entry of those officers for the purpose of arresting any one betting or playing a game there for a stake constituted a presumption under the Gaming Ordinance, unless the contrary was proved, that the house was a common gaming place and that the persons found in it were guilty of unlawful gaming.

Having had frequent occasion to read and interpret this Ordinance I entertain no doubt that such presumption can only arise when persons or instruments for gaming are found in a place visited by the Police Magistrate himself under the provisions of section 8 of the Gaming Ordinance or by a Police officer (or other person named therein) under a warrant issued by a Police Magistrate under the provisions of the section 7 of that Ordinance.

As I read the Ordinance, it was the intention of the legislature that the Police Magistrate should visit a private house under the Gaming Ordinance or issue his warrant to a Police Officer or other person to visit and search a private house only in the circumstance mentioned in the 7 and 8 sections of that Ordinance respectively, he himself being entitled to visit it in the cases stated under the 8th as well as under the 7th section. For these reasons I think that the judgment of acquittal in this case is a right one.

Affirmed.

BEFORE *Withers* J.

August 24 and 31, 1893.

MALAR *v.* KIRITHATKANDU and another.

[No. 873 C. R. TRINCOMALIE.]

Servitude—Overhanging branches. Co-owners—Injunction—Damages.

An owner of a land over which a tree overhangs has the right to a decree ordering such tree to be cut down, although such owner be tenant in common with defendants of the land supporting the tree.

Semble, per WITHERS, J.—The joint owner of an overhanging tree has no right to cut it down himself except with the consent of his co-owners.

Sampayo for Defendants-Appellants.

Seneveratne for Plaintiff-Respondent.

Cur. adv. vult.

On August 31, the following judgment was delivered by WITHERS, J.— The servitude of an overhanging palmyra-tree shedding its leaves and dropping its fruits on the adjoining landowner's bakery has not been proved, if indeed an easement of the kind could be acquired by prescription.

The difficulty in the case is caused by the fact that the owner of the land with the injured bakery on it is also co-owner with the defendants of the soil on which the overhanging palmyra tree stands. He, therefore, is as much to blame for the nuisance as the other co-owners are.

I do not decide, however, that he could not under any circumstances have recovered indemnity from his co-owners, for the injury sustained to his bakery, as the law that one wrong doer cannot sue another wrong doer for contribution or indemnity seems to apply to cases of wrong in the ordinary sense of the word or culpable negligence.

The plaintiff has suffered this state of things to continue too long when he might have had earlier recourse to the remedy which the Commissioner has afforded him and which I confirm, the order I mean requiring the defendants to cut down the overhanging tree, to entitle him to damages by way of indemnity.

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As tenant-in-common with defendants of the land supporting the palmyra tree, I take it that it was not in his power to cut down the tree without the consent of his co-owners, unless in exceptional circumstances which are not present here.

It would have been an act of destructive waste quite outside the course of good husbandry which his co-owners might have applied to the court to prevent by injunction.

In confirming the order on the defendants to cut down the tree I intend to follow the principles of the case decided by Clarence J. and reported in 1 S. C. C. p. 103.

Mr. Seneviratne argued that defendants were responsible for the damages, as they were the exclusive owners of this particular tree.

There would have been an additional difficulty in the case if this fact had been proved, but I do not find it even so alleged in the plaint.

Vary the Commissioners' decree by striking out that part of it which orders the defendants to pay the plaintiff damages and costs.

As both sides have partially succeeded each will bear his own costs.

BEFORE *Lawrie* A. C. J, *Withers* AND *Brown* J. J.

August 29 and September 1, 1893.

KATTE KECHU and another *v.* NARANY and others.

[No. 1,015 C. R. KAYTS.]

The "Thesawalame"—Contract of Purchase and Sale—Custom—Formalities—Publication and Udayar's Schedule—Pre-emption—Pleadings—Transfer in fraud of Creditor.

Publication and Udayars' Schedules are not requisites essential to the validity of a contract for the purchase or sale of Land in the Province of Jaffna.

Held that these formalities were designed to protect the right of third parties to pre-emption.

Held also, that where Plaintiff had not in his plaint questioned the validity of the form of execution of a deed, it was not necessary for defendant to prop up by averment each detail of due execution.

No. 19,377 and 20,562 D. C. Jaffna, IX S. C. C., p. 67 observed upon.

On August 8, 1892, 1st defendant and his son 2nd defendant unlawfully took possession of a land belonging to 2nd plaintiff, whereupon plaintiffs four days thereafter, on the 12th of August, instituted against them the action 768. C.R. Kayts. On the 13th August, 1st defendant executed in favor of his daughter-in-law, the 3rd defendant, wife of 2nd defendant, a transfer of his only land and when plaintiffs recovered judgment against first defendant and sought to execute their writ the 3rd defendant claimed under her conveyance,

The plaintiffs brought the present action to have this transfer by the 1st defendant in favor of the 3rd defendant "cancelled and set aside as fraudulant and illegal" as the same was executed without consideration and in fraud of the plaintiffs' creditors. The defendants contended that the transfer was not fraudulent, but was *bona fide* and for good consideration.

At the trial, the 1st defendant, who was called as a witness for the plaintiff, proved the consideration, but admitted that the deed was executed without publication and Udayars' schedule, and the Commissioner, upon the plaintiff's counsel's motion, declared the deed invalid, holding he was not bound by the decision in IX, S.C.C., p. 67, as it was not a decision of the Collective Court, and that the said decision was at variance with previous decisions of the same Court, and declared the land to be the property of the 1st defendant.

The plaintiff appealed.

The following cases and ordinances were cited or referred to in the course of the argument:—Nos. 19377 and 20562, D.C. Jaffna, IX, S. C. C., p. 67, No. 329, C. R. Chavakachcheri, III Lorenz p. 28—Vanderstraaten's Reports p. 94—Muttukistna's "Thesawalame" 27th Section, No. 12,869 D.C. Jaffna, Ramanathan 1864, p. 93, No. 2,599, D. C. Jaffna, Ramanathan 1849-166, Proclamation No. 18 of 1806, Ordinance No. 1, of 1842.

Sampayo for 2nd and 3rd Defendants-Appellants.

Ramanathan, S. G. (*Wendt* with him) for Plaintiff-Respondents.

Cur. adv. vult.

On September 1, the following judgments were delivered by

LAWRIE, A. C. J.—I agree that the judgment must be set

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aside and that the case must be sent back for trial on the issue whether the transfer to the 3rd defendant was executed in fraud of the plaintiff creditor. In trying that issue it may be a relevant fact that the transfer was not preceded by the publication which usually attends transfers of land in the Jaffna Peninsula and the Islands.

The judgment reported in IX. S. C. C. p. 67, deserves re-consideration. I venture to think that Mr. Justice Clarence was in error in fact when he said that the formalities were obsolete. I believe that they are not obsolete; neither do I agree with Mr. Justice Dias when he said that the rule must be taken to have been dispensed with, after the statute of frauds came into operation. It was in full force long after 1840. I approve of the law laid down in a case not cited to us at the argument, a case decided by the Collective Court (Rowe, C. J. Sterling and Temple J. J.) on 29th May, 1858, reported in III Lorenz p. 28, where it was held that the want of publication did not *ipso facto* render a deed of transfer invalid, and that the right to take the objection was limited to those for whose protection the provision was made. Here even if the proclamation had been made the present plaintiff would have had no status to object to the sale.

I shall be ready to re-consider the *dicta* in the case reported in the 9th volume of the Circular when the objection is taken by one who proves that his interests have been prejudiced by the omission of this time-honoured, and, I dare say, useful custom.

WITHERS, J.—We have been asked to reconsider the judgment pronounced in 1890 by Clarence and Dias J. J. which declared that publication and Udayar's schedules are not essential to the contract of a purchase and sale in the Jaffna Province.

How the question has come before us has been stated by my brother Browne, and I need not go over the same ground.

It certainly occurred to me during the argument that we were not in a position to determine the point in this case inasmuch as it is not alleged as a part of plaintiff's cause of action that the deed under which the defendant claim-

ed the property, seized in execution at plaintiff's instance, was invalid on the ground that the custom of the country which required publication and schedule had not been complied with as a condition precedent to a contract of purchase and sale.

If, however, it is a fact that such a custom is the law of the land laid down by this Court in decisions previous to the one we are invited now to reconsider, I am not sure that it was not open to the plaintiff on eliciting an admission from the defendant, that the execution debtor had not complied with that custom before executing the transfer in his favour, to move the Court for judgment declaring the sale to be void and as a necessary consequence the property of the execution-debtor leviable under his (plaintiff's) judgment.

I am therefore prepared to state my opinion as to the law on the subject.

There are no doubt to be found decisions in the books implying that the formality of publication and schedule is necessary to constitute a valid transfer of property in the Jaffna Province, not that there is a uniform current of decisions to that effect. The most direct decision on this point of modern times was pronounced by this Court in 1870 and is reported in Vanderstraaten's Reports p. 94. The decision is a very short one and may be said to be comprised in the following words "according to the general Jaffna law publication and schedule are necessary to the valid sale of land." Little would be gained by going through all the decisions which I have come across on the subject *seriatim*.

All that I think it necessary to say, as regards them, is that I cannot understand from them why such law was pronounced to be the law at any time.

The learned Commissioner and Mr. Solicitor relied very much on the 27th of the 72 orders to be found in Muthukistna's "Thesawalame" which are said to have been published at different times by the Dutch authorities.

That order declares that the inhabitants of the Jaffna Province shall not sell or Otty land without procuring publication thereof three weeks in the church nearest the land previous

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to the sale and prescribes a fine for the violation of the injunctions contained in the order. But the provisions of those 72 orders never had the force of law given to them by any Regulation or Ordinance.

Regulation 18 of 1806 did give the force of law to the country customs of the Malabar inhabitants of the Jaffna Province collected by Claaz Isaaksy and approved of by Governor Simons.

Those customs in an English translation are to bo found in the first XXXIV pages of Mutthukistna's Thesawalame.

The custom relating to the purchase and sale of land is described in the 1st paragraph of the 27th section of that collection of country customs.

The custom described in that section and preserved by the regulation referred to is the requirement of a certain mode of publication by a vendor of his intention to sell land to a stranger in the interest of his (the vendors) heir, and partner, or that of the adjoining landowner, who holds a mortgage security over the land, to preserve their right of pre-emption. That is not the same thing as a custom which makes publication and schedule incidents so necessary to the transfer of land, that a transfer without them is void as being contrary to the law. Giving my best consideration to the matter, I am of opinion that we should declare the law of the Jaffna province to be that publication and Udayar's schedule are not requisites essential to the validity of a contract for the purchase and sale of land.

I am not disposed to go so far as to say that the due publication of the intention of a vendor to sell his lands to a stranger is not necessary to defeat the rights of parties who have the privilege of pre-emption.

I am quite open to consider the question of a customary right of pre-emption in certain classes of persons, when the occasion shall arise.

In the result I am for setting aside the judgment, and remitting the case for trial in due course on the issues raised in the pleadings. The appellant will have his costs in appeal.

BROWNE, J.—This appeal has come before the Collective Court upon the request of the Solicitor General, inasmuch as he desired to raise for re-consideration the question decided by CLARENCE and DIAS J. J. in 19,377 and 20,562 D. C. Jaffna IX. S. C. C. 67.

The facts of the present case are averred in the plaint to be as follows :—

On the 8th August 1892 1st defendant and his son 2nd defendant unlawfully took possession of a land belonging to 2nd plaintiff, whereupon the plaintiffs 4 days thereafter, on the 12th August, instituted against them the action 768 C. R. Kayts. On the 13th August 1st defendant executed in favour of his daughter-in-law 3rd defendant, wife of 2nd defendant, a transfer of his only land, and when plaintiffs recovered judgment against 1st defendant and sought to execute their writ, 3rd defendant claimed under her conveyance that land when seized.

The plaintiffs have accordingly instituted the present action to have the transfer to 3rd defendant by 1st defendant "cancelled and set aside as fraudulent and illegal," and the defendants in their answer maintain that the transfer was not fraudulent, but was *bona fide* and for good consideration.

In support of his case plaintiff called and examined as his witness the 1st defendant who proved he had received consideration for his transfer, but at the end of his examination was asked without objection and deposed to the fact that the deed was executed without an Udayar's schedule from the Udayar of the village, certifying that he had caused publication in the village of 1st defendant's intention to sell the land.

Plaintiff himself then gave his testimony, in which he stated he was prepared to prove that there had not been any consideration for the execution of the deed.

But before any further evidence was adduced plaintiff's Counsel moved the Court to hold the deed to 3rd defendant invalid, to set aside 3rd defendant's claim founded thereon, on the ground that it was executed without such a schedule, and to declare the land the property of the 1st defendant. Counsel

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for 2nd and 3rd defendants while admitting that no such schedule had been granted, relied on the above-mentioned decision of this Court in IX. S. C .C., 67, and the Commissioner held the deed invalid and declared the land to be the property of the 1st defendant, holding that the decision cited was at variance with previous decisions of this Court, and that not being a decision of the Collective Court, it was open to him to decide as he did.

I consider first of all that the summary way of deciding this litigation was entirely irregular and that this judgment cannot stand. Plaintiff instituted his action on the basis that the deed was regularly executed, but was so executed in fraud of himself a creditor, and this was the only issue—fraud or not—which on the pleadings the Court had to try. Had plaintiff desired to rely on the informality of the execution of the deed, and that 3rd defendant was never thereby entitled to the land, he should have so averred. Mr. Solicitor in argument contended that the answer was bad in that the 3rd defendant or all of them did not allege in support of the validity of the deed that publication had been made and schedule obtained, but when the plaintiff had not questioned the validity of the form of its execution it was surely unnecessary for the defendants to prop up by averment of each detail of due execution what was by plaintiff left standing square and firm. Secondly, even if disregarding the decision in IX. S. C. C. we consider the arguments of Mr. Solicitor, I consider that as indicated on the question respecting the future sale of land in 12,869 District Court, Jaffna Ramanathan 1864, 93 and also in the case cited by my Lord the Chief Justice, plaintiffs have not shown that it was open to them to raise the objection that there had been no publication nor schedule which were designed to protect the right of 3rd parties to pre-emption. As between the 1st and 3rd defendants here, the contracting parties, the transaction was no doubt valid and binding, and if it could be disturbed at all, it could only be by someone whose right as of pre-emption &c., existing at the date of the transaction, had been prejudiced by the omission of the customary procedure. Plaintiff had not then any such right, because

on the day previous to the sale he had instituted an action which resulted in his getting Rs. 1·25 damages and costs.

Thirdly the proof and admission in the case extends not further than that Udayar's schedules were not granted. I find no express proof or admission that due publication was not made, and it has been pointed out by OLIPHANT, C. J. in 2,596 District Court Jaffna Ramanathan 1849 166 that section 27 of the Thesawalame makes no mention at all of any requirement for such schedule, and that Ordinance 1 of 1842 only enacts that when they are desired, there shall be be no delay or extortion in the matter of their grant. The necessity for a schedule therefore did not become law by the Proclamation 18 of 1806.

I agree, however, that in view of the recognition and pronouncement by this Court for over 60 years after 1806 that both proclamation and schedule are, at all events in such cases as where a right of pre-emption may be affected, necessary legal preliminaries for a sale of land in the Jaffna province, the decision in IX. S. C. C. will be deserving of reconsideration when occasion shall arise. I know not on what proof it was there held that this procedure was obsolete, or indeed how what is law could become obsolete in less than 20 years (so far as our published reports show—possibly much less so far as regards actual decisions,) since this Court last recognised it to be law. But this may be shewn when next the question shall arise.

BEFORE *Lawrie* A. C. J. *Withers* AND *Browne* J. J.

August 18 and 29, 1893.

PULLE *v.* PULLE and others.

[No. 559, D. C. NEGOMBO.]

Deceased debtor—Heirs in possession—Executors de son tort.

Where on the death of the debtor, the next of kin enter into possession of his estate and by active steps take the benefit therefrom, they become liable for the debts of the deceased to the extent of the benefit.

PULLE v. PULLE.

Per BROWNE, J.—An heir is liable to the extent of the property of the deceased which has come into his possession, and a decree could be entered against the estate of deceased.

Wendt for appellant.

De Saram for respondent.

Cur. adv. vult.

On August 29th the following judgments were delivered.—

BROWNE, J.—I regret I cannot agree in dismissing plaintiff's action. Plaintiff sues to recover Rs. 284 as due to him on a notarially attested Tamil written document stamped with a 50 cents stamp, which the plaint calls a bond. A question having been raised in argument as to whether this is a bond or the amount is otherwise now irrecoverable, I hold, in the light of the decision reported in Wendt 296, and I. C. L. R. 40, that the instrument falls within the class specified in Section 6 of Ordinance 22 of 1871, and that the action has been instituted within time.

Plaintiff avers his obligor died about five years before action brought without paying this debt and left "as heirs in possession of his estate and effects which do not exceed Rs. 400," two persons, Salome the wife of 1st defendant, and 2nd defendant who had married one Juliana, who pre-deceased the debtor, leaving her surviving her children Inacia and Lucia, the 3rd set of defendants minors sued by their father 2nd defendant as their guardian *ad litem*.

Plaintiff does not set out the relationship of these defendants to his debtor, but in his evidence he deposes that 1st defendant is son-in-law of the debtor, wherefrom it may be assumed to be possible that Salome and Juliana were daughters of the debtor. No doubt the heirship should have been more clearly particularized, but inasmuch as the defendants have not denied they are heirs and the usual form of decree in these cases affects only the debtor's property and not the defendants, personally, save so far as they have profited thereby, the plaintiff should not, in my opinion, fail thereby to obtain his decree.

Plaintiff further particularizes the lands to have been the property of his debtor, and says that all the defendants are in possession of them—that 2nd defendant has been appointed

guardian *ad litem* over his minor children, and that the amount due to him on this bond is only Rs. 284.

Defendants filed an answer, that, in my judgment, discloses no defence whatever to plaintiff's claim. They do not meet plaintiff's averments, but deny the debtor "executed any bond" or died "possessed of any property of which they are now in possession as his heirs and legal representatives," and finally they aver that before his death the debtor "gifted all his lands to the defendants by deeds, and, therefore, they are not liable for his unsecured debts." To me this very admission, in so far as it negatives the existence of other property out of which the debt could be paid, confirms plaintiff's averments, and assists to show his right to maintain this action.

For, is not the question this? What is a creditor of a petty Rs. 250 debt like this to do when his debtor dies leaving Rs. 400 worth of property, and no more, and some persons, who may be his children, sons-in-law, or grand children, but are not denied to be his heirs, are in possession thereof? We may excise from the judgment of this Court, reported in VIII S. C. C. 14, all that was there ruled as to necessity for administration, for since the passing of our Civil Procedure Code it would be even less necessary that this creditor should administer a Rs. 400 estate to recover Rs. 250 than that a mortgagee creditor should do so, and the latter in a case of this kind would be so excused under the provisions of section 642. There will remain then the other portions of that decision which point out that an heir is liable to the extent of the property of the deceased which has come into his possession if it be proved what is here admitted, that the deceased died possessed of property, and that the property came into the possession of and was appropriated by the heir. I regard this case with such an ineffective answer as has been filed, as similar to 57,840 District Court Colombo, Vanderstraten 158, and that decree should be entered against all who are in possession in the same form as was entered in 5,805 District Court Kegalla VII S. C. C. 180, and 52,983 District Court Galle Supreme Court Min. 4th March 1887 (save the last sentence therein). A minor is, I humbly conceive, as

PULLE v. PULLE. capable of receiving benefit in his everyday life out of a fructuous estate as is an adult, though, of course, in a lesser degree, proportionate to his younger years, and it needs only that he should be duly represented in order that the creditor should by appointment of a guardian *ad litem* of any minor heirs obtain a valid decree, which will reach the debtor's assets in his or his guardian's hands.

Another question, however, might here arise, if defendants should properly plead that which plaintiff in VI. S. C. C. 13 admitted against himself, that they are not only heirs of the debtor but are donees from him of the lands of which they are admittedly in possession. No doubt had plaintiff been aware of those deeds he should have set them out in his plaint and challenged their efficacy to protect the donees on such grounds as he might advance, or had defendants disclosed and pleaded them with precision in their answer he might have replied thereto so as to raise the issue which DIAS, J, in the decision under reference held, had not these been duly raised. As the pleadings now stand, I do not see that it would be open to defendants to lead proof of what they have not duly and fully pleaded.

While I would set aside this decree, holding that there had been sufficient proof of the debt and that decree could be entered "against the estate of the deceased" (57,840 D.C. Colombo, *ut supra*) *i.e.*, in the later form to which I have referred, I would give liberty to defendants to amend the 3rd paragraph of their answer on the usual terms within a specified time and the case to proceed to trial thereon, or else that judgment be entered against the defendants for the amount claimed, such judgment to be enforceable if necessary by levy on the property of the deceased Susey Fernando Vengadashi, in the hands of the defendants, or any of them, but not otherwise.

LAWRIE, A. C. J. This action is instituted against 5 persons as "heirs in possession" of the estate of a deceased debtor of the plaintiff. It is plain from the averments, and from the evidence, that out of the five defendants, two—the two men (husbands of Salome and Juliana)—are not heirs or next of kin of the deceased. Whatever be their liabilities it is not as

heirs in possession. Of the remaining three, two are stated to be minors. It is not averred in the plaint, nor was it proved at the trial, that these minors by any act of theirs had entered on the inheritance. I do not say that a minor by his duly appointed guardian, or even a minor himself when he reached years of comparative understanding, may not enter on and take possession of land or goods which belonged to a deceased ancestor, but I say, that the plaintiff in this case has neither averred nor proved any acts of the minors or by a guardian which, in law, would make them liable for the debts of the deceased relative.

The remaining defendant is Salome. What relative she is to the deceased the plaintiff does not take the trouble to tell us in his plaint nor does he aver what is the name or value of the lands Salome is in possession of.

In affirming the judgment, mainly for the reasons given by the learned District Judge, I do not feel that I am abridging the rights of creditors of small sums whose debtors die before payment. Now, as always, the law is, that the mere fact of relationship, of being the next of kin, the son, the guardian, nephew, cousin or father, or uncle, of one who dies, will not make men liable for their relations' debts. They were not liable when the debtor was alive; they are not liable when he is dead; but if, by the death one or more of the next of kin is entitled to benefit, and by active steps takes the benefit, he becomes liable to the extent of the benefit, either as an *executor de son tort* or as an heir, who has entered on the inheritance. But, to make minors liable for the relations' debts, the creditor must aver and prove something more than relationship, and even something more than presumed benefit, he must prove acts of possession and enjoyment of the deceased's property sufficient to render even minors liable.

Again (as from the pleadings and proof seems to be the case here) if the deceased debtor before his death dispose *inter vivos* of all his estate by deeds of gift, the question whether the donees are by virtue of their taking benefit under their deeds liable for the donor's debts, will depend on the

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date of the contracting of the debt as compared with the date of the gift; it will further be complicated by consideration as to the amount of property which the deceased then had and how he dealt with it. The plaint of an action directed against donees should fairly raise the issue of liability, but here the plaintiff has avoided it by ignoring the deeds of gift altogether.

The burden of proving that these defendants are liable on a contract to which they were strangers lay on the plaintiff. In my opinion, he failed, and his action was properly dismissed.

WITHERS J.—I agree in affirming the judgment. I do not see how the minors can be made accountable for this debt, either in their own persons or to the extent of assets, if any, which have come into their hands.

BEFORE *Lawrie* A. C. J., *Withers* AND *Browne* J. J.

August 15th and 25th, 1803.

CHETTY *v.* ETANA and others.

No. 472, D. C., CHILAW.

Adiating an inheritance—Widow and children of deceased debtor—Executor de son tort—Liability of heirs.

Observations on the *allegandа et probanda* necessary to render an heir in possession of the deceased's estate liable for the deceased's debts and the extent of such liability.

D. C. Kandy, 90, 200, IV. S. C. C., followed.

Wendt for appellant. No appearance for respondent.

Cur. adv. vult.

On August 25th, the following judgments were delivered.—

LAWRIE A. C. J.—The plaintiff, averring that he holds a writing obligatory granted to him by the deceased Vidane Appu and that the debt Rs. 1,250 is still due, sues the widow and the minor children of the deceased debtor, and prays for judgment against them on the ground that they have "adiated the inheritance." As against the minors this is plainly not a cause of action.

I do not think it is possible for several minors to "adiate an inheritance." It is perhaps not very certain what is the meaning of the expression "adiating an inheritance;" but at best it must be some act or series of acts by a person of full age and contracting powers; no act by minors would be such an adiation of an inheritance, as to render them after the doing of the act liable for debts which but for the act they would not have been responsible for. This at least I feel certain of, that a general averment of adiation is not sufficient; the specific acts the doing of which render the minors liable must be clearly set forth.

With regard to the 1st defendant (the widow) if she being of full age and legal capacity without taking letters of administration, had taken possession of the whole of her husband's estate, she may have rendered herself liable for his debts as an *executor de son tort*, but that is not the cause of action against her. She, like her children, is sued because she adiated the inheritance, does that mean more than that she has taken possession of the one half of the property, to which under the Ordinance of 1876 she has right? If so, that does not necessarily make her liable to pay all the debts of the husband; she is not liable to pay more than the amount she succeeded to.

It is not here averred what the amount of the estate was.

The case as against the widow would have been different if the plaintiff had averred that the estate of the deceased debtor was of greater value than Rs. 1,000, that the widow had failed to take letters of administration and had notwithstanding taken possession of specified property of specified value and had therefore rendered herself liable to pay a debt of that specified amount. The action against these defendants was rightly dismissed, though, as I have indicated, I do not rest my judgment on the ground given by the learned District Judge.

WITHERS, J.—I also would affirm this judgment. The plaint is so defective in my opinion that the action cannot but fail.

The suit is brought by the creditor of one Vadagu Mudianselage Vidane Appu deceased, against his late debtor's widow and children, to recover from them the amount of his

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debt on the ground that they have "adiated" the dead man's "inheritance." This antiquated expression of old Roman law is hardly adapted to the law of to-day, and without particulars is an empty averment.

The *allegandu* and *probanda* in an action like the present are pointed out in VI. S. C. C. p. 13. Nothing however could be alleged or proved to make the minor children answerable for the father's debt in whole or in part, either out of his assets or their assets.

The plaintiff has shewn himself unwise rather than tricky in not procuring a person to be appointed administrator of the estate and effects of his deceased debtor.

BROWNE, J.—Plaintiff seeks to recover a money decree for Rs. 1,256·75 principal and interest on a mortgage bond dated 16th December 1891, which he recited in, and filed with his plaint, alleging that his obligor died 10 months prior to institution of action, and that his widow and children whom plaintiff named as defendants have adiated their husband's and father's inheritance. Concurrently with the institution of the action plaintiff applied for and obtained an order nisi appointing 1st defendant guardian *ad litem* over minor children, the 2nd, 3rd and 4th defendants, and this order was thereafter made absolute on no cause being shewn. Those latter proceedings were irregular in that (1) there is no record that the minors appeared personally in Court or were prevented by good cause from so doing, (Sec 493 Civil Procedure Code) in that (2) the petition and affidavit did not contain the averments required by Section 749, and in that (3) (as I think should still be done according to what was directed in 76,232 District Court Colombo S. C. C. 154 and in order to avert the necessity of the Summary Procedure are permitted by section 493) no notice was served along with the summons on the minor defendants to procure a guardian *ad litem* of their own selection to be appointed nor was averment made that they were so young as to be unable to do so.

The parties however regarded that 1st defendant had been validly appointed, the caption of the plaint was amended

accordingly, and then the Court queried whether the action would be maintained when there had not been application made for the appointment of an administrator to the estate of the deceased mortgagor, as required by Section 642, Civil Procedure Code, and on this suggestion the defendant filed answer taking that plea.

I do not consider that sections 545 and 547 have any application to the present question, for the former concerns the question of appointment generally on a death being reported to the Court, and the latter only actions for the recovery of any property of a deceased (9 S. C. C. 181). But the question is rather, since the passing of the Civil Procedure Code, is it open to a mortgagee when his mortgagor has died since the 1st, August 1890, to sue to recover only a money judgment in respect of the debt due to him on his mortgage bond? To me it appears that the provisions of sections 640 and 642 are obligatory upon the mortgagee desiring to realize monies secured to him on a mortgage after the death of his mortgagor, to proceed only in either of the ways therein directed, according to either contingency of the property mortgaged exceeding or being less than Rs. 1000 in value, and that he cannot institute an action on the mere debt. The policy of this requirement is very possibly this:—That the heirs of a mortgagor whose property exceeding Rs. 1000 in value was mortgaged to its entire value would never seek to administer it, and so the revenue by stamp duties thereon is thus protected by the obligation thus imposed on each mortgagee. The design of the plaintiff (if any) I regard, not as the learned District Judge does, to have been to trick the widow and children, but rather to realize the mortgage without its having been reduced by the costs of administration.

In this case, however, there is nothing before the Court to shew what is the value of the property of the debtor which has passed to the possession of the defendants, to the value whereof alone the plaintiff could obtain a decree against any vicious intromitters in a suit for the purpose and both as an action against an executor *de son tort*, the plaint is defective as my brother WITHERS has pointed out, and

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in my opinion it was not permissible for the plaintiff so to sue the widow and children, save in a proper mortgage action. I agree that the suit be dismissed with costs.

BEFORE *Lawrie*, A. C. J. AND *Withers* J.

July 11 and August 1, 1893.

BASTIAN *v.* ANDRIS and others.

[No. 35,918 D. C. MATARA.]

Mortgage by guardian—Liability of guardians—Liability of minors—Ratification—Knowledge and acquiescence.

The first defendant acting in good faith, but without authority, as guardian of the other defendants who were minors, mortgaged with the plaintiff certain immoveable property belonging to the latter. The plaintiff claimed a money judgment against all the defendants and a mortgage decree against the immoveable property.

Held, that plaintiffs action failed (a) against the first defendant because he did not bind himself as principal and (b) against the other defendants because the first defendant was not authorised to incur a debt on their behalf and there was no proof that they ratified the mortgage when they came of age.

Dornhorst for 1st defendant-appellant.

Wendt for 2nd, 3rd and 4th defendants-appellants.

VanLangenberg for plaintiff-respondent.

Cur. adv. vult.

On August 1, 1893, the following judgments were delivered:—

LAWRIE, A. C. J.—In 1869 the first defendant without authority held himself out to be the legal guardian of the other defendants, and borrowed money on the security of a mortgage over the property which he assumed he had power to grant. The mortgagee was permitted to enter on the lands. He and his assignee possessed them for many years during the minority of the owners. On attaining majority the defendants did not notify the mortgage of the 1st defendant. About 1889 the mortgagee lost possession, and in 1890 he brought this action alleging that the mortgage was granted by the 1st defendant for, or on behalf of and as guardian of the second, third and fourth defendants.

He prayed for a money judgment againts the defendants jointly and severally and for a mortgage decree affecting the lands.

The 2nd, 3rd and 4th defendants are not bound by the mortgage and the plaintiff has no right to a judgment against them or against the lands. The question whether the 1st defendant is liable to repay the money borrowed and received by him depends on the terms of the bond, it is difficult to decipher the document of which the plaintiff ought to have filed a legible copy.

I understand that the 1st defendant represented himself to be an agent; he did not bind himself personally, there is no allegation that he was guilty of fraud or fraudulent representation. It may be that he and the plaintiff laboured under the mutual mistake that he was the natural guardian of his deceased sister's minor children, and that he had legal powers to deal with their estate. It was not contemplated that the guardian should bind himself and his own property; the bond is not so expressed.

I am of opinion that the plaintiff is not entitled to recover from the 1st defendant personally.

I would set aside the judgment and dismiss the action with costs.

WITHERS, J.— This is an action to recover on a usufructuary mortgage bond a sum of Rs 300. principal with legal interest thereon from the date of suit till payment in full. The bond purports to be made by the 1st defendant on the 2nd of September, 1869, and to mortgage shares in certain lands belonging to the other defendants to be possessed by plaintiff in lieu of interest. The plaintiff claims a money judgment against the defendants jointly and severally and a mortgage decree against the shares in the land for the liquidation of the said sum and interest.

It is clear that plaintiff cannot recover judgment for the debt against the 1st defendant and the others jointly and severally as prayed, for the 2nd, 3rd and 4th defendants were no parties to the bond. We have to decide two questions, one whether the 1st defendant is liable to satisfy the debt personally, the other whether the shares in the land are liable to be sold in satisfaction of the debt secured by the mortgage. The plaintiff is entitled to a mortgage decree only on proof

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that the defendant had the authority to borrow the money on behalf of the other defendants and secure their property for the repayment of the money borrowed, or that the mortgage by 1st defendant of their shares in lands was ratified by the other defendants so as to bind the lands as security for the debt.

I omit for the moment any notice of other points of importance raised by appellants counsel.

In his deposition plaintiff says that the money was borrowed by 1st defendant to pay off a debt due from the estate of one Punchi Hamy, the mother of the 2nd, 3rd and 4th defendants. He says that the money was duly paid for on account of what it was borrowed.

He further says that 1st defendant had been judicially appointed guardian of the 2nd, 3rd and 4th defendants, then minors, when he borrowed and applied the money to the discharge of the claim against Punchihamy's Estate.

He declares that he took possession of the shares of lands mortgaged to him and remained in possession of them till he assigned his interest in the bond to one Don Louis some nine or ten years before the time he gave evidence in the cause. His assignee entered into possession of the shares, according to this witness, and held them for some four years when, having paid his assignee the money given for the assignment, the plaintiff entered into possession of the shares of land and held possession till 1889, when the 3rd defendant witheld possession of them from him to his loss of interest in kind.

In cross examination, the plaintiff says that he contracted with the 1st defendant as guardian of the other defendants, they being minors. Don Louis confirms plaintiff's testimony and says he not only endorsed the bond in a way to shew that plaintiff had paid him back the money for which he had taken the bond, but afterwards executed a deed cancelling the assignment.

There does appear to be an endorsement on the original bond by one Louis Hami, of which the translation filed is as follows:—

"The Rs. 100 appearing in this deed has correctly been received from Mr. Don Bastian, the seller (*i. e.* assignor) therein named, and the deed is handed to him on this 5th November 1886.

At page 49 is a document to which the plaintiff and Don Louis were parties, bearing date August 18th, 1889. It purports to be a renunciation of all the latter's claim to the benefits of the bond theretofore assigned to him in consideration of the repayment of that which he—Don Louis—gave for the assignment of the 1st defendant's mortgage bond in his favour.

Here may be mentioned one of the points made by appellant's counsel. He argued that this deed of renunciation was not operative to extinguish the contract of assignment so that plaintiff had no title to sue.

I am against counsel on this point. I think that the contract was thereby extinguished and that the plaintiff was restored to his position of usufructuary mortgagee under 1st defendant's bond.

Now, what of 1st defendant's liability? Mr. Dornhorst made two other points on this question. He argued that the bond was granted by 1st defendant to and accepted by the plaintiff, not in the personal character of the 1st defendant, but in a representative character as guardian.

In support of his contention he referred to the plaint which alleges that 1st defendant received this money for and on behalf of and as guardian of the 2nd, 3rd and 4th defendants, to the evidence of the plaintiff above recited as to the purpose for which this money was borrowed, and to the recital in the bond itself, p. 33 "know all men that.....before.....Notary appeared the undersigned on behalf of the three defendants and one Babahami (since deceased) all being minors, who acknowledge himself to be indebted to Don Bastian (plaintiff) in the sum of..... ..to be lent and advanced to him the appearer, for the purpose of paying the amounts of the two cases..... .. who renounce the benefit of *non numerata pecunia* which aforesaid sum of..... ..the appearer on behalf of the aforesaid minor children hereby promises and undertakes to pay or cause to be paid unto the said Don Bastian his heirs, &c., for the securing thereof the appearer hereby on behalf of the aforesaid declare to bind specially as a mortgage certain shares of lands therein enumerated—p 37? ***—(illegible) by the four minor children by right of maternal inheritance of ***

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(illegible) upon conditions nevertheless that the said creditor (the plaintiff) d ›, may and shall possess without any interruptions the produce and profits of the aforesaid premises in lieu of interest as aforesaid.

This document is signed in Sinhalese characters by the mortgagor.

Is this signature, which is presumptive evidence of assent to the document signed, rebutted by evidence to the effect that the signatory was not to be bound as principal. It may well be that a creditor looks to the personal responsibility of a borrower for monies which he is lending to the borrower on behalf of 3rd parties and that the borrower may bind himself personally therefor. But in this case it seems to me that the whole tenor of the bond shows that the signatory was not binding himself as a principal and other circumstances referred to confirm this view of the position. So that on this point I think the 1st defendant is entitled to succeed.

I am not with Mr. Dornhorst in his contention that the debt is barred as against the 1st defendant, because no payment of interest by him had taken the law out of our Statute of Limitations. I think the possession in lieu of interest operated as a payment.

There is no evidence that the defendant had any authority to incur this debt on behalf of the minors and bind their estate, nor do we know that the shares of land mortgaged by 1st defendant was estate devolving on the minors from Punchihamy on account of whose debt the money was borrowed.

The plaintiff may perhaps have had a good cause of action for damages against the defendant on account of monies borrowed under a misrepresentation of authority, but this is not one of the present causes of action. As to the right of the plaintiff to recover his debt by a judicial sale of the shares of land mortgaged to him by the 1st defendant, it must be clearly proved that the act of the 1st defendant in thus mortgaging the shares was subsequently ratified by the defendants after they came of age so as to bind their interests and the shares of land. Acquiescence and non-disavowal within a reasonable time may be taken to conclude a ratification, but acquiscence and ratification must be

based on a full or bare knowledge of facts. Of this really there is no proof. Indeed, if Ango Appu, the person spoken of by Mendis Jayawardane, a witness for the plaintiff, is the 3rd defendant who is alleged to have ousted the plaintiff, he by this very act repudiated the mortgage of the lands which he wished to enjoy himself. No doubt it is said that he undertook to pay the debt, but at the most that imported only a moral obligation and cannot be converted into an acquiescence in the mortgage the usufruct of which he stopped the moment it seems he was aware of it.

As to the 2nd and 4th defendants there is no proof whatever of their knowledge or acquiescence of the mortgage of their shares.

In the result it is my opinion that the judgment should be set aside and the plaintiff's claim dismissed with costs.

BEFORE *Withers* AND *Browne*, J. J.

August 8 and 15, 1893.

PERERA *v.* ABERAN and others

[No. 640, D. C., KALUTARA.]

Decree holder—Sale in execution—Unsatisfied decree—Necessary averments in plaint—Civil Procedure Code—Section 247.

In an action by the decree holder under section 247 of the Civil Procedure Code to have it declared that certain properties are liable to be sold in satisfaction of the decree in his favour, it must be alleged and proved that at the date of the institution of the action the decree was unsatisfied.

This was an action by the decree holder against a successful claimant and the judgment debtors to have it declared that the land claimed was liable to be sold in execution of the decree in his favour. There was also a claim for damages. The plaint did not allege that at the date of the institution of the action the amount decreed was unsatisfied, the defendants, *inter alia*, answered that "the allegations in the plaint do not entitle the plaintiff to the relief prayed for." At the trial the judge dismissed the plaintiff's case, on the ground that there was no averment in the plaint that any amount was due to the plaintiff on his writ. Plaintiff appealed.

PERERA
v.
ABERAN.

Sampayo for plaintiff-appellant;
Morgan for 1st 7 deffendants-respondants.

Cur. adv. vult.

On August 15, 1893, the following judgments were delivered :—

WITHERS, J.—I think the learned judge was right in pronouncing the plaint defective, but I think he went too far in dismissing the claim altogether in consequence.

The point of law was not very fairly taken in the answer, in the sense, I mean, of not being explicit as it should have been. Had the ground been specified in the answer plaintiff, if so advised, might have applied for leave to amend his plaint by stating, if true, that he had recovered a money decree against defendants for so much with costs, that the amount so recovered was at the date of the order complained of and at the date of institution of this action wholly or partially unsatisfied, as the case may be, and he would have been or should have been allowed to make the necessary amendment. I should have thought that the fact of a subsisting money decree was as essential an element in a plaint by a judgment creditor under the 247 section Civil Procedure Code as a statement of the order releasing the seizure and the date of that order.

That order is conclusive unless within 14 days an action is instituted to have it declared that that order notwithstanding the property seized and released is liable to be sold in satisfaction of the execution creditor's judgment and that declaration is adjudged. Mr. Sampayo, however, argued that it was at least not necessary to allege the substance of the judgment debt at the date of action, because a judgement creditor, even if paid after release of seizure occasioned by an improper objection or claim, would be entitled to recover damages consequent thereon in an action instituted for the purpose of having it declared that at the date of the order of release the property as his debtor's assets was liable to be sold in execution of the decree in his favour. That is a very plausible contention, but looking at the effect of the order which subject to the result of the action shall be conclusive and to the object of the action permitted to the judgment creditor by section 247 viz. to have

the said property declared liable (*i. e.* I take it presently liable) to be sold in execution of his decree, the plaintiff in this action must in my opinion declare on a subsisting judgment debt. A judgm nt can only he executed if any part of it is outstanding. If there is no debt to levy for what is the cause of action? It would be adding to the list of fictitious causes of action if a sham decree could originate a contest as to title to property. No doubt it may be said that if the property is assets of the judgment debtor it is no concern to the parties having no sort of interest therein whether the judgment debt is a sham or genuine one, but when property has been released from seizure on the ground that it was not in the debtor's possession direct or indirect and therefore not leviable by the Fiscal it surely is incumbent on a judgment creditor in an action against third parties at whose instance such an order has been made to aver and prove that he holds an unsatisfied money decree as well as that the property he seeks to attach is assets of his debtor liable to be levied thereunder. I am prepared to give plaintiff liberty to amend his plaint as indicated on payment of the costs of the argument on the 8th February last. As the learned judge gave him no option in the Court below I think it would be unfair to order him to pay the costs of appeal as to which no order will be made if he avails himself of the liberty accorded to him.

Set aside the judgment with liberty to plaintiff to amend his plaint as indicated within fourteen days of the date of our judgment herein on paying respondent's costs as aforesaid.

Plaintiff failing so to amend his plaint on terms as aforesaid and delivering copy of the amendment to respondent's Proctor within two days of the entry of the amendment on the record, the action will stand dismissed with cost in both Courts.

BROWNE, J.—Under a certain Bill of Sale and two Fiscal's transfers Simon, plaintiff avers, was entitled to $\frac{3}{4}$ of $\frac{1}{7}$ of two allotments of land and he and the 8—11 defendants had prescriptive possession thereof. Plaintiff then avers that he is the decree holder that 8—11 defendants are next of kin who

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adiated Simon's inheritance on the judgment debtors in a certain action but that 1—7 defendants when plaintiff had the land seized in execution of his decree unlawfully claimed the same to her damage of Rs. 20. Plaintiff prayed the usual declaration of the liability of the land to be sold and damages. The 1—7 defendants answered *inter alia* that the allegations in the plaint do not entitle the plaintiff to the relief prayed for and at the trial expanded this into the objection that there was no averment that any amount was due to plaintiff on his writ.

This Court has already held this allegation and proof thereof to be necessary in an action by a mortgagee under Sect. 247 of the Civil Procedure Code or in an ordinary hypothecary action (574 D. C. Negombo II C. L. R. 188 *in notis*) and in my opinion is necessary in all actions instituted under the provisions of section 247 and this for the more immediate object of having this land declared liable to be sold in execution as well as for the lesser object of recovering damages for the wrongful claim.

Whether in the extreme case suggested by Mr. Sampayo of the writ being paid after the wrongful claim, but the writ holder still desiring to recover damages and suing to recover them alone it would be necessary to him to make this averment, will properly fall to be considered when such case shall rise. While agreeing in the views held by my brother WITHERS in the judgement he has written, I may add even in such an action as that suggested, not instituted for the peculiar purpose of section 247, it seems to me it would be still necessary to aver and prove existence of an unsatisfied decree to show that the plaintiff had full right to seize the land at the time when the wrongful claim was made to his damage. So that in all cases the averment and proof are necessary.

I agree to the order proposed considering plantiff should have had opportunity given him to amend before his plaint was dismissed altogether.

BEFORE *Lawrie* A. C. J, *Withers* AND *Browne* J. J.

August 11 and 15, September 15 and 22, 1893.

SIATU *v.* SADUWA.

[No. 224, D. C., KEGALLA.]

Judgment—Appealable Order—Civil Procedure Code, sections 508,754—Courts Ordinance section 39.

The plaintiff, a Nindagama proprietor, sued the defendants as Paravani tenants of the Nindagama for services alleged to be due but not performed by them. The defendants filed answer objecting as a matter of law that the plaint disclosed no cause of action. The District Judge upheld the claim and decreed a sum of Rs. 121·25 to the plaintiff reserving for further adjudication the proportion payable by each defendant. The defendants appealed.

Held, (WITHERS J. dissenting) that the order was an appealable one.

Bawa for defendants-appellants.

Sampayo for plaintiff-respondent.

On August 15, 1893, the following judgments were delivered:—

BROWNE, J.—Plaintiff claiming to be lessee from the executrix of the late Henry de Soysa, owner and proprietor of a certain Nindagama, and to be (in the words of his lease) ordained to recover money from the tenants in lieu of *Rajahkariya* sued in this action thirteen defendants as the *paravani* Nelakarayas for Rs. 121·25 alleged to be the commuted value of the *Rajahkariya* services due by them.

Ten of the thirteen defendants filed answer wherein they raised only for defence as matter of law the question whether the plaint did or did not disclose a right in the plaintiff to bring and maintain this action and gave nine grounds upon which they submitted their defence should be sustained.

The learned District Judge upheld the claim of the plaintiff, *i. e.* I presume that the plaint did disclose the right of the plaintiff to bring this action and entered a "decree" that the thirteen defendants as *paraveni* tenants of the Pangua in question do each severally pay to plaintiff such portion of the sum of Rs. 1·25 and the taxed costs of the action as would bear the same ratio to that sum as his individual interest in the pangua might bear to the whole value of the pangua, and further that the amount of such portion be subject of further adjudication before execution should

SIATU v. SADUWA.

issue and be recovered in the first instance from the produce of the Pangua belonging to the Nilakarayas and failing such recovery by sale of the defendants' interest therein.

The defendants at once appealed from this judgment and decree and objection has been taken preliminary to the argument thereof that no appeal lay from this decree.

I consider the objection should not be sustained but that the appeal should be heard. No doubt a mere expression of opinion on the part of a judge would not be a decree or sentence (5,326, District Court Mannar 2 Lor. 9. 82,841, District Court, Kandy, IV. S. C. C. 124) but here there has been a judgment that the plaintiff has in his plaint disclosed a sufficient cause of action and (since there was no further defence) a decree that each defendant do severally pay his proportionate share of the amount in claim and costs and a further decree for the ascertainment of each such proportion and the mode of its recovery. The one question which the pleadings made at issue between the parties was thus decided in that a sufficient right or cause of action was preferred for adjudication and from this decision an appeal lies.

I regard the decree made by the learned District Judge as one of those contemplated by section 508 of the Civil Procedure Code and I apprehend that every successive decree or order in any such piecemeal adjudication would be as open to appeal as was each successive order in *Corbet v.* The *Ceylon Company* that determined a principle upon which ulterior proceedings would be taken. If it be so, the right to appeal could more strongly be claimed here in that if the defence were upheld and the decision reversed the Court would be saved the time and trouble and the parties the costs of the proposed further enquiry and adjudication thereon. In my view the wording of section 39 of Courts Ordinance and section 752 of the Civil Procedure Code is large enough to include any such decree or order made by a District Court as the present among the class of what is rightly appealable.

WITHERS J.—In my opinion the appeal is premature and must be rejected.

True there is a judgment and a decree but the judgment does not decide the question at issue and the decree cannot as it stands be executed.

The action is instituted by a so called Nindagama proprietor for the time being to recover compensation from his tenants for failure of services during the plaintiff's alleged proprietorship under which the defendants hold the lands forming a pangua of the Nindagama.

Plaintiff claims that the defendants be condemned to pay him Rs. 121-25 by way of compensation. The learned judge has found that the compensation asked for breach of services ought to be paid by the defendants not as joint and several debtors but as debtors *pro parte virili*.

It remains to be ascertained and adjudicated what each defendant ought to be decreed to pay the plaintiff.

The judgment and decree are therefore inconclusive, and the action has not yet been finally decided. I cannot see how an appeal can be taken from a judgment or so-called decree in this incomplete state and I think respondent's preliminary objection must succeed and I would reject the appeal with costs.

If I am not mistaken, the principle of my proposed decision has been constantly recognised by this Court.

LAWRIE, A. C. J.—I am unable to agree to reject this appeal.

The defendants plead as a matter of law that the plaint does not disclose a right of action in the plaintiff and they pray that the action be dismissed with costs.

The District Judge repelled that plea in law and found the defendants liable according to the proportion which the land held by them bore to the sum claimed. In my opinion there is a judgment against which an appeal may be taken. It is not a mere incidental order, it goes to the root of the action.

BEFORE *Lawrie*, A. C. J. AND *Withers* AND *Browne*, J. J.

September 8 and 15, 1893.

SAIBO and another *v.* APPUHAMY.

[No 433, D. C, CHILAW.]

Landlord and Tenant—Liability of Landlord to put Tenant in possession of premises let—Interruption by Landlord or strangers of Tenant's enjoyment of the premises.

Per WITHERS, J.—In an action for rent by landlord against Tenant it is a good defence that the landlord did not implement the contract of letting by putting the tenant in possession of the property let, and if the tenant had advanced money by way of rent for the use of the premises of which the landlord had failed to put him in possession, he might recover the money so paid as money had and received by the landlord for the use of the tenant.

Interruption by the landlord or any one under him of the tenant's enjoyment of the premises let is no answer to a claim for rent due and payable before such interruption, but it is ground for a tenant's claim to have the contract of lease cancelled and for recovery of damages consequent on the interruption.

Interruption of a tenant by strangers after the tenant has been put in possession by the landlord is no answer to a claim for rent, unless such interruption was followed by eviction in due course of law, and it is then only an answer to a claim for rent that has become due after such interruption.

Such interruption is no ground for a claim to damages or cancellation of the lease, unless it was followed by eviction in law and due notice had been given to the landlord, in the proceedings terminating in eviction, to warrant and defend the defendant's title.

This was an action by a landlord against his tenant for rent Judgment having gone for defendant, plaintiff appealed.

Wendt (Sampayo with him) for plaintiff-appellant.

Jayewardene for defendant-respondent.

On September 15, 1893, their Lordships being of opinion that the answer was so ambiguously worded that it was impossible to know whether the defence was that the defendant was never put in possession or that after he was let into possession he was interrupted, agreed to remit the case to the Court below for amendment of the answer, giving the liberty to amend the answer on payment by him to the plaintiff of all costs incurred by the plaintiff since the filing of the answer, and the following judgment in which the points summarised above were considered was delivered by

WITHERS, J.—It is an essential part, I take it, of a contract of letting or hiring that a landlord should put his tenant in

possession of the subject of the contract, and to an action for rent covenanted for by the tenant I think it would be a good defence that the landlord *haud implevisse contractum* by putting the tenant in possession of the premises and if the tenant had advanced any money by way of rent for the use of the premises into which the landlord had not put him as his contract obliged him to do, I think it would be competent for the tenant to recover the money so paid without consideration or for a consideration that has failed as money had and received by the landlord for the use of the tenant.

Interruption by the landlord or any one under him in the enjoyment of the premises can be no answer to a claim for rent due and payable before the interruption, but it would be good ground for a tenant's claim to have the contract of lease cancelled and for damages consequent on the interruption. Interruption by strangers after a tenant has been put into possession by a landlord can be no answer to a claim for rent unless the interruption was followed by eviction in due course of law and then only an answer to a claim for rent after such interruption, and such interruption can be no ground for claim to damages or cancellation of lease unless such interruption was followed by eviction in law and due notice to the landlord to warrant and defend defendant's title in the proceedings terminating in eviction had been given to the landlord. The answer in this case is so ambiguously worded that I do not know whether the plea intended to be taken is that the defendant was never let into possession of the premises by the plaintiff or that after he was let into possession he was interrupted by the people named in his answer.

If the former is intended then I think that the defence and counterclaim can be sustained, otherwise both defence and counterclaim fail. If the judge is satisfied after such examination as is mentioned in the 146th Section of the Civil Procedure Code that the defendant's plea is that he was never let into possession by the plaintiff, then that issue should be settled and set down for trial, and I am prepared to set aside the judgment for the purpose of remitting the case to the lower Court in order that that issue, if so settled after enquiry may be duly tried.

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This is really an indulgence to the defendant and I agree with the order as to costs proposed by the Chief Justice as well as to his suggestion that on defendant's failure to comply with this order judgment should be entered for plaintiff with costs.

BEFORE *Lawrie*, A. C. J.

September 21 and 28, 1893.

THE QUEEN *v.* BABUN and another.

[No. 9,007, D. C. CRIMINAL, MATARA.]

Offence punishable with imprisonment or fine—Imprisonment in default of payment of such fine—Penal Code, Sections 163, 454.

Section 454 of the Penal Code enacts that "whoever commits forgery shall be punished with imprisonment of either description which may extend to five years, or with fine, or with both."

Held, that the offence being punishable with a fine alone the term of imprisonment in default of payment of such fine should be regulated by section 63, of the Penal Code.

The accused were convicted, uuder section 454 of the Penal Code, of forgery, and were sentenced to pay a fine of Rs. 100 each, and in default of payment of the fine to nine months' rigorous imprisonment. The accused appealed.

There was no appearance of Counsel for the appellants.

Drieberg, C. C., for respondent.

LAWRIE, A. C. J.— I see no reason to disturb the conviction and the sentence of fine of Rs. 100, but I cannot sustain the order that in default of payment the accused shall suffer rigorous imprisonment for nine months.

The crime of which the accused have been found guilty is by the Penal Code punishable with imprisonment of either description or fine or both.

Therefore, it is a crime punishable with fine alone. It is not one of those crimes which must be punished with imprisonment, but it is a crime which may be punished with fine without imprisonment, and for such sentence the 63rd section of the Penal Code applies, and the imprisonment,

which the Court imposes in default of payment of the fine, may not be rigorous it must be simple, and it shall not exceed four months, when the amount of the fine does not exceed Rs. 100.

I, therefore, reduce the sentence of imprisonment in default of the fine to four months' simple imprisonment.

BEFORE *Withers*, J.

September 14 and 19, 1893.

TELESINGHE *v.* ANTHONY.

[No. 5,225, P. C., CHILAW.]

Obstruction of person executing the lawful order of a Public Servant—Penal Code, Section 183.

In order to support a conviction under Sect. 183 of the Penal Code for obstructing a person executing the lawful order of a public servant the order must be one which it was competent to the public servant to make.

There was no appearance of counsel for either party.

WITHERS, J.—The appeal succeeds on the point of law taken in it that the order which the prosecutor was obstructed by the appellant in his endeavour to execute was not a lawful order of a public servant (*i. e.*, a Police Magistrate) in the discharge of his public functions.

A mandate to sequestrate several cocoanut lands and sell the fruits thereof (which lands are apparently the subject of a civil action in the District Court) with the object of preventing a possible disturbance of the peace amongst those who assert a right to enjoy the produce of the land is not one which a Police Magistrate is competent to issue.

IN THE SUPREME COURT.*

[ADMIRALTY JURISDICTION.]

THE GELDERLAND.

Admiralty--Collision—Foreign vessel, action against—Admiralty Jurisdiction of the Supreme Court of Ceylon—Vice-Admiralty Act of 1863—Ordinance No. 2 of 1891.

The Supreme Court of Ceylon in its Admiralty Jurisdiction has the same powers as the High Court of England in its Admiralty Jurisdiction and must have the same regard as that Court to international law and the comity of nations.

Hence, the Supreme Court of Ceylon in its Admiralty Jurisdiction can entertain a claim for damages against a Foreign Vessel lying in the harbours of Ceylon for injuries caused by her to a British ship on the high seas.

The procedure to be followed in the exercise of such jurisdiction is the procedure enacted by the Vice-Admiralty Act of 1863.

An action of damage by collision.

This was an action *in rem* brought by plaintiffs, the owners of the steamship *Swordsman*, to recover damages arising from a collision on the high seas between the *Swordsman* and the *Gelderland*, a foreign vessel, which at the date of action was lying in the harbour of Colombo.

Messrs. *Dornhorst* and *Wendt* appeared for the plaintiffs.

The Hon'ble *C. P. Layard*, *A.-G.*, (Messrs. *Templer and VanLangenberg* with him) appeared for the owners of the *Gelderland*.

On the day of trial, November 7, 1893. *Layard*, *A.-G.*, objected to the jurisdiction of the Supreme Court of Ceylon to entertain the action, the *Gelderland* being a foreign vessel and the collision having occurred on the high seas. He also argued that the procedure adopted was irregular, inasmuch as no summary application had been made to any Judge for the detention of the of the ship until satisfaction or security given, and that there was no defendant properly before the Court.

Cur. adv. vult.

On November 8, the following judgments were delivered:—

LAWRIE, A. C. J.—This is the first Admiralty case instituted in this colony since the passing of the Ceylon Courts of

* BEFORE *Lawrie*, A. C. J., *Withers* AND *Browne*, J. J.

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Admiralty Ordinance 1891. The Attorney-General challenged the jurisdiction of the Court over a foreign ship, now in the harbour of Colombo, which had caused injury to a British ship on the high seas. On hearing all that the learned Attorney-General urged, I yesterday had no doubt at all that the objection to our jurisdiction was unsound, but it was right that the full Court should take time to consult together. We have consulted and we have carefully considered the basis of the powers extended to us by the Legislature. We authoritatively dispose of the objection, and unhesitatingly sustain our jurisdiction. The Attorney-General laid much stress on the 527th section of the Merchant Shipping Act. By that, certain powers were given to all Courts of Record in the United Kingdom, but the jurisdiction over foreign ships existed in the High Court of Admiralty long before the passing of that Act, and the provisions of the 527th section which provides a procedure by which almost any one in authority in Great Britain may detain a foreign ship have no bearing whatever on the question of the jurisdiction of the Supreme Court of Ceylon. By our Ordinance 2 of 1891, the Supreme Court has jurisdiction over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England whether existing by virtue of any Statute or otherwise, and such Colonial Court of Admiralty shall exercise such jurisdiction in the like manner and to as full an extent as the High Court of England, and shall have the same regard as that Court to international law and the comity of nations. If the High Court in England has jurisdiction over foreign ships found within the harbours of the United Kingdom which have caused injury to British ships in any part of the world, then the Supreme Court of Ceylon has the like jurisdiction over foreign ships found in the harbours of Ceylon.

That the High Court had that jurisdiction is clear. It is equally clear that this Court has it unless indeed there be any provision or limitation in the Colonial Courts of Admiralty Act 1890 which takes it away from this Court. There is no such limitation to be found in that Act, and I assert for this Court full and complete jurisdiction in all cases where foreign ships found within the harbour and rivers of this Colony, are

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stated to have caused injury in any part of the world to any British ship. The rules by which that jurisdiction is to be exercised are the rules made under the Vice-Admiralty Act of 1863, and not the procedure of the 527th section of the Merchant Shipping Act.

WITHERS, J.—The plea taken by the Attorney-General *ore tenus* to the jurisdiction of the Court must, I think, be repelled. As to the jurisdiction I cannot read the Colonial Courts of Admiralty Act of 1890 and our local Ordinance No. 2 of 1891 without coming to the conclusion, that in like circumstances this Court has, subject to anything in the former Act, the same jurisdiction as the Admiralty jurisdiction of the High Court of Justice in England. This is not less than the jurisdiction of the High Court of Admiralty before the constitution of the Supreme Court of Judicature. By statute 24 Victoria Cap 10, I take it that the High Court of Admiralty was competent to entertain a suit for damage caused in any waters, by a foreign ship, to one owned by Her Majesty's subjects, the presence of the ship in any port in England giving it the right to make it answerable in damages. An action against a ship for damages by collision is one *in rem* for the arrest of which the High Court of Admiralty had, and the High Court in Admiralty has, its own procedure. This procedure is quite outside the sections of the Merchant Shipping Act to which the Attorney-General invited our attention when he protested against our mode of procedure, as well as our exercise of jurisdiction. No rules having been framed under our own Ordinance, we are obliged to follow the rules of the Vice Admiralty Act of 1863 which was done in the present case.

BROWNE, J.—Although under 3 and 4 Vic. C. 65 the High Court of Admiralty had jurisdiction to decide all claims and demands whatsoever in the case of any foreign ship apparently only necessaries supplied, this jurisdiction was largely increased by 24 Vic. C. 10, Sect. 7 whereof gave it jurisdiction "over any claim for damage done by any ship." This act was later than the Merchant Shipping Act of 17 and 18 Vic. C. 104, Sect. 527—29 whereof were cited with such stress by Mr. Attorney to us and I gather from the case of *Jeffrey*

vs. The Franconia (25 W. R. 699 and 796: 46. L. J. P. D. and A. 71 and 33) that there never was any question as to the jurisdiction of the High Court of Admiralty thereunder to award damages, for injury to property caused by foreign ships under collision at sea. In that action the only questi·n raised was whether "Damage" was applicable to injury to the person as well, and the Appeal Court being divided in opinion, the Judgment in the affirmative thereof by the Admiralty Court was affirmed, thus giving the power as large an application as possible. It has been urged upon us by Mr. Attorney, however, that the sections 527-529 cited by him direct a procedure to be had "Whenever any injury has in any part of the world been caused to any property belonging to any of Her Majesty's subjects by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom or within three miles of the coast thereof" and that this procedure has not been followed in these proceedings. What is there enacted is that the Judge of any Court of Record in the United Kingdom or the Judge of the High Court of Admiralty or in Scotland the Court of Session or the Sheriff of the Country within whose Jurisdiction such ship may be, may on summary application whenever the injury was probably caused by the misconduct or want of skill of the master, &c., of such ship to issue an order directed to any officer of Customs or any officer named by such Judge requiring him to detain such ship until such time as the owner, &c., had made satisfaction of such injury, or had given approved security to abide the result of any action, suit or legal proceeding that might be instituted· in respect of such damages and pay all costs and damages, and the officer so directed should detain such ship. Mr. Attorney objected that no application had been made summarily to any Judge, or order made by such Judge to any officer requiring the detention of the ship until satisfaction or security given, and no such detention had been made since only a writ of summons and warrant to arrest the ship and cargo had been issued as in an ordinary Admiralty action in this Court against a British ship, and that there was no defendant properly before the Court,

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since (Sect. 529) it was the person who had given such security who should be made defendants and no one has as yet given such security. I read these sections of Part X. of that Act which relates only to Legal Procedure as in no respect affecting the jurisdiction of the Admiralty Court under the later Act to which the largest possible construction has been given as I have said. These sections are a provision for the emergency that the foreign ship may leave the port before an ordinary action can be instituted against her n the ordinary procedure and are no substitute for that ordinary procedure. This is even more clear from Section 528 which, without the intervention of any Court at all, enables a full pay Commissioned Officer or any British Officers of Customs or Consular Officer, without risk to himself so long as he acts on reasonable grounds, to detain such foreign ship until such time as shall allow of such application to be made, so that (assuming these sections apply to Ceylon) if the *Gelderland* had desired to leave Colombo a few hours after her arrival the Collector of Customs might have detained her till application was made to this Court, or possibly some other Court, in turn to order some one to detain her until the master, &c., had given security or had abided the event of any action which might be instituted of course in the usual manner. No such application was needed or was made, and action has been so filed, and in its form is not in my opinion vitiated by the absence of any of those proceedings. I do not find that this procedure was resorted to in the first instance in the case of the *Franconia*. She had been "arrested" not merely "detained" at the suit of the owners of the *StrathClyde* and thereafter some certain actions were pending against her at the suit of other persons, the Admiralty Court ordered she should be released in all actions on her owners giving such general security in a form corresponding to that which Sect. 547 indicates (vide L. R. 2, C. P. D. 173, 46 L. J, C. L. 363.) That security was, however, held not to apply to an action in the Common Pleas Division for damages for injury to person and so the claim in *Jeffrey's* case was pressed in the Admiralty Court with success as I have said. The Sections of the Merchant

Shipping Act do not, therefore, need to be read with substituted words under 53 and 54 Vic. C. 27, Sect. 2 (3a). Reading together the provisions of that act and of our Ordinance No. 2 of 1891 whose language in its preamble and 2nd section is a reproduction of the English Enactment, I hold that this Colonial Court of Admiralty has as full jurisdiction to entertain this action against a foreign vessel lying in the harbour of Colombo as the High Court of England in its Admiralty jurisdiction would have to hear and determine a like action against a like foreign vessel lying in a like harbour in England, but that it must have the same regard as that Court to international law and the comity of nations and that the procedure which has been taken under the still existing rules of the Vice-Admiralty Courts Act of 1863 is regular.

BEFORE *Withers* AND *Browne*, J. J.

October 27 and November 3, 1893.

SENANAYEKE *v.* APPU and others.

[No. 1,195 D. C., NEGOMBO.]

Plaint—Prolixity—Summons—Issue and Service—Irregularity—Waiver—Civil Procedure Code, Sections 55, 92, 356, and 756.

Where a plaint is so prolix and embarrassing as to be oppressive it is the duty of the defendant, who is summoned to answer it, to apply to the Court at the earliest opportunity to have the plaint taken off the file.

Where the defendants appeared in obedience to summons and applied for and obtained fourteen days' time to file answer and on the day before the answer was due moved to have the plaint taken off the file as embarrassing and unintelligible:—

Held, that the motion was made too late, and that the defendants having obtained time to file answer must be considered to have waived all objections to the plaint and the summons.

Per WITHERS and BROWNE, J. J.—Issue of summons unauthorized by the judge's signature and entry of date is irregular.

Per WITHERS, J—Where summons has not been duly served in accordance with the provisions of section 55 of the Civil Procedure Code the defendant is not bound to appear and no judgment by default can be entered against him. If he appears he cures the irregularity.

Per BROWNE, J.—Notice of appeal under section 756 of the Civil Procedure Code should be served by the Fiscal.

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Plaintiff's proctor having filed his appointment, plaint and affidavit moved for writ of sequestration. The District Judge ordered that notice of this motion should issue. Three days thereafter the Secretary of the District Court issued summons and concise statements, without being authorized thereto by the Court. On the returnable day of summons the 5th defendant moved "that the proceedings had in the case be vacated." This motion was disallowed. Wishing to appeal against the order disallowing the motion the 5th defendant served notice of appeal on the plaintiff's proctor by his clerk. The District Judge holding this service to be insufficient declined to accept the security thereafter tendered. Against this refusal the 5th defendant appealed. The other defendants obtained fourteen day's time to plead and on the day before their answer was due moved to have the plaint taken off the file as embarrassing and unintelligible. This motion was rejected for want of particulars of objection to the plaint. The motion was renewed the following day when it was rejected for want of legal notice of it, *i. e.*, served through the Fiscal. Against both rejections these defendants appealed.

Dornhorst and *Sampayo*, for defendants-appellants.

Wendt and *Asserappa*, for plaintiff-respondent.

Cur. adv. vult.

On November 3, the following judgments were delivered :—

WITHERS, J.—I have no doubt that a Court of record has jurisdiction to protect its records from abuse by taking off its file any pleading affidavit or other document which is so prolix and embarrassing as to be oppressive. If such was the character of the plaint filed in this action it would have been the proper course for the defendants summoned to answer it to take the first opportunity available of applying to the Court for an order to remove it from the file and the Court would have been quite competent to make the order. Mr. Wendt however, has satisfied me that the plaint is not so embarrassing as to be oppressive. The fourth paragraph is not so clear as it might be and in the 9th paragraph there is a mistaken reference to the third paragraph of the plaint which, however, could mislead nobody.

On the 18th, of April, three days after the plaint was filed, summons was issued accompanied by concise statements of the plaint, see journal entry of the 18th April. The issue of summons unauthorised by the Judge's signature and entry of date was no doubt irregular (see sections 55 and 92 of the Civil Procedure Code), but in my opinion this irregularity was waived. The defendants applied for time to file answer hereinafter referred to.

The first application which concerns us is one made to the Court on the 2nd May, 1893, by the Proctor above-mentioned —and this was that the Court should vacate the proceedings had in the case, I will say no more of this application than that I do not pretend to understand it. Vacating an order is intelligible, so is a stay of proceedings. The application was rejected. The next motion which concerns us is one made to the Court on the 15th of May by Mr. Proctor Rajapakse on behalf of the defendants, and that was to remove the plaint from the file on the ground of it being embarrassing and unintelligible.

That question I have disposed of. On the following day Mr. Wijetunge, for 5th defendant, moved the Court to direct acceptance of the security tendered in appeal from (I suppose) the order of the 2nd May before referred to. The motion was disallowed.

This motion was renewed on the 19th of May and was again disallowed. I think it unnecessary to discuss the points acutely argued by counsel with regard to the acceptance of a plaint, the order thereon for summons, the proper mode of service of notices and especially of notice relating to tender of security in appeal and other interesting points of practice, because I think on the plain merits of the case that all these appeals ought to be dismissed. The cloud of objections raised by them should be cleared from the face of the record. There was no solid foundation for any of them.

The appellants on their own application had obtained 14 days, time to file answer and that permission closed their mouths against all objections on the ground of irregularity of proceedings.

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Had they during that fortnight found the plaint so embarrassing as to pass all understanding, I am not prepared to say that they would have been precluded from applying to the Court for due redress.

I think it proper not to leave the case without making this observation. Where summons has not been duly served in accordance with the provisions of the 55th section of the Civil Procedure Code, the defendant is not bound to appear and no judgment default can be entered against him. If he appears to the summons he cures the irregularity. If the copy of the plaint or concise statement delivered to him under that section is so indefinite and uncertain as not fairly to apprise him of the cause of action, I see no reason to prevent a defendant giving notice with all despatch to the other side that he will appear and move the Court that that defect may be cured in the plaint or copy or statement and the proceedings stayed in order to enable him to have a clean case put before him to answer, and in this regard I must take exception to a passage in the learned judge's order to be found at page 22 of the record, where he appears to intimate that a native who does not understand English and has engaged a Proctor is not prejudiced by the omission to serve on him a copy of the plaint or concise statement translated into his language.

I think he is prejudiced, because he is much better able to instruct his proctor if he has received such a translation of the statement of the cause of action than if he has not. I am for dismissing all the appeals with costs.

BROWNE, J.—The 5th defendant in this action has separated himself from the 8 other defendants both in appointment of Proctor and in the steps taken by him, and this separation continues even in the appeals which have been filed.

Dealing with the 5th defendant first the proceedings were as follows:—

Plaintiff's proctor filed appointment, plaint and affidavit and moved for writ of sequestration. The District Judge made order only that notice of the motion should issue. Three days thereafter, without any recorded order by the judge to sanc-

tion his act, the Secretary issued summons and concise statements. There cannot be any presumption as to the authority of the Secretary to do so, and 5th defendant rightly appreciated their legal invalidity. He, however, considered this entitled him to come forward and object to them and the form of his objection as recorded by the District Judge (I presume it was made *viva voce* on the returnable date of summons as I cannot find any written embodiment of it by his proctor) was "that the Court will vacate the proceedings," but no doubt the proper course for him to have taken was to have treated them as worthless against him and not to have appeared generally in the action, or else possibly to appear only specially to object thereto on notice. The District Judge rejected the application, and though I entirely dissent from the reasons given by him for doing so, I would not be disposed to set aside his order. The object of any summons that could have been regularly issued had been attained by all the defendants having a week previously caused appearance to be entered for them in the action as they might always voluntarily do before service on them of summons and the insufficiency in language or quality of any concise statement served on them would thereafter at least be ground only for extension of time to plead or do prepare defence

All defendants were before the Court when this application was made and the District Judge has recorded that on their application time was given them to file answer. I do not see how the 5th defendant could appeal from the order thereafter. He did however desire to do so and served notice of appeal on the plaintiff's proctor only and that by his clerk. The District Judge held this service insufficient and declined to accept the security thereafter tendered against which refusal 5th defendant has appealed. It is still an open question whether notice to the defendant (Sect. 756) can be given under the provisions of Sect. 29 to the Respondent's Proctor, the three Judges of this Court in *285 District Court, Colombo*, (Supreme Court minutes, 19th December, 1890,) not having agreet thereon, though they suffered the appeal then before them to be argued.

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The notice however should in my opinion under Sect. 356 have been served by the Fiscal, and the appeal therefore cannot be sustained. The other defendants after accepting on the 2nd May time to plead, moved on the day before their answer was due that the plaint be taken off the file as embarrasing and unintelligible. On the rejection that day of the motion for want of particulars of objection to the plaint, the motion was renewed on the following day and it was then rejected for want of legal notice of it, *i. e.*, served through the Fiscal: against both rejections these other defendants have appealed.

I am not disposed to disturb this order. The application made at the last moment, a month after the plaint was filed and a fortnight after time to plead was given, savours of a policy of delay rather than *bonâ fide* contention and cannot expect any sympathy. But I regard the reasons for the rejection as in themselves sufficient and (allowing to a clerical error twice repeated of calling paragraph 4, "the third paragraph") the plaint is clear and intelligible: the end of that paragraph describes in words and by a figure of survey the land in claim in the action and the defendants should reasonably have been able to plead thereto.

BEFORE *Burnside*, C. J.

February 18 and 23, 1892.

VELAYADAN *v.* GEDDES.

[No. 7,444, C. R., CHAVAKACHCHERI.]

Loan—Hire—Destruction of thing Lent or Hired—Liability of Bailee.

Where a person borrows or hires a thing, he is bound to return it, unless he is prevented from doing so by something for which he is not responsible.

In an action for damages for non-return of a bull loaned to the defendant, the defendant pleaded that it was killed by a leopard while in his possession:—

Held, a bad plea, unless it could be shewn that the defendant had taken the utmost care of the animal, or that it was at the time of the accident under the care of the plaintiff's servant.

The facts sufficiently appear in the judgment of the Court.

No Counsel appeared.

On February 23, the following judgment was delivered :— VELAYADAN v. GEDDES.

BURNSIDE, C. J.—There was no appearance on this appeal. The plaintiff's claim is for damages for non-return of a bull which he says he loaned to defendant. Defendant denies that he borrowed the bull, but admits that he hired it for a journey.

Now this was no answer to the action, for whether he borrowed it, or hired it, he was bound to return it, unless indeed he was prevented from doing so by something for which he was not responsible.

It is said that the bull was killed by a leopard whilst it was in the defendant's possession, but there is no proof of it, and even had it been proved, *prima facie* the defendant was liable, unless he shewed that he had taken the utmost care of the animal, or that it was at the time of the accident under the care of the plaintiff's servant. This it certainly was not. It was in the charge of a person not employed by the plaintiff but who was acting as the defendant's servant, and whether he had once been plaintiff's servant or not does not touch the question of the defendant's liability for his default.

The defendant was, therefore, liable to the plaintiff for the value of the animal which he has failed to return. On his own shewing the defendant was bound to pay the plaintiff something for the hiring, even this he has not done.

The defendant's evidence to my mind is most unsatisfactory. His defence is certainly ungenerous, and I do not understand the judgment of the learned Commissioner.

I set aside the judgment and give judgment for the plaintiff for the value of the bull which may be fairly estimated at rupees thirty together with rupees ten as damages, which includes what the plaintiff would have been entitled to receive for the use of it, and the plaintiff will have his costs in both Courts.

BEFORE *Lawrie*, A. C. J., *Withers* and *Browne*, J. J.

September 5 and 8, 1893.

MAHATMAYA *v.* BANDA.

(No. 6,473, D. C., KANDY.)

Kandyan Law—Illegitimate Children—Acquired Property—Widow, Right of—Civil Procedure Code Section 18.

According to the Kandyan law the illegitimate children of a deceased succeed to his acquired property, provided there be no legitimate children and no widow surviving.

If there be both legitimate and illegitimate children the acquired property is divided between them.

Action in detinue. The facts sufficiently appear in the judgments of the Court.

Wendt, for plaintiffs-appellants.

Dornhorst, for defendant-respondent.

Cur. adv. vult.

On September 8, the following judgments were delivered:—

LAWRIE, A. C. J.—If it were not that these plaintiff's are minors I would recommend that the action be dismissed on the ground that the plaint is evasive and that the evidence led is at variance with the averments.

The plaintiffs claim as the heirs-at-law of Ukku Banda who is incidentally stated to be their father. It is certainly untrue that they are his heirs-at-law and even if they are, there is no averment that there are no other heirs-at-law or that Ukku Banda died intestate.

The plaint is silent as to the nature of the property whether acquired or inherited.

This is an action in detinue. There is no averment of wrongful detention.

If, however, we deal liberally with the plaintiffs, and if we take the answer and the evidence adduced as truly disclosing the facts, we find that this is an action not by Ukku Banda's heirs-at-law, but by his illegitimate children in which they claim his acquired movable property on the footing that their father died intestate and unmarried without legitimate children.

The learned District Judge was with the plaintiffs on all points but one; he held that Ukku Banda was married at the time of his death, and that his widow Muttu Menika had right to the acquired property superior to that of the illegitimate children.

I hesitate to agree with the learned District Judge.

It is not averred or proved that the marriage of Muttu Menika to Ukku Banda was registered.

It is proved that she left him many years ago and that she is now living as the wife of another man; she is no party to this action. She has made no claim to this property. The defendant does not assert that he holds this property for her.

It seems to me that we may safely exclude Muttu Menika from consideration.

Another supposed competitor is Kiri Banda said to have been adopted by Ukku Banda, but as he has not pressed a claim he, too, may be left out of consideration.

It is well-established Kandyan law that provided there be no legitimate children and no widow illegitimate children succeed to the whole of the acquired property of the father.

Sawers, p. 7 (quoted afterwards by Marshall, p. 338). Niti Nighanduwa p. 14. Perera's Armour p.p. 8 & 34; 1 Lorensz p. 189.

If the deceased owner of the acquired property leaves (besides the illegitimate children) legitimate children, the acquired property is divided between them, and in a case unreported of which I have a note, 721, District Court, Kandy, decided on March 11, 1842, it was held by this Court that the acquired property should be divided between the widow and the illegitimate children of the deceased, but in that case I think the widow, by *daru uruma* got the property as heir of the deceased legitimate son of her's.

Here, on the footing that Ukku Banda left no widow and no legitimate children, I think it right that the plaintiff should be held entitled to the property which the defendant in his answer admits he has possession of.

WITHERS, J.—The contest between the parties is as to the right of Ukku Banda's children, being issue of his co-habitation with Punchi Manika, to certain movable assets of Ukku Banda's

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estate admittedly in the custody of the defendant. It is taken for granted that Ukku Banda died intestate.

It is not alleged or pretended that the plaintiffs are the legitimate issue of Ukku Banda. If as his illegitimate children they are entitled to the movable assets of the estate in the defendant s hands, the defendant must be adjudged and ordered to surrender them to their curator who sues on their behalf to recover those assets.

Defendant does not claim the movables admittedly in his possession as his own, nor does he set up a *jus tertii*, he says and has a right to say, "before you can compel me to give up the movables I am keeping as a sort of stake-holder, you the plaintiffs must prove your right to these goods."

The simple issue on the pleadings is, are the plaintiffs, as illegitimate children of Ukku Banda, entitled to have and keep those movables as their own? This is a pure question of Kandyan law which would be answered adversely to the plaintiff if there was proof of a legitimate widow of Ukku Banda now being alive. But the existence of such a person has not been proved and cannot be assumed.

As it is, it must be answered in their favour, these being articles acquired by their father. Defendant must give up the articles admitted to be in his possession. I would give plaintiff judgment for those articles with costs.

BROWNE, J.—If defendant had desired for her own protection that there should be a decision as to any possible conflict of claim between plaintiffs, Muttu Menika and Kiri Banda, he could have moved under Section 18 of the Civil Procedure Code that the alleged widow and adopted son should have been joined as parties necessary for effective and complete adjudication of all questions involved in the action. But though his answer suggested their rights he did not so press forward any contention for them and they on their part abstained from any claim. There is no proof of either the marriage or the adoption, and I agree that the plaintiffs should have judgment for all articles admitted in the answer or their values as stated in the plaint, and also for the Cash Rs. 16·88 which defendant admits he received but does not prove he disbursed.

BEFORE *Lawrie*, A. C. J.

September 21 and 28, 1893.

FERNANDO *v.* FERNANDO.

[No. 26,193, D. C., CRIMINAL CHILAW.]

Execution of decree—Refusal to yield up possession—Contempt of Court—Civil Procedure Code, Sections 326,800.

Refusal to yield possession of lands under a decree of court does not amount to a contempt of Court.

Appeal from a conviction for contempt of Court under section 800 of the Civil Procedure Code. The facts sufficiently appear in the judgment.

Senewiratne, and *Senathiraja*, for the appellant.

Dornhorst, for respondent.

Cur. adv. vult.

On September 28, the following judgment was delivered:—

LAWRIE, A. C. J.—When the Fiscal's officer, entrusted with the execution of the decree for delivery of possession to the purchaser of four lands sold by the Fiscal, first went to execute the decree on 26th April, 1892, he found in possession of the four lands a man Waas, who claimed the land as his own under a transfer.

In subsequent proceedings the defendant and Waas were made respondents, and on 23rd November, 1892, the District Court of Chilaw ordered both respondents, Wass and the defendant, to yield up possession of the lands within one month on pain of being punished for contempt of court.

Waas appealed, but the order was affirmed by the court on 3rd March, 1893.

Notwithstanding the affirmance of the order, I am of opinion that the threat to punish for contempt of court was an error and not in conformity with the Code. The respondent Waas had brought himself within the 326th section, and, instead of ordering him to yield possession within a month, the District Court ought to have committed him to jail for 30 days and directed the judgment-creditor to be put in possession of the property—and from that order Waas might have appealed.

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On 30th March, 1893, the District Judge again ordered the defendant and Waas to yield up possession of the lands to the plaintiff, within one month from that date on pain of being punished for contempt of Court.

This notice was served on the respondents, but no order to put plaintiff in possession was issued to the Fiscal or to a headman.

On 27th April, 1893, the plaintiff, accompanied by the Mudaliyar, proceeded to the land to take possession. This seems to me to have been premature. The order of the District Judge of 30th March gave the respondents a month's time.

The plaintiff states in an affidavit, dated 8th May, 1893, that he and the Mudaliyar and several headmen proceeded to the lands "when the defendant Santiago, who was on the spot, refused to yield up possession."

The Mudaliyar's report was that the 1st defendant, who was on the spot, refused to allow the plaintiff to obtain possession of the same" (*sic*).

When he was examined on oath on August 14th, the Mudaliyar said—"I asked this defendant to give up possession of the land to the plaintiff. Defendant was in his house. He said he did not know that the lands had been sold and refused to come out of his house. He refused to give up possession of the land to the plaintiff. Defendant said he would never allow any one to take possession of the lands sold under the writ. I do not know if defendant's residing house is on a sold portion or not."

Plaintiff said as the defendant declined to come, he could not take possession of the lands.

The Constable Aratchi's evidence is that "the Mudaliyar called upon the defendant, to deliver possession of the lands to plaintiff and the defendant declined to do so."

I think this comes to no more than that the defendant refused to accompany the plaintiff and the headman. It is by no means proved that the house, which the defendant then occupied, had been purchased by the plaintiff or that the plain-

tiff had then any right to call on him to leave it. The charge which the learned District Judge framed was—"that you committed a contempt of this court by refusing to yield up possession of certain lands to plaintiff as required by the order of this court, dated 30th March, 1893, and that you thereby committed an offence punishable under section 800 of the Civil Procedure Code."

Neither in the order of the 30th of March, nor in the charge, are the names of the lands given. The charge does not disclose an offence under section 800.

I am unaware of any authority for the proposition that a refusal to yield possession of lands under a decree of court is a contempt of court.

The offence of obstructing an officer charged with the execution of a writ is a specific offence punishable with 30 day's imprisonment under section 326.

Here, the alleged contempt of court was refusing to give up possession on the 27th of April of land which the court ordered the defendant to yield possession within 30 days of the 30th of March. A part of the refusal alleged, was a refusal to listen to the Mudaliyar who had no authority to go there, or to speak to the defendant.

The proof does not show that the defendant was in possession of the lands purchased. What the plaintiff and the Mudaliyar wanted him to do was to make a public submission to them, and to walk round the boundaries and point them out surrendering all within the limits.

There is, to my mind, no proof that the plaintiff was in any way prevented from taking possession of the lands.

I would set aside the conviction and sentence, and acquit the defendant.

PRESENT:—*Bonser*, C. J., AND *Lawrie* AND *Withers*, J. J.

(November 14. 1893)

The Hon'ble *John Winfield Bonser* was sworn in as Chief Justice.

BEFORE *Bonser*, C. J.

November 16, 1893.

MENDIS *v.* APPUHAMI.

[NO. 16,101, P. C., NEGOMBO.]

Preliminary Inquiry—Non-summary Charge—Discharge by Police Magistrate—Appeal.

A Magistrate holding a preliminary inquiry into a non-summary charge has the discretion of deciding whether there are sufficient grounds for committing the accused for trial.

It is the duty of the Magistrate in such a case to ascertain whether there are grounds for putting the accused to the ignominy and expense of a trial; and the Magistrate would fail in his duty if he send up a case for trial where he considered the prosecution was utterly unreliable and that there was no possibility of a conviction.

In this case the accused was charged with forgery, an offence beyond the summary jurisdiction of the Police Court. The Magistrate, after the preliminary inquiry into the charge under Chapter XVI. of the Criminal Procedure Code, discharged the accused, being of opinion that there was not sufficient evidence for his committal.

The complainant appealed.

Wendt, for appellant.

Dornhorst, for respondent.

BONSER, C. J.—This is an appeal against the order of a Magistrate who discharged a defendant who had been charged before him with forgery of a lease. It appears to have been laid down by this Court that an appeal does lie against such an order, and I do not question the law as so laid down. But I do think it is a most inconvenient state of things, that an appeal should lie under such circumstances, and I entirely agree with the view of the late Chief Justice in the case of *Kalu Banda v. Pusumba*, reported II. C. L. R. I, that it is better to leave this question to the authority designated by

the Code, as the responsible officer in this matter, viz, the Attorney-General, at the same time an appeal lies, and we have to consider it, however inconvenient it may be. But we should require the strongest possible case before we could interfere. Now the law has left to the Police Magistrate the discretion of deciding whether there are sufficient grounds for committing an accused for trial. Mr. *Wendt* endeavoured to argue that the Magistrate in discharging the accused in this case had acted illegally. But there appears to be no ground for such a suggestion. The Magistrate's duty is to consider the evidence and to exercise his judicial discretion. He has to ascertain whether there are grounds for putting an accused to the ignominy and expense of a trial, and a Magistrate would fail in his duty if he send up a case for trial, where he considered the prosecution was utterly unreliable and that there was no possibility of a conviction. In this case the Magistrate considered most carefully the evidence adduced for the prosecution and has formed a very strong opinion thereon, and I see no reason for differing from him.

There are many grounds of suspicion in the case. It is a curious thing that there is a deed prepared in a Notary's Office, prepared by a clerk, the lessor is a person well known and on intimate terms with the Notary, and yet the Notary attests the signature of a stranger, who, he says, he thought somebody else with a similar name, a "rather fair man." It is also remarkable that the clerk in whose hand-writing the deed was prepared is not called; no person is called who took the instructions for the deed.

Under these circumstances the Magistrate was justified in discharging the accused.

The respondent's costs in this appeal must be paid by the appellant, as taxed by the Registrar.

BEFORE *Bonser*, C. J., and *Lawrie*, and *Withers*, J. J.

November 28, 1893

FERNANDO *v.* FERNANDO.

[No. 16,443 D. C., NEGOMBO.]

Last will—Incidental proof—Inconvenience—Probate.

A Court may, in its discretion, allow a will to be proved incidentally in the course of an action; but it would be highly inconvenient to do so.

Where a will is sought to be so proved the Court would be well-advised if it adjourns the case to enable the parties to prove the will in independent proceedings.

This was an appeal by the defendant from an order of the District Judge (*Baumgartner*) refusing to allow a will to be proved incidentally in the course of a trial.

Wendt (*Sampayo* with him) for defendant-appellant cited 20,703, D. C.. Badulla, (2 C. L. R 140); Paranatale *v.* Punchimenica, *RamaNathan* (1863-68), p. 325.

Layard, *A.-G.*, (*Dornhorst* with him) for plaintiff-respondent cited Stone *v.* Forsyth, 2 Donglas 108; Bradford *v.* Young 54 L. J. Equity p. 96 ; 514, D. C., Caltura (2 C. L. R. 140).

BONSER, C. J.—This is an appeal from a judgment of the District Judge of Negombo, who refused to allow a will, which was sought to be put in evidence by the defendants, to be proved incidentally in this suit. The will has not been proved in the District Court which had jurisdiction to grant probate ; and the defendants sought to prove it in this suit.

The learned District Judge was referred to a case (No. 20,703., D. C., Badulla), reported in 2 C. L. R. 140, as an authority for the course of procedure which the defendants wished to follow. The learned District Judge declined to follow that case; and in that, I think, he was wrong; because it was a judgment of this Court, and it was binding on him, until it was reversed by this Court. But although he was not, in my opinion, justified in refusing to acknowledge the authority of that case, still, I think, the course which he adopted was on the whole in accordance with convenience and the due administration of justice. That case, as I read it, merely decides that if the learned judge had admitted the

Will to be proved in the course of the suit, he would not have acted illegally. But I do not read that case as deciding that he was bound to do so. I think that, although the District Court may have jurisdiction to do this, yet, it would be in most cases exceedingly inconvenient to exercise its jurisdiction in this way. It would be manifestly inconvenient to try the issue of the validity of a Will involving questions as to the sanity of the testator, the due execution of the Will and other like questions incidentally in the course of an action for goods sold and delivered.

Therefore I am of opinion that in the great majority of cases where a will is sought to be proved in this way a judge would be welladvised if he adjourns the case to enable the parties to prove the Will in independent proceedings. I think that what the learned judge did in this matter was right, though, I think, his reasons were wrong.

The case must be sent back, to be dealt with in accordance with the opinion expressed by this Court.

LAWRIE and WITHERS, J. J., concurred.

BEFORE *Bonser*, C. J.

November 16, 1893.

DISSANAYEKE *v.* APPUHAMI.

[No. 17,130, P. C., KANDY.]

Arrack—Possession—Removal—"A gallon or thereabouts"—Ordinance No. 10 of 1844, section 33.

Section 33 of Ordinance 10 of 1844 enacts that "no spirit distilled from the produce of the cocoanut or other description of palm, or of the sugar cane, in any quantity exceeding two quarts, shall be removed without a permit accompanying the same . . . . . ":—

Held, that, under this section, it was not an offence to be in possession of more than two quarts of arrack without a permit.

The accused was charged with "having been in possession of one gallon of arrack or thereabouts without a permit."

Held, that the charge was bad, inasmuch as "a gallon or thereabouts" may be less than two quarts.

The accused was convicted, under section 33 of Ordinance 10 of 1844, of having been in possession of one gallon of

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arrack or thereabouts without a permit as required by that section.

In appeal.

Van Langenberg appeared for the accused-appellant.

BONSER, C. J.—I think that in this case the conviction must be set aside.

The defendant was convicted of "being in possession of (removing) more than two quarts of arrack without a permit in the form required by the Ordinance 10 of 1844, section 33." On reference to this section it will be found that the only offence is "removing."

"Possession" is not an offence but the "removal" of any quantity of arrack exceeding two quarts is an offence under the Ordinance and punishable under that section. The charge, and the complaint was adopted by the Magistrate as the charge, was that the defendant was found in possession of one gallon of arrack "or thereabouts." It is clear that this was no legal offence because "a gallon or thereabouts" may be less than two quarts. The words "or thereabouts" make the quantity uncertain, and, therefore, the defendant was charged with an offence which is no offence in law.

It is further alleged by appellant that there was no satisfactory evidence of the quantity of arrack in the jar, and I agree with the contention. The prosecutor says that it contained six bottles of arrack. Now the only evidence of what a bottle contained is to be found in the evidence of the tavern-keeper, Hendrick Rodrigo, who says that three bottles are 14½ gills. Therefore, there being 32 gills in a gallon, it is clear that in six bottles there are only 29 gills, and the result will be that the quantity is short by three gills of the legal quantity. The Magistrate seems to have been very much influenced by the fact that the jar was in a gunny bag. He says, "who is going to carry about a gallon jar with arrack in it in a gunny bag unless, it is full and unless for an unlawful purpose." The answer, of course, which the Magistrate expects to this question, is that no one would carry about a gallon, &c., &c. I cannot see anything to lead me to this conclusion or to justify this inference.

I think, therefore, that the Magistrate was wrong in the conclusion he arrived at, and that his judgment must be reversed.

No order as to costs.

BEFORE *Burnside*, C. J. and *Lawrie* and *Withers*, J. J.

January 24 and February 10, 1893.

SIMAN *v.* NANDO.

[No. 1,178. D. C. GALLE.]

Defendant as Plaintiff's Witness—Interested party—Adverse Witness—17 & 18 Vict. C. 125, Section 22.

The evidence of a defendant called by the plaintiff as his witness is not conclusive against the plaintiff.

Such evidence is no more than the evidence of an interested party, which may be contradicted by the evidence of other witnesses.

In this case the plaintiff called the defendant as his witness. The defendant gave hostile evidence, and the District Judge *(Saram)* dismissed the plaintiff's action, holding that the defendant's evidence was conclusive against the plaintiff.

The plaintiff appealed.

Wendt, for plaintiff-appellant.

Dornhorst, for defendant-respondent.

On February 10, the following judgments were delivered:—

BURNSIDE, C. J.—I cannot agree with the District Judge, if I understand his judgment aright, that because the plaintiff called defendant who gave hostile evidence against him, therefore such evidence must prevail.

The evidence of a party to the suit is always regarded as that of an interested party.

The evidence of the defendant in his favour is not necessarily stronger evidence against the plaintiff than the plaintiff's evidence is in his own favour, and the District Judge should have balanced all the conflicting evidence in the case. I would send the case back to be reheard, but I cannot expect the District Judge to change his opinion, and, as the plaintiff has exhausted all his evidence, I think that, balancing the evidence, as the

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District Judge should have done, the weight of evidence is in favour of the plaintiff, and he should have judgment.

LAWRIE, J.—In the course of the trial the plaintiff called the 1st defendant as a witness, though his name did not appear in the list.

As might have been expected, the 1st defendant gave evidence in support of his own case.

The learned District Judge dismissed the action on the ground that this witness called by the plaintiff proved the defendant's case.

He did not adjudicate on the other evidence.

He felt himself bound to take 1st defendant's evidence as evidence against plaintiff.

He seems to have regarded it as equivalent to the old Roman Dutch reference to Oath which was decisive of the question put to the adversary.

The act 17 and 18 Vict. C. 125, section 22 provides "that a party producing a witness . . . . . may in case the witness shall in the opinion of the judge prove "adverse," that is, hostile, as contradistinguished from being merely unfavourable, contradict by other evidence."

Here to use the words of Taylor, (Evidence, section 1262) "the defendant stood in a situation which of necessity made him adverse to the party calling him" and the plaintiff, in my opinion, had the right to call other witnesses to contradict the 1st defendant, and the District Judge ought to have weighed the evidence as a whole, and not to have considered the testimony of the defendant, as conclusive against the plaintiff.

I was inclined to send the case back to the District Court, but as the Chief Justice and brother WITHERS are of opinion that, on the evidence, plaintiff is entitled to judgment, I agree to the judgment being set aside. Judgment entered for plaintiff with costs.

WITHERS, J.—I am prepared to give plaintiff judgment here and now.

BEFORE *Lawrie* and *Withers*, J. J.

December 8 and 12, 1893.

DE SILVA *v.* SELLA UMMA.

[No. 2,670, D. C., COLOMBO.]

Writ Against Person—Rupees two hundred—Partial Recovery —Action for Realisation of Mortgage— Form of Writ—More than one Judgment Debtor— Separate Writs—Civil Procedure Code, Sections 298 and 306.

On the return, to a Writ of Execution against property, in satisfaction of a decree awarding a sum of Rs. 200 and over, that property of a judgment debtor has been levied as a part of the sum so decreed, and that the Fiscal can find no further property of the debtor, out of which to levy the unsatisfied balance, the Court may issue a warrant for the arrest of the judgment debtor.

The facts sufficiently appear from the judgments.

Sampayo, for appellant.

Dornhorst, for respondent.

On December 12, the following judgments were delivered :—

LAWRIE, J.—I agree to affirm. When a judgment creditor holds a decree wherein the sum awarded inclusive of interest up to the date of the decree, but exclusive of any further interest, and exclusive of costs, amounts to above Rs. 200, and when after seizure and sale, the Fiscal reports that a partial recovery has been made, which reduces the debt to below Rs. 200, and that he is unable to find any more property of the judgment debtor moveable or immoveable, then, in my opinion, the Code permits the Court to issue a warrant for the arrest of a judgment-debtor. In other words, a debtor may be incarcerated for non-payment of a sum less than Rs. 200, provided the decree was for a larger amount. If a man be imprisoned for non-payment of more than Rs. 200, he cannot claim his release, as a matter of right, until the decree is fully satisfied. A partial payment is not sufficient, but the powers of the Court to refuse to incarcerate or to release after incarceration are large, provided the Court be satisfied that the debtor has no property, which can be sold in execution. A harmless and honest debtor who lies in jail has only himself to thank, if he does not apply to the Court,

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under the provisions of the 306th and the subsequent sections of the Code.

Here, while I do not altogether agree with the reasons given by the learned District Judge, I am not disposed to set aside this order, and to require him to send the defendant to jail.

The warrant of arrest issued on the 10th of May, 1893, proceeded on the return by the Fiscal, dated the 13th April 1893, which was a misleading and inaccurate return. It stated that the Fiscal on the 28th March was unable to find any property, moveable or immoveable, of the defendant, but it omitted to state that prior to the service of the writ on the 28th March, property had been seized and sold. In my opinion, the warrant of arrest should not issue, and if issued, should not be followed by the committal of the debtor, unless the procedure required by the Code has been strictly followed.

I may add that, in my opinion, the writ against property was not in proper form. It ought to have been in terms of the decree—not an ordinary writ of execution of property, but a special writ to the Fiscal, that in default of payment, he should sell the mortgage property described in the decree.

It is also worthy of the attention of the District Judge, whether in cases where there are several judgment debtors, separate writs against each debtor should not issue, instead of, as in the present case, one writ against all.

WITHERS, J.—In my opinion, on the return, to a writ of execution against property, in satisfaction of a decree awarding a sum of Rs. 200 and over, that property of a judgment debtor has been levied as to part of the sum so decreed, and that the Fiscal can find no further property of the debtor, out of which to levy the unsatisfied balance, it is competent to the Court to issue a warrant for the arrest of the judgment-debtor.

In this particular case, however, the return to the writ of the 13th of April was defective in two particulars. It omitted to mention the fact of a levy on the 1st defendant's property for a sum of Rs. 290, and it did not say, as to the

2nd defendant, that the Fiscal could find no property of his, out of which to levy execution for the balance. At the foot of the return to the joint writ against the two defendants it is stated "I have been unable to find any property of the judgment debtor (*sic*) moveable or immoveable."

It is not said which debtor, *non-constat* that it was the second, rather than the first, defendant.

There was therefore no such foundation, as the section 298 of the Civil Procedure Code requires, for the issue of a warrant of arrest against the 2nd defendant; moreover, the decree required execution against specific moveable, as well as specific immoveable property of the two defendants, in default of payment of the sum thereby awarded, *i. e.* Rs. 388·25, with interest and costs (Rs. 250), and thereafter the defendants were ordered to pay the deficiency, if any, after the realisation of those mortgaged properties. The writ was not in conformity with this decree. Before the Court could issue a warrant of arrest against either debtor for a balance, if any, of the sum of Rs. 388-25, it was incumbent on the Fiscal to satisfy the Court that he had first levied on those properties or was unable to do so, by reason whereof, payment of the balance could be enforced in the usual way.

For these reasons, I think, the order, appealed from, should be affirmed with costs.

BEFORE *Lawrie*, J.

November 29, and December 5, 1893.

CAVE *v.* WILLIAM.

(Cave's Case.)

[No. 26,803, P. C., COLOMBO.]

Journeyman Artificer—Machine-ruler—Ordinance No. 11 of 1865, Sections 3, 6, 7 and 11—Charge—Alteration.

A machine-ruler, who has entered into a contract of monthly service, is a "Journeyman Artificer," within the meaning of Ordinance 11 of 1865.

The accused was charged as follows:—"That he, being a *Journeyman Artificer* did, on the 12th September 1893, at

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Colombo, without reasonable cause, neglect to attend at the office of Messrs. H. W. Cave & Co., his employers, between the hours of 9 a.m. and 5 p.m., during which hours it was usual, according to his occupation, being that of a machine-ruler, for him to attend, and that he thereby committed an offence punishable under section 11 of the Ordinance 11 of 1865."

The Magistrate (*Pagden*) acquitted the accused on the ground that he was not a *Journeyman Artificer*.

The *Attorney-General* appealed.

Dornhorst, for appellant.

Pereira, for respondent.

LAWRIE, J.—The Ordinance No. 11 of 1865 applies to three classes of earners of wages.

First.—Menial, domestic, and other like servants.

Second.— Pioneers, Kanganies, and other labourers whether employed in Agricultural, Road, Railways, or other like work.

Third.—Journeyman artificers.

The accused does not belong to either the first or the second class. He was neither a servant who lived and worked within his master's house and walls, nor an out-door labourer.

Contrary to the opinion of the Police Magistrate, I hold that the accused was a *Journeyman Artificer*.

A machine ruler in a printing office is certainly an artificer.

The difficulty arises from the use by the Legislature of the prefix *Journeyman*.

Now, although, from the derivation of the word, and from the 5th section of the Ordinance 11 of 1865, it is plain that *Journeyman Artificer* primarily means one who contracts to work for one day and for no longer, it means, secondarily, artificers who make a special contract or agreement to work for a longer period than one day.

The 6th and 7th and many other sections of the Ordinance seem to me to show clearly that by such contract he does not lose his designation of *Journeyman*, nor does he forfeit the privileges, nor escape from the penalties of the Ordinance.

In Police Court, Gampola, 25,204, November 11, 1873, reported in 2nd Grenier Police Courts, p. 98, Sir Edward Creasy, C. J., held, that a man was a *Journeyman Artificer*, although he had contracted to serve for an indefinite period, namely, until he had repaid an advance.

If an artificer, who enters into such an indefinite contract, is liable to punishment imposed on *Journeyman Artificers* by the 11th section, much more is an artificer liable, who enters into a definite contract of monthly service.

In a case decided by the same Judge on 11th February, 1893, reported in 2 Grenier, p. 13, a lithographing boy was held not to be a servant, or a labourer, but the Court does not seem to have considered the question, whether he was a *Journeyman Artificer*.

I read the words *Journeyman Artificers*, in this Ordinance, as meaning all skilled workmen in the regular employment of an employer, who are not indoor house servants nor out of door labourers, who are by law presumed to work by the day for day's wages, including those who legally contract to work and serve for a longer time.

I hold that it is proved that the accused entered into a contract of monthly service, and had worked in terms of that contract, and had received monthly wages for several years. On 12th September, 1893, he without reasonable cause, refused to attend at, and during the time and hours, and at the place where, and when he contracted to attend, before the end of his term of service, without previous warning, as required by the 3rd section of the Ordinance, and that he thereby committed an offence punishable under the 11th section of the Ordinance 11 of 1865.

The charge should be altered by adding the words, after *Journeyman Artificer*, "being bound by contract to serve for the period of one month renewable month by month."

I set aside the acquittal, and find the accused guilty of the above offence and sentence him to one week's simple imprisonment.

BEFORE *Lawrie* J.

November 29 and 30, 1893.

VAN HOUTEN *v.* SOOTA.

[No. 7,707. M. C., COLOMBO.]

Tom-tom, beating of—Allegations and proof—Licence—Ordinance No. 16 of 1865, section 90.

In a prosecution, under section 90 of Ordinance 16 of 1865, it is not incumbent on the complainant to allege and prove that beating a tom-tom was calculated to frighten horses, or that it was done by night, so as to disturb the repose of the inhabitants. It is enough to allege and prove that the accused, not being under Military Regulations, beat a tom-tom, within a town, without a licence.

The accused was charged under section 90 of Ordinance 16 of 1865 in that "he, not being under Military Regulations, beat a tom-tom within a town, without a license."

The accused, having pleaded guilty, was sentenced to pay a fine.

In appeal.

Pereira for appellant. There is no evidence that the beating of tom-tom frightened horses or that it disturbed the public repose, &c. In the absence of such evidence, the accused cannot be convicted of an offence under section 90 of Ordinance 16 of 1865.

On November 30, the following judgment was delivered:—

LAWRIE, J.—The accused pleaded guilty and was sentenced to pay a fine.

There is no appeal.

The legislature by section 90 of Ordinance 16 of 1865 has made the beating of drums and tom-toms within a town, an offence, unless it be done under either Military Regulations or a license from the Police Magistrate or a Superintendent or an Inspector of Police.

It is not necessary for a complainant to allege and prove that beating a tom-tom was calculated to frighten horses, or that it was done by night so as to disturb the repose of the inhabitants. It is enough to allege and prove that the accused, not being under Military Regulations, beat a tom-tom, within a town, without a license. This the accused has admitted. His admission was rightly construed as a plea of guilty.

The appeal is dismissed.

END OF VOLUME II.